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INTERNATIONAL AND EUROPEAN DEVELOPMENTS IN FAMILY LAW 2013

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Résumé

Ce chapitre fait une revue de certains récents développements en droit de la famille dans le contexte du droit international et du droit de l'Union européenne. Les thèmes abordés incluent l'enlèvement international (en particulier la défense de risque grave de danger en cas de retour de l'enfant, ainsi que l'usage de la médiation dans des cas d'application de la Convention de La Haye), l'influence de 'Rome III' et de 'Bruxelles II bis' sur le droit de la famille (particulièrement la reconnaissance et l'exécution des jugements en matière de divorce, de séparation et d'obligation alimentaire), la reconnaissance de plus en plus étendue du caractère exécutoire des ententes conjugales, ainsi que les changements, sur le plan international, en matière de mariage entre personnes de même sexe. Finalement, il sera fait état de quelques récents développements dans la jurisprudence de la Cour européenne des droits de l'homme.

I CHILD ABDUCTION LAW – BEST INTERESTS OF THE CHILD AND THE ART 13(B) DEFENCE

In the context of an international dispute concerning alleged child abduction, the oft-unavoidable interaction of co-existing international agreements can give rise to interpretive challenges for the courts. One such instance arose in the 2010 ruling of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Neulinger and Shuruk v Switzerland*,¹ in respect of the interaction between the UN Convention on the Rights of the Child (UNCRC) and the Hague Convention on the Civil Aspects of Child Abduction ('the Hague Convention'). In particular, the ruling of the court raised questions as to the tests to be applied in respect of the protection of children and how to assess what is in the best interests of the child in such a dispute. The decision by the Grand Chamber to refuse to force the return of the child to his country of origin certainly had the potential to impact significantly upon the principles and objectives of the Hague Convention and represented a departure from the underlying principle of the Hague Convention that disputes over children are best resolved in the child's country of habitual residence. The disquiet arising

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¹ *Neulinger and Shuruk v Switzerland* [2010] ECHR 1053.

from the position adopted by the Grand Chamber was fortunately addressed head-on by the United Kingdom Supreme Court (UKSC) in *Re E (Children)*,² which welcomed the opportunity to provide guidance to judges and practitioners in the United Kingdom, given the inevitability of the need to address the interrelationship of these two international instruments.

In an attempt to elevate the importance of the impact of an order to return the child on the mother, and consequently upon the child, it was argued in support of the position of the applicant mother in *Neulinger* that, whilst the preamble to the Hague Convention states that ‘the interests of children are of paramount importance in matters relating to their custody’³ this does not go as far as the unequivocal statement of the UNCRC that the child’s welfare is ‘a primary consideration’. However, this effort to distinguish the two instruments and suggest a stronger protection of the interests and thus welfare of children under the UNCRC was rejected by the Supreme Court in *Re (Children)* which noted that whilst ‘the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, [this] does not mean that it is not at the forefront of the whole exercise’.⁴ Although the articles of the Hague Convention might not expressly identify the best interests of the child as a governing principle, the preamble notes the universal desire on the part of all signatories to protect children, and the communal view amongst signatories that ‘the interests of children are of paramount importance’.⁵

(a) Invoking the Art 13(b) defence to defeat an order for the return of a child

Article 13(b) of the Hague Convention provides that the judicial or administrative authority of the requested state is not bound to order the return of the child if the person who opposes the return can establish that ‘there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’. The scope of this defence and the correct test to be applied has received significant attention in a number of recent high profile cases.

² *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144; [2011] Fam Law 919.

³ Article 3. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3, available at: www.unhcr.org/refworld/docid/3ae6b38f0.html (accessed June 2013).

⁴ Above n 2 at para 14.

⁵ *Ibid.* Stressing that the aim of the 1980 Hague Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted, the UK Supreme Court added that the Convention *also* aims to serve the best interests of the individual child. It quotes directly from the preamble to the Convention which declares that the signatory states are: ‘Firmly convinced that the interests of children are of paramount importance in matters relating to custody [and are] . . . Desiring to protect children internationally from the harmful effects of their wrongful removal or retention.’ Certainly the UKSC confidently asserts that nowhere in the Convention is it stated that this objective is to serve the best interests of the adult person, or other person/body whose custody rights have been infringed.

