International Academy of Family Lawyers
IAFL
Asia Pacific Chapter

IAFL Introduction to International Family Law Conference Sydney, Australia

Monday 18th February 2019

EDUCATION PROGRAMME MATERIALS PACK

Contents

IAFL INTRODUCTION TO FAMILY LAW CONFERENCE
SYDNEY, AUSTRALIA
Monday 18 February 2019
at the Australian National Maritime Museum

EDUCATION PROGRAMME
Chair: Max Meyer

9.00 **Opening**
Max Meyer, IAFL Asia Pacific Chapter President

9:05 **Introduction to IAFL**
Mia Reich-Sjögren, IAFL President

9.15 **Comparison of Code Civil and Common Law Jurisdictions**
William Longrigg (London), Dr Daniel Trachsel (Zurich)

10:15 **Morning Tea**

10:35 **International pre and post nuptial agreements: a view from Australia, France, the Netherlands and Singapore**
Sheridan Emerson (Australia), Alexandre Boiché (France), Sandra Verburgt (Netherlands), Koh Tien Hua (Singapore)

11:45 **A role play exercise in international collaborative practice in a financial dispute in Australia**
Susan Pearson (Sydney), John Thynne (Brisbane), Valerie Norton (Sydney), Jamie Burreket (Sydney)

12:45 **Lunch**

1:45 **A role play exercise in international collaborative practice in a financial dispute in Australia (continued)**

2:45 **Afternoon Tea**

3:00 **The Hague Conventions about children:**

1) **More than just abduction, an introduction**
   Rachael Kelsey (Edinburgh)
2) **The operation of the 1996 Child Protection Convention**
   The Honourable Justice Victoria Bennett AO (Melbourne)
3) **The Hague Convention – the Japanese experience**
   Makiko Mizuuchi (Tokyo)

4:30 **Treaties and International Agreements relevant to Family Law proceedings in Australia**
Jacky Campbell (Melbourne)

5.00 **Close and post conference reception**

HON. JUSTICE VICTORIA BENNETT AO

Family Court of Australia

Melbourne, Australia

The Honourable Justice Victoria Bennett AO was appointed to the Family Court of Australia, in Melbourne, in November 2005. She is the longest serving judge in the Melbourne Registry.

Her Honour's first judicial appointment was in 2004 as a Federal Magistrate sitting across all areas of that court's wide jurisdiction. Prior to her Honour's judicial appointments, she was a member of the Victorian Bar for 17 years. In 2015 her Honour accepted a five year appointment as a Presidential Member of the Administrative Appeals Tribunal.

Justice Bennett represents the court on the cross-jurisdictional committee on family violence convened by the Chief Justice of the Supreme Court of Victoria, the taskforce on family violence convened by the Chief Magistrate of Victoria and on the judicial indigenous cultural awareness committee convened by the Supreme Court and the Judicial College of Victoria.
Her Honour has had many years of experience in transnational family law with a particular interest is the 1980 and 1996 Hague Conventions. She regularly lectures on both Conventions domestically and internationally. Since 2008 Justice Bennett has been designated as a judge of the International Hague Network of Judges for Australia. The other judge designated to the International Hague Network of Judges is Chief Justice the Honourable William Alstergren.

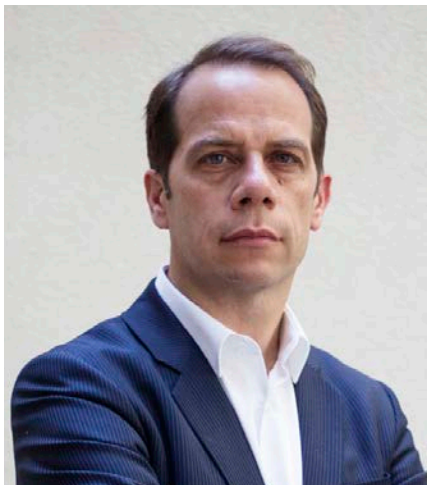
In January 2018 her Honour was appointed an Officer in the General Division of the Order of Australia (AO) for "distinguished service to the judiciary and the law, to the improvement of the family law system and child protection, to legal education, and to improving access to justice for indigenous families".

ALEXANDRE BOICHÉ

Alexandre Boiché Avocats

Paris, France

www.aboiche.com



Alexandre BOICHÉ created his firm in January 2015, he was previously founding partner of a firm specializing in domestic and international family law.

He has been practising exclusively in this field since 2000.

Previously from 1998 to 2002, Alexandre BOICHÉ was Legal Officer in charge of the Specialized Bureau for International Legal Information at the National Center for Information on Women's and Family Law (CNIDFF) in Paris.

He is a Doctor in Law, he has defended a thesis at the Faculty of Law of Toulouse on 'The notion of favor in conflict of laws rules relating to filiation' (Very honorable mention with the congratulations of the jury). During the preparation of this thesis, he was a temporary attaché in teaching and research and in charge of tutorials.

Alexandre BOICHÉ is a recognized specialist in international family litigation, including conflicts of jurisdiction or laws and the recognition of foreign decisions. As such, he provides numerous training courses for judges and colleagues in this field both in France and abroad. Anxious to promote lasting solutions, he is also specialized in the drafting of international marriage contracts or prenuptial agreements, agreements on divorce and parental authority on the international level. He is also trained in collaborative law. He is also a trained mediator at the CNV.

Since 2006, he is editor for the magazine Legal News Family Editions Dalloz.

He is a member of the International Association of Family Lawyers of the French Committee of Private International Law, the association Louis Chatin for the defense of the rights of the child and the network LEPCA (Lawyers in Europe on Parental Child Abduction).

JAMIE BURREKET

Managing Direcor
Broun Abrahams Burreket

Sydney, Australia

bablaw.com.au/

Jamie is one of Australia's most highly regarded family lawyers. He is ranked by his peers as Preeminent in New South Wales and one of only two lawyers from that state to be ranked Preeminent in the nation consistently over the past four years. While he practises from Sydney he has appeared in matrimonial Courts in most other states and regularly advises clients residing outside of Australia.

His practice spans both financial and parenting matters and some specialty in the more complex issues that arise like challenges to Binding Financial Agreements, jurisdictional choices, opposition to single expert evidence, claims in equity and the intersection of tax planning and property settlements. He litigates, collaborates, mediates and negotiates based on the specific needs of each matter. Opposed to a one size fits all mentality to family law, Jamie believes the profoundly personal nature of family law requires a bespoke approach to each and every matter.

Committed to an open dialogue at all times, he maintains working relationships with the leading accountants, mediators, Senior Counsel, valuers, tax experts and other leading family lawyers in the family law arena. This not only makes sure that his clients get the team they need working for them, but that he can communicate efficiently and effectively with those acting for your former partner or spouse.
He regularly speaks at state and national conferences and has presented overseas on complex family law issues to other family law experts. He authors articles and presentations in family law annually.

JACKY CAMPBELL

Partner
Forte Family Lawyers

Melbourne, Australia

www.fortefamilylawyers.com.au

Jacky is a Partner at Forte Family Lawyers and an Accredited Specialist in Family Law. Jacky has a Master of Laws from Monash University, doing her thesis on bankruptcy and family law. She also has a Graduate Diploma of Professional Writing. She is a Fellow of the International Academy of Family Lawyers and a board member of the Asia Pacific Chapter of that Academy.

Jacky writes widely including as a consultant editor of Wolters Kluwer/CCH Australian Family Law and Practice, a contributing author to Wolters Kluwer/CCH Australian Family Law and Practice to the Property, Spousal Maintenance, Financial Agreements, Maintenance Agreements, Procedure and Precedents chapters, author of the family law chapter in Thomson-Reuters Australian Financial Planning Handbook, author of the family law chapter in Wolters Kluwer/CCH Australian Master Superannuation Guide and author of chapters of Wolters Kluwer/CCH Master Family Law Guide.

SHERIDAN EMERSON

Partner
Pearson Emerson Meyer Family Lawyers

Sydney, Australia

www.pemfamilylaw.com

In 2018 Sheridan was recognised in Doyle's Guide to the Australian Legal Market as one of only 5 pre-eminent family lawyers in Sydney. Sheridan is also consistently recognised as one of the leading family lawyers Australia-wide.

Sheridan Emerson is a family law specialist accredited by the Law Society of New South Wales and a partner of the firm. Sheridan is a Fellow of the International Academy of Family Lawyers (IAFL).

Sheridan provides clear, focussed and strategic advice on all aspects of family law including property and financial matters, parenting issues, child support, spousal maintenance and de facto relationships, with a particular focus on those matters involving significant asset pools and issues of legal and commercial complexity.

Prior to specialising exclusively in family law, Sheridan worked in commercial litigation and finance at leading commercial law firms in Sydney and London. Sheridan's experience in these areas underpins her strategic approach in matters involving complex financial structures and valuation issues.

Sheridan graduated with Honours from the University of Queensland in 2001 and was admitted as a Solicitor of the Supreme Court of NSW and the High Court of Australia in May 2003.

Sheridan presents regularly to members of the legal profession, both in NSW and nationally, on family law related matters.

While experienced in litigation, Sheridan has a strong interest in alternative dispute resolution and is accredited as a family dispute resolution practitioner. Sheridan encourages negotiated resolution where possible and is committed to achieving a commercial outcome for all her clients.

Sheridan is a member of the Family Law Section of the Law Council of Australia, the Women Lawyers' Association of NSW, International Academy of Collaborative Professionals, Collaborative Professionals (NSW) Inc and the Central Sydney Collaborative Forum. Sheridan is a board member of Women's Legal Services NSW.

RACHAEL KELSEY

Director
SKO Family Law Specialists

Edinburgh, Scotland

www.sko-family.co.uk

Rachael is a founding Director of SKO. She is one of only 3 ranked solicitors in Scotland in the current edition of the Legal 500- the only woman and person under 50. She is accredited as a Specialist in Family Law and as a Family Mediator by the Law Society of Scotland and is Secretary of the International Academy of Family Lawyers (IAFL). Rachael has been recognised for many years as a first tier 'Ranked Lawyer' in both Chambers & Partners and The Legal 500.

The current edition of Chambers notes that Rachael *"is renowned for her skills in complex litigation and for her 'boundless energy and superb judgement'."*

Rachael has cases in both the Court of Session and the Sheriff Court. She also provides expert opinions on Scots law for courts outwith Scotland. Many of her cases have international or intra-UK jurisdictional issues, an area of specialism for which she is particularly well known and in respect of which she has built up a UK-wide practice. She has a particular interest in the issues that arise when acting for individuals in same-sex relationships.

Rachael has lectured widely- nationally and internationally- on pure family law issues as well as on dispute resolution (DR) generally. She enjoys writing, and talking, about Scots family Law, both for lay-people and other lawyers, and is widely published and regularly appears on the broadcast media.

In 2016 Rachael was appointed for a period of 3 years to the Family Law Committee of the Scottish Civil Justice Council. She is a FLAGS (Family Law Arbitration Group Scotland) Arbitrator and trainer, is the only Scottish Arbitrator on the IFLAS (International Family Law Arbitration Scheme) panel and is on the committee of the Scottish Branch of CIArb (Chartered Institute of Arbitrators). Rachael is the Scottish correspondent for International Family Law, published by Jordans.

Rachael is a past Chair of the Family Law Association; was Chair, a Director and Trustee of Family Mediation Lothian for eight years, until earlier in 2017 and was Treasurer of CALM (the organisation of accredited family solicitor mediators in Scotland) for nine years until 2016. In 2016 Rachael was on the Scottish Law Commission Arbitration Advisory Group for the Review of Contract Law: Third Party Rights.

TIEN HUA KOH

Partner
Eversheds Harry Elias LLP

Singapore

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Tien Hua is a Partner and Co-Head of our Family and Matrimonial Law and Private Client Advisory Practice Groups. He has acted for high net worth individuals, successful entrepreneurs and wealthy families in numerous matrimonial and family law disputes and has appeared in matrimonial cases from the Singapore Family Court to the Singapore Court of Appeal.

Tien Hua is a fellow of the International Academy of Family Lawyers. He is also a member of the Family Law Committee of the Law Society of Singapore and author of a book on matrimonial and family law entitled "Divorce - Untying The Knot", a publication by Marshall Cavendish. He also wrote and contributed 3 chapters to "Law & Practice of Family Law in Singapore" by Sweet & "Maxwell, a seminal practitioner's guide to Family Law in Singapore, of which the Editor –in-Chief is the Presiding Judge of the Family Justice Courts, Judicial Commissioner Valerie Thean and the General Editor is Ms Foo Siew Fong.

Tien Hua is an accredited Singapore Mediation Centre family law mediator involved in the Singapore Mediation Centre's Family Law Mediation Pilot Project and is on the panel of the Singapore Mediation Centre's Collaborative Family Practice ("CFP") service, which aims to resolve family disputes outside of the courtroom. He has been appointed as a Child Representative by the Family Justice Court for custody cases. Tien Hua is also a licensed solemniser and a deputy registrar of marriages.

Tien Hua is identified as a preeminent lawyer in the Doyles Guide for Family & Divorce Lawyers in Singapore from 2015- 2018. The Family and Matrimonial Practice Group was also recognised as the only 1st tier law firm practicing family and matrimonial law in Singapore for 2015- 2018.

In the area of Private Client Advisory, Tien Hua is a legal adviser to an independent Asian Family Office and has advised private clients on succession planning, trust structures, administration of trusts, probate and general trusts.

Tien Hua speaks regularly as a specialist in his field. He was also recently featured on national television, Channel News Asia, where he shared his expert opinion on various matters relating to family law.

Tien Hua is an adjunct professor with Singapore Management University's School of Law, teaching family law.

Tien Hua was called to the Singapore Bar in 1994 and was a Commissioner for Oaths. He graduated from the London School of Economics in 1992 and is a barrister-at-law of the Middle Temple, UK.

WILLIAM LONGRIGG

Partner
Charles Russell Speechlys

London, England

www.charlesrussellspeechlys.com

Profile: IAFL President September (2014-6). Born in 1960. Joined Charles Russell as trainee in 1985 and made a partner in 1992. Has specialised in family law since qualifying in 1987. Secretary/Treasurer of European Chapter (2003-2006). Secretary IAML 2006 - 2010. President European Chapter IAML May 2010 to April 2012. Member of Resolution Mediation Committee (1990-96); Secretary Resolution London Region Committee (1992-96) and Chairman (1996-2000). Has lectured on various aspects of Family Law for a number of organisations. Co-author (with IAML fellow Sarah Higgins) "Trusts and Family Breakdown", Butterworth, 2002 Edition.

Languages Spoken: English, Italian, some German and French

Practice Areas: Appeals, Child Custody/Residence/Visitation/Contact, Child Support, Cohabitation, Collaborative Law, Divorce, Emergency Procedures/Injunctions, Enforcement: Child Custody, Enforcement: Child Support, Enforcement: Property Division, Enforcement: Spousal Support, Finance: Capital Provision, Finance: Pensions/Superannuation/Retirement and Employment Benefits, Finance: Property Issues, Finance: Taxation, Finance: Trusts, Modification/Variation: Child Custody, Modification/Variation: Child Support, Modification/Variation: Property Division, Modification/Variation: Spousal Support, Parentage/Paternity, Pre-nuptial/Post-nuptial Agreements, Relocation/Removal from Jurisdiction, Same Sex Partnerships, Spousal Support/Maintenance/Alimony

MAX MEYER

Pearson Emerson Meyer Family Lawyers

Sydney, Australia

www.pemfamilylaw.com/

Max Meyer was one of the first lawyers accredited as a Family Law Specialist in New South Wales.

He was admitted to practice in 1971. He was the partner in charge of the Family Law Group at Marshall Marks Kennedy for 11 years. He then founded the firm of Meyer Pigdon, then later Meyer Partners Family Lawyers. He is now Special Counsel at Pearson Emerson Meyer Family Lawyers.

Max is a member of the New South Wales Law Society and the Family Law Section of the Law Council of Australia. He was one of the first two lawyers practising in New South Wales to have been elected as a Fellow of the elite International Academy of Family Lawyers. Max is the first elected President of the newly formed Asia Pacific Chapter of the International Academy of Family Lawyers and has been appointed to the IAFL Nominating Committee.

He was the only Australian lawyer to be invited to contribute the chapter on Australian family law to "Family Law Jurisdictional Comparisons" published by Thomson Reuters in 2011, an industry internationally recognised and distributed book on international family law. He has now revised this for the 2nd, 3rd and 4th editions. More recently, Max has been invited to contribute the chapter on Australian family law to the third edition of "Family Law and Practice in Hong Kong" published by Sweet & Maxwell. Max has also been invited to contribute towards the Australian Chapter within the 2019 edition of "The International Comparative Legal Guide to Family Law. He often speaks on family law issues including at international conferences.

He has acted in major cases including international financial disputes on marital breakdown, and other disputes for high profile and high net worth professional and business clients. A number of his cases have established legal precedent.

MAKIKO MIZUUCHI

Mimosa International Law Office

Greater Tokyo Area, Japan

http://familylaw.mimoza-law-office.net

I practice all aspects of family law, with particular specialism in international family law, divorce and financial settlement with an international dimension, relocation and international custody disputes, Hague Convention, international child support and maintenance issues, and international inheritance.

I am registered with the JFBA (Japan Federation of Bar Associations) Lawyer Referral Service for Hague Convention Cases regarding the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") cases.

I have represented clients for child return cases under Hague Convention in Japan since the Hague Convention entered into force on April 1, 2014 in Japan.

In addition, I am a member of Hague Convention Working Group of the Japan Federation of Bar Associations ("JFBA") and during 2015 and 2017 I gave lectures to several bar associations in Japan, as part of the seminar series hosted by the Ministry of Foreign Affairs (the Central Authority of Hague Convention), on the topic of the practice of the courts hearing Hague Convention cases.

Furthermore, I am a fellow of the International Academy of Family Lawyers ("IAFL").

I was invited to the International Visitor Leadership Programme (IVLP) in 2016 sponsored by the Department of the States, U.S., the title of which is "International Parental Child Abduction".

I obtained B.A. from Faculty of Law, University of Tokyo, Tokyo, and Master of Laws, from Graduate School of Law, Hitotsubashi University, Tokyo.

VALERIE NORTON

Collaborative Mediation Practice

Sydney, Australia

www.collaborativemediation.com.au

Prior to studying psychology, Valerie spent most of her twenties and thirties overseas living in London and Singapore. After following a career in publishing, Valerie worked for the British Chamber of Commerce in Singapore, forming business alliances and mediating international business arrangements between chamber members during the 1990s.

Currently Valerie works as both a Collaborative Coach and as a Family Dispute Resolution Practitioner with people who are separating or have family issues. She coaches and assesses candidates for National Mediator accreditation at the College of Law and Relationships Australia and is a registered Family Dispute Resolution Practitioners (FDRP) and Nationally Accredited by the National Mediation Accreditation System (NMAS). Valerie has extensive experience in navigating expatriate separations, where one or both parents are living overseas, or where cultural considerations need to be taken into account. Her understanding of the complex psychological issues associated with separation gives Valerie an insight into the personalities and dynamics in the mediation room.

Valerie is a member of The Resolution Institute (LEADR and IAMA), ISDR (Institute of specialist Dispute Management), AMA (Australian Mediation Association), board member of Collaborative Practice (NSW Inc), member of CSCF (Central Sydney Collaborative Forum), AACP (Australian Academy of Collaborative Professionals) and IACP (International Academy of collaborative Professionals).

SUSAN PEARSON

Partner
Pearson Emerson Meyer Family Lawyers

Sydney, Australia

www.pemfamilylaw.com

With over 30 years' experience in family law, and as one of the first lawyers to be accredited as a family law specialist by the Law Society of New South Wales, Susan is consistently acknowledged as one of Australia's leading family lawyers. Susan is recognised in Doyle's Guide for 2018 as one of the five pre-eminent family lawyers in Sydney. Susan has also been recognised as one of the pre-eminent family lawyers Australia-wide.

Susan is a Fellow of the International Academy of Family Lawyers (IAFL).

Acting for high profile and high net worth individuals with sensitivity and discretion in complex parenting and property cases - including international financial cases with complex corporate and trust structures, Susan is a highly effective lawyer who provides a commercial, strategic approach to the management of litigation.

Susan advises and works with commercial, property and estate lawyers and accountants in strategic asset planning and the preparation of binding Financial Agreements.

Susan is a member of the Central Sydney Collaborative Forum, a group of specialist family lawyers practicing in Sydney who have all been trained in Collaborative Practice and who are committed to assisting parties to resolve disputes using the less adversarial approach to family law provided by Collaborative Practice.

Susan has spoken and presented papers on family law issues to the media, professional associations and community groups. She has been an expert witness in cases involving family law and a consultant to the Family Court of Australia in the formulation of practice and procedure.

Susan is on the Register of Practitioners of the High Court of Australia and is a member of a number of professional bodies.

MIA REICH-SJÖRGEN

Advokaterna Sverker och Mia Reich Sjögren AB

Göteborg, Sweden

PRACTISING LAWYER IN SWEDEN
Partner: Sverker Sjögren Advokatbyrå AB, 1984- 2004
Partner: Advokaterna Sverker och Mia Reich Sjögren AB, 2004-
The Law Firm cooperates with Advokatfirman Ljung AB, Gothenburg since 2006
Address: Advokatfirman Ljung AB, Södra Hamngatan 23, 400 13 Gothenburg, Sweden.
Branch office in Båstad, Adress Ängelholmsvägen 1, 269 21 Båstad, Sweden.

Member of the Swedish Bar Association since 1984
Member of the IBA, family Law division
Member of the IAML since 1994
Admissions Committee, IAML
Counsel IAML
President of the European Chapter of the IAML 2008-2010
Vice-President IAML 2010-2016
President Elect 2016-2018 IAFL
President IAFL 2018

Practice Areas: Child Custody/Residence/Visitation/Contact, Child Support, Cohabitation, Enforcement: Child Custody, Enforcement: Child Support, Enforcement: Property Division, Finance: Property Issues, Modification/Variation: Child Custody, Modification/Variation: Property Division, Parentage/Paternity, Pre-nuptial/Post-nuptial Agreements, Relocation/Removal from Jurisdiction, Same Sex Partnerships

Lectured and written on Swedish International Family Law

Languages Spoken: Swedish, English, German, French

JOHN THYNNE

Vincents

Brisbane, Australia

vincents.com.au

John has over 23 years' business analysis and commercial experience that he relies upon in investigating financial matters and providing reports in relation to commercial and family disputes, business valuations, assessment of damages and professional negligence matters.

John previously held a business analyst role for an international finance company. He has worked in commerce and also operated his own forensic accounting firm before joining Vincents in July 2004.

John's experience has led him to develop an approach to consider the key quantification and investigative issues when analysing situations and preparing reports.

As a mediator, John is often called upon as a neutral party to provide advice in alternative resolution matters. He has also developed an interactive process to deliver his single expert valuation engagements that allows parties to 'buy-in' to the process and result as opposed to encouraging further conflict (CDR).

Qualifications

- Chartered Accountant Australia & New Zealand (CA ANZ)
- Accredited Business Valuation Specialist (CA ANZ)
- Graduate Diploma in Applied Corporate Finance (FINSIA)
- Mediator (Australian National Mediation Standards)
- Bachelor of Business (Accountancy) (Queensland University of Technology)
- Authorised Representative, Vincents Financial Advisory, ABN 40 010 855 991, AFS Licence No 236608

Memberships

- Queensland State Council (CA ANZ)
- Chartered Accountant Australia & New Zealand (CA ANZ) – Fellow
- Queensland Collaborative Law – Treasurer
- International Academy of Collaborative Professionals (IACP)
- Society of Trust and Estate Practitioners (STEP)
- Family Law Practitioners Association (FLPA) – Member
- Financial Services Institute of Australasia (FINSIA) – Fellow

Publications & Presentations

John is a regular presenter and has delivered many seminars, workshops and training over his career with Chartered Accountants Australia New Zealand, Queensland Law Society, Queensland Collaborative Law Inc. College of Law (Sydney) and the Vincents Education Events.

DR. DANIEL TRACHSEL

Trachsel Bortolani Partner

Zurich, Switzerland

www.trigondorf.ch

1953, Attorney at Law, Certified Specialist SBA Inheritance Law, Mediator FHNW.

Daniel Trachsel studied in Zurich and has worked as an independent lawyer since 1982. Since 1993 he has been a partner, lawyer and mediator at Trachsel Bortolani Partner, Zurich.

From 1999 to 2001, Daniel Trachsel completed the postgraduate course "Mediation in Economics, Environment and Administration" at the University of Applied Sciences Northwestern Switzerland. From 1995 to 2000, he was a member of the Mediation Commission of the Swiss Bar Association and its President from 1999.

In 2011, Daniel Trachsel obtained the Certificate of advanced Studies in Inheritance Law from the University of Zurich. He is entitled to hold the title Certified Specialist SBA Inheritance Law.

From 1994 to 2005, Daniel Trachsel headed the divorce law section of the Zurich Bar Association. From 2005 to 2017, he chaired the Family Law Expert Commission of the Swiss Bar Association SAV, which - together with the Universities of Zurich and Fribourg - is responsible for the training of the Certified Specialists SBA Family Law.