Much concern arose following the 2010 ruling of the Grand Chamber in *Neulinger* and the perceived lowering of the threshold for a successful Art 13(b) defence. The case concerned the removal of an Israeli boy from Israel by his mother, a Swiss national. Subsequent to their divorce in 2005, and following an application by the father, the Tel Aviv Family Court had confirmed that the child was habitually resident in Tel Aviv and that the parents had joint guardianship. As a result it found that the child's removal from Israel without the father's consent was wrongful within the meaning of Art 3 of the Hague Convention. Following his request for the return of the child, the mother invoked the Art 13(b) defence, claiming that to return the child to Israel would expose him to physical and psychological harm or otherwise place him in an intolerable situation. It was alleged on behalf of the applicants (mother and son) that, by ordering the return of the child to Israel, the Swiss Federal Court had breached their right to respect for their family life as guaranteed by Art 8 of the European Convention on Human Rights (ECHR). The Swiss Federal Court (Cantonal Court) had ordered the return of the child given that there was an absence of evidence that would objectively justify a refusal on the mother's part to return to Israel, thereby preventing her from invoking the Art 13(b) defence in respect of the alleged associated serious threats to the well-being of the child. The Swiss Court, with reference to Art 13(b), asserted that the defence is not even open to consideration 'unless the child's intellectual, physical, moral or social development is under serious threat'.⁶ A Chamber of the ECtHR delivered its judgment in January 2009, declaring the complaint under Art 8 admissible and by a majority of 4:3 found that there had been no violation of Art 8. However, this ruling was overturned by the Grand Chamber of the ECtHR on the basis that the order to return the child to Israel constituted an infringement of the right to respect for the private and family lives of the mother and child, as protected by Art 8 of the ECHR.

In terms of implementing the aims and objectives of the Hague Convention, one of the main concerns arising from the *Neulinger* judgment was the apparent shift away from the primacy of the expeditious return of the child to his or her country of origin.⁷ Given the perceived weight to be attached to Art 8 of the ECHR, the Grand Chamber asserted that a child's return 'cannot be ordered automatically or mechanically when the Hague Convention is applicable', notwithstanding the request from the domestic court. Rather, it identified an obligation on the part of the domestic court, prior to ordering the return of the child, to conduct 'an in-depth examination' to assess the best interests of the child in each individual case, such best interests being determined with reference to 'a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents

⁶ With reference to and reliance upon Judgment 5P.65/2002 of 11 April 2002.

⁷ Above n 1. In the course of the judgment of the Grand Chamber, at para 39, a communication from the Israeli Central Authority was cited which had emphasised to its Swiss counterpart the presumption under the Hague Convention that the child ought to be returned to his father, reminding the Swiss Central Authority that it 'must be remembered that this is a Hague Convention proceeding, and not a custody case'.

and his environment and experiences'.⁸ In carrying out this exercise, the Grand Chamber emphasised the importance of ensuring that the decision-making process of the domestic court was fair, which in the opinion of the Grand Chamber necessitated the provision of an opportunity for those concerned 'to present their case fully'.⁹ According to the Grand Chamber, this included the requested court being satisfied that the domestic court had 'conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person',¹⁰ in order to determine if the return of the child to his country of origin would be the best solution in the circumstances. This obvious departure from the priority of ensuring the speedy return of the child to the country of origin, regarded as the court best placed to determine the substantive dispute, would place a very heavy burden on the domestic court to conduct a thorough investigation at a very preliminary application stage and appeared to ignore the summary nature of Hague proceedings.

In order to properly assess this perceived shift in approach, it is important to contextualise the case, as it is perhaps distinguishable on its own facts, given that the boy was 2 when leaving Israel and it had been 5 years since he had so departed. Although the father contacted authorities in Tel Aviv in the same month as the child had been removed, it was a year before the child could be located and the following 4 years were taken up with a series of applications, judicial decisions and appeals, before the matter came before the Grand Chamber of the ECtHR. This lengthy period of time unavoidably meant that evidence was available as to the very settled life he now had in Switzerland and the extent to which an enforced return to Israel would negatively impact upon him, and in the circumstances the mother was in a position to demonstrate this very well. In the course of the judgment of the Grand Chamber, it is obvious that the established nature of the boy's life in Switzerland, and the significant passing of time greatly influenced the decision of the court:¹¹

'As regards Noam, the Court notes that he has Swiss nationality and that he arrived in the country in June 2005 at the age of two. He has been living there continuously ever since. In the applicant's submission he has settled well and in 2006 started attending a municipal secular day nursery and a State-approved private Jewish day nursery. He now goes to school in Switzerland and speaks French. Even though he is at an age where he still had a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial.'

As regards the contentious issue of the abducting parent benefiting from the act of wrongdoing and the delays typically encountered in the process, the

⁸ Above n 1 at paras 138–139.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Above n 1 at para 147.

Swiss Government in *Neulinger* relied upon the position previously adopted by the ECtHR in *Maumousseau and Washington v France*¹² when defending the orders made by the Federal Court:¹³

‘... the aim of the Hague Convention was to prevent the “abducting” parent from succeeding in legitimating, by the passage of time operating in his or her favour, a de facto situation which he or she had created unilaterally.’

Whilst the Grand Chamber did not comment directly on the benefits, if any, secured by the applicant mother given the significant passing of time before the preliminary matter was concluded, it was evidently influenced by the extent to which the child had settled in Switzerland and by what it perceived as the ‘serious consequences’ for the child if he was ‘uprooted again from his habitual environment’.¹⁴

Fears that the decision in *Neulinger* might signal a sea-change in the jurisprudence of the European Court of Human Rights and a lowering of the threshold when invoking the Art 13(b) defence were comprehensively addressed by the UK Supreme Court in *Re E (Children)*. Most helpfully the decision of the UK Supreme Court presents a welcome assessment of the interface between the tripartite of international conventions, namely the European Convention on Human Rights, the UN Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction.

In *Re E (Children)*, both parties accepted that the removal of the two children from Norway, their country of origin, was wrongful within the meaning of the Hague Convention. The children aged 4 and 7 were born in Norway to a Norwegian father and English mother and had lived there since birth. In September 2010 their mother brought them to England without the consent of their father. In accordance with the provisions of the Hague Convention, the father successfully requested the return of the two children through the Norwegian authorities. The matter was heard in the English/Welsh courts by Pauffley J at first instance. Having considered the arrangements and undertakings proposed by the father the judge rejected the mother’s argument that the risk to her mental health – in the context of alleged violence on the part of the father, she was diagnosed as suffering from an adjustment disorder that could deteriorate into self-harm and suicidality if she had to return to Norway¹⁵ – constituted a grave risk of psychological or physical harm to the children and concluded that it was ‘overwhelmingly’ in the best interests of the

¹² No 39388/05, ECHR 2007 XIII.

¹³ Above n 1 at para 119. In the earlier case of *Maumousseau and Washington v France*, above n 12, relied upon by the Swiss government in *Neulinger*, it was noted that the mother was in a position to accompany her child to the state in which he had his habitual residence in order to assert her rights there. The mother’s unrestricted access to that territory and her capacity to bring proceedings before the courts of that state was regarded as a decisive factor in ordering the return of the child.

¹⁴ Above n 1 at para 147.

¹⁵ Above n 2 at para 10.

children to be returned to Norway where the domestic court could determine the substantive issues relating to their welfare needs and future arrangements. The subsequent appeal by the mother was rejected; the Court of Appeal¹⁶ refused to accept that the decision in *Neulinger* should precipitate a change in the approach of domestic courts to the application of Art 13(b) and the interpretation of the ‘best interests of the child’.

At the Supreme Court hearing, the mother in *Re E (Children)* attempted, as in the lower court hearings, to rely upon the purportedly more generous approach to the scope of the Art 13(b) defence, evidenced in *Neulinger*. The Supreme Court was quick to note the limited capacity for a court to apply the Art 13(b) defence, noting that the circumstances awaiting the return of the child would need to be ‘so inimical to the interests of the particular child that it would also be contrary to the object of the [Hague] Convention to require it’, but equally noting that such narrow application does not prevent a literal interpretation. The court confirmed that a plain reading of the wording of Art 13(b), and in particular the ‘grave risk [of] . . . physical or psychological harm’ requirement, does not require further elaboration or gloss and thus there is no need for such an evidentiary burden to be ‘narrowly construed’. Rejecting the more restrictive views of the lower court, the Supreme Court accepted that what constitutes a ‘grave’ risk to the child *can* include exposure to the harmful effects of the abuse of a parent, irrespective of whether it is fact or a mere perception of abuse on the part of that parent:¹⁷

‘ . . . the words “physical or psychological harm” are not qualified. However, they do gain colour from the alternative “or otherwise” placed “in an intolerable situation” . . . Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent . . . the source of it is irrelevant: eg where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.’