Daniel Trachsel is the author of the guidebooks "Scheidung" and "Trennung - von der Krise zur Lösung" published by Beobachter Verlag. He publishes regularly and is a speaker at educational trainings for lawyers and judges.

Daniel Trachsel deals with mandates in (international) family and inheritance law. He is a member of the International Academy of Family Lawyers (IAFL), a worldwide network of family law specialists.

Languages: German, English, French

SANDRA VERBURGT

Delissen Martens advocaten
belastingadviseurs mediation

The Hague, Netherlands

www.delissenmartens.nl/

With more than 17 years experience in all kind of family law matters Sandra is a senior lawyer. She is in charge of the private clients and international relationships team, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. To this she works closely with Jeroen Maas, who is dealing with migrations issues at Delissen Martens. Her practice includes mainly divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 Sandra also deals with cross border disputes. She works closely with accredited family law specialists all over the world. She advises her foreign colleagues frequently on Dutch Family Law issues. Further she has provided expert opinions in England and USA.

International Academy of Family Lawyers

Australia and the Hague Conventions

Rachael Kelsey
Edinburgh & London

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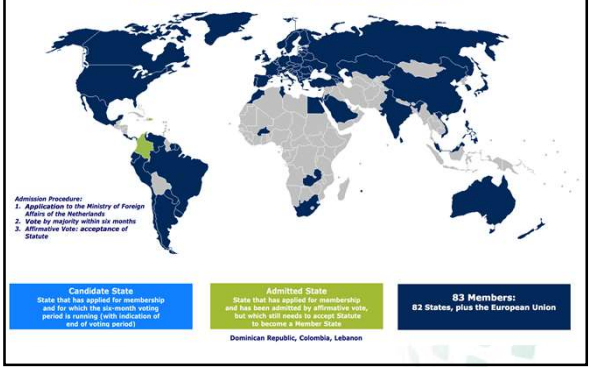
HAGUE CONFERENCE I

- Global inter-governmental organisation.
- 126 years old this year
- 82 member countries
- 1 REIO (Regional Economic Integration Organisation)
- 150 connected states (signed, ratified or acceded to one of more convention/are in the process of becoming members)
- Australia- contracting party to 11 Conventions

1

Members of the Hague Conference



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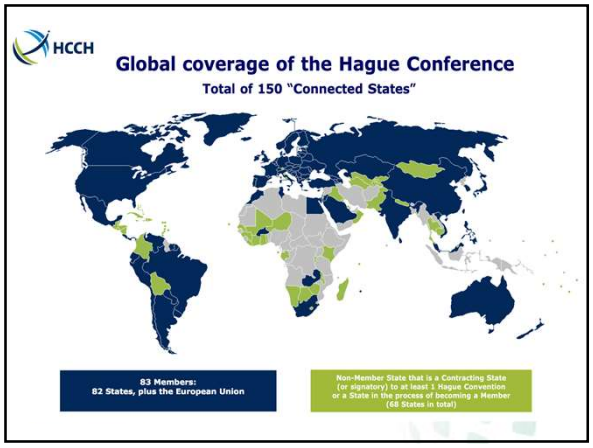

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HAGUE CONFERENCE II

- A melting pot of different legal traditions, it develops and services multilateral legal instruments, which respond to global needs.
- Building bridges between legal systems
- Reinforcing legal certainty and security
- Governed and funded by its members

International Academy of Family Lawyers

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HAGUE CONFERENCE III

- NOT unification of substantive law
- Unification of Private International Law rules
- "…finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.'

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HAGUE CONVENTIONS & FAMILY LAW I

- Convention on the Recognition of Divorces and Legal Separations 1970
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973
- Convention on Celebration and Recognition of the Validity of Marriages 1978
- Convention on the Civil Aspects of International Child Abduction 1980

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HAGUE CONVENTIONS & FAMILY LAW II

- Convention on Protection of Children an Cooperation in respect of Inter-Country Adoption 1993
- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996
- [Convention on the International Recovery of Child Support and other forms of Family Maintenance 2007]

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CONVENTION ON THE RECOGNITION OF DIVORCES AND LEGAL SEPARATIONS 1970

- 20 Contracting States
- recognition in one Contracting State of divorces and legal separations obtained in another Contracting State
- assures divorced and separated spouses that new status receives the same recognition abroad as in the country where the divorce or separation is obtained
- only applies to the decree of divorce or legal separation, not to findings of fault or to ancillary orders pronounced on the making of the decree of divorce or legal separation
- does not establish direct uniform rules of jurisdiction in the Contracting States. It regulates jurisdiction indirectly, by providing that recognition of divorces or legal separations is conditional upon presence of certain links between the spouses, or either one of them, and the State of divorce or legal separation.

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CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS 1973

- 24 Contracting States
- Desiring to establish common provisions to govern the reciprocal recognition and enforcement of decisions relating to maintenance obligations in respect of adults,
- Desiring to coordinate these provisions and those of the Convention of the 15th of April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children,
- Art 1: This Convention shall apply to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate, between -
  - (1) a maintenance creditor and a maintenance debtor; or
    (2) a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor.
- Effectively overtaken by 2007 Convention (which Australia is not a party to)

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CONVENTION ON CELEBRATION AND RECOGNITION OF THE VALIDITY OF MARRIAGES 1978

- 3 Contracting States
- Implements, for international and in particular cross-border situations, the provision of Article 23 of the United Nations International Covenant on Civil and Political Rights, 1 which places the right of marriage of men and women of marriageable age in the foreground, and bases marriage on the free and full consent of the intending spouses.
- Convention does two things: it facilitates the celebration of marriages, and it ensures the recognition of the validity of marriages across national borders. Part I of the Convention deals with celebration of marriage; Part II with the recognition of foreign marriages.
- "Although the Convention has not yet been ratified by many States (currently Australia, Luxembourg and the Netherlands are States Parties), it is very modern in its approach. It has been a model for recent work by the International Commission on Civil Status. The Convention is simple, straightforward, and, in many ways ahead of its time. It deserves to be looked at more closely than has perhaps been the case thus far."

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CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980

- 99 Contracting Parties
- Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access
- Article 1: a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States
- A return order is not a custody determination. It is simply an order that the child be returned to the jurisdiction which is most appropriate to determine custody and access.

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CONVENTION ON PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTER-COUNTRY ADOPTION 1993

- 99 Contracting States
- Developed to establish safeguards to ensure that intercountry adoptions take place in best interests of the child and with respect for the child's fundamental rights
- Recognition that were serious and complex human and legal problems
- Recognition that intercountry adoption may offer advantage of a permanent family for a child, for whom one cannot be found in their country of origin
- Prohibition on improper financial gain
- Clear procedures to deliver greater security, predictability and transparency for all- including prospective adoptive parents
- Establishes system of cooperation between authorities in countries of origin and receiving countries- to ensure the adoption guarantees best practice and elimination of abuse
- Sharing of regulatory burdens for receiving and origin states

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CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND COOPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN 1996

- Combines legal framework and co-operation mechanisms
- International parental disputes over custody/access
- Children placed abroad in alternative care arrangements which don't fall under the adoption Convention
- Cross-border trafficking and exploitation of children
- Refugees and unaccompanied minors
- Relocation cases
- Not an attempt to create uniform law of child protection, rather, an attempt to-avoid legal and administrative conflicts and build structures for effective international cooperation in child protection between different legal systems
- Very useful where domestic law is influenced by, or based upon, sharia law- eg. specific reference in Article 3 to Kafala

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CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE 2007

- Number of Contracting Parties, incl. REIOs and States bound as a result of approval by an REIO: 39 [NOT AUSTRALIA]
- Child Support for 'children' under 21
- Includes Spousal Support
- International recovery of Child Support and other forms of family maintenance
- Culmination of work which had begun in the 1990's with two formal reviews of the existing Hague Conventions concerning maintenance (The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations; and Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations) and, of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.

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IAFL SYDNEY INTRODUCTION TO INTERNATIONAL FAMILY LAW

18 FEBRUARY 2019

THE OPERATION OF THE 1996 CHILD PROTECTION CONVENTION[1]

The Honourable Justice Bennett[2]
International Hague Network Judge
Family Court of Australia, Melbourne, Australia[3]

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[1] This paper is largely based on a paper given to the Hunter Valley Family Law Conference 2017.

[2] I wish to express my gratitude to my legal associate, Stephanie O'Leary, for her assistance in preparing this paper, for which we have drawn on earlier papers of my own.

[3] The views of this paper are my own views; they do not represent the views of the Family Court of Australia or other judges. These views do not indicate how I would decide a case after having the benefit of the argument.

The protection of childhood in danger has always

been at the heart of the concerns of the Hague Conference

on private international law.[4]

I Introduction

1. In Australia, we understand distance and isolation. A large part of our national identity has been shaped by being a small population living on a huge continent on the other side of the world. The 1996 Convention facilitates Australia's integration and engagement with the rest of the world by the harmonisation of private international law in relation to children.

2. The 1996 Child Protection Convention[5] came into operation in Australia on 1 August 2003.

3. Upon ratification, the 1996 Convention was not directly effective in Australian domestic law. It was recognised and implemented by our *Family Law Act 1975* (Cth) ("the FLA") in Part XIIIAA – Division 4 – International Protection of Children. Additional provisions to facilitate the operation of Division 4 were enacted in the *Family Law (Child Protection Convention) Regulations 2003* (Cth). It is our legislation and regulations, rather than the 1996 Convention per se, which have the force of law in Australia.

4. For the first ten or so years, Australia's participation in the 1996 Convention was with contracting states with which we did not experience the dynamics which the 1996 Convention seeks to address. It was not until the end of 2011 that most member states of the European Union ratified the 1996 Convention. The

[4] The Explanatory Report on the 1996 Hague Child Protection Convention by Paul Legarde (1998) HCCH Publications [3]

[5] The full title is *The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("the 1996 Convention").

1996 Convention entered into force between Australia and the United Kingdom on 1 November 2012. The United States signed the 1996 Convention on 22 October 2010 but has not ratified it. Neither New Zealand nor Canada, which are significant countries for Australia in terms of parenting and children's matters with an international dimension, have signed, but each have expressed interest in doing so. New Zealand has drawn enabling legislation. The 1996 Convention is currently in force between Australia and 48 other contracting states the most recent being Fiji (5 June 2018) and Honduras (1/8/18).

5. The 1996 Convention[6] is concerned with civil measures aimed at protecting children in international contexts. The 1996 Convention takes account of the wide variety of legal institutions and systems that exist around the world. Its purpose is to avoid legal and administrative conflicts and to build a structure for effective international cooperation in child matters. It has broad application, covering both private and public measures for protection and care.[7]

II Breadth of the 1996 Convention

6. As its title describes, the 1996 Convention regulates a broad range of matters, including:

- parental responsibility;
- parental access and contact;
- public care and protection of children;
- matters concerning the protection of children's property;
- procedural aspects of cases involving children.

7. The 1996 Convention addresses the exercise of jurisdiction by authorities within contracting states. Authorities include courts and administrative authorities. It refers to "measures of protection" which is inclusively defined and goes far wider than the public law measures of care and protection with which we are familiar. The "measures" or orders may deal with the person of the child or the property of the child and are described at Article 3 as follows:

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child's property.

8. Article 4 of the 1996 Convention provides that the Convention does *not* apply to the following:

a) the establishment or contesting of a parent-child relationship;

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

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[6] Full title of which is *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 2204 UNTS 95 ("the 1996 Convention").

[7] HccH, *Outline, Hague Convention on Child Protection* (September 2008) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

c) the name and forenames of the child;

d) emancipation;

e) maintenance obligations;

f) trusts or succession;

g) social security;

h) public measures of a general nature in matters of education or health;

i) measures taken as a result of penal offences committed by children;

j) decisions on the right of asylum and on immigration.

III Interpretation and context

9. The 1996 Convention is more difficult to read and digest than the 1980 Convention[8] but, once you crack the code, it operates intuitively and is a treasure trove for judges and practitioners who deal with cross-border family disputes. Unlike the 1980 Convention, the 1996 Convention can come unheralded. The 1996 Convention can sneak up on you because it operates widely and without needing to be expressly invoked.

10. Of necessity, the terminology of the 1996 Convention must cover a range of jurisdictions within which civil law jurisdictions dominate. Some terms and concepts come from the 1980 Convention, so those will be familiar. For instance, *rights of custody*, *habitual residence* and *parental responsibility* have the same autonomous legal meaning under the 1996 Convention as they do under the 1980 Convention. However, there is some new terminology which can be confusing when you read the 1996 Convention and our implementing legislation, the *Family Law (Child Protection Convention) Regulations 2003* (Cth) ("the Regulations") and Part XIIIAA - Div 4A of the *Family Law Act* ("the FLA"). For our purposes:-

a) "*a measure*" or "*a protective measure*" is a court order or a decision made by a competent authority;

b) "*authority*" includes a court, the Central Authorities and an administrative body invested with power to make decisions in the country in which it is located;

c) "*competent authority*" is an "*authority*" which has jurisdiction to take a "*measure*";

d) "*judicial or administrative authority*" includes a court;

e) "*a measure for the protection of the child*" includes a parenting order;

f) "*a measure for the protection of the property of the child*" includes an order about property to which a child is entitled.

g) "*parental responsibility*" includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

11. In 2013, our Full Court observed[9] that:-

> There has to date been virtually no experience in this country, or indeed to the best of our knowledge, in any country, with the operation of the Child Protection Convention, and in particular, its provisions for the recognition and enforcement of the orders of one Convention country in another.

This observation was correct. The good news is that we are building an instructive body of precedent and experience under the 1996 Convention, largely led by the United Kingdom but to which Australia is a valued contributor.

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[8] The full title is *Convention of 25 October 1980 on the Civil Aspects of Child Abduction* ("The 1980 Convention")
[9] *Cape & Cape* [2013] FamCAFC 114 [73].

12. The 1996 Convention promotes the objectives of the United Nations Convention on the Rights of the Child 1989 ("UNCROC"),[10] to which Australia became a signatory on 22 August 1990.[11]

13. You may have heard of Brussels II *bis*.[12] The earliest version of the Brussels Regulation was passed by the European Parliament and Council in 2000 and entered into force for European Union Member States in March 2002. It regulated jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It was revised to include decisions relevant to cross-border parenting. The revised regulation is called Brussels II *bis*. Brussels II *bis* was modelled on, and follows the scheme and principles of the 1996 Convention but in some respects goes further than the 1996 Convention in relation to the operation of the 1980 Convention. Brussels II *bis* will be further revised when the United Kingdom leaves the European Union. For our purposes, you can assume that the provisions of Brussels II *bis* are not inconsistent with the 1996 Convention and that European decisions and guidance on the implementation of Brussels II *bis* are valuable for our interpretation of the 1996 Convention.[13] The 1996 Convention brings some Brussels II *bis* principles to our Asian region.

14. The judicial interpretation of the 1996 Convention frequently includes reference to the Explanatory Report of 1998 which was prepared by Paul Legarde.[14] General and supplementary rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties to which Australia is a party,[15] in particular, Articles 31 and 32 of the Vienna Convention (which are set out at Annexure A), permit reference to the *travaux préparatoires* found in Volume II of the Acts and Documents of the Eighteenth Session of the Hague Conference. There is also the Revised Practical Handbook on the Operation of the 1996 Convention, published by the Permanent Bureau (which is referenced in Annexure B).

IV Familiar concepts

15. There are a number of concepts employed in the 1996 Convention about which we already know from the 1980 Convention. These include *wrongful removal* and *wrongful retention* which have the same meaning as under the 1980 Convention. Some terms are slightly different.

A Child

16. The 1996 Convention applies to children from the moment of their birth until they attain the age of 18 years.[16] This differs from the 1980 Convention which only applies to children under the age of 16 years. The higher age limit in the 1996 Convention reflects the fact that the 1996 Convention covers much

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[10] Nigel Lowe and Michael Nicholls, *The 1996 Hague Convention on the Protection of Children* (Jordan Publishing, 2012), 8.3.

[11] UNCROC has not been incorporated directly into Australian domestic law. By amendment effective from 7 June 2012, an additional object of the parenting provisions of our legislation is "to give effect to the Convention of the Rights of the Child" (section 60B(4) of the FLA). It does not override specific provisions of domestic law including our regulations which implement the 1980 Convention. Rather, the UNCROC is an aid to interpretation and can be used to resolve ambiguities in domestic legislation and may have a significant role to play in the interpretation of Australian laws and the common law relating to children.

[12] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and recognition and enforcement of judgements on matrimonial matters and in matters of parental responsibility for children of both spouses which is colloquially known as "Brussels II". Brussels II was revised on 29 November 2002 by agreement of the Council of Ministers (Justice and Home Affairs). The revising law was Council Regulation (EC) No 2201/2003 of 27 November of 2003 and completely repeals BII. It is known variously as BII revised or BIIr or BII bis (bis meaning approximately encore).

[13] *Bunyon & Lewis (No 3)* [2013] FamCA 888.

[14] Paul Legrade, *Explanatory Report on the 1996 Child Protection Convention* (1998) <https://www.hcch.net/en/publications-and-studies/details4/?pid=294>

[15] Australia acceded to the 1969 Vienna Convention on the Law of Treaties on 13 June 1974 and it entered into force in Australia on 27 January 1980.

[16] Article 2

more than international parenting disputes, for instance, the protection of vulnerable children who do not have parents, displaced children and children's property.[17]

B Contracting State

17. A contracting state is a state in respect of which the 1996 Convention has entered into force. There is a Status Table in relation to countries which have signed, and/or ratified the 1996 Convention on the HCCH website; <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

18. Article 53(1) provides that the 1996 Convention only applies to measures of protection taken after the 1996 Convention entered into force for that state. Article 53(2) provides that the recognition and enforcement provisions of the 1996 Convention only apply to measures taken after the 1996 Convention entered into force between the two contracting states concerned. Accordingly, like the 1980 Convention, the 1996 Convention does not operate retrospectively.

C Central Authorities

19. As with the 1980 Convention, the 1996 Convention requires contracting states to appoint a central authority to carry out the obligations of the Convention. In Australia, the Commonwealth Attorney-General's Department is the Australian central authority. The Australian central authority has designated a central authority for each of the eight states and territories within Australia.[18]

20. The drafters of the 1996 Convention recognised that without functioning central authorities, the harmonisation of private international law could easily be frustrated. Article 30 provides a general duty of cooperation between central authorities and competent authorities in their states to achieve the purposes of the Convention, including to facilitate agreed solutions through mediation and conciliation and to provide assistance in ascertaining the whereabouts of children. Article 30 also provides that central authorities are to take appropriate steps to provide information as to the laws of, and services available in their states relating to the protection of children where the Convention applies. Article 31 provides that central authorities either directly or through other authorities, facilitate communication and other assistance about transfer of jurisdiction and co-operation between states. They must also assist in locating a child on a request by another contracting state when the child is thought to be in need of protection. The balance of Chapter V provides even more specific obligations around cooperation.

D Habitual residence

21. Habitual residence is a jurisdictional fact and a very important concept in both the 1996 and the 1980 Conventions. It is not a defined term. One should attribute an international autonomous meaning to the concept of habitual residence rather than applying any domestic meaning from national law. Lord Wilson recently described habitual residence in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* ("*B (A Child)*") [2016] UKSC 4 at [27] as "the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to [children]". As to its nature, Lady Hale and Lord Toulson observed recently in *B (A Child)* "[habitual residence] is a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact".[19]

22. Habitual residence is one of the most frequently litigated issues under the 1980 Convention. There has been a discernible shift in Australia and England in the law in relation to habitual residence. Accordingly, care should now be taken about relying on older decisions or academic writings because they may no longer be good law.

23. Until about ten years ago, in Australia, the identification of a shared and mutual intention by parents to reside in a place for an appreciable period of time or for settled purposes dominated our jurisprudence about habitual residence. Australia followed English precedent in this regard. It followed that, in the absence of shared parental intention to reside in a place for a settled purpose, habitual residence was not

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[17] For example, the right to recover under an insurance policy.
[18] South Australia and Western Australia are states in which the central authority for the 1996 Convention is a person/organ other than the person/organ designated as for the 1980 Convention.
[19] [2016] UKSC 4, [57].

established. The focus was on parental intentions. A child's place of habitual residence could be identified as the last locale where the parents had both been habitually resident and that habitual residence could pertain notwithstanding that one parent moved away. The parental intention model was a construct, the application of which could produce highly artificial results.

24. In 2009, the High Court of Australia decided *LK & Director-General, Department of Community Services*[20] ("*LK & Director-General*"). The High Court made two preliminary observations. First, there are a wide variety of circumstances that bear upon where a child resides and whether that residence is habitual. Second, the past and present intentions of a child's parents will affect the significance to be attached to particular circumstances, such as the duration of a person's connections with a place of residence. Regarding intention, the High Court noted that a parent's intentions will usually be relevant to, but not necessarily be determinative of, habitual residence. The High Court noted that a person's intentions may be ambiguous.

25. In *LK and Director-General*, the mother had left Israel with the children on the understanding that if she and the father reconciled they would return to Israel, but if they did not reconcile she and the children would remain in Australia. The High Court found that it was appropriate to have regard to the steps the mother took before and after her arrival in Australia as supporting the mother's argument that it was not her intention to move to Australia unless the marriage reconciled. The High Court made several points about parental intention (emphasis original):

> [32] … because the notion of habitual residence does not require that it be possible to say of a person at any and every time that he or she has a place of habitual residence, it is important to recognise that a person may cease to reside habitually in one place without acquiring a new place of habitual residence.
>
> [33] Secondly, because a person's intentions may be ambiguous, in asking whether a person has *abandoned* residence in a place it is necessary to recognise the possibility that the person may not have formed a singular and irrevocable intention not to return, yet properly be described as no longer habitually resident in that place. Absence of a final decision positively rejecting the possibility of returning to Israel in the foreseeable future is not necessarily inconsistent with ceasing to reside there habitually.
>
> [34] Thirdly, when considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child. It will usually be necessary to consider what each parent intends for the child. When parents are living together, young children will have the same habitual residence as their parents. No less importantly, it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence. The assent of the other parent (or a court order) would be necessary. But again, if it becomes necessary to examine the intentions of the parents, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged.

26. Our High Court endorsed the reasons of the plurality in the New Zealand Court of Appeal case of *P v Secretary for Justice*, when it said the following in relation to ascertaining habitual residence:[21]

> Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called at [22], the underlying reality of the connection between the child and the particular state.

27. The High Court in *LK v Director General* unanimously concluded that a closed set, or a hierarchical set, of criteria would not assist in making a decision which could potentially fall within a very wide range of circumstances.

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[20] (2009) 237 CLR 582.

[21] *LK and Director-General, Department of Community Services* (2009) 237 CLR 582, quoting *P v Secretary for Justice* [2007] NZLR 40 at [88] and citing *SK v KP* [2005] NZLR 590.

28. In Australia, shared parental intention remains a relevant consideration but it is not determinative in the identification of whether, or where, a child is or was habitually resident. The absence of shared parental intention to relinquish or embrace a place of habitual residence *per se* will not leave the child in a vacuum.

29. In the United Kingdom, the Supreme Court's decision in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* ("*A v A*")[22] illustrates how English jurisprudence has also moved away from joint parental intention as a predominant factor.

30. In *A v A*, the Supreme Court aligns the identification of habitual residence under the 1980 Convention with European authorities under Brussels II *bis*[23] and adopted by the European Court of Justice ("CJEU") in the case of *In Proceedings brought by A* ((2009) Case C-523/07) and affirmed by it in *Mercredi v Chaffe* ((2010) Case C-497/10 PPU). That is:

> that habitual residence is 'the place which reflects some degree of integration by the child in a social and family environment.' Shared parental intention to reside in that place is relevant but not a necessary prerequisite to the establishment of habitual residence.

31. The European jurisprudence, as recently adopted in the United Kingdom, sits comfortably with the Australian approach from *LK & Director General* onwards.

32. In *In Proceedings brought by A* ((2009) Case C-523/07), the Supreme Administrative Court of Finland sought a ruling by the CJEU on the interpretation to be given to the concept of "habitual residence" within the meaning of BIIr art 8(1). The Finnish proceedings related to three children who had been living in Sweden since 2001 with their mother and step-father. In the summer of 2005, they went to Finland on vacation and lived in caravans and at a range of campsites. In October 2005, the family applied for social housing accommodation. The mother and step-father returned to Sweden leaving the children in Finland with the step-father's sister. The children were taken into state care in November 2005 on the basis that they had been abandoned. The mother commenced proceedings to have the children returned to her care.

33. The CJEU, comprising the President of the Chamber, A. Rosas, the Rapporteur, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), and Judges U. Lõhmus and P. Lindh, stated in relation to art 8(1) of BIIr at [44]:

> … [T]he concept of 'habitual residence' under Art 8(1) of the regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

34. *In the matter of LC (Children) (No 2)* [2014] UKSC 1 ("*In the matter of LC*"), the Spanish mother took the four children aged 13, 11, 9 and 5 to live in Spain. When the children went to England for the Christmas holidays with their English father, they did not return. It was alleged that the 13 year old objected to return within the meaning of Article 13 of the 1980 Convention. The Court of Appeal agreed that the oldest child objected in the relevant sense and that the lower court had erred in not exercising its discretion to refuse to order the eldest child to return to Spain. The father then appealed to the Supreme Court on the basis that the trial judge had not taken the views of the middle children into

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[22] [2013] UKSC 60.

[23] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and recognition and enforcement of judgements on matrimonial matters and in matters of parental responsibility for children of both spouses which is colloquially known as "Brussels II". Brussels II was revised on 29 November 2002 by agreement of the Council of Ministers (Justice and Home Affairs). The revising law was Council Regulation (EC) No 2201/2003 of 27 November of 2003 and completely repeals BII. It is known variously as BII revised or BIIr or BII bis (bis meaning approximately encore).

account interpreting them as merely preferences rather than objections to returning to Spain. The Supreme Court allowed the Appeal, and in doing so, said that a child's state of mind, particularly that of an adolescent, could be taken into account in determining habitual residence. In a minority judgment, Lady Hale and Lord Sumption countenanced that the states of mind of each of the middle children (aged 10 and 8 at the trial) were relevant to whether that child had attained a degree of integration in the new state and thereby, a determination of the place of habitual residence of the children.

35. In 2015, in *AR v RN (Habitual Residence)*,[24] the Supreme Court of the United Kingdom considered whether to return two girls to France who had been living temporarily in Scotland with their British/Canadian mother. The girls were born in France in August 2010 and June 2013, and lived there with their French father and mother. In July 2013, during her 12-month maternity leave, the mother and children temporarily relocated to Scotland where the maternal grandparents lived. The mother claimed that the intention was for the family permanently to relocate to Scotland after 12 months. She had moved into a rental property that both she and the father had inspected. During this time, the mother learnt of the father's infidelity and she decided to end the relationship. She commenced proceedings for a residence order in respect of the children and a restraining order preventing the father from removing the children from Scotland. The father brought Hague return proceedings seeking a return order (to France). At first instance, it was found that the children had maintained their habitual residence in France because there had been no jointly held parental intention to leave France permanently. This decision was reversed by an Extra Division of the Inner House of the Court of Session.[25] The intermediate appellate court found that the trial judge had incorrectly determined that a shared parental intention to move permanently to Scotland was an essential element in any alteration of the children's habitual residence from France to Scotland. The Extra Division found that the children had become habitually resident in Scotland. The father's appeal was dismissed by the plurality of the Supreme Court. The Supreme Court reiterated that habitual residence was a question of fact that required an evaluation of all relevant circumstances. It considered the situation of the child, with the purposes and intentions of the parents merely being among the relevant factors. The important element was the stability of the residence not the permanency of it. The Supreme Court held that there was no requirement that there should be a particular period of time that the children should have been resident in Scotland before acquiring habitual residence there, nor did there need to be an intention on the part of one, or both, parents to reside there permanently or indefinitely. It was held that, in failing to consider the stability of the mother's and the children's lives in Scotland, the Extra Division had not taken into account their social and family environment there. Lord Reed who delivered the judgment for the Supreme Court, noted at [16]:[26]

> It is … the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

36. It is apparent that the proposition that the habitual residence of a child cannot be changed by the individual acts of one parent, no longer holds true. In *Re B (A Child)*[27] the United Kingdom Supreme Court considered the circumstances and point at which habitual residence was lost. Lord Wilson, with whom Lady Hale and Lord Toulson agreed, held that the subject children did not lose their habitual residence immediately upon removal from the jurisdiction, even where there was a settled intention that they would no longer live there. Their Honours' reasoning was that children lose their habitual residence when they achieve the required degree of disengagement from the jurisdiction. The parents were a same-sex couple who had been in a relationship until 2011. In February 2014, the respondent birth mother, a British national of Pakistani ethnicity, went to live in Pakistan with the aim of entering into a business partnership. On 13 February 2014, the applicant other mother became aware that the daughter had been removed from her home but was unaware that she had been taken abroad. She issued an application under the *Children Act 1989* for leave to apply for shared residence of the child or to have contact with

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[24] [2015] UKSC 35.
[25] *In the petition of AR for an order under the Child Abduction and Custody Act 1985* [2014] CSIH 95.
[26] *AR v RN (Habitual Residence)* [2015] UKSC 35.
[27] [2016] UKSC 4.

her. Both the High Court and the Court of Appeal were satisfied that the child had been lawfully removed by her birth mother who had a settled intention of making a new life abroad. The Court of Appeal upheld the first instance decision to dismiss the other mother's application for shared residence of the seven-year-old daughter on the basis that, by the time the application had been made by the other mother, the child had lost her habitual residence in England. Lord Wilson noted that two consequences flowed from the modern international concept of habitual residence. First, that it was not in a child's interests to be left without a habitual residence. Second, that the domestic interpretation of habitual residence should be consonant with its international interpretation. A third issue to consider was whether the point at which habitual residence was deemed to be lost required adjustment following the court's adoption of the European concept of habitual residence in *A v A* cited above. Lord Wilson stated:[28]

> [45] I conclude that the modern concept of habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed [the child]. The concept operates in the expectation that, when a child gains a new habitual residence, he loses this old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or better, disengagement) from it.
>
> [46] … The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:
>
> > 1. the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
> >
> > 2. the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
> >
> > 3. were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement.

37. Lord Wilson concluded his analysis based on the discussion at [44] in the opinion of Advocate General Kokott in *In Proceedings brought by A*,[29] that all the circumstances in the case must be taken into account where there is a change of place. He described the necessary process as follows:

> This should be a composite consideration of all the circumstances in the new environment and as a mirror image, in the old environment in order to determine whether habitual residence has shifted from the latter to the former.[30]

38. Taking into account the circumstances of the situation, Lord Wilson considered a range of factors that might lead to a conclusion of a level of disengagement from the old environment and integration with the new, in order to determine the child's habitual residence. On weighing the factors, he found that the child was still habitually resident in England.

39. In their joint judgment, Lady Hale and Lord Toulson support Lord Wilson's decision and proceed to add a pragmatic perspective. They said:

> [57] We agree fully with Lord Wilson's reasoning and conclusion on the issue of habitual residence. He has described the identification of a child's habitual residence as overarchingly a question of fact (para 46). At the risk of appearing pedantic, we would prefer to describe it as a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact. We do not, however, understand Lord Wilson to be laying down a rule of law that a child must always have a

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[28] *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4.
[29] (2009) Case C-523/07
[30] *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4 [54].

habitual residence: rather that, as a matter of fact, the loss of an established habitual residence in a single day before having gained a new one would be unusual. In this particular case, although the respondent said that her intentions were permanent, looked at from the child's point of view, on the relevant date they had been in Pakistan for only nine days, they had no home there, and she had not yet been entered into a school. Had the respondent then changed her mind and decided that the move was a bad idea, it is unlikely that a court would have held that the habitual residence of either of them had changed during those few days.

40. The most recent decisions of the UK Supreme Court have, in effect, adopted the CJEU concept of habitual residence which aligns with the view of the Australian High Court. There has been a downgrading of parental intention, the abolition of the "one parent cannot unilaterally change a child's habitual residence" rule and the upgrading (so to speak) of an examination of the extent to which a child has integrated into life in the new state. Older children may have views of their own about their degree of integration as was discussed above in relation to *In the matter of LC*. There is likely to be a correlation between the age and maturity of the child and the weight to be accorded to the child's views such that the views of a younger child would be accorded less weight than an older child.

41. In the relatively recent decision of *Secretary, Department of Family and Community Services & Padwa* [2016] FamCAFC 57, the Full Court considered a first instance decision that the subject child was habitually resident in Indonesia, a non-convention country, or alternatively, in both Indonesia and the Netherlands, the latter of which is a convention country. The Court emphasised that the test for habitual residence in both Australia and other like jurisdictions, such as the UK, has shifted away from giving parental intention significant weight. Rather, the test focuses on whether presence in a place has a "degree of settled purpose from the child's perspective". They also emphasised that "time spent in a particular place is not determinative of itself of the strength of ties to that place and thus of habitual residence, but continuity of place can be an important matter for a child and, as such, is a circumstance to be considered from the child's perspective".[31] The Court considered that it was unnecessary to decide whether the child could simultaneously have more than one habitual residence at any given time, but said that if that was the case, the father's application, seeking that the child be returned to the Netherlands under the 1980 Convention, was properly founded because the relevant regulation (regulation 16(1A)(b) of the *Family Law (Child Abduction Convention) Regulations 1986*) requires that the child be "habitually resident in a Convention country" immediately before the child's removal to or retention in Australia; it does not require that the child only be habitually resident in that Convention country.[32] They concluded that "even if the child was simultaneously habitually resident in Indonesia and the Netherlands, the fact that this might result – as between Australia and Indonesia – in proceedings of one sort or another does not affect the rights otherwise regularly invoked under the Convention and the Regulations."[33]

42. In *Secretary, Department of Family and Community Services & Padwa*,[34] the court was considering habitual residence under the 1980 Convention, where the time at which habitual residence is relevant is the immediately before the child's removal or retention – an historical perspective. Under the 1996 Convention, the examination of habitual residence is at a different point in time, being the current habitual residence of the child.

E Rights of custody

43. The 1996 Convention uses the same concept of wrongful removal or retention as the 1980 Convention. Not every removal or retention of a child from its habitual residence across an international border without the consent of the other parent is "wrongful" within the meaning of the conventions. An essential element to a wrongful removal or retention is proving that there has been a breach of rights of custody under the law of the child's state of habitual residence. It is another jurisdictional fact.

44. A right of custody is distinguished from a right of access. In the 1980 Convention, Article 5 states:

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[31] *Secretary, Department of Family and Community Services & Padwa* [2016] FamCAFC 57, [57].
[32] *Secretary, Department of Family and Community Services & Padwa* [2016] FamCAFC 57, [68].
[33] *Secretary, Department of Family and Community Services & Padwa* [2016] FamCAFC 57, [70].
[34] [2016] FamCAFC 57.

> a) 'rights of custody' shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence.
>
> b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The same concept applies in the 1996 Convention. Again, the meaning of "a right of custody" is to be attributed an autonomous meaning distinctly from domestic concepts of custody or residence.

45. A parent will not have rights of custody unless he or she has the right to determine where a child will live, pursuant to the law of the state in which the child was habitually resident.

46. In Australia, a left-behind parent who has a right of veto (frequently referred to as "a *ne exert* right") pursuant to the laws of the state of habitual residence and can prevent the other parent from relocating across international borders, is considered to have a right of custody. This is regardless of whether the left-behind parent only has a right to access or visitation under the law of the home state, or does not see the child at all.

47. In *Re D (A child) (Abduction; Custody Rights)* [2007] 1 ALL ER 783 Lord Hope of Craighead said at [9] to [10]:

> [9] It has come to be appreciated in most, but not all, contracting states that for the convention's purposes a right to grant or withhold consent to the child's removal from the state where he resides is a right of custody. Article 5 states that for the purposes of the Convention 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. To understand what this means reference must be made to art 3, where the words 'rights of custody' are used to define the circumstances in which the removal or retention of a child is to be considered wrongful — 'wrongful' because the convention proceeds on the assumption that welfare issues are best dealt with in the state where the child is habitually resident.
>
> [10] The key to what the phrase means lies in these facts. The convention is an agreement between states. It seeks to address the problems that arise where a child is moved across international borders. It does not concern itself with disputes about the exercise of custody or access rights within the country of the child's habitual residence. The right to determine the child's place of residence has to be seen in that context. The word 'place' in the phrase 'the child's place of residence' must be taken, for convention purposes, to include the country of the child's residence. A right to object to the child's removal to another country is as much a right of custody, for those purposes, as a right to determine where the child is to live within the country of its residence.

48. In order to answer whether a parent has a right of custody it is first necessary to establish what rights the parent had under the domestic law at the time of the child's removal from that State. Having done so, the next step, according to Australian law, is to determine whether such rights amount to "rights of custody" within the meaning of Article 3 of the 1980 Convention (i.e. are the rights to determine place of residence, and/or the right of veto, according to our law).

49. In *Jiang and Director-General Department of Community Services* [2003] FamCA 929, the Full Court (Finn, Holden and Mushin JJ) outlined the following steps to identify right of custody:

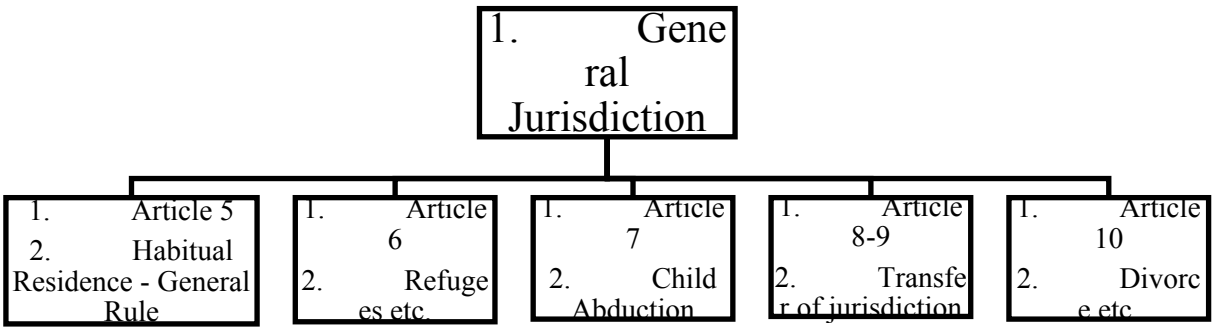
> (a) the first task of the court is to establish, on the evidence before it, what rights, if any, the parent seeking the return had under the law of the foreign country in relation to the child at the time of removal;
>
> (b) the next stage is to resolve, as a matter of Australian law under the Regulations (being the law of the forum where the Convention has been invoked), whether those rights amount to 'rights of custody' within the meaning of the Regulations; and
>
> (c) finally, the question is whether or not the retention of the child was in breach of those rights, and therefore whether or not the removal was wrongful within the Regulations.

50. Therefore, as far as Australia is concerned, the right of custody relied upon must qualify as a right of custody within the meaning of Article 3 of the 1980 Convention in both the home state and in Australia.

V General jurisdiction

51. Speaking aout Australia, a ready reckoner for the jurisdiction and our courts' power to make orders in relation to children is found at section 111CD of the FLA and there is a corresponding provision about appointing a guardian in relation to a child's property at Section 111CK of the FLA.

52. Section 111CD of the FLA (see Annexure C) incorporates all of the general jurisdictional provisions in Articles 5 to 10 of the 1996 Convention the categories for which are:[35]



53. Section 111CF of the FLA incorporates Article 13 of the 1996 Convention and provides that an Australian court cannot make orders or take measures where proceedings are pending before another contracting state exercising general jurisdiction.

F Starting point

54. The starting point for general jurisdiction is Article 5 of the 1996 Convention. It provides that the judicial or administrative authorities of the Contracting State of the habitual residence of the child have preeminent jurisdiction to take measures directed to the protection of the child's person or property. Subject to a provision for children who have previously been wrongfully removed or retained (within the meaning of Article 7), where a child's place of habitual residence changes to another contracting state, the authorities of the state of the new habitual residence have jurisdiction.

Example of Article 5 jurisdiction[36]

55. In 2013, a child and her father relocated from Australia to the Netherlands shortly after the death of the child's mother. During the mother's illness, the parents had become estranged. The little girl was cared for by the maternal family, but as the mother's condition deteriorated, the father assumed more day to day care of the child. By the time of the mother's death, the child was living with the father and the mother's family were very opposed to him. After the mother passed away, the father facilitated access between the child and the maternal grandparents. There were no court orders. One day the father said that the little girl had another commitment and he cancelled the access arrangement with the maternal grandparents. The next day he was in the Netherlands with the child, having decided that they should leave Australia permanently.

It was not contended that anyone other than the father had rights of custody or could decide the child's place of habitual residence. Accordingly, the 1980 Convention did not apply. However, the child's departure from Australia had involved subterfuge and was an incendiary step in the already fraught relationship between the father and the maternal family and they immediately made application for various orders from our Court requiring the return of the child to Australia so the child could spend time with them or live with them. A judicial officer of our court ordered the father to return the child within 30 days. On *de novo* appeal to a judge, the father was permitted to retain the child in the Netherlands pending a final hearing. Both judges missed the fact that when the little girl went to live in the Netherlands, her habitual residence became the Netherlands and pre-eminent jurisdiction in relation to

[35] I have reproduced this table from a power point presentation by Anne-Marie Hutchinson OBE, QC delivered at HCCH Asia Pacific Week 2017 in Seoul in July 2017.
[36] *Bunyon & Lewis (No 3)* [2013] FamCA 888

her and her property vested in the Netherlands. Because the 1996 Convention had entered into force between Australia and Netherlands by the time the father removed the child, Australia had no jurisdiction to make parenting orders about the child.

G Refugee children

56. Article 6 of the 1996 Convention provides that where a child is present in a contracting state because the child is a refugee or has been displaced due to disturbances in their country or a child's habitual residence cannot be established, the contracting state where the child is present will have jurisdiction.

Example of application to refugee children [37]

57. A paternal grandmother was seeking parenting orders for refugee children whose parents were presumed dead. The children had been living in Afghanistan, followed by Iran, and at the time of the application were in Syria with a paternal aunt. The applicant's case was that the children's aunt did not have enough food for them and could no longer care for them and that the applicant was prepared to assume full responsibility for the orphans in Australia. The applicant had been advised, however, that she would not be able to secure the children's entry into Australia unless she had an order providing that she had parental responsibility for them. Article 6 of the 1996 Convention provides that jurisdiction for refugee children, or children whose habitual residence cannot be established, lies with the authorities of the contracting state in which they are present which, in this case, was Syria, a non-contracting state. Therefore, in spite of the necessitous circumstances, our courts could not make parenting orders. Fortunately, somehow the children got to Australia. Once the children arrived in Australia, his Honour was satisfied that he had jurisdiction under s 111CD of our *Family Law Act 1975* (Cth) to make the parenting orders sought by the grandmother.

H Child abduction

58. Article 7 of the 1996 Convention relates to children who have been wrongfully removed or retained. It provides that, where a child has been wrongfully removed or retained, the contracting state in which the child was habitually resident immediately prior to the removal or retention keeps its jurisdiction. However, where a wrongfully removed or retained child has acquired habitual residence in a new contracting state, jurisdiction will move to the new state in which the child is present if:-

    a) Everyone who has rights of custody has acquiesced in the removal or retention; or

    b) The child has resided in the new state for at least a year after any person or body with rights of custody knew or should have known the child's whereabouts, no request for return under the 1980 Convention is pending and the child is settled.

Article 7 is implemented into Australian law by section 111CE of the FLA.

[37] *Saadah & Saadah* [2014] FamCA 1189.

Child abduction example

59. *State Central Authority & Thomas* was a 2014 case under the 1980 Convention in which it was alleged that the mother wrongfully removed the two young children from Austria to Australia in November 2012.[38] The return application was filed within 12 months of the removal and the only exception pressed was whether the father consented or subsequently acquiesced to the retention of the children in Australia. The father's position, as revealed to the courts in Austria, was that he did not oppose the children residing out of Austria but was emphatic that the children not be permitted to enter a Sharia law state, even temporarily. The Hague proceedings were not finalised until August 2015 when the father withdrew his application. During the 18 months or so that the return application was pending, the mother had returned to Austria to participate in two appeals and one re-hearing of proceedings in Austria. It was accepted that Austria was the children's place of habitual residence. No exception to return under the 1980 Convention applied to the case. However, each successive decision by the courts in Austria was predicated on the children being entitled to remain in Australia. In short, it did not make sense to return the children to Austria under the 1980 Convention because, at all relevant times, the last made decision of Austrian courts countenanced the children remaining in the primary care of the mother in Australia.

There was extensive direct judicial communication between myself and the Austrian Network Judge and then between myself and the judge at first instance in Austria. I made it clear that, if the courts in Austria made an order requiring the mother to return the children to Austria forthwith, then I would return the children. This is because Article 5 of the 1996 Convention accords Austria primary jurisdiction. Article 23(1) provides that measures (orders) made in one contracting state (i.e. Austria) shall be recognised by operation of law in all other contracting states (i.e. Australia).

At the point of recognition, the order can be observed by the parties to the proceedings in which it was made and is treated as an order made (or measure taken) in the other state. However, recognition does not equate to enforceability. Enforceability in Australia of an order (measure) made in Austria comes under Article 28 of the 1996 Convention which provides that: -

> [m]easures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

The consequence would have been that an Austrian court's order must be enforced in Australia unless any of the grounds for refusal in Article 23(2) applied. The exceptions to enforceability under Article 23(2) can be summarised as orders being made without jurisdiction, without procedural fairness or natural justice or if they are contrary to public policy. Article 25 provides that a court in the state in which the order is sought to be enforced is bound by the findings of fact on which the court or authority in state where the order (measure) was taken. As no order was ever made by the Austrian court, the children were not to return until the parenting proceedings in Austria were concluded.

In *State Central Authority & Thomas*[39], the social science arm of the court prepared an extensive social science report to be used by the judge in Austria in her decision in the final parenting case. The family report was provided to the judge in Austria under Article 30 of the 1996 Convention which provides, *inter alia,* that Central Authorities promote cooperation amongst the authorities (including courts) to achieve the purposes of the 1996 Convention. In this case, the purpose was to facilitate the court with pre-eminent jurisdiction under Article 5 of the 1996 Convention, Austria, to make a decision about parenting arrangements for the children with the assistance of an up-to-date assessment by a court employed psychologist. The father was interviewed in Melbourne and was assessed in face-to-face

[38] *State Central Authority & Thomas (No 1)* [2014] FamCA 195; *State Central Authority & Thomas (No 2)* [2014] FamCA 196.
[39] *State Central Authority & Thomas (No 1)* [2014] FamCA 195; *State Central Authority & Thomas (No 2)* [2014] FamCA 196.

meetings between himself and the children. The family consultant published her report and it was released to the Austrian judge and the parties. Our family consultant was available to give evidence by video link to Austria, if necessary. In the meantime, the judge in Austria made arrangements to interview the oldest child, who was of the age that an interview is mandatory in Austria. The interview was conducted by video link to Australia. The judge also requested that the younger child speak to her by video link and accepted a request by the requesting parent that the independent children's lawyer appointed in Australia also be present with the children. The judge in Austria decided, without ambiguity or resulting points of appeal, that the children should reside in Australia.

The purpose of Article 7 is considered to be to remove incentive for the state to which the child is wrongfully removed or retained, to refuse return on the assumption that it would then acquire jurisdiction to make parenting arrangements or orders for the child. In this Austrian case, upon losing the proceedings in Austria, the father immediately instituted parenting proceedings in Australia, which was taken as him consenting to Australia's jurisdiction and acquiescing to Australia being the state of habitual residence of the children (who had, by that time been in Australia since November 2012). Furthermore, within the meaning of Article 7(1), there was no pending request for return and the children were settled in their new environment (Australia) so there was no impediment to Australia assuming jurisdiction.

I Transfer of jurisdiction

60. Article 8 and Article 9 of the 1996 Convention provide for a transfer of jurisdiction between contracting states.

61. In both cases, the court or authority in the state which is making the request must consider which state is "better placed to consider the child's interests" *and* the transfer must be in the child's best interests.

62. Where Articles 8 or 9 are sought be to invoked, the courts or authorities of the states "may proceed to an exchange of views".

63. Article 8 provides for requests made by a state where a child is habitually resident for an authority in another contracting state to exercise jurisdiction. This is implemented into Australian law by section 111CG of the FLA which provides that an Australian court may, if it considers that it is in the child's best interests to do so, invite the parties or the Central Authority to ask the court in the other contracting state "in a way which the Commonwealth Central authority considers appropriate" to agree to the Australian court assuming jurisdiction to take measures relating to the child.

64. The eligibility of the other state to which jurisdiction may be transferred is described as a state to which the child has a "substantial connection" and is prescribed in Article 8(2) as being:

    a) A state of which the child is a national;

    b) A state in which property of the child is located;

    c) A state whose courts or authorities are seized of an application for divorce, legal separation or annulment of the parents' marriage;

    d) A state with which the child has a substantial connection.

The meaning of "substantial connection" in the context of the 1996 Convention has not been specifically defined. In the *Explanatory Report*, Paul Lagarde[40] suggests that Article 8(2)(d) "encompasses and exceeds" sub-paragraphs (a)-(c); that "it will permit, according to the case and always as a function of the child's best interests, the possible jurisdiction. It provides flexibility for the court to make an assessment of which court (or forum) the child's best interests would be better placed and facilitates the application of those principles that accord with the *forum conveniens* principle. For instance, determination of "substantial connection" may include the court's consideration of factors such as where extended family members who might support the child live; or the language of the parties to

[40] Paul Lagarde, 'Explanatory Report on the *1996 Hague Child Protection Convention*' (Report HCCH, 1998) <http://www.hcch.net/index_en.php?act=publications.details&pid=2943> [55].

proceedings if different to the place of habitual residence; or where additional proceedings for the parties, such as divorce applications, are taking place.[41]

Example of Australian jurisdiction being transferred to another contracting state[42]

The applicant was an Australian citizen and her former partner (a French national) had been in a committed relationship since 2003 spending time together in each country. Their daughter was born in 2005 and lived with her parents in France and Australia. The father travelled to Australia to spend time with the mother and the child, and it was the mother's evidence that he intended to move permanently to Australia once he retired and had become eligible for his pension. However, in 2010 the father died in France intestate. Under French law the child inherited the father's estate, which in this case included monies in French bank accounts, payment under a life assurance contract and real estate in Paris.