However in considering the case before the court, the UKSC, whilst acknowledging the very real risk to the mother’s mental health if the children were returned to Norway and the detrimental impact of such suffering upon the children, it was satisfied that the ordering of protective measures would sufficiently minimise any risk of psychological harm to the children on their return to Norway.

Ultimately the UKSC noted the limitations of the court’s capacity to protect a child from the identified risk and/or to implement the necessary protective measures. Given the starting point presumption that the child should be returned to the country of origin, and the challenges faced by courts beyond

¹⁶ *E Children FC* [2011] EWCA Civ 361.

¹⁷ Above n 2 at para 34. Emphasis in the original.

ordering that protective measures are taken, the UKSC noted the usefulness of international cooperation between judges in these applications, and further the effectiveness of introducing international machinery to oversee the protective measures agreed. This idea was reiterated by the Special Commission on the practical operation of the Hague Convention when it considered the merits of a proposal for the establishment of a group of experts to develop principles and associated practice guides to assist in the cross-jurisdictional management of allegations of domestic violence in cases where an application has been made for the return of a child under the provisions of the Hague Convention.¹⁸ Concerns undoubtedly remain where the child is returned to the country of habitual residence on the basis that protective measures will be put in place, yet the capacity to supervise and/or enforce those protective measures effectively remains outside the remit or jurisdiction of the court ordering the return of the child. Clearly this can affect the existing and future welfare of the child and the current lack of cross-jurisdictional cooperative structures arguably provides support for the position asserted in *Neulinger*.

The ECtHR in *Maumousseau and Washington v France* had previously refused to find in favour of the mother who had taken the child to France for holidays but refused to return her to the United States afterwards. In the circumstances, it did not allow the Art 8 based arguments made by the mother to override the positive obligation arising from the Hague Convention of reuniting parents with their children, identifying the need to strike ‘a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order’.¹⁹ In ordering the return of the child to the United States, the ECtHR was clearly swayed by what it regarded as the ‘in-depth examination’ conducted by the French courts. With reference to this earlier decision, the Supreme Court in *Re E (Children)* highlighted the more detailed examinations being conducted by national courts in child abduction cases, referring, for example, to the ‘in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature’ as evidenced by the ECtHR in *Maumousseau*.²⁰ However, the UKSC critically noted that the manner in which this approach was endorsed by the Grand Chamber in *Neulinger* appeared to elevate what could be regarded as good practice in *Maumousseau* to a ‘legal requirement’, a development not supported by the UKSC. Conversely, it was of the view that doing so ‘gives the appearance of turning the swift, summary decision-making process which is envisaged by the Hague Convention into the full-blown examination of the child’s future in the requested state which it was the very object of the Hague Convention to avoid’.²¹ Whereas on the one hand the Hague Convention mandates a swift summary decision-making process, the

¹⁸ Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, 1–10 June 2011 available at www.hcch.net/upload/newsletter/nl2012tome18e_p02.pdf (accessed June 2013).

¹⁹ Above n 12 at para 62.

²⁰ Above n 2 at para 20, quoting from para 74 of the judgment in *Maumousseau*.

²¹ Ibid at para 22.

ECtHR in *Neulinger* envisaged an in-depth examination of the entire family situation and of a whole series of related factors (as mentioned above). This obligatory course of action on the part of the domestic court giving rise to a 'balanced and reasonable assessment of the respective interest of each person', was defended in the course of the *Neulinger* judgment as necessitated in order to ensure a fair decision-making process. However, the UKSC advocated the assessment of the best interests of the child on the basis of two key aspects, namely 'to be reunited with their parents as soon as possible, so that one does not gain unfair advantage over the other through the passage of time; and to be brought up in a 'sound