In October 2013, the Guardianship Judge of Family Matters of the Tribunal de Grande Instance de Paris, determined that the French courts were best placed to take necessary protective measures concerning the child and invited the applicant "to make an application before the competent Australian authorities to lodge an application to authorise the Guardianship Judge of the Superior Court of Paris to exercise jurisdiction to take all measures to protect the assets of the minor child … forming part of the estate of the [father] and in particular the acceptance of the estate and where applicable the sale of assets of the estate". Australian legislation and the Regulations which implement the Convention for Australia require that the Court be satisfied of various jurisdictional facts before transfering jurisdiction to the court in France. In this instance,:

a) The child was habitually resident in Australia;

b) The court had jurisdiction to make a Commonwealth property protection measure as sought by the applicant;

c) The Convention was in force between Australia and France;

d) France was a state in which property of the child was located and a state in which the child had a substantial connection within the meaning of Article 8(2) of the 1996 Convention.

It was found that the French court was better placed to assess the child's best interests in relation to the child's interest in the estate of her late father and to take measures appointing, or deciding the powers of, a guardian for her property.

65. Article 9 of the 1996 Convention provides for requests to be made by a state in which the child is not habitually resident, to the state in which the child is habitually resident, for the first state to be able to exercise jurisdiction and the second state must expressly accept the request. This is implemented into Australian law by section 111CG(2) of the FLA.

Example of Australia considering whether to request a transfer of jurisdiction from another contracting state

66. By way of an example of Article 9, I return to *State Central Authority & Thomas,* the case with the young girl taken to the Netherlands by her father.[43] Apart from the imperative that she be able to maintain a relationship with the maternal family, there was a financial dimension to the case. The child's mother had bequeathed about AUD$1.5 million to the child, to be held on trust for the girl by a close friend. The trustee was wholly aligned with the maternal family and hostile to the father. The father was excluded from any inheritance. The father had was unsuccessful in seeking permission to access the trust funds in our state courts, where he alleged that the trustees of the child's interest in her mother's estate

[41] See Munby J's comments in *AB v JLB* [2008] EWHC 2965 (Fam) at [24].
[42] *Carrick* [2013] FamCA 1118.
[43] *State Central Authority & Thomas (No 1)* [2014] FamCA 195; *State Central Authority & Thomas (No 2)* [2014] FamCA 196.

applied part of the trust funds to pay legal costs for the proceedings against the father in the Family The father maintained his allegation that the trustees were using the funds nonetheless. In the context of the unresolved parenting arrangements and the situs of the child's trust funds being Melbourne, the maternal family requested a transfer of jurisdiction from the Netherlands to Australia pursuant to Article 9 of the 1996 Convention.

With the consent of the parties, there was direct judicial communication with the Network Judges in the Netherlands to obtain details of precisely how proceedings would be conducted in the court at Dordrecht, the hours of sitting, who could attend, the language and some information about audio visual capabilities. Ultimately, whilst the Court, in Australia, was well equipped and well able to assess the child's best interests, it was not "better placed" to do so than the courts in the Netherlands. The request for a transfer of jurisdiction from the Netherlands to Australia was declined.

J Divorce

67. Article 10 of the 1996 Convention provides that a court exercising jurisdiction to hear a divorce, legal separation or annulment of a marriage between parents can exercise primary jurisdiction to make parenting orders (or other orders) providing that the parents both consent to that state making orders, one of the parents is resident in that state and one parent has parental responsibility in relation to the child. Notably, this jurisdiction ceases as soon as the divorce or annulment power has been exercised.

68. There are conflicting first instance decisions in Australia as to whether the term "divorce" encompasses any proceedings consequent upon the breakdown of a relationship rather than the actual divorce. *Zegna & Zegna* [2015] FamCA 340 is a decision by Watts J delivered 11 May 2015 in which he, as a single judge, interpreted sections 111CD(1)(b)(vi) and section 111CD(3) of the FLA (which implement Article 10). His Honour analysed the meaning of proceedings concerning divorce, separation or annulment. Watts J disagreed with an interpretation of another single judge of the Family Court delivered about a year earlier, *Duckworth v Jamieson* [2014] FamCA 40, where the judge deciding that case adopted a broad interpretation and purported to make parenting orders about a child not habitually resident in Australia on the back of financial orders in relation to the parents, and without there being any divorce or annulment proceedings before him. In declining to adopt that course, Watts J referred to authorities dealing with Brussells II *bis* and the Lagarde Report. Watts J concluded, correctly in my view, that the words "divorce or separation of the child's parents or the annulment of their marriage" did not encompass ancillary or related proceedings.[44]

VI Concurrent and subordinate jurisdiction

69. There are certain circumstances in which an authority or court in a state which is not the state of habitual residence but in which the child or the child's property is present can take measures or make orders in relation to a child. They are:

    a) Under Article 11, a court of a contracting state in which the child is present but not habitually resident may make an order in "all cases of urgency". Notably this order must be "necessary", will have extra territorial effect but will lapse as soon as the authorities with pre-eminent jurisdiction make orders or take measures required by the situation.

    b) Under Article 12, a court of a contracting state in which the child is present but not habitually resident may make an order of a provisional character which has territorial effect confined to that state which is not inconsistent with orders or measures already taken by the state of habitual residence. As with urgent orders, a provisional order will lapse as soon as the authorities with pre-eminent jurisdiction make orders or take measures required by the situation.

[44] *Zegna & Zegna* [2015] FamCA 340, [63] to [67].

70. Section 111CI of the FLA provides that an urgent or provisional measure will lapse if a corresponding order or measure is taken by a competent authority of a Convention country and any of the following apply:

a) The child is habitually resident in the other Convention country;

b) The child is a refugee child present in the other Convention country;

c) There is a pending request for a transfer of jurisdiction;

d) A competent authority in the other Convention country has made a corresponding measure when exercising divorce jurisdiction; or

e) The child has been wrongfully removed or retained outside the Convention country and Article 7 applies.

K Urgent Orders

71. The 1996 Convention does not provide a definition as to what constitute "cases of urgency". The *HCCH Handbook on the 1996 Convention*[45] observes that it will therefore be a matter for the courts in the state where the child is present to determine whether a particular situation is "urgent". The *Explanatory Report* states that a situation of urgency may be said to exist where, if measures of protection were only sought through the normal channels of Articles 5 to 10 (the general bases of jurisdiction), irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised.[46] The *Handbook* suggests that a useful approach for courts and authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his or her protection or interests compromised if a measure is not taken to protect the child in the period that is likely to elapse before the authorities with general, or pre-eminent jurisdiction, can take the necessary measures of protection. However, see also the UK Supreme Court's decision In *Re J (AP)* discussed below.

Example of "urgency"

In *Re J (AP),*[47] the United Kingdom Supreme Court considered the particular meaning of "urgency" in Article 11 of the 1996 Convention in the context of whether the United Kingdom had jurisdiction to order the return of a child to Morocco. In this case, J was born to Moroccan and British parents in 2007. They were living in Morocco when the couple divorced and the mother was granted residential custody by the Moroccan courts. In September 2013, the mother removed J to England without the consent of the father. The 1980 Convention had not entered into force between Morocco and England. The father made an unsuccessful application for residential custody to the Moroccan courts. His application failed because the child had already left the jurisdiction of the Moroccan Courts. He then made an application in the English court in March 2014 for an order for J's return under the 1996 Convention. The judge directed the mother to return the child to Morocco to enable the courts there to resolve issues relating to J's welfare. The mother appealed. The Court of Appeal held that the English courts did not have jurisdiction under the 1996 Convention or on any other basis to make a return order on the facts of the case and set aside the order.[48] The father appealed to the Supreme Court which reversed the decision of the Court of Appeal. In summary, the Supreme Court held that "urgent" does not necessarily mean urgent and that the relief does not necessarily have to be available in the home state either. The guidance stated by Lady Hale is as follows:

[45] Permanent Bureau, *Practical Handbook on the Operation of* the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children Convention (2014) The Hague Conference on Private International Law, 67 <https://www.hcch.net/upload/handbook34en.pdf>.
[46] Lagarde, above n 17.
[47] [2015] UKSC 70.
[48] [2015] EWCA Civ 329 [72].

[34] It is obviously consistent with the overall purposes of the Convention that measures of protection which the child needs now should not be delayed while the jurisdiction of the country of habitual residence is invoked. On the other hand, the article 11 jurisdiction should not be used so as to interfere in issues that are more properly dealt with in the home country. It is a secondary, and not the primary, jurisdiction. Thus it is one thing to use the article 11 jurisdiction in support of the home country, for example, by facilitating a return there after a wrongful removal. It is quite another thing to set up the article 11 jurisdiction in opposition to that of the home country (as happened in Detiček). Clearly it was not intended for that purpose.

[35] We have received very helpful written submissions from three interveners: Reunite International Child Abduction Centre, the AIRE Centre, and the International Centre for Family Law, Policy and Practice. All are broadly supportive of the above approach. Reunite argues that, in cases of wrongful removal or retention, no left-behind parent should be shut out from invoking the jurisdiction under article 11. It is then a question for the court whether the circumstances are such that a return order is necessary. At this stage, questions of long delay, or possible objections to return, analogous to those in article 13 of the 1980 Convention, may become relevant. In this way, the position under the 1996 Convention would broadly mirror that under the 1980 Convention in child abduction cases.

[36] On the other hand, this view of the matter does not emerge either from the *Explanatory Report* on the 1996 Convention by Paul Lagarde (HCCH Publications 1998) or from the *Practical Handbook on the Operation of the* 1996 Hague Child Protection Convention, the most recent edition of which is dated 2014. The Lagarde Report points out, at para 68, that the Convention does not define the notion of urgency, but as it is a derogation from the normal rule it ought to be construed "rather strictly". It might be present "where the situation, if remedial action were only sought through the normal channels of articles 5 to 10, might bring about irreparable harm for the child". However, he later puts it more broadly, when explaining the justification for this concurrent jurisdiction. "If this jurisdiction had not been provided, the delays which would be caused by the obligation to bring a request before the authorities of the state of the child's habitual residence might compromise the protection or the interests of the child". The examples he gives are an urgent surgical operation or the rapid sale of perishable goods.

…

[38] Two comments seem appropriate. First, it would be unfortunate if words in the Explanatory Report were treated as if they were words in the Convention itself. There is a world of difference between "irreparable harm" and "compromising the protection or interests of the child". Neither expression is in the Convention, which merely asks whether the measure is necessary and the case urgent. Secondly, the Report and the Handbook clearly have abduction in mind, but only in the context of proceedings for return under the 1980 Convention. In that context, both interim contact orders and "safe harbour" orders are contemplated. Abduction in cases where the 1980 Convention does not apply is not considered, yet the 1996 Convention clearly provides for wrongful removal and retention in article 7. Far from derogating from the jurisdiction of the home state in these circumstances, the use of article 11 would be supporting it. It would be extraordinary if, in a case to which the 1980 Convention did not apply, the question of whether to order the summary return of an abducted child were not a case of "urgency" even if it was ultimately determined that it was not "necessary" to order the return of the child.

[39] While I would not, therefore, go so far as to say that such a case is invariably one of "urgency", I find it difficult to envisage a case in which the court should not consider it to be so, and then go on to consider whether it is appropriate to exercise the article 11 jurisdiction. It would obviously not be appropriate where the home country was already seized of the case and in a position to make effective orders to protect the child. However, as Lord Wilson pointed out in the course of argument, the courts of the country where the child is are often better placed to make orders about the child's return. Those courts can take steps to locate the child, as proved necessary in this case, and are likely to be better placed to discover the child's current circumstances. Those courts can exert their coercive powers directly upon the parent who is here and indeed if necessary upon the child. The machinery of going back to the home country to get orders and then enforcing them in the presence country may be cumbersome and slow. Getting information from the home country may also be difficult. The child's interests may indeed be compromised if the country where the child is present

is not able to take effective action in support of the child's return to the country of his or her habitual residence.

72. Article 11 measures have extra territorial effect and can be used to secure protective or safe harbour orders for immediate care arrangements for the child on return thereby sparing the child form an unseemly predicament where, say, the left-behind parent seeks to remove the child from the taking parent at the airport or refuses to return the child to the abducting parent after a period of re-introductory access. Urgent orders may provide for where the child will live or when the child will have access with the abducting parent, what school the child will attend and if the child should attend upon a therapist or counsellor for mental health support. These may sound more medium than immediate or short term provisions but it is to be remembered that an order made in a case of urgency under Article 11 (section 111CI(1)(b)(vi) of the FLA) will lapse as soon as the court exercising jurisdiction under Article 5 or 6 makes a contrary order.

73. An urgent order, like other measures and orders, will be "recognised by operation of law in all other contracting states" (Article 23(1)). This means that it is recognised and can be relied upon in another contracting state without the parties being required to take any legal proceedings. However, recognition is not the same as enforceability. Obedience of a recognised order is voluntary.

74. Recognition can be "refused" on limited grounds set out in under Article 23(2) which is implemented into Australian law by regulations 15(2) and (3) of the Regulations. The non-recognition grounds are:-

(2) An order may be made only if:

a) the competent authority in the Convention country in which the foreign measure was taken did not have jurisdiction in accordance with the Child Protection Convention to take the measure; or

b) in taking the measure, the competent authority in the Convention country is taken to have acted contrary to fundamental principles of procedure under Australian law; or

c) the registration, or enforcement, of the measure in Australia is contrary to public policy, taking into account the best interests of the child concerned; or

d) the court has jurisdiction under the Act to take a measure of protection for the child in accordance with Division 4 of Part XIIIAA of the FLA.

(3) For paragraph (2) (b), a competent authority in a Convention country is taken to have acted contrary to fundamental principles of procedure under Australian law if it:

a) did not give the child, or a person with parental responsibility for the child, an opportunity to be heard before the foreign measure was taken; and

b) did not take the measure as a matter of urgency.

75. A recognised measure or order from another contracting state will not be enforceable in Australia until it is registered in accordance with regulation 12 of the Regulations.[49] Likewise, an urgent order made in Australia pursuant to section 111CD(1)(b)(ii) of the FLA will not be enforceable in another contracting state until it is registered for enforcement or declared to be enforceable in the other contracting state.[50] The registrars who handle the registration of orders in Australia are Registrar Judy George (Melbourne), Registrar Colin Campbell (Sydney), Registrar Susan Coutts (Brisbane) and Registrar Jenny Paxton (Adelaide).

76. If you are contemplating an Article 11 measure, it is prudent to ensure that the recognition of the order will not be subsequently refused, varied or cancelled in the state of habitual residence. You can do this

[49] *Family Law Act 1975,* s 111CT(2).

[50] Some contracting states, like Australia, provide for a foreign measure to be enforceable on registration whilst other contracting states provide for the making of a declaration of enforceability. They have the same effect.

by employing the advance recognition procedure provided for in Article 24. Article 24 allows any interested person to ask for a declaration confirming whether or not a measure will be recognised.

77. Once you have a decision on recognition or non-recognition, the urgent order can be rendered enforceable under Articles 26 and 28 which are implemented into Australian law by regulation 12 of the Regulations. Obviously, it is implemented by domestic legislation in each of the other convention country. In this regard, Article 26 provides that each contracting state must employ a simple and rapid procedure for enforceability.

L Provisional orders

78. The other temporary order which is based on the presence of the child rather than habitual residence is a provisional measure under Article 12 of the 1996 Convention. This is implemented into Australian law by section 111CD(1)(b)(ii) of the FLA.

79. There are distinctions between urgent orders under Article 11 and provisional orders under Article 12. Urgent measures (orders) have extraterritorial effect and can be made after a child has been wrongfully removed or retained. Provisional measures (orders) cannot be taken after a wrongful removal or retention. There does not need to be any pressing circumstance, or urgency, for a provisional measure but a provisional measure (order) cannot be inconsistent with a measure (order) already taken in the state of habitual residence. Provisional orders have no amenity as safe harbour orders because of the lack of extra-territorial effect.

VII Recognition of orders and advance recognition of orders

80. I have dealt with recognition and enforceability above in the discussion about urgent orders but I will recap briefly.

81. Recognition of an order or measure occurs by operation of law (Article 23(1)). Therefore an order made in Manchester will be recognised, by operation of law, in Melbourne. Regulation 10 of the Regulations provides that the Registrar of a court may, on application by an interested person, send a certified copy of an order or measure and information about the whereabouts of the child, to the central authority in the other contracting state, with a request that the measure be recognised. This regulation only makes sense if recognition is for the purpose of enforcement. Recognition can also be refused on an application made by an interested person under regulation 15. Article 23(2) of the 1996 Convention lists several grounds upon which recognition of a measure (order) can be refused. They include:

a) The order was made without jurisdiction (Article 23(2)(a)).

b) Except in the case of urgency (where Article 11 would apply), the order was made without the child having an opportunity to be heard *and*, that is in violation of fundamental principles of procedure in the requested state (Article 23(2)(b)). There is no such fundamental principle in Australia but in, say, Germany a child over the age of 3 years must meet personally with the judge.

c) Except in the case of urgency, at the request of a person who claims that the order infringes his or her parental responsibility where that person was not given an opportunity to be heard (Article 23(2)(c)).

d) If recognition and enforceability "is manifestly contrary to public policy of the requested state, taking into account the best interests of the child" (Article 23(2)(d)).

e) If the order is incompatible with a later measure taken in the non-contracting state of habitual residence and the order fulfils the aforementioned requirements of Article 23 (Article 23(2)(e)).

f) Where a child is sought to be placed in another contracting state but the state of habitual residence has not provided the intended state with notice under Article 33 (Article 23(2)(f)).

82. The non-recognition grounds are implemented into Australian law by regulation 12 of the Regulations. In deciding an application to vary or cancel a recognised foreign measure, regulation 16(2) provides that some rules of evidence are relaxed and that, subject to regulation 15, the court must not review the merits

of the foreign measure and is bound by the findings of fact on which the competent authority that took the foreign measure, based its jurisdiction.

83. Articles 26 and 28 of the 1996 Convention provide that enforcement proceedings may be initiated by any interested party where there is no voluntary compliance by requesting the measure or order to be registered for enforcement or declared enforceable. Our legislation provides, in regulation 12(2) of the Regulations, that once a measure is registered it has the same effect as an order under the FLA. Regulation 12(4) provides that a registered measure or order can be enforced by any interested person in any court having jurisdiction under the FLA.

84. If permission is granted to a parent to relocate a child out Australia, it will be on the basis that the court has given careful consideration to what parenting arrangements can and will apply after the relocation. The advance recognition procedure available under Article 24 can be used to avoid the insecurity of waiting for recognition or enforcement to be challenged. Accordingly, in relocation proceedings, the court could pronounce orders (measures) but make the relocation contingent upon the parties first obtaining advance recognition of the order on the basis that, if advance recognition cannot be obtained, the relocation order will be set aside and the matter returned to court for further consideration. Even where the international relocation of a child is refused, the applicant may still want to travel with the child to the other country to see his or her family of origin or his or her new partner. Where relocation is permitted, the left-behind parent will require the security of orders in the other country which facilitate access arrangements. Either outcome requires the parents and their lawyers to understand how to obtain "mirror" or complimentary orders in the other country.

Example of advance recognition

The advance recognition procedure under Article 24 has been employed to permit or entitle a parent to take the child to live overseas pending the hearing of the appeal on the basis that, if declared or registered as enforceable, our court was satisfied that the return of the parent and child to Australia could be compelled.[51] Orders were made by the trial judge and then the Full Court permitting the mother to relocate a child to Germany pending determination of an appeal against orders permitting the relocation, subject to the mother executing an undertaking as a protective measure pursuant to the 1996 Convention that she would return the child to Australia in the event that the father's appeal was successful. The mother could remove the child providing she first obtained, from a court of competent jurisdiction in Germany, either recognition of orders pursuant to Article 24 or a declaration of enforceability or registration pursuant to Article 26 of the 1996 Convention.

A second case was a matter before my Deputy Chief Justice ("DCJ").[52] The DCJ had ordered that a mother could relocate a child to Sweden. The father appealed the DCJ's decision to our Full Court and sought a stay of the relocation order. His Honour was satisfied that there were necessitous circumstances around the mother's health which justified her being able to leave with the child before the appeal was heard, provided she could first obtain advance recognition of enforceability of an order that she would return if required to do so. The request was made in September 2013 and the Svea Court of Appeal in Sweden made the declaration in February 2014.

85. As a trial judge, when hearing relocation cases, I require parties to obtain orders in another country as a precondition to a child being removed from Australia.

86. In my capacity as one of three Hague Network Judge's for Australia, I facilitate that process for my colleagues. For instance, a matter[53] that was finalised in the Family Court in South Australia, the parties to proceedings were seeking reciprocal orders be made urgently between Australia and the United Kingdom so that the children could travel to the United Kingdom to have access with the father. Through

[51] *Cape & Cape* [2013] FamCAFC 114.
[52] *Lasman & Lasman* [2013] FamCA 593.
[53] Under the pseudonym *Montjoy & Hillman*, unreported.

the Hague Network, I made contact with the Judicial Officer for International Family Justice for England and Wales seeking reciprocity of these orders which were duly made. The paperwork to obtain enforceable orders in the United Kingdom is quite detailed and realistically requires certifications by a court official. The assistance of Tazeen Said of the office for International Family Justice for England and Wales was invaluable. The request was completed in two days.

87. In 2014, I contacted Hague Network Judges in all contracting states to the 1996 Convention and asked what the "simple and rapid procedure" was in his or her home state to obtain a declaration of enforceability or registration. I received replies from 22 countries,[54] all of which are available on request.

VIII Sundry matters relevant in proceeding relating to a foreign measure

88. Self-evidently, regulation 16 of the Regulations provides:

(1) This regulation applies to proceedings affecting, or involving, a foreign measure.
(2) The court is bound by findings of fact on which the competent authority, in the Convention country in which the foreign measure was taken, based its jurisdiction.
(3) Subject to regulation 15, the court must not review the merits of the foreign measure.
(4) Any document relating to the foreign measure that is provided by a competent authority in a Convention country is admissible as evidence of any facts stated in the document.
(5) An affidavit relating to the foreign measure that is made by a witness who resides outside Australia, if filed in the proceedings, is admissible as evidence even though the witness does not attend the proceedings for cross-examination.

IX Cooperation between international courts

89. Chapter V of the 1996 Convention establishes rules for cooperation between authorities in different contracting states. Since the conventions were negotiated, we know more about child development and the incidence of overseas travel is greater. With ease of international travel, children may find themselves living in a country other than the country in which both their parents live. Furthermore, with the focus of habitual residence now being on the integration of the child into the environment (rather than joint parental intention), a requesting parent may not be familiar with the child's environment or the child's situation in that environment. The 1996 Convention provides the basic framework for an exchange of information and for the necessary degree of cooperation between administrative authorities and judicial authorities in contracting states.[55]

90. Article 35(2) of the 1996 Convention provides a preliminary mechanism to an access application. It enables a parent who is seeking to obtain or maintain access to a child in another contacting state to request the Central Authority in his state "to gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised". It further provides that the evidence and information sent by the Central Authority of the requesting state "shall admit and consider such information, evidence and finding before reaching its decision".

91. The Article 35(2) mechanism facilitates the transmission of independent and reliable information. It is silent on the degree to which the information can be scrutinised or tested. In Australia, we expect that the transmission of information would be completely transparent and that the maker would be able to be cross-examined by electronic means but that will not always be the case in other jurisdictions.

92. Article 35(2) is a valuable means by which independent evidence of the applicant's circumstances can be transmitted to the courts of the jurisdiction where access will be determined. It could go a long way

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[54] The countries are: Austria, Belgium, Cyprus, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Hungary, Latvia, Luxembourg, Poland, Portugal, Republic of Ireland, Slovakia, Spain, Sweden, Switzerland, The Netherlands, United Kingdom (England and Wales, Northern Ireland, Scotland) and Uruguay.

[55] HccH, *Outline, Hague Convention on Child Protection* (September 2008) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> 1.

to dispel the unknown elements of the applicant's case. For instance, there would be less mischief around speculating on the circumstances in which a child will be placed if sent to another country to have access with a non-primary caring parent if the residence and situation of the remote parent has been assessed by an independent agency who has prepared a report which can be tested in evidence.

93. The 1980 Convention has not been particularly effective in the facilitation or establishment of rights of access. However, once the proceedings are contemplated, Article 34(1) of the 1996 Convention provides that the Central Authority in one country may "request any authority of another contracting state which has information relevant to the child to communicate such information". This is a valuable tool to demystify the circumstances of the child and to progress an international access application. It is an effective means of gathering information in any access case but very much so where, say, the primary care parent is travelling from one country to another to avoid either the access application or the jurisdiction of child protection authorities.

94. Article 32 provides that:

> "on a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,
>
> a) provide a report on the situation of the child;
>
> b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child."

95. Some of the problems encountered by a parent seeking access to a child in another country are that he or she seems remote, that there has frequently been a complete breakdown of any communication between him or her and the child, and that the parental relationship is characterised by a lack of trust. The dislocation in parent-child relationship may be something that the primary care parent exploits to the disadvantage of the applicant for access with the child. Oftentimes, the requesting parent may have unrealistic expectations of what access should be ordered. Article 32 can be utilised by a parent who resides in a contracting state, other than the state of habitual residence, to request a report on the child's situation from which the remote parent can assess what access arrangements he or she should seek. Article 32 can also be used to assess the needs of children who are living remotely from their parents including runaway children.

Example of information being provided from the home state

The five year old son was removed from Hungary in May 2015 by the mother, who subsequently retained him contrary to the father's rights of custody and part way through parenting proceedings in Hungary. The application was filed within one year of the alleged wrongful removal. Notably, the child, the father and the mother were all born in Hungary and had lived there until 2015. When the mother left, the father retained care of an older child, a daughter from the mother's earlier relationship. Before the court, the mother alleged that she could not cope emotionally with the prospect of return and that she would not get a fair hearing because the father was a high ranking local government official. Both contentions under Article 13(b) of the 1980 Convention were rejected, but the Court did require that the child be assessed by a family consultant employed by the court. The mother had refused to accompany the child and the Court needed an expert assurance on how to make the return bearable for the child in the absence of the mother.

The family consultant gave expert evidence at court. During cross-examination she said:

> ---Your Honour, I have significant concerns for this child's emotional and mental health. And if he returns to Hungary without his mother returning also, he is, in my opinion, going to need professional therapeutic intervention. I don't know this child, but I spent, maybe, an hour, an hour and a-half with him. Certainly, from my observation, he strikes me as being a child who is more likely to internalise his distress rather than externalise it. And so, for his caregivers who may not know him intimately, it may be that they assess that he is okay, because he is quiet, he is not crying,

> he is not asking for his mother, he is compliant, he's doing what's asked of him. But in fact, he may be in some kind of internal turmoil that is just not evident because he's not acting out in any way, and if that's left unchecked, hypothetically, he could become severely depressed. He could – his emotions may become so intolerable for him that the only way that he can actually manage day-to-day is to disconnect, to dissociate from his emotions, if you like, which will then result in him being disconnected from his world, from his environment, from the people around him. It will impact on his ability to learn, it will impact on his ability to form any kind of trusting relationships and therefore his ability to take comfort from the adults around him and, you know, hypothetically, he could end up as a very significantly psychologically damaged child and into his teens, into adulthood.

The hearing was adjourned and it was ordered that the applicant State Central Authority introduce a request for information about what services would be available for the child in the event of return including the location of such services. It was a request pursuant to Article 32. The court received a letter prepared by a guardianship official at the Public Authority and Guardianship Department in relation to psychological supports that are available to the child in the event he returned to Hungary. It was extremely detailed and very helpful.

The Court ordered that the child be returned and the mother changed her mind and accompanied the child. Once in Hungary, the mother completed pending parenting proceedings. The Hungarian court confirmed its orders that the mother had sole parental responsibility for the young boy and she returned to Australia immediately. The father retained sole parental responsibility for the daughter.

XII COOPERATION THROUGH THE INTERNATIONAL HAGUE NETWORK OF JUDGES

96. The operation of both the 1996 and the 1980 Conventions, together or separately, can be facilitated by the International Hague Network of Judges.

97. At the 1998 De Ruwenberg Seminar for Judges the creation of a judges' network was discussed by judges who were experienced and knowledgeable about the operation of the 1980 Convention. It was recommended that each of the relevant authorities in the different jurisdictions nominate a member of the judiciary to act as a conduit for communication of information between the judges from their jurisdiction and judges in the other contracting states in relation to, initially, the operation of the 1980 Convention. In July 2008 the Permanent Bureau of the Hague Conference renamed the judges as the International Hague Network of Judges ("IHNJ") and strongly encouraged formal designations by each country.

98. The Honourable Chief Justice John Pascoe AC CVO, the Deputy Chief Justice Alstergren and I are the three judges designated to the International Hague Network of Judges for Australia.

99. There are 124 Network Judges designated by contracting states in respect of which the 1980 Convention is currently in force with Australia.

100. The Permanent Bureau of the Hague Conference also encourages countries which are not contracting states nominate judges to the Network. In our Asia-Pacific region, Singapore and Pakistan had a Network Judge for many years prior to its accession as a party. The Philippines have designated judges to the Network.

Countries in respect of which the 1980 Convention is in force with Australia with shading for contracting states which have designated judges to the Hague Network

Convention Country	Convention Country	Convention Country	Convention Country
Albania	Ecuador	Latvia	Saint Kitts and Nevis
Andorra	El Salvador	Lesotha	San Marino
Argentina	Estonia	Lithuania	Serbia
Armenia	Fiji	Luxembourg	Seychelles
Austria	Finland	Malta	Singapore
Bahamas	Former Yugoslav Republic of Macedonia	Mauritius	Slovakia
Belarus	France	Mexico	Slovenia
Belgium	Gabon	Moldova, Republic of	South Africa
Belize	Georgia	Monaco	Spain
Bolivia	Germany	Montenegro	Sri Lanka
Bosnia and Herzegovina	Greece	Morocco	Suriname
Brazil	Guatemala	Netherlands	Sweden
Bulgaria	Guinea	New Zealand	Switzerland
Burkina Faso	Guyana	Nicaragua	Thailand
Canada	Honduras	Norway	Trinidad and Tobago
Croatia	Hungary	Organisation of Eastern Caribbean States	Tunisia
Chile	Iceland	Pakistan	Turkey
China, People's Republic of (Hong Kong & Macau)	Iraq	Panama	Turkmenistan
Colombia	Ireland	Paraguay	Ukraine
Costa Rica	Israel	Peru	United Kingdom
Croatia	Italy	Philippines	United States of America
Cuba	Japan	Poland	Uruguay
Cyprus	Kazakhstan	Portugal	Uzbekistan
Czech Republic	Kenya	Romania	Venezuela
Denmark	Korea, Republic of	Rwanda	Zambia
Dominican Republic		Russian Federation	Zimbabwe

101. While the Network was initially conceived of as a means of ensuring cooperation *vis-à-vis* the 1980 Convention, it has been of increasing assistance with regard to the operation of the 1996 Convention.

XIII LIAISON JUDGE BETWEEN OUR FAMILY COURTS

102. Judge Grant Riethmuller is the liaison judge between the Federal Circuit Court of Australia and the Family Court of Australia.

XIV DIRECT JUDICIAL COMMUNICATION

103. One aspect of the work of a Hague Network Judge is to conduct judicial communication. General communications occur routinely at conferences such as this one. If a communication relates to a specific case it is referred to as "a direct judicial communication". The Permanent Bureau of the Hague Conference has published a guide on direct judicial communication, called the "Emerging Guidance",[56] which is found at:http://www.hcch.net/index_en.php?act=publications.details&pid=6024.

104. The Emerging Guidance sets out details about the designation of judges to the Network, the principles for general judicial communication and the principles for direct judicial communication in specific cases including commonly accepted safeguards. The safeguards are described as follows:

- Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.
- When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.
- In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:
    - except in special circumstances, parties are to be notified of the nature of the proposed communication;
    - a record is to be kept of communications and it is to be made available to the parties;
    - any conclusions reached should be in writing; and
    - parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.
- Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

105. Generally speaking, matters of logistics, procedure and implementation of arrangements are appropriate subjects for direct judicial communication. Communications should not deal with the merits of a case and an Australian judge will not ask a judge in the other country to decide something that he/she should decide.

106. The Emerging Guidance provides an inclusive description, by way of examples, of matters which may be the subject of direct judicial communication in specific cases. They are:-

a) scheduling the case in the foreign jurisdiction:
    i. to make interim orders, e.g. support, measure of protection; and
    ii. to ensure the availability of expedited hearings;
b) establishing whether protective measures are available for the child or other parent in the state to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that state before a return is ordered;
c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
d) ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);
e) confirming whether orders were made by the foreign court;
f) verifying whether findings about domestic violence were made by the foreign court; and

[56] Hague Conference on Private International Law, *Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges* (Permanent Bureau, The Hague Conference on Private International Law, 2013).

g) verifying whether a transfer of jurisdiction is appropriate (this applies only to cases under the 1996 Convention).

107. Direct judicial communication is particularly helpful in implementing parenting orders after relocation has been allowed or disallowed and overseas access cases. It is also an essential feature in many abduction cases under the 1980 Convention.

108. There is no legislative basis for direct judicial communication in Australia. Direct judicial communication can only occur in Australia with the express consent of the parties. The communication must be transparent and is usually conducted by email which is then published to the parties and received as evidence in the case to which it relates. The contact details of the Network Judges are deleted, in order to avoid the misapprehension that we can be contacted directly.

109. I recently considered the evidential significance of direct judicial communications in *Biondi & Koen* [2018] FamCA 746.

XIV APPLICABLE LAW

110. Chapter III of the 1996 Convention contains applicable law provisions.

M General proposition

111. The general proposition is found at Article 15 which provides that, in exercising jurisdiction under Articles 5 to 14, the authorities of the contracting state shall apply their own law. This is implemented into Australian law by Section 111CR(2) of the FLA which provides that , when a court in Australia exercises jurisdiction to take measures about the protection of a child or decisions about the guardian of a child's property, "the court must apply the law of Australia in exercising that jurisdiction." That is unexceptional because courts understand their own law best and jurisdiction under the 1996 Convention accrues predominantly to authorities and courts in the state in which the child is located.

112. An overriding provision to all applicable law provisions is Article 22 which provides that application of the law of the place of habitual residence may only be refused if its application would be manifestly contrary to public policy taking into account the best interests of the child.

N Exceptionally applying or considering the law of another country

113. Article 15(2) provides that "in so far as the protection of the person or the property of the child requires, they may exceptionally apply of take into consideration the law of another State with which the situation has a substantial connection. Section 111CR(3) of the FLA provides that:-

> the court may in exceptional circumstances apply or take into account the law of another country with which:
>
> (a) a child has a substantial connection; or
>
> (b) a child's property is substantially connected;
>
> if the court considers the protection of the person of the child, or the child's property, requires the court to do so.

114. The concept of *substantial connection* is discussed above in relation to transfer of jurisdiction [64] and includes the state of the nationality of the child, the location of the child or the child's property, the state seized of an application for the divorce of the child's parents or the annulment of their marriage.

115. Notably, there is a qualification under Australian law that consideration of another country's law should occur "if the court considers the protection of the child, or the child's property, requires the court to do so". Further, the other country is not limited to a contracting state or a state for which the 1996 Convention has entered into force with Australia.

116. The HCCH Practical Handbook on the Operation of the 1996 Hague Child Protection Convention[57] provides an example[58] of a court, which has granted a parent permission to relocate the residence of a child to another country, wanting to regulate residence, access and parental responsibility in the child's future state of habitual residence and to employ the terminology used and understood in the other country to do so. There can be little argument that expressing orders in terminology which is readily understood in the country in which the orders are envisaged to operate is likely to promote a smooth continuation in parenting arrangements for a child who is about the be relocated. However, it is to be remembered that merely using the terminology of a non-convention country will not lead to recognition by operation of law and using the terminology of a country for which the 1996 Convention has entered into force with Australia will not achieve enforceability.

117. A further advantage of the court's consideration of the law of a state to which a child is permitted to be relocated is that it will require the court and the parties to obtain some information of operational knowledge of the other country's laws and, when this occurs, anomalies which were hitherto not considered may be uncovered and can be addressed.

O Change of child's habitual residence

118. There was a balance to be struck between according pre-eminence to the jurisdiction of the state of a child's habitual residence and the benefit of continuity of a child's care arrangements and the minimisation of disruption to parental responsibility when a child goes to live in another convention country.

119. Article 14 provides that measures (orders) taken in application of Articles 5 to 10 of the 1996 Convention (ie. not Article 11 urgent or Article 12 provisional measures), "remain in force according to their terms … so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures".

120. Article 15(3) provides that where a child's habitual residence changes to another contracting state, the law of the new state of habitual residence governs the conditions of application of measures (orders) taken in the previous state of habitual residence. "Conditions of application" is not defined.

121. Articles 16 to 18 provide specific rules dealing with parental responsibility. These provisions are implemented into Australian law by Section 111CS of the FLA which provides as follows:-

> (1) The principles set out in this section apply despite anything in this Act.
>
> (2) The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by operation of law (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence.
>
> (3) The circumstances in which parental responsibility for a child is attributed to a person, or extinguished, by an agreement or a unilateral act (without the intervention of a court or appropriate authority) are governed by the law that applies in the country of the child's habitual residence when the agreement or act takes effect.
>
> (4) The exercise of parental responsibility for a child is governed by the law applying in the country of the child's habitual residence.
>
> (5) If a child's country of habitual residence changes to another country:
>
> > (a) parental responsibility for the child that exists under the law applying in the country in which the child was habitually resident continues to exist; and
> >
> > (b) the circumstances in which parental responsibility for the child is attributed by operation of law to a person who does not already have such responsibility are governed by the law applying in the country of the new habitual residence; and

---

[57] Permanent Bureau, *Practical Handbook on the Operation of* the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility
[58] Example 9a

(c) the exercise of parental responsibility for the child is governed by the law applying in the country of the new habitual residence.

….

(7) The parental responsibility referred to in subsection (2), (3), (4) or (5) may be ended, or the conditions of its exercise changed, by a measure taken in accordance with section 111CD or 111CK.

(8) A court need not apply a principle set out in subsection (2), (3), (4) or (5) if, on the application of an interested person, the court considers that doing so would be manifestly contrary to public policy having regard to the best interests of the child concerned.

122. The general position is that attribution or extinction of parental responsibility can occur by one of three processes:-

a) By operation of law, without intervention by a judicial or administrative authority, for example, Section 61C(1) of the FLA which provides that each of the parents of a child who is not yet 18 has parental responsibility for the child.
b) By agreement or a unilateral act, without intervention by a judicial authority, such parents as entering their names in the birth registration application;
c) By court order such as a parenting order.

123. When a child's habitual residence changes, parental responsibility which exists under the law of the original state of habitual residence will continue notwithstanding the change in habitual residence. Further, where, the law of the new state of habitual residence confers parental responsibility on a person who would not have parental responsibility in the former state, the law of the new state prevails. Therefore, a change in habitual residence might lead to additional persons having parental responsibility by operation of law but will not deprive a person who had parental responsibility in the former state from attribution of parental responsibility in the new state (ie. you can add but not subtract). In jurisdictions such as Australia, where unmarried fathers have parental responsibility, Article 14 and 16 of the 1996 Convention put beyond doubt that an unmarried father's parental responsibility will continue even if the child relocates to a convention country where he would not have parental responsibility by operation of law. Furthermore, regulation 19 of the Regulations provides:-

(1) On application by an individual, for Article 40 of the Convention, the Registrar of a court may issue a certificate stating:

(a) that the individual has parental responsibility for a child; and

(b) whether the individual's parental responsibility arises from section 61C of the Act or from a parenting order made by a court; and

(c) the effect that any parenting order has on the individual's parental responsibility under section 61D of the Act.

(2) A certificate issued under subregulation (1) must include a copy of section 61B of the Act.

Note Section 61B of the Act sets out the meaning of parental responsibility.

(3) The Registrar may, if he or she considers it appropriate, include such other information or material that describes the capacity in which the individual is entitled to act, and the powers of the person, in relation to the child.

124. The exercise (as opposed to attribution) of parental responsibility is governed by the law of the state of the child's habitual residence. Notwithstanding that a parent will not lose parental responsibility when the habitual residence of a child changes, the parent may lose the right to exercise the parental responsibility but not lose the parental responsibility itself.

125. This is complex area which is best understood by examples rather than abstract explanation or recitation of the legislation. Time permitting, the presentation at your plenary will focus on appropriate examples to illustrate how judges and practitioners can understand and take advantage of the applicable law provisions of the 1996 Convention consistently with the theme of preparing for outcomes.

XV CONCLUSION

126. The 1996 Convention equips us to implement family law in an international context. The representation of children's interests, hearing the child's voice, mediation, direct judicial communication through the International Hague Network of Judges and a concentration of jurisdiction, makes us more able than ever before to obtain for Australia the maximum advantage and benefit offered by the 1996 Convention.

Judges Chambers, Melbourne January 2019

ANNEXURE A - 1969 VIENNA CONVENTION ON THE LAW OF TREATIES

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

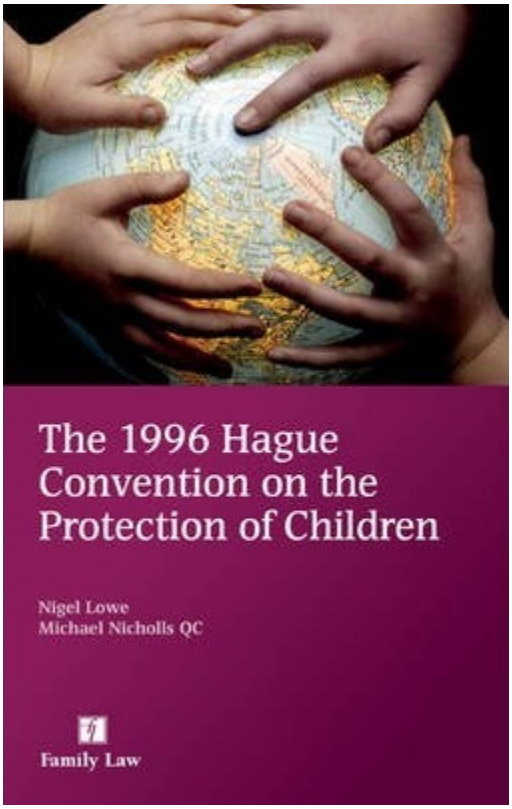
(b) leads to a result which is manifestly absurd or unreasonable.

ANNEXURE B - RECOMMENDED READING ON THE 1996 AND 1980 CONVENTIONS

Nigel Lowe and Michael Nicholls's book on the 1996 Convention provides a valuable guide to the convention and its relationship with other international instruments, including the 1980 Convention and Brussells II *bis*.

The book is published by Jordan Publishing but may be purchased from the Book Depository at:

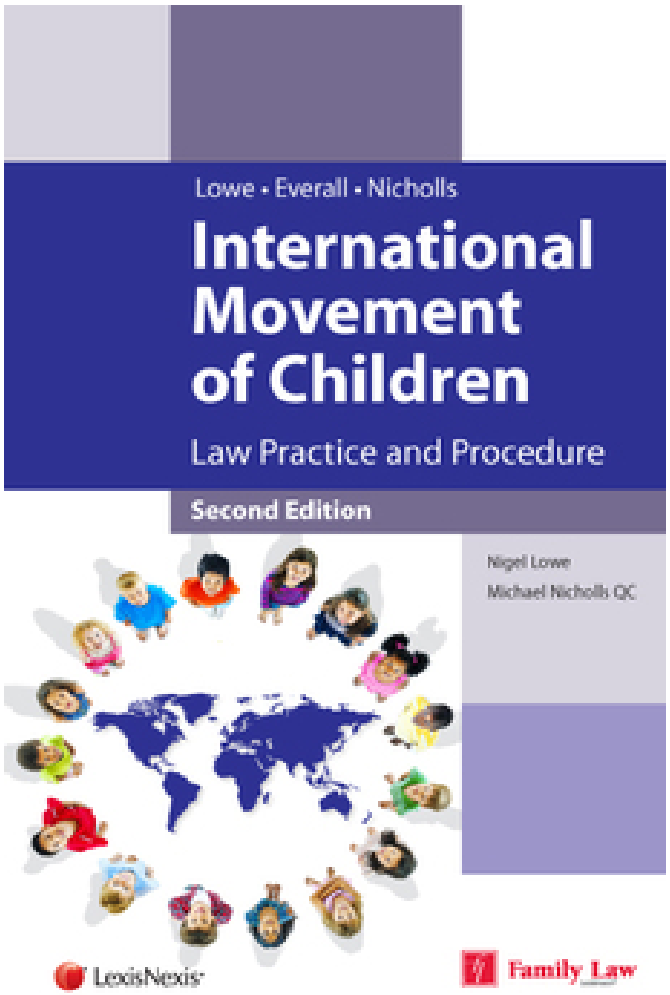
https://www.bookdepository.com/The-1996-Hague-Convention-on-the-Protection-of-Children-Nigel-Lowe-Michael-Nicholls/9781846615313?ref=bd_recs_1_1



Nigel Lowe and Michael Nicholls's have also written a book on cross border disputes involving children, entitled 'International Movement of Children Law Practice and Procedure', published by Lexis Nexis in 2016, is a valuable resource on the 1996 Convention and its relationship with the 1980 Convention and Brussels II *bis*.

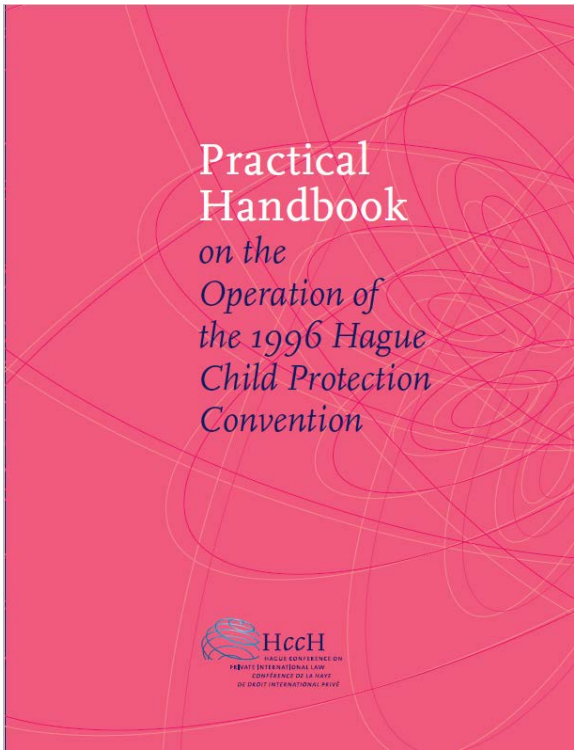
It can be purchased from:

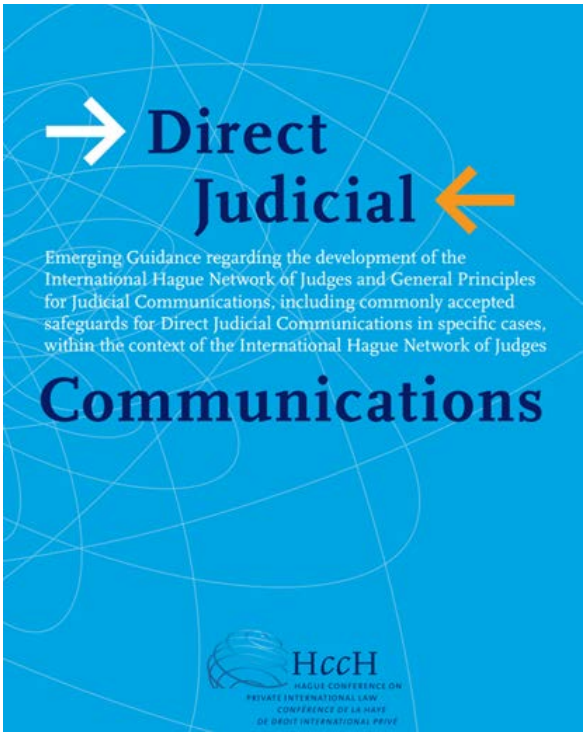
https://store.lexisnexis.com.au/product?product=international-movement-of-children-law-practice-and-procedure-2nd-edition&meta_F_and=9781846612466

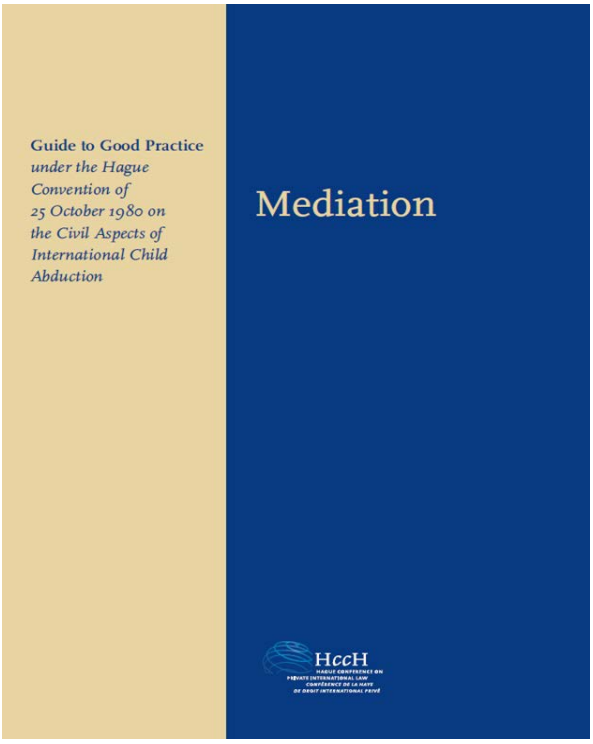


The HCCH website is also a valuable place to find resources such as Practical Handbooks and Explanatory Reports

https://www.hcch.net/en/publications-and-studies







ANNEXURE C – SECTION 111CD OF THE FAMILY LAW ACT (1975) (CTH)

111CD Jurisdiction relating to the person of a child

(1) A court may exercise jurisdiction for a Commonwealth personal protection measure only in relation to:

(a) a child who is present and habitually resident in Australia; or

(b) a child who is present in Australia and habitually resident in a Convention country, if:

(i) the child's protection requires taking the measure as a matter of urgency; or

(ii) the measure is provisional and limited in its territorial effect to Australia; or

(iii) the child is a refugee child; or

(iv) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence; or

(v) a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or

(vi) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or

(c) a child who is present in a Convention country, if:

(i) the child is habitually resident in Australia; or

(ii) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or

(iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence or country of refuge; or

(iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or

(v) the child is habitually resident in a Convention country and the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or

(d) a child who is present in Australia and is a refugee child; or

(e) a child who is present in a non-Convention country, if:

(i) the child is habitually resident in Australia; and

(ii) any of paragraphs 69E(1)(b) to (e) applies to the child; or

(f) a child who is present in Australia, if:

(i) the child is habitually resident in a non-Convention country; and

(ii) any of paragraphs 69E(1)(b) to (e) applies to the child.

(2) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(ii) if the measure is not incompatible with a foreign measure already taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention.

(3) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(vi) or (c)(v) for a Commonwealth personal protection measure relating to a child if:

(a) one or both of the child's parents are habitually resident in Australia when the proceedings referred to in that subparagraph begin; and

(b) one or both of the parents have parental responsibility for the child; and

(c) the jurisdiction of the court to take the measure is accepted by the parents and each other person with parental responsibility for the child; and

(d) the exercise of jurisdiction to take the measure is in the best interests of the child; and

(e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.

(4) Paragraphs 111CD(1)(a) to (d) are subject to the limitations in sections 111CE, 111CF and 111CH.

The Hague Convention -the Japanese experience

Presenter
Makiko Mizuuchi, an IAFL Fellow from Japan
Mimosa International Law Office

1

1 Introduction

・The Hague Convention entered into force on April 1, 2014 in Japan.

・The Implementation Act prescribes domestic procedures and other matters required to implement the Hague Convention.

The Implementation Act was enacted in June, 2013, and it became effective on April 1, 2014.

2

2 Grounds for Return of Child(Article 27)

(i) The child has not attained the age of 16;

(ii) The child is located in Japan;

(iii) Pursuant to the laws or regulations of the state of habitual residence, said removal or retention breaches the rights of custody with respect to the child attributed to the petitioner;

(iv) At the time of said removal or the commencement of said retention, the state of habitual residence was a Contracting State.

3

3 Grounds for Refusal of Return of Child, etc. (Article 28)

Article 28

(1) Notwithstanding the provisions of the preceding Article, the court shall not order the return of child when it finds that any of the grounds listed in the following items exists; provided, however, that even in cases where there exist grounds prescribed in items (i) to (iii) or item (v), the court may order the return of child if it finds that it serves the interests of the child to have him/her returned to his/her state of habitual residence after taking into account all the circumstances:

4

(i) The petition for the return of child was filed after the expiration of the period of one year since the time of the removal or the commencement of the retention of the child, and the child is now settled in his/her new environment;

(ii) The petitioner was not actually exercising the rights of custody at the time of the removal or the commencement of the retention of the child (except in the case where it could be deemed that the rights of custody would have actually been exercised by the petitioner but for said removal or retention);

5

Article 28(1)（ｉ） Explanation

In most cases, since it is objectively clear that the period of one year since the time of the removal or the commencement of the retention of the child has not expired before the petition for the return of the child was filed, the grounds for refusal of the return of the child in Article 28(1) (i) is rarely disputed.

6

Article 28(1)（ii） Explanation

It is rare for this ground for refusal of return [of the child] to become an issue.

7

Article 28(1)(iii) The petitioner had given prior consent or subsequently approved the removal or retention of the child;

(iv) There exists a grave risk that his/her return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

(v) The child objects to being returned, in a case where it is appropriate to take account of the child's views in light of his/her age and degree of development;

(vi) It would not be permitted by the fundamental principles of Japan relating to the protection of human rights and fundamental freedoms to return the child to the state of habitual residence.

8

Article 28(2) The court, when judging whether or not the grounds listed in item (iv) of the preceding paragraph exist, shall consider all circumstances such as those listed below:

(i) Whether or not there is a risk that the child would be subject to the words and deeds, such as physical violence, which would cause physical or psychological harm (referred to as "violence, etc." in the following item) by the petitioner, in the state of habitual residence;

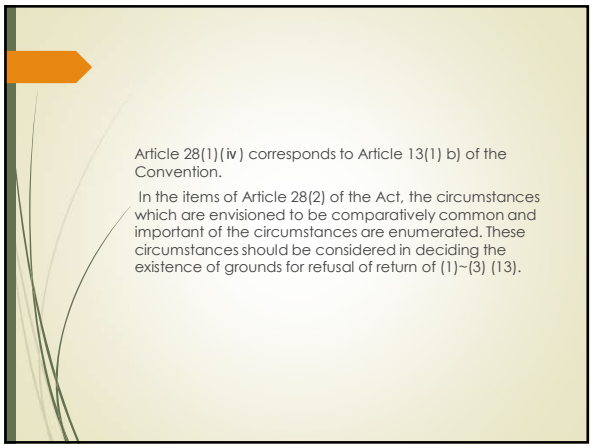
(ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence;

(iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence.

9


Article 28(1)（iii）Explanation
It is rare for this ground for refusal of return to become an issue.
There are many judicial decisions where, in order to find the ground for refusal of return under Article 28(1)(ii), it was necessary to consider that the LBP, who had consented to or approved not only the child's temporary stay in Japan, but also the child's residing in Japan for a significantly long period of time, as having waived his/her right to demand return of the child.

10


Article 28(1)(iv) corresponds to Article 13(1) b) of the Convention.
In the items of Article 28(2) of the Act, the circumstances which are envisioned to be comparatively common and important of the circumstances are enumerated. These circumstances should be considered in deciding the existence of grounds for refusal of return of (1)~(3) (13).

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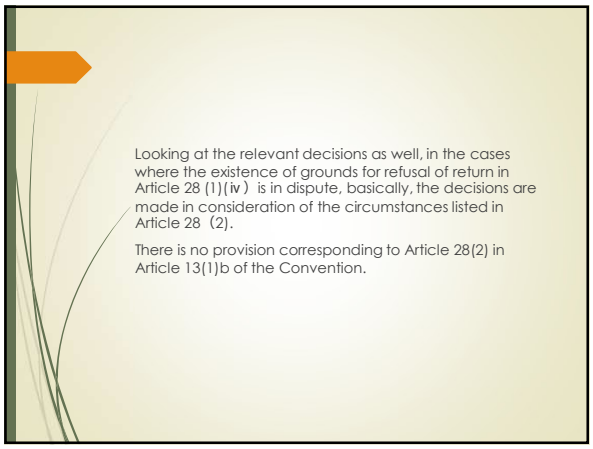

Looking at the relevant decisions as well, in the cases where the existence of grounds for refusal of return in Article 28 (1)(iv) is in dispute, basically, the decisions are made in consideration of the circumstances listed in Article 28 (2).
There is no provision corresponding to Article 28(2) in Article 13(1)b of the Convention.

12

However, recognizing the existence of grounds for refusal to return due to grave risk to the child under Article 28 (2), which has no corresponding provision in the Convention, will not necessarily be liberally granted.

According to published court statistics, of 21 final decisions from the courts of first instance family courts (Tokyo, Osaka) and the appellate High Courts(s) from April 1, 2014 through March 31, 2017, there was only one case of non-return on the ground of Article 28 (1)(iv) of the Act (corresponding to Article 13(1)b of the Convention).

Further, although the family court ordered the return of the child in that case, the appellate High Court ordered non-return [of the child].

13

In a case where a grave risk to the child was found (Article 28(1)(iv)), the TP was subjected to terrible, continuous violence by the LBP in front of the child.

14

- Of the circumstances of Article 28(2) of the Act, the circumstance considered most important is the risk of violence, etc. by LBP (Article 28(2)(ⅰ),(ⅱ))
- There is a trend of requiring that violence, etc. of a certain intensity be conducted continuously and constantly in order to say that there was violence, etc. by LBP.

15

- In addition, to be able to say the violence, etc. to TP is a grave risk to the child, such violence, etc. must definitely cause psychological trauma to the child, so in many cases, it was required that the violence, etc. be done in a situation where the child can be aware of such violence, for example, in front of the child.

16

Protective measures

If premised on violence, etc. by LBP done in the past, even if it could be said there is a possibility of the same violence, etc. being repeated if the child is returned to the country of habitual residence, if there is a legal system for the protection of TP and the child in the country of habitual residence ("protective measures") and it can be said it is possible to remove the risk of violence, etc. by LBP through such protective measures, as a result, it is decided that there is no risk of violence, etc. by LBP.

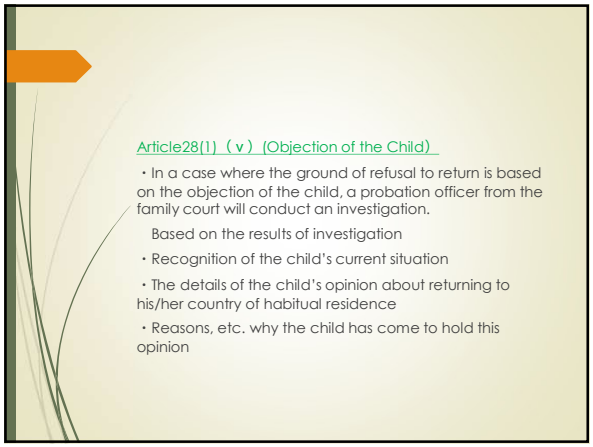
17

Article 28(2)(iii) Explanation

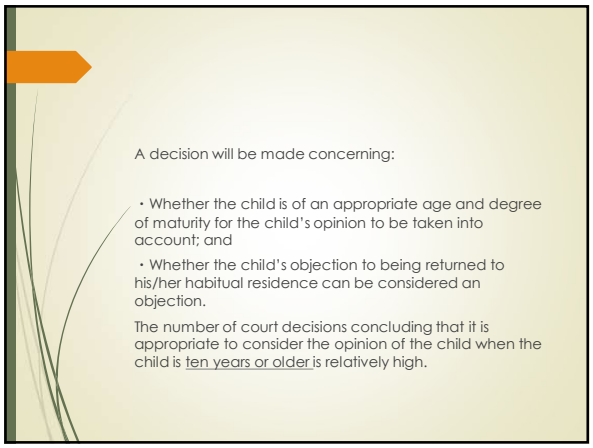
The below factors are taken into consideration.

- there is difficult circumstances for care, and in such determination;
- the circumstances of visa status in the country of habitual residence and the possibility of getting such acquisition;
- existence and degree of work motivation and work capacity;
- possibility of ensuring workplace and school to be attended by the child, etc.;
- existence and degree of assistance to be received from family、 friends, and support organizations; and
- existence and degree of physical and mental health issues of alcohol and drug dependency and mental

18


Article28(1)（v）(Objection of the Child)
・In a case where the ground of refusal to return is based on the objection of the child, a probation officer from the family court will conduct an investigation.
Based on the results of investigation
・Recognition of the child's current situation
・The details of the child's opinion about returning to his/her country of habitual residence
・Reasons, etc. why the child has come to hold this opinion

19


A decision will be made concerning:
・Whether the child is of an appropriate age and degree of maturity for the child's opinion to be taken into account; and
・Whether the child's objection to being returned to his/her habitual residence can be considered an objection.
The number of court decisions concluding that it is appropriate to consider the opinion of the child when the child is ten years or older is relatively high.

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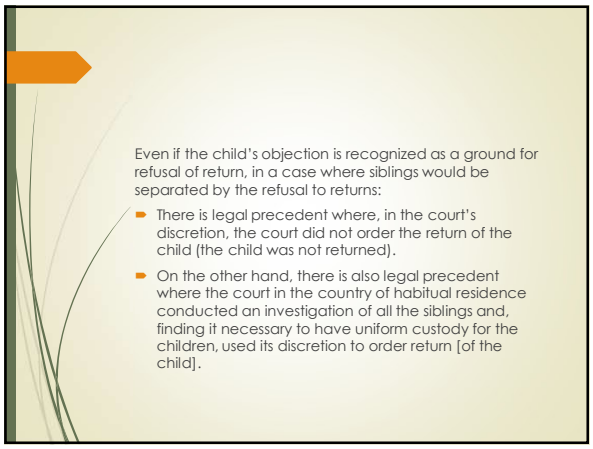
Even if the child's objection is recognized as a ground for refusal of return, in a case where siblings would be separated by the refusal to returns:
There is legal precedent where, in the court's discretion, the court did not order the return of the child (the child was not returned).
On the other hand, there is also legal precedent where the court in the country of habitual residence conducted an investigation of all the siblings and, finding it necessary to have uniform custody for the children, used its discretion to order return [of the child].

21

4 Flow of Procedures

- Petition for the Return of Child (Petition for Ne Exeat Order and for Passport Surrender Order)

↓Designated Date

- The Date for Proceedings

© The judge clarifies the points of the argument considering the documents for argument of both parties and evidence.

© The judge may directly ask both parties to state their arguments.

© Beside conciliation, a solution may be sought by the agreed Settlement.

22

↓ Referral to Conciliation requires consent of both parties

If both parties reach an agreement, the case is settled.

Parties not making an agreement on settlement

↓

Judicial decision on the petition for Return of Child

23

- ©The first date of the proceedings is fixed on approximately 2 weeks after the petition was filed,
- ©Depending on the progress, the date for proceedings may be held several times.
- ©Between the dates for proceedings, family court investigating officer may carry out investigations.

24

5 Results of Court Decisions Returning [the Child]

Many cases are resolved by conciliation.

Of 35 cases handled by the courts of first instance (the Tokyo Family Court and the Osaka Family Court) from April 1, 2014 through March 31, 2017, 14 cases were referred to conciliation.

Of the 14 cases, 8 cases agreed to return and 6 cases agreed to non-return.

Of 21 cases resulting in final decisions, only 6 cases involved non-return.

25

6 Current Arguments about Compulsory Execution(enforcement)

Problems with the implementing legislation for the current Hague Convention

1 When conducting direct compulsory execution such as direct compulsion(enforcement) or execution by substitute, indirect compulsory execution(enforcement) is invariably involved.

2 If the release [of the child] can only occur when the child is together with the obligor, this means that the so-called child/obligor simultaneous presence rule has been adopted.

3 The place of execution(enforcement) when conducting direct compulsory execution (enforcement) is, in principle, the residence of the obligor.

26

Currently, this is being discussed at the Legislative Council of the Ministry of Justice.

1 Preposition of Indirect Compulsory Execution(enforcement)

→In the current implementing legislation of the Hague Convention, a preposition of indirect compulsory execution is necessary as a requirement for a petition for the execution by substitute (direct enforcement) of the return of the child from the perspective of minimizing the impact of compulsory execution on the mind and body of the child. However, there may be a problem from the viewpoint of effectiveness of the compulsory execution.

27

Therefore, with the preposition of indirect compulsory execution no longer being necessary, the creation of a provision allowing a petition for the execution by substitute of the return of the child only when [the case] falls under one of items below has been proposed:

①when there has been a preposition of indirect compulsory execution,

②when, even though an indirect compulsion has been implemented, it is considered likely that the obligee will return the child to his/her country of habitual residence, or

③when the immediate execution by substitute is necessary to prevent imminent danger to the child.

28

2 The simultaneous presence principle of the child and the obligor

→ From the perspective of minimizing the impact of compulsory execution on the mind and body of the child, the simultaneous presence principle of the child and the obligor is mandatory.

However, there may be problems from the viewpoint of the child's not infrequent encounters with highly stressful situations as well as ensuring the effectiveness of compulsory execution.

29

Therefore, the following has been proposed:

・A provision allowing the court execution (enforcement) officer to take necessary actions to release the child from the care of the obligor only when the obligee appears as the return implementer at the place of execution, and

・The creation of a provision allowing the return of the child by execution by substitute by a person who appears as the return implementer at the place of execution when the obligee is unable to appear at the place of execution, and when the appearance of such other person, who is other than the obligee, is recognized as being in the interest of the child based on such person's relationship to the child, such person's knowledge and experience and other circumstances.

30

3 In principle, the place of execution (enforcement) is the residence of the obligor.

In the implementing legislation of the Hague Convention, when the place of execution is a place other than the residence of the obligor, from the perspective of ensuring legality, obtaining the consent of the occupant of such place is mandatory for the court execution officer to take necessary acts to release the child from the care of the obligor.

→There may be issues from the viewpoint of effectiveness of compulsory execution.

Therefore, a regulation has been proposed allowing the acts mentioned above to be taken with the permission of the execution court in lieu of the occupant's consent.

31

(Preposition of Indirect Compulsory Execution)

Article 136 A petition for the execution by substitute of the return of child may not be filed until two weeks have elapsed from the day on which the order under the provision of Article 172 (1) of the Civil Execution Act became final and binding (where the elapse of a certain period to perform the obligations specified by said order comes after the elapse of said two weeks, until the elapse of said period).

32

Article 140 (1) A court execution officer may carry out the following acts, in addition to persuading the obligor, in the residence of the obligor or any other place possessed by the obligor, as necessary acts for releasing the child from the care of the obligor:

(i) To enter the residence of the obligor or any other place possessed by the obligor and to search for the child at such place, in which case, if it is necessary, to take a necessary disposition to open a closed door;

(ii) To have the return implementer meet the child or to have the return implementer meet the obligor;

(iii) To have the return implementer enter the residence of the obligor or any other place possessed by the obligor.

(2) abbr.

(3) Necessary acts for releasing the child from the care of the obligor under the provisions of the preceding two paragraphs may be carried out only when the child is with the obligor.

(4)~(6) abbr.

33

7 Enforcement

- Indirect compulsory enforcement(execution)
- Direct compulsory enforcement(execution)
- If the return of the child has not been successful by direct enforcement, there is no other method to achieve the return of the child under the Implementation Act.

34

8 Published Legal Precedents

- 3 cases published on INCADAT
- Of these, 2 are Supreme Court decisions.
- The Supreme Court First Petty Bench decision, March 15 2018(Grounds Non-Convention issues)
- The Supreme Court First Petty Bench decision, December 21 2018(Grounds Objections of the Child to a Return)

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9 The Supreme Court First Petty Bench decision, March 15 2018

Facts

The parents are both Japanese nationals.

After their marriage, they first resided in Japan.

The first son was born in Japan in 1996. The daughter was born in Japan in 1998.

They moved to the U.S.

The second son was born in the U.S.in 2004.

In January 2016, the mother took the second son aged 11 years and 3 months back to Japan without the consent of the father.

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In July 2016, the father filed a petition for the return of the second son with the Tokyo Family Court.

In September, the court ordered the return of the child to the U.S. The order became final and binding.

The mother refused to comply with the order.

In May 2017,a court enforcement officer attempted to carry out an enforcement by substitute. However, the enforcement (direct enforcement) was not successful.

37

The father filed a petition at the Nagoya High Court for a habeas corpus order.

A habeas corpus order aims to restore freedoms of an illegally restrained person by expeditous summary proceedings.

38

The ruling by the Kanazawa Branch of the Nagoya High Court

The petition was dismissed on the following grounds.

1 The judges opined that the son had become settled in the social and family environment in Japan and freely expressed his wish to stay there, such that the care of the mother did not constitute a "restraint" under the Habeas Corpus Act and Habeas Corpus Rules.

2 The judges held that, even if the care of the mother constituted a "restraint" under the Habeas Corpus Act and Habeas Corpus Rules, it was not so "conspicuously illegal" as to fulfill the requirements of a habeas corpus order in the light of the circumstances of care and the age and intention of the son. The fact that the return order had become final and binding was not held relevant in this respect.

39

The Supreme Court ruling

The judgment by the Kanazawa Branch of the Nagoya High Court was quashed. The case was remanded to the Nagoya High Court

The Justices stated that there were special circumstances in which the child could not be seen to be staying with the mother based on his free will, to the effect that care by the mother constituted a "restraint" under the Habeas Corpus Act and Habeas Corpus Rules.

40

The Justices states, when a child is wrongfully removed across borders to Japan, "restraint" of the child by the taking parent despite a final and binding return order is so "conspicuously illegal" as to fulfill the requirements of a habeas corpus order under the Habeas Corpus Act and Habeas Corpus Rules, unless there are special circumstances that would render release of the child from care of the taking parent extremely inappropriate.

41

In the absence of the special circumstances, the Justices held that "restraint" of the child by the mother was "conspicuously illegal".

While holding that the petition for a habeas corpus order be granted subject to the above-mentioned facts, the Justices decided to remand the case to the lower court for further examination, particularly with a view to ensuring the appearance of the child before the court.

Please refer to the INCADAT database.

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Thank you very much
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IAFL Family Law Symposium

Sydney, Australia

18 February 2019

Treaties and international agreements relevant to family law proceedings in Australia

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1

Sources

Where to find them?

- www.austlii.edu.au
- www.info.dfat.gov.au/TREATIES

2

Relevance of treaties

- *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168
- *Dietrich v The Queen* (1992) 177 CLR 292
- *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1
- *Mabo v Queensland (No 2)* (1992) 175 CLR 1

3

Parenting

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- *United Nations Convention on the Rights of the Child*
- *Hague Convention on Jurisdiction Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("Child Protection Convention")
- *Hague Convention on the Civil Aspects of International Child Abduction*
- *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*
- Agreement between the Government of Australia and the Government of the Arab Republic regarding co-operation on protecting the welfare of children
- Agreement between Australia and the Republic of Lebanon regarding co-operation on protecting the welfare of children

4

Divorce

FORTÉ FAMILY LAWYERS

Hague Convention on the Recognition of Divorce and Legal Separation

5

Child support and maintenance

FORTÉ FAMILY LAWYERS

- *United Nations Convention on the Recovery Abroad of Maintenance* (UNCRAM)
- *Hague Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations*
- Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance
- Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (Support) Obligations

Australia is not a party to:

- *Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (HCIRS).*

6

Evidence and Service

- *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*
- *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*
- *Various bilateral treaties*

7

Property

- *Hague Convention on the Law Applicable to trusts and their Recognition*

8

Enforcement

- *Reciprocal Recognition & Enforcement of Judgements in Civil and Commercial Matters 1994*
- *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (signed in 2008).*

9

Other potentially relevant legislation

- *Foreign Judgments Act 1991* (Cth)
- *Trans-Tasman Proceedings Act 1991* (Cth)
- *Foreign Evidence Act 1994* (Cth)
- *Overseas legislation*

10

Case Law

- *Sibley & Cassidy* [2015] FamCA 912
- *Nevill & Nevill* [2015] FamCA 876

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Case Law

- The full paper is on the website of the International Academy of Family Lawyers – www.iafl.com
- OR you can email me and ask for a copy – jcampbell@fortefamilylawyers.com.au

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International Academy of Family Lawyers
Sydney Symposium - 18 February 2019

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Introduction

This paper looks at the international treaties and agreements which may be relevant in an Australian family law dispute with international aspects. The treaties are first dealt with by subject matter, and then the more important treaties are dealt with individually. Copies of the treaties, agreements and cases cited in this paper can be found in Austlii – www.austlii.edu.au Treaties can also be found in the Australian Government's Australian Treaties database – www.info.dfat.gov.au/TREATIES

Many of the treaties have been incorporated into Commonwealth legislation. To the extent that they have not been, there are limited opportunities to rely on them. In *Minogue v Human Rights & Equal Opportunity Commission* [1999] FCA 85, with reference to the *International Covenant on Civil and Political Rights* (ICCPR), the Full Court of the Federal Court said (at [47]):

> The provisions of an international treaty do not form part of Australian law merely because Australian law is a party to a treaty and has ratified it. In consequence, the ICCPR does not of itself operate to give rights to or impose duties on members of the Australian community.

This reflects a longstanding principle affirmed by the High Court in many cases, such as *Koowarta* v *Bjelke-Petersen* (1982) 153 CLR 168 and *Dietrich* v *The Queen* (1992) 177 CLR 292.

However, whilst an unincorporated treaty cannot operate as a direct source of rights or duties, it may have other implications for Australian law (*Minister of State for Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273). The court can be assisted by the terms of an unincorporated treaty in resolving an ambiguity in legislation (*Chu Kheng Lim* v *Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1), and in developing the common law (*Mabo v Queensland (No 2)* (1992) 175 CLR 1).

Parenting

An international treaty is far more likely to be relevant in parenting proceedings than in property proceedings. The most important are:

- *United Nations Convention on the Rights of the Child*
- *Hague Convention on Jurisdiction Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("Child Protection Convention")

- *Hague Convention on the Civil Aspects of International Child Abduction*
- *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.*

There are also international agreements with Egypt and Lebanon:

- Agreement between the Government of Australia and the Government of the Arab Republic regarding co-operation on protecting the welfare of children
- Agreement between Australia and the Republic of Lebanon regarding co-operation on protecting the welfare of children

See *Family Law Regulations 1984*, regs 23-24 and Sch 1 and *Family Law Act* ("FLA"), s70G-70N.

Divorce

The relevant treaty is the *Hague Convention on the Recognition of Divorce and Legal Separation*.

Child support and maintenance

The most important treaties are:

- *United Nations Convention on the Recovery Abroad of Maintenance* (UNCRAM)
- *Hague Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations*

Also relevant are inter-country agreements, such as with the United States and New Zealand:

- *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance*
- *Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (Support) Obligations*

An important point to note is that despite the wording of the inter-country agreements, Child Support does not enforce the exact obligation under the US order or NZ order or assessment, but the figure which Child Support calculates as being payable in Australian dollars when the order or assessment is registered in Australia (see regs 37 and 38 *Child Support (Registration and Collection) Regulations 2018*. This ignores future currency fluctuations so the figure enforced will almost always differ from the actual amount payable in the other country.

<u>Australia is not a party to</u>:

- *Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (HCIRS)*.

Evidence and Service

The treaties relevant to the taking of evidence and the service of subpoenas are:

- *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*
- *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*
- Various bilateral treaties

Property

- *Hague Convention on the Law Applicable to Trusts and their Recognition*

Enforcement of Property Orders

Usually, the only alternative for enforcement of overseas property orders in Australia is to look at enforcement under the common law.

Australia is a party to:

- *Reciprocal Recognition & Enforcement of Judgments in Civil and Commercial Matters 1994*
- *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement (signed in 2008).*

Australia is not a party to:

- *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971*
- *Hague Convention on Choice of Court Agreements*

Other potentially relevant legislation

There is Australian legislation other than the FLA (and the accompanying Rules and Regulations under the FLA) which may be relevant. These are:

- *Foreign Judgments Act 1991* (Cth)
- *Trans-Tasman Proceedings Act 2010* (Cth)
- *Foreign Evidence Act 1994 (Cth)*

Legislation of overseas countries which is potentially relevant is too extensive to research and list, which is one reason why consulting with an experienced lawyer in the relevant jurisdiction is important.

United Nations Convention on the Rights of the Child (UNCRC)

The United Nations Convention on the Rights of the Child (UNCRC) has been in force in Australia since 2 September 1990, so its effects are largely entrenched in the FLA and, indeed, the general law of Australia. The UNCRC is only 15 pages, consisting of 54 articles, and covers matters such as rights with respect to education, health care, children with disabilities, discrimination, standard of living, torture, neglect, and criminal charges. Some of the more useful Articles are:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status…

Article 5

1. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents…

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence…

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child…

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern…

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse,

neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties…

The UNCRC is rarely referred to in family law cases, but examples of where its relevance was considered include:

- *Re Jamie* [2013] FamCAFC 110 - gender identity treatment case;
- *Langmeil & Grange* [2012] FamCAFC 39 - mother alleged the UNCRC had been breached. Finding of trial judge that it had not been breached was upheld by appeal court;
- *In the Matter of Z* [1996] FamCA 89 - change in terminology to “in the best interests of the child” was found to be in conformity with the UNCRC;
- *Bateman & Kavan* [2014] FCCA 2521 - rights of child under the UNCRC relevant to child support where father is a donor;
- *Karamalis & Karamalis* [2018] FamCA 312 - refers to Articles 12 and 13 of the UNCRC in support of decision to refuse to make final orders until child informed of the agreement, and taking into consideration the views of the child;
- *Duffy & Gomes (No 2)* [2015] FCCA 1757 and *Duffy & Gomes (No 1)* [2015] FCCA 1121 - found that Article 12 of the UNCRC gave the child a right to participate in the proceedings;
- *Zanda & Zanda* [2014] FCCA 1326 - refers to Art 9 of the UNCRC which ensures that children not be separated from parents against their will unless it is in their best interests. The judge rejected the reference to the UNCRC, and made orders to the effect that the children be returned to Australia to reunite with their parents, including the father, who were both in Australia. This case is also later discussed in this paper.

Immigration cases that are useful for guidance as to the application of the UNCRC include *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 ("Teoh's case") and *G v Minister for Immigration and Border Protection* [2018] FCA 1229.

Field v Human Rights & Equal Opportunity Commission **[1999] FCA 1711 (Federal Court)**

There were proceedings in the Family Court between the mother and father over custody of and access to the child, in which the grandmother intervened. The grandmother was the applicant in the

Federal Court proceedings. In the course of the Family Court proceedings, it was ordered that the child be apprehended by the Australian Federal Police, and the mother arrested for breach of orders requiring her to make the child available for access and restraining her from taking the child to a doctor. At trial, Brown J ordered that the father have sole parental responsibility, and that the mother and grandmother have no contact with the child. This was upheld by the Full Court of the Family Court, which found no evidence that Brown J had violated any international conventions (as alleged by the grandmother). The High Court refused to grant special leave to appeal.

There had also been proceedings in the Children's Court, the Administrative Appeals Tribunal and the Supreme Court of Victoria.

The grandmother made a complaint to the Human Rights and Equal Opportunity Commission (HREOC), but the HREOC declined to consider the issue. The grandmother sought to review the decision of the HREOC in the Federal Court, and also sought orders against the Commonwealth of Australia, alleging failure to protect the child. She alleged that the father was a sexual abuser, and that the orders allowing the father to have access to the child, among other things, breached the UNCRC (as well as the UN International Covenant on Civil and Political Rights (ICCPR)). The Family Court found that there was no evidence of sexual abuse.

Citing *Teoh* and *Dietrich v The Queen* (1992) 177 CLR 292, North J found that neither the ICCPR nor the UNCRC could be relied upon by the grandmother as they were not specifically incorporated into domestic law. Justice North said (at [83]):

> "[the grandmother's] disappointment over the result of [the Family Court] proceedings does not make a complex and difficult family law issue into an international human rights issue".

Justice North said that the Federal Court proceedings were simply yet another attempt to appeal the issue of child custody and access.

Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention)

The Child Protection Convention came into force in Australia on 1 August 2003. The objects are set out in Article 1(1):

> "*a)* to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
> *b)* to determine which law is to be applied by such authorities in exercising their jurisdiction;
> *c)* to determine the law applicable to parental responsibility;
> *d)* to provide for the recognition and enforcement of such measures of protection in all Contracting States;
> *e)* to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention."

Exceptions to the breadth of the Child Protection Convention are set out in Article 4 and include the establishment or contesting of a parent-child relationship, maintenance obligations and decisions on the right of asylum and on immigration.

Section 111C2(1) FLA provides that Regulations may make provision for the implementation of the UNCRC in Australia. Schedule 1 of the *Family Law (Child Protection Convention) Regulations 2003* lists countries which are parties to the *Child Protection Convention,* although the list is incomplete:

- Czech Republic
- Ecuador
- Estonia
- Monaco
- Morocco
- Slovakia

A full list of countries which are parties to the Convention is at:
www.hcch.net/en/instruments/conventions/status-table/?cid=70

Articles of particular interest to family lawyers include:

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 7

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention…

Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or

- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

a) a State of which the child is a national,
b) a State in which property of the child is located,
c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Webster & Webster (No 3) **[2017] FamCA 815 (England)**

The parties agreed that the children should live with the mother. The father lived in England and disputes were the extent of holiday time the children should spend with the father and whether that should be overseas. Justice Austin discussed the Child Protection Convention and his comments (at [35], [36], [39]) are useful:

> Alternatively, the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("the 1996 Convention") is designed to resolve international jurisdictional disputes over children and makes provision for the recognition and enforcement in one Contracting State of parenting orders (called "measures of protection") made in respect of children in another Contracting State. The 1996 Convention entered into force in Australia on 1 August 2003 and in the UK on 1 November 2012. The UK therefore meets the definition of a

> "Convention country" in Australia (s 111CA), even though it is not recognised as such in subordinate legislation (s 111CZ(2)(c); Schedule 1 to the *Family Law (Child Protection Convention) Regulations 2003* (Cth)). In the absence of such regulatory recognition, some doubt necessarily attends the mother's entitlement to petition the Court's Registrar to send a sealed copy of this Court's orders to the Commonwealth Central Authority for transmission to the UK Central Authority (reg 10 of the *Family Law (Child Protection Convention) Regulations 2003* (Cth))
>
> Nevertheless, the parenting orders made in these proceedings will be conditionally recognised by operation of law in the UK (Article 23) and, since the mother is an "interested person" or "interested party", she would be able to request a court of competent jurisdiction in the UK to decide on the recognition in the UK of the parenting orders made by this Court (Article 24) and to issue a declaration of registration and enforceability in respect of the orders (Article 26). But that process would need to be initiated by the mother personally, in the UK, and at her expense. It would not necessarily be easy for her and it could be time-consuming, particularly if the father contests the enforceability of the orders on various grounds under the 1996 Convention (Articles 11, 23(2), 26)…
>
> The inconvenience, difficulty, delay, and possible expense the mother would likely incur in procuring the children's return to Australia by resort to either the 1996 Convention or the 1980 Convention, if wrongfully retained by the father in the UK (let alone in another foreign State which is not a signatory to those Conventions), tends to recommend the imposition of an embargo upon the children being taken or sent outside Australia to spend time with the father. As already noted, while the risk of their wrongful retention by him may not be as pronounced as the mother fears, the serious repercussions in the event of its occurrence means the risk is not worth taking. The mother and Independent Children's Lawyer established the need to foreclose the children's visits with the father outside Australia and an order should therefore clarify the parties' rights under s 65Y of the Act.

***Zanda & Zanda* [2014] FamCAFC 173; (2014) FLC 93-607 (Lebanon)**

The parties and children had moved back and forth between Australia and Lebanon. The father unsuccessfully appealed an order restraining him from leaving Australia. Lebanon was not a party to the Convention, so the Full Court's comments were dicta. It said (at [57]) that s 69E and s 65D(1) (the power to make parenting orders) must be applied in the light of Australia's ratification of the Convention.

***Cape & Cape* [2013] FamCAFC 114; (2013) FLC 93-549 (Germany)**

The father appealed against the orders (residence, parental responsibility, and relocation) made by the trial judge which permitted the wife to take the child to Germany to live, provided orders were first obtained in Germany. One of the grounds of the appeal was that the Child Protection Convention relied upon by the trial judge was not (at [61]) sufficient "to overcome…a traditional reticence on the part of the court not to stay an order permitting a child to go abroad pending the determination of an appeal against that order".

The Full Court found that the orders made by the trial judge were unclear as to whether the mother could take the child to Germany once the Australian orders were registered in Germany, or only after her undertaking was registered in the Australian court. The Full Court discharged the orders made at

trial and made new orders providing that the mother return the child to Australia if the father's appeal was successful and an order made for the child's return. The orders further provided that the mother be entitled to remove the child from Australia 7 days after proof of registration, advance recognition (Art 24 of the Convention) or a declaration of enforceability (Art 26 of the Convention) from a German Court was filed in the Family Court of Western Australia.

***Ryland* [2018] FamCA 896 (unidentified country)**

The wife took the children from Australia to Country P. The children were in the care of social services in Country P, with limited supervised time with the wife and no direct contact with the husband. The husband succeeded in proceedings under the Child Abduction Convention and obtained an order from the Family Court of Australia that the children return to Australia.

The Family Senate of the Higher Regional Court of City O, pursuant to Art 11 Convention ('case of urgency'), temporarily stayed the enforcement of the Australian return order. The Family Court of Australia said (at [48]) that "It is a matter for the judicial officer in each contracting State to consider the extent of the measures necessary to ameliorate the urgency of the situation."

The Family Court held that Australia was not an inappropriate forum, but the more appropriate forum was Country P as necessary evidence was only available in that jurisdiction and the Country P court system was clearly competent to protect the children's best interests. The retention of the children in Country P was supported by Art 11 of the Child Protection Convention.

***Ormond & House* [2018] FamCA 861 (England)**

The mother was permitted to relocate with the child to England. The Family Court found that, as per the Convention, "the father could have some confidence that he could take steps in the UK…to enforce the provisions of the orders I will make that provide for the child to spend time with him" (at [2]). Justice Forrest cited the Practical Handbook on the Operation of the 1996 Child Protection Convention, 2014, p 110 [10.22]. The Practical Handbooks on the Hague Conventions are at https://www.hcch.net/en/publications-and-studies/publications2/practical-handbooks

***Contadini & Georgiou* [2018] FamCA 701 (unidentified country)**

The mother sought orders allowing her to relocate to Country B in Europe with the child. It was ordered that the mother make all relevant enquiries before the adjourned date to enable the Family Court to determine whether it would be able to make an order that if the mother obtained recognition of the Family Court orders from a court in Country B, or a declaration of enforceability in Country B, or that the mother be entitled to remove the child from Australia 7 days after the documentary proof of registration of the orders in a court in Country B pursuant to the Child Protection Convention.

***Lane & Armstrong* [2018] FamCA 424 (United Kingdom)**

The wife was restrained from relocating the child outside Australia until she served documentary proof on the father that she had requested a decision from a competent Court in the United Kingdom for the recognition of the Australian orders pursuant to Art 24 Convention, and obtained a declaration of registration and enforceability from the United Kingdom Court pursuant to Art 26. She was also required to file an affidavit in the Family Court demonstrating her compliance.

***State Central Authority & Afridi* [2018] FamCA 649 (Fiji)**

The mother lived in Fiji. The father and child lived in Australia. The State Central Authority sought orders under the Child Abduction Convention for the child to have Skype calls with the mother twice a week, face-to-face access for half of the Fiji summer holidays, and for the mother to have regular updates on the child's schooling and health. The Child Protection Convention was also relevant.

Parenting proceedings were pending in a Fijian court. The Family Court found that Australia was the appropriate forum to make parenting orders. Because the child lived in Australia, the Court found that the only circumstances in which Fijian courts would be competent to make parenting orders were "confined to pre-existing proceedings for which the courts in Fiji have jurisdiction under Articles 5 to 10 of the 1996 Convention". These were restricted to where the parents ask the court to decide parenting issues in the context of divorce proceedings which were currently underway in Fiji (Art 10), and "where jurisdiction has been transferred from Australia to Fiji" (Arts 8 and 9).

***Curzon & Curzon* [2017] FamCA 575 (USA)**

The mother wanted to relocate with the three children to the United State. The father did not seek orders that the children live with him. The Family Court held that the 16 year old was able to decide for herself where she would live and the mother was able to relocate with the two younger children, aged 11 and 12. The mother was unable to request a USA court in State E to decide on the recognition of the Australian parenting orders or to obtain advance recognition and a declaration of enforceability of the Australian orders in the USA because the Convention had not yet entered into force there. However, Austin J observed (at [34]) that the Australian orders could still be enforced in the USA in the event orders were made enabling the mother to relocate to the USA. The father could request the Registry Manager of the Family Court of Australia to send a sealed copy of the orders to a court in State E for registration pursuant to the Family Law Regulations and State E's counterpart provisions to the FLA enabling registration of international parenting orders.

***Goen & Sinna* [2017] FamCA 857 (USA)**

The child was living in Australia. There were parenting proceedings in the USA. Hague child abduction proceedings for the return of the child to the United States failed as the child was found to

be habitually resident in Australia. The mother sought that the proceedings be continued in Australia. However the trial judge found that any delays or costs would be similar were the proceedings to be determined in either jurisdiction. The best evidence in relation to the mother's health and its impact on parenting was likely to be available in Australia. If the mother were required to travel to the USA, her health and the welfare of the child would be disadvantaged. Both parties were restrained from continuing legal proceedings in the USA court in relation to the child. It was held to be in the best interests of the child for the proceedings to be determined in Australia.

Hunt & Planey **[2017] FamCA 549 (United States of America)**

There was a long history of litigation. The father unsuccessfully appealed an order permitting the mother and child to relocate the United States. The orders of the Family Court of Australia were registered in the Superior Court of California. These proceedings arose when the father sought to overturn the Australian orders on the basis that the child was at risk. The mother contended that Australia was not the appropriate forum. The parties agreed that the Convention did not apply in the United States. The Family Court found that on balance California was the more appropriate forum.

Millar & Oakley **[2017] FamCA 415 (unidentified African country)**

The trial judge dismissed the father's application to lift an injunction restraining him from leaving Australia. The injunction was made as there was a risk that he would go to Country B in Africa, reunite with the children (who had been left there with his parents), and never return the children to Australia. There were proceedings in Country B between the paternal grandparents and the mother as to the children's care. The father was restrained from continuing any parenting proceedings in Country B. The trial judge found that it was implicit in the father's case that the matter should proceed in Country B, not Australia. The reasoning of the Full Court in *Zanda & Zanda* was applied.

Sloan & Sloan **[2017] FamCA 186 (unidentified African country)**

The mother had wanted to take the children to Africa, but later agreed that Australia would remain the children's home. A notation to the orders made in relation to parental responsibility and shared time stated that the orders constituted "measures of protection directed to the protection of the person of the children" under the Convention. The notation was made to help guard against abduction or retention overseas.

Olmos & Morrall (No 2) **[2016] FamCA 812 (Germany)**

The mother was permitted to relocate with the children to Germany. The parties were required to seek that the orders be registered in Germany under the Convention, but the relocation was not subject to the registration. The fathers appeal was unsuccessful in *Olmos & Morrall* [2017] FamCAFC 2.

***Hutcheson & Meli* [2016] FamCA 400 (United Kingdom)**

The mother was permitted to relocate with the child to the United Kingdom. The mother sought, among other things, orders that the parties obtain recognition (Art 24) and a declaration of enforceability (Art 26) in the UK of the orders of the Family Court. The trial judge recommended that steps be taken to register the orders in the UK, but did not consider that orders to that effect were necessary. The father's appeal against the relocation was unsuccessful in *Hutcheson & Meli* [2016] FamCAFC 258.

***Alfarsi & Elhage* [2016] FamCA 428 (Iraq)**

The parents and children were Australian citizens. The father removed the children to Iraq in September 2014, but the children were habitually resident in Australia before that time. The father asserted that he did not know who was caring for the children in Iraq. The Convention had no application as Iraq was not a signatory.

The trial judge cited observations of Bennett J in *State Central Authority & Spring-Ernest (No.2)* [2013] FamCA 906 at [47]:

> Prior to Australia's ratification of the 1996 Convention, this court's power to make orders about a child, including orders with extra territorial effect, was not circumscribed by where the child was habitually resident.

The trial judge said at ([58]):

> The Convention is primarily designed to operate between contracting States to the Convention. However the implementation of the Convention into the Act has seen the introduction of 'qualifying connections' applicable in Australia as between Australia and non-Convention countries as to jurisdiction over a child (see s 111CC and s 111CD(1)(e) and (f)).

Subdiv C Div 4 of Pt XIIIAA FLA only applied if (as per s 111CC) there was an issue as to whether a court, as opposed to a "competent authority of a non-Convention country" (s 111CC(b)), had jurisdiction to take measures directed to protection of the child (i.e. parenting orders). No such issue arose. No evidence "of any such jurisdictional conflict … [or the] existence or otherwise of any such 'competent authority' in Iraq that may or may not or has sought to exercise jurisdiction over the children" (at 61). Therefore the Convention had no application.

However, if this conclusion were wrong, the trial judge determined that the children were habitually resident in Australia despite their removal to Iraq (s 111CD(1)(e)). He commented in dicta that if the Convention as implemented into the FLA did in fact apply, the Court would have had jurisdiction over the children.

***Cullin & Tarankiev* [2016] FamCA 263 (Sweden)**

The mother sought to relocate with child to Sweden. Relocation was permitted after July 2017, with other orders made for the mother's sole parental responsibility, as well as time with the father. The trial judge stated that the father might be able to rely on any Swedish legislation giving effect to the Convention if the mother does not act to support the child's relationship with the father as per the orders requiring the child to return to Australia each year to spend time with him. Applied *Cape & Cape*. The mother was ordered to take all reasonable steps to obtain recognition of orders, a declaration of enforceability, and registration of the Family Court orders in a Swedish court pursuant to Art 24 or 26 of the Convention.

***Baxter & Baxter* [2016] FamCA 572 (Ireland)**

The mother sought to relocate to Ireland with the children. Even though not yet recognised in the subordinate legislation (Sch 1A *Family Law Regulations 1984* or Sch 1 *Family Law Amendment (Child Protection Convention) Regulations 2003*), Ireland had ratified the Convention and was a contracting state. The father was concerned about the enforceability of the orders in Ireland. As a precondition to relocation, the mother was ordered to obtain a declaration of registration and enforceability from a competent court in Ireland.

The Family Court noted (at [95]) that the orders obviated the need for the father to register the orders in Ireland an alternative manner, if the mother failed to comply, incurring expense and inconvenience. He would be required to request the Registrar of the Family Court to send a sealed copy of the orders to the Commonwealth Central Authority to be transmitted to the Irish Central Authority (reg 2 FLA Child Protection Convention Regs), or the Registry Manager of the Family Court sending the orders to "an appropriate court or authority" in Ireland even though Ireland was not yet a "prescribed overseas jurisdiction" in the regulations. The father would then have to launch litigation in Ireland to enforce the orders. Citing *Cape & Cape*, the trial judge (at [96]) noted that the Full Court had confirmed that it was desirable to obtain advance recognition and a declaration of enforceability.

The requirement for the mother to obtain advance recognition and a declaration of enforceability did not "impose an unreasonable burden upon her" (at [97]). Art 26(2) of the Convention required a "simple and rapid procedure". If these measures could not be followed, then the mother should not be allowed to relocate the children to Ireland.

***Koehler & Koehler* [2016] FamCA 60 (Germany)**

The parties lived in Germany, where the child was born. They separated whilst on vacation in Australia. The father commenced proceedings in Germany, and the mother in the Federal Circuit Court in Melbourne. The State Central Authority sought that the child return to Germany, which was then her habitual place of residence. In earlier proceedings the trial judge accepted that the child

was wrongfully removed from Germany but found that to return the child to Germany would be to risk harm to the child, and refused to order the child's return. The father stopped participating in the Australian proceedings and did not appear at the trial. The court found that the child was habitually resident in Australia pursuant to s 111CD FLA, as she had lived there for 2 years and was settled. Under Art 1.1(b) *Child Protection Convention*, as no request for return was still pending, the Family Court had jurisdiction to determine the parenting application under the FLA.

***Lowe & Durnov* [2015] FamCA 643 (Germany)**

The trial judge noted that Germany was still not shown as a Convention country in Sch 1 to the Regulations, although it had ratified the Convention. The mother was allowed to relocate the child to Germany, and this was held to be in the best interests of the child. A meaningful relationship with the father could still be maintained. No evidence was adduced as to the law of Germany and the procedure for advance recognition of the orders. No orders were made as to advance recognition. The father was (at [67]) "clear and unequivocal" in holding that there would be no issue with the parties' adherence to orders for the child spending time with the father and the father's family. Without this clear stance, the trial judge, who had referred to *Cape*, commented (at [67]) that the failure to produce evidence establishing this "may have weighed the balance in favour of an order restraining the mother from removing the child from the Commonwealth of Australia until, at the very least, the mother had obtained some indication about advance recognition".

***Attorney General's Department & Sciacia* [2017] FamCA 692 (Canada)**

The Attorney General's Department sought that the provisional orders of a Provincial Court in Canada be confirmed under reg 39 *Family Law Regulations 1984*. The father sought that the Canadian orders (which were in relation to the father's child support obligations) be discharged, or modified. The trial judge noted there was no authority or guidance as to the application of this regulation (reg 39(4)). She referred to the Child Protection Convention, but said (at [27]) that "it seems to me that where the court is not expressly empowered to take into account the law of a foreign state, whether or not that state is a party to a treaty or not, the law pursuant to which issues must be determined in this court is the law of Australia". She concluded that, as per reg 39, the law to be applied in determining whether the orders be discharged or confirmed was the Australian law - the FLA. She found that the court had jurisdiction to make child maintenance orders under Australian law.

***Dawe & Short* [2018] FamCAFC 205 (United Kingdom)**

The parties had a platonic relationship, had a child through IVF and purchased a property together for the mother and child to live in. The parties' friendship later broke down. Parenting orders made

by the Family Court in the UK were later registered in Australia. The orders permitted the mother and child to relocate to Australia, and spend some time with the father in the school holidays.

The wife sought to vary the orders, but her application was dismissed by the trial judge, who found that s 70G and 70J FLA applied, and that as required by s 70J(1)(b) FLA the wife had failed to establish substantial grounds to justify that the child's welfare required that the Family Court of Australia exercise jurisdiction.

The parties agreed to allow the appeal by consent, on the basis that the provisions to which the trial judge referred did not apply. The orders were not of a prescribed overseas jurisdiction (reg 14(a) Family Law Regulations), as the UK was not identified in column 2 of Sch 1A of the Regulations. The appeal was allowed.

Hague Convention on the Civil Aspects of International Child Abduction

As there is a specific paper at this conference on this Convention, it is not discussed in detail in this paper. This treaty provides a process for the return of children to their country of habitual residence. It is a method of international enforcement of custody and access. Its objects are set out in Article 1:

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Countries which are parties to the Convention must accede to each other's ratification of the Convention before it is in force between the 2 countries. A full list of countries which according to the Attorney-General's Department with Australia are accepted by Australia is at:

https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/HagueConventionOnTheCivilAspectsOfInternationalChildAbduction.aspx

These countries are also set out in Sch 2 *Family Law (Child Abduction Convention) Regulations.*

A list of all countries which are parties to the Convention is at:
https://www.hcch.net/en/instruments/conventions/publications1/?dtid=36&cid=24

The countries which are parties to the Convention, but have not been accepted by Australia, noting that the Attorney-General's list is not up-to-date, are:

- Andorra—acceded in April 2011
- Bolivia – acceded in July 2016
- Gabon—acceded in December 2010
- Guinea—acceded in November 2011
- Iraq—acceded in March 2014
- Jamaica – acceded in February 2017
- Lesotho—acceded in June 2012
- Morocco—acceded in March 2010
- Pakistan – acceded in December 2016
- Russia—acceded in July 2011
- Seychelles—acceded in May 2008
- Tunisia – acceded in July 2017

- Kazakhstan—acceded in June 2013
- Cuba – acceded in December 2018
- Zambia—acceded in August 2014
- Philippines – acceded in March 2016

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

Australia ratified the Intercountry Adoption Convention on 25 August 1998, and it entered into force on 1 December 1998.

Suttikul and Anor & Suttikul and Ors **[2017] FamCA 70**

A married couple launched proceedings in the NSW Supreme Court to adopt the wife's niece, who moved from Country B to Australia on a temporary student visa. The NSW Supreme Court identified a jurisdictional issue. The couple filed proceedings in the Family Court to seek declarations which they thought would assist them in the NSW Supreme Court adoption matter – i.e. that the niece was no longer habitually resident in Country B, that the principles of *loco parentis* did not apply to the applicants, and that the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth) could not interfere with NSW Supreme Court jurisdiction to determine intercountry adoptions under the NSW Act.

The application was dismissed for lack of jurisdiction. The Family Court had no jurisdiction to grant child adoptions under NSW law. The NSW Supreme Court had jurisdiction in intercountry adoptions pursuant to reg 25 Hague Convention Regulations. The Family Court had no jurisdiction if it was invested in a State court (r 24A(2)).

The application was also dismissed as an abuse of process. An issue estoppel arose as there were proceedings in the NSW Supreme Court on the jurisdictional question, and there were incomplete proceedings in the AAT in relation to an administrative review of the refusal of an adoption visa for the niece.

Hague Convention on the Recognition of Divorce and Legal Separations

This Convention came into force in Australia on 23 November 1985. Overseas divorces must be recognised by the parties to the treaty if one of the following factors listed in Article 2 applies to proceedings in the other contracting state:

(1) the respondent had his habitual residence there; or
(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled -
    a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;
    b) the spouses last habitually resided there together; or
(3) both spouses were nationals of that State; or
(4) the petitioner was a national of that State and one of the following further conditions was fulfilled -

a) the petitioner had his habitual residence there; or
b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -
a) the petitioner was present in that State at the date of institution of the proceedings and
b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

Section 104 FLA, which implements the Convention, states (in part):

(3) A dissolution or annulment of a marriage effected in accordance with the law of an overseas country shall be recognized as valid in Australia where-
(a) the respondent was ordinarily resident in the overseas country at the relevant date;
(b) the applicant was ordinarily resident in the overseas country at the relevant date and either-
(i) the ordinary residence of the applicant had continued for not less than 1 year immediately before the relevant date; or
(ii) the last place of cohabitation of the parties to the marriage was in that country;
(c) the applicant or the respondent was domiciled in the overseas country at the relevant date;
(d) the respondent was a national of the overseas country at the relevant date;
(e) the applicant was a national of the overseas country at the relevant date and either-
(i) the applicant was ordinarily resident in that country at that date; or
(ii) the applicant had been ordinarily resident in that country for a continuous period of 1 year falling, at least in part, within the 2 years immediately before the relevant date; or
(f) the applicant was a national of, and present in, the overseas country at the relevant date and the last place of cohabitation of the parties to the marriage was in an overseas country the law of which, at the relevant date, did not provide for dissolution of marriage or annulment of marriage, as the case may be.

(4) A dissolution or annulment of a marriage shall not be recognized as valid by virtue of sub-section (3) where-
(a) under the common law rules of private international law, recognition of its validity would be refused on the ground that a party to the marriage had been denied natural justice or that the dissolution or annulment was obtained by fraud; or
(b) recognition would manifestly be contrary to public policy.

(5) Any dissolution or annulment of a marriage that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this sub-section shall not be limited by any implication from those provisions….

***Dane & Kabrig* [2013] FamCAFC 113**

The wife sought a stay of the Australian divorce proceedings to permit the matter to proceed in India. The test was whether Australia was a clearly inappropriate forum. The wife argued that an Australian divorce order would not be recognised in India because of the Hindu Marriage Act, and that India had not entered into the Divorce Convention. However, the trial judge found that Australia was not a clearly inappropriate forum to hear the divorce application. The parties lived, and were likely to continue to live, in Australia. Both parties were Australian citizens, and the husband had property in

Australia. The fact that an Australian order may not be recognised in India might have been significant if the parties were living in India, but this was not the case. Even if the order could not be recognised in India, this could not "and should not prevent the husband here from exercising rights under Australian law" (at [29]). The trial judge made the divorce order. The Full Court dismissed the wife's appeal.

***Talwar & Sarai* [2018] FamCAFC 152**

A different approach was taken by the Full Court of the Family Court in this case where the trial judge had followed *Dane & Kabrig* and found that Australia was not a clearly inappropriate forum to hear the divorce application. The Full Court distinguished *Dane & Kalbrig* as the wife in *Talwar* was living in India, intended to continue to live in India, would be detrimentally affected by a divorce occurring in Australia rather than India and complete relief (including dowry issues) was available in India, but not in Australia. The Full Court remitted the matter for re-hearing.

United Nations Convention on the Recovery Abroad of Maintenance (UNCRAM)

Australia acceded to this Convention on 12 February 1985. It aims to overcome the legal and practical difficulties involved in establishing claims for maintenance abroad where other reciprocal arrangements do not exist. It operates in Australia in relation to maintenance under the FLA through s 111 FLA and regs 40-56 *Family Law Regulations 1984* and there are also provisions in the *Child Support (Registration and Collection) Act* and Regulations.

The text of the Convention appears at Sch 3 *Family Law Regulations 1984*. The current active UNCRAM members are listed in Sch 4 *Family Law Regulations*.

A payee in an UNCRAM country can make an application to another UNCRAM country in which the liable parent resides for that country to establish a maintenance liability on their behalf. A few UNCRAM countries, not including Australia, will register an existing liability under UNCRAM but only where their domestic law allows. Wherever possible, Australia will use other arrangements in place with a reciprocating jurisdiction in preference to making applications under UNCRAM.

A payee may need to make an UNCRAM application if they are seeking maintenance from a payer in an UNCRAM country, but cannot do so under reciprocal arrangements (e.g. because the laws of the reciprocating jurisdiction do not allow that jurisdiction to recognise a child support assessment). A payee can prepare an UNCRAM application for a liability to be created (Art 3) or for recognition of an existing child support assessment or court order (Art 5). The Registrar will transmit the application to the relevant country along with a copy of the child support assessment (or court order, if a child support assessment cannot be made).

A court in the receiving UNCRAM country (i.e. where the payer resides) will decide the level of maintenance payable under the relevant law in that jurisdiction (Art 6). It may take into account the information provided by the Registrar in making that decision.

Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

On 1 February 2002 Australia became a contracting state to this Convention. The other signatories are mainly European countries with which Australia previously had no reciprocal arrangement (and prior to the Hague Convention had to rely on applications to these countries being sent under UNCRAM).

This Convention applies to both spousal and child support obligations. It has the effect of establishing reciprocal agreements with other contracting states to recognize and enforce maintenance decisions made by judicial or administrative authorities in Convention countries.

It provides for recognition of administrative assessments (rather than just court orders or court registered agreements). It also provides for the relatively simple and speedy enforcement of existing Australian liabilities by overseas courts and administrative authorities. However, a contracting state will only recognize a decision of an administrative authority such as the Australian Registrar of Child Support if the laws of that state support that recognition.

It operates in Australia in relation to maintenance under the FLA through s 111A FLA.

***Sibley & Cassidy* [2015] FamCA 912**

The husband was an Australian, and the wife Canadian. There were Canadian proceedings related to child abduction under the Hague Convention, which resulted in an order for the wife to return the child to Australia. The Canadian Court also ordered the husband to pay child and spousal support, and made orders in relation to costs. The wife retained sole custody. There were earlier proceedings in the Family Court of Australia. In the proceedings at hand, the parties sought orders for property settlement pursuant to s 79.

Regulation 30(2) *Family Law Regulations* provides that enforcement proceedings for an overseas maintenance entry liability "may be taken as if the liability were an order made under Part VII or VIII of the Act". The FLA and its Regulations and Rules apply to the proceedings so far as they are applicable (reg 30(3)). The Court noted that s 66E FLA (providing that a child maintenance order not be made if an application for administrative assessment of child support could be made) did not apply to proceedings under Regulations made pursuant to s 111A (i.e. in relation to overseas maintenance). The Australian Child Support Agency had made an assessment providing for both the husband and the wife to pay an amount of child support to each other.

It was found that the orders sought by the husband, discharging all future and unpaid child support and spousal maintenance of both parties to nil, departing from the assessment and granting the wife an interest in the husband's superannuation, were just and equitable. It was just and equitable to take into account the Canadian orders (regarding child support, spousal maintenance, and costs) as well as the Australian child support assessment, in order to abide by "the provisions of the international child support and spouse maintenance legislation" (at [123]).

Agreement between Australia and New Zealand

The *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance* facilitates the collection of liabilities under maintenance orders and administrative assessments of child support. The Australian Child Support Registrar and New Zealand Inland Revenue Child Support can each collect child support liabilities assessed by the other authority.

The agreement limits the jurisdiction of each country. The country where the payee is habitually resident issues and administers the assessment, and the country where the payer resides is responsible for collection. The agreement provides that a child support assessment made in one country will end from the day before the date that country receives written notice that the payee is habitually resident in the other country. The notice can be from the payer, payee or the other Contracting State.

The full text of the agreement is at Sch 1 *Child Support (Registration & Collection) Regulations 2018*.

Agreement between Australia and United States of America

The *Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (Support) Obligations* came into force on 12 December 2002. The Agreement:

- deals with the enforcement of court orders and administrative assessments;
- provides for a liability to be created in and varied in the country in which the payee is resident except where the payer has had no or little connection with Australia. Where a USA liability is registered in Australia and the payee still lives in the state of the USA where the liability was initiated, that state will claim continuing jurisdiction over the liability. Therefore the USA cannot recognise a variation by an Australian court of the liability, despite it being available to the liable parent in Australia and recognised in Australia;
- obliges each country to assist in locating payers, serving notices and providing advice;
- provides for the protection of privacy and for information sharing.

For Australia, the agreement applies in Australia, Norfolk Island and the territories of Christmas and Cocos (Keeling) Islands. For the USA, the agreement applies in the fifty states, American Samoa, the District of Columbia, Guam, Puerto Rico, the United States Virgin Islands and any other jurisdiction of the United States participating in Title IV-D of the Social Security Act.

Trans-Tasman Proceedings Act

The *Trans-Tasman Proceedings Act 2010* (Cth) ("TTPA") implements the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman court proceedings and regulating enforcement. It applies to:

- determining the jurisdiction of court cases;
- registration and enforcement of court judgments;
- procedural matters, such as issuing and serving subpoenas and giving evidence.

Proceedings under the FLA (save for contempt matters which may arguably be excluded) are covered. However, civil proceedings relating wholly or partially to an "excluded matter" are not covered. An "excluded matter" is defined in s 4 as:

(a) the dissolution of a marriage, or
(b) the enforcement of:
  (i) an obligation under Australian law to maintain a spouse or a de facto partner (within the meaning of the *Acts Interpretation Act 1901*), or
  (ii) an obligation under New Zealand law to maintain a spouse, a civil union partner (within the meaning of the *Civil Union Act 2004* of New Zealand) or a de facto partner (within the meaning of the *Property (Relationships) Act 1976* of New Zealand), or
(c) the enforcement of a child support obligation.

There are other exemptions which are not relevant to family law matters.

The test for an application to stay an Australian proceeding on forum grounds is in s 17(1) TTPA:

> A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in issue.

A stay of the Australian proceeding can be ordered by an Australian court on an application under s 17(1) if it is satisfied that a New Zealand court, in accordance with s 19(1):

(a) has jurisdiction to determine the matters in issue between the parties to the proceeding; and
(b) is the more appropriate court to determine those matters.

An unusual aspect is that the test for a stay of Australian proceedings is that New Zealand is "the more appropriate court" whereas the test for family law (and general law) matters in other countries

is that the Australian court is a "clearly inappropriate forum" (*Voth v Manildra Flow Mills Pty Ltd* (1990) 171 CLR 538).

The matters to be considered by the Australian court in determining whether a New Zealand court is the more appropriate court under s 19(1)(b) are listed in s 19(2):

(a) the places of residence of the parties or, if a party is not an individual, its principal place of business;
(b) the places of residence of the witnesses likely to be called in the proceeding;
(c) the place where the subject matter of the proceeding is situated;
(d) any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be commenced (other than an exclusive choice of court agreement to which s 20(1) applies);
(e) the law that it would be most appropriate to apply in the proceeding;
(f) whether a related or similar proceeding has been commenced against the defendant or another person in a court in New Zealand;
(g) the financial circumstances of the parties, so far as the Australian court is aware of them;
(h) any matter that is prescribed by the regulations;
(i) any other matter that the Australian court considers relevant;

and must not take into account the fact that the proceeding was commenced in Australia.

Nevill & Nevill

The trial judge in *Nevill & Nevill* [2015] FamCA 876 (which was upheld in *Nevill & Nevill* [2016] FamCAFC 41; (2016) FLC ¶93-694) referred to the decision of Brereton J in *Re Featherston Resources Limited, Tetley v Weston* [2014] NSWSC 1139. Justice Brereton considered the relevant provisions of the Trans-Tasman Act in the context of the *Corporations Act 2001* (Cth). Justice Brereton noted (at p [51]) that, whilst the power conferred by s 17 is discretionary, "it would be an exceptional case, if there is one at all, in which being satisfied that the New Zealand court had jurisdiction and was the more appropriate one, the Court would not stay the Australian proceedings". Justice Kent agreed with this statement. Justice Brereton pointed out that the test directed attention to the more "appropriate", not the more "convenient", court. Whilst convenience was an important consideration, it was not determinative. The factors which "loomed large" for the trial judge were (at [62]):

(i) The parties are both New Zealand nationals and they lived for the greater part of their married life in New Zealand, having commenced cohabitation there in January 2003 and marrying there in January 2005. Conversely, the marriage relationship (prior to final separation) only subsisted for some six months after the parties came to Australia in January 2013;
(ii) The parties accumulated their existing property or the property interests of either of them predominately [sic] whilst they pursued their married life together in New Zealand;
(iii) The property of the parties or either of them is substantially situated in New Zealand. There are obviously substantial property interests involved;
(iv) The wife's trust, which predominately [sic][owns or controls the vast majority of what may be conveniently described as the wife's assets (including the real property that

was the parties' former matrimonial home in City F) is a New Zealand trust with a corporate trustee which is New Zealand based;

(v) The husband's trust, which overwhelmingly in terms of value owns or controls the vast majority of property interests which are the focus of these proceedings, is a New Zealand trust with New Zealand trustees including both an individual resident in New Zealand and a corporate trustee;

(vi) Neither party has acquired any asset of any significance in Australia beyond personal items;

(vii) All, or predominately [sic] all, events referred to by either party in their respective evidence to date (accepting that to be preliminary) as to the acquisition or improvement of property or property interests (and historical real property transactions during the course of the marriage) occurred in New Zealand, and some of these are seemingly in dispute.

The trial judge (at [73]-[76]) made an order permanently staying the Australian proceedings having concluded:

> The subject matter of these proceedings is property overwhelmingly situated in New Zealand.
>
> There are potential aspects relating to the trust law of New Zealand, in particular as regards the husband's trust and his pursuit of proceedings for the declaratory relief in relation to the husband's trust that potentially have a connection with property settlement proceedings.
>
> The parties' marriage subsisted for most of its duration in New Zealand and overwhelmingly in New Zealand as compared with Australia. In my judgment the nature and subject matter of the issues in dispute between the parties and the inter-relationship between those issues and New Zealand, render the Family Court in New Zealand (or the High Court if the proceedings are transferred there) the more appropriate court within the meaning of the Act.
>
> The discretion under s 17(1) of the Act thus enlivened, there is no reason not to conclude, in circumstances where a New Zealand court has jurisdiction and appears to be the more appropriate court to determine the matters in issue between the parties, that these proceedings ought be stayed".

Foreign Judgments Act 1991 **(Cth)**

The *Foreign Judgments Act 1991* (Cth) does not apply to "a matrimonial cause or proceedings in connection with matrimonial matters" (s 3), but de facto financial causes appear to be enforceable under that Act.

Service

There are 4 options for service overseas:

1. Australia is a party to *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965*. Service procedures are set out in Regulations 21AC-21AN *Family Law Regulations 1984.*

2. Service in New Zealand is covered by r 26A.03, *Family Law Rules 2004* which implements the Trans-Tasman Act procedures.

3. Part 7.6 of the *Family Law Rules 2004* deals with service in non-convention countries. If the country to be served is party to a Convention with Australia other than the Hague Service Convention, refer to Regulations 21AO to 21AS *Family Law Regulations 1984.*

4. The *Federal Circuit Court Rules 2001* do not provide for service overseas, but adopts the relevant rules from Div 10.4 *Federal Court Rules 2011* (see Div 10.4 to Div 10-.6 and Div 34.4).

Information about the Hague Service Convention, including a link to the full list of countries which are signatories to the Convention and their status, is on the Attorney-General Department's website https://www.ag.gov.au/InternationalRelations/PrivateInternationalLaw/Pages/ServingaLegalDocumentAcrossInternationalBorders.aspx. This website and the links should be checked, not only to ascertain whether the country where service is to occur is covered, but there may be other specific requirements, such as the manner of service and whether a translator is required.

Service of a document on a person in a non-convention country may be made:

(a) in accordance with the law of the non-convention country, or
(b) if the non-convention country permits service of judicial documents through the diplomatic channel (r 7.19(1)).

A person seeking to serve a document on a person in a non-convention country through Diplomatic channels must:

(a) ask the Registry Manager in writing to arrange service
(b) translate each document, if necessary, into an official language of that country, and
(c) lodge with the court two copies of each document to be served (r 7.19(2)).

The documents to be served are sealed and sent by the Registry Manager to the Secretary of the Department of Foreign Affairs & Trade with a written request (prepared by the court) that the documents be sent to the government of the non-convention country for service (r 7.19(2)).

Service in a non-convention country can be proven by an official certificate or declaration sent to the court by the government or court of the non-convention country, stating that the document has been personally served, or served in another way under that law of the country (r 7.20(1)(a)). The certificate or declaration once filed has effect as if it were an affidavit of service (r 7.20(2)).

Service by a private process server may be possible if permitted by the foreign country.

Bilateral treaties, except for those within Korea and Thailand, were established as an extension of the *Convention between the United Kingdom & Germany regarding Legal Proceedings in Civil & Commercial Matters* (by virtue of Australia's membership of the Commonwealth). In most cases the bilateral treaties have been largely overtaken by the 1965 Hague Convention. Australia has separate treaties with Korea and Thailand covering service and the taking of evidence:

- Treaty or Judicial Assistance in civil and commercial matters between Australia and the Republic of Korea 1999

- Agreement on Judicial Assistance in civil and commercial matters and co-operating in Arbitration between Australia and the Kingdom of Thailand 1999

There is no separate legislation implementing these treaties. In relation to family law, the countries are covered by the phrase “Convention Countries” in the *Family Law Regulations*.

Service of initiating documents and subpoenas in New Zealand is covered by the *Trans-Tasman Proceedings Act 2010*. Service of initiating documents for “a civil proceeding commenced in an Australian Court” (s 8(i)(a)) are covered by Div 2 of the *Trans-Tasman Proceedings Act* 2010, subject to certain exclusions. A civil proceeding is defined in s 4.05 as “a proceeding that is not a criminal proceeding”.

Initiating documents which are covered by Div 2 “must be served in the same way that the document is required or permitted under the procedural rules of the Australian court or tribunal, to be served in the place of issue” (s 9). The note to s 9 expressly provides that the leave of the Australian court is not required. The initiating document must, however, be accompanied by information for the defendant that is prescribed by the *Trans-Tasman Proceedings Regulations 2012* (s 11). Form 1 is contained in Sch 1 to the Regulations.

Service of subpoenas in New Zealand in relation to a proceeding in an Australian court cannot be done without the leave of the Australian court (s 31(1)). In determining whether to grant leave, the court must take into account:

(a) the significance of the evidence to be given, or the document or thing to be produced, by the person named; and
(b) whether the evidence, document or thing could be obtained by other means without significantly greater expense, and with less inconvenience to the person named.

In giving leave, the court may impose conditions, and must impose a condition that the subpoena cannot be served after a specified day (s 31(4)). The person to be served cannot be less than 18 years old (s 31(5)).

The subpoena must be served in New Zealand in accordance with the relevant procedural rules of the Australian court and any directions given by the Australian court that gave leave for the subpoena to be served (r 32(1)). The subpoena must be accompanied by the form prescribed under the *Trans-Tasman Regulations 2012*, which is Form 4 in Sch 1 (s 32(2)).

Allowances and travelling expenses sufficient to meet the reasonable expenses of compliance must be paid at the time of service of the subpoena or some other reasonable time before the person named is required to comply with it (s 33). Importantly, if production of documents or things is required rather than the attendance of a person, the document or thing can be produced at any

registry of the High Court of New Zealand not later than 10 days before the date specified in the subpoena as the date required for production.

Division 10.6 *Federal Court Rules 2011* which deals with service under The Hague Convention, applies to proceedings in the Federal Circuit Court.

Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970

Information about this Convention and the steps to be followed is at:

https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

See also *Family Law Regulations*, regs 53 and 54.

Foreign Evidence Act 1994

Part 2 sets out procedures for the examination of witnesses abroad for proceedings in some Australian courts.

A party can apply to a superior court (including the Family Court and the Federal Court) in Australia for an order that a person outside Australia be examined outside Australia (s 7(1)(a)), a commission be issued for such examination (s 7(1)(b)), or a letter of request be issued to the foreign judicial authorities to take evidence from that person or cause it to be taken (s 7(1)(c)). In determining whether or not to make the order, the court will consider (s 2(2)):

(a) whether the person is willing or able to come to Australia to give evidence in the proceeding;
(b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;
(c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.

The court may make directions and requests relating to the procedure to be followed for the examination (s 8). Evidence taken at an examination abroad is then admissible in the Australian superior court (s 9), as long as the court remains satisfied that at the time of the hearing that the person is not in Australia or unable to attend the hearing (s 9(a)) and that the evidence would have been admissible if adduced at the time of the hearing (s 9(b)). Part 6 of the Act relates to proceedings in Australian courts for the taking of evidence for use in proceedings in a foreign court. For child support and family law Federal Circuit Court proceedings, the Family Court can exercise its powers on the application of a party to Federal Circuit Court proceedings (s 9A(1)).

Convention on the Law Applicable to Trusts and on their Recognition (Trusts Convention)

Australia ratified the Trusts Convention on 17 October 1991, and it entered into force on 1 January 1992. There are only 14 contracting parties, including Canada, China, the UK, and the USA.

***Teo & Guan* [2015] FamCAFC 94**

The husband submitted that the Family Court of Western Australia was required to recognise a Deed of Family Arrangement, setting out declarations of trust under Singaporean law to the effect that the 5 parties (the husband, wife and their children) to the Deed share the assets equally. The husband argued this was pursuant to the Trusts Convention. However, this argument failed as the FLA "confers power to set aside a 'disposition', which is defined by s 106B(5) to include the creation of an interest in a trust".

***Nevill & Nevill* [2016] FamCAFC 41; (2016) FLC 93-694**

The Full Court upheld the permanent stay of the property settlement proceedings because New Zealand law was the most appropriate law to apply. The Full Court quoted (at 39) the trial judge who referred both counsel to the "*Trusts (Hague Convention) Act 1991 (Cth)* under which Australia has adopted the articles of that convention ... [as] part of our domestic law ... within those articles is how one determines the proper law of a trust in a case that arises" resulting in the (correct) concession by both counsel that the law of New Zealand governed the trusts".

Possible reforms/changes

The Australian Attorney-General's Department is taking part in the Hague Conference Judgments Project. A draft Convention was produced in May 2018 to establish uniform rules for the recognition and enforcement of foreign judgments in civil and commercial matters. It will exclude most, if not all, family law matters.

Conclusion

This has been an overview of the international treaties affecting family law, some of the Australian legislation and case law. However, facts will vary and assistance from lawyers in overseas jurisdictions will often be required.

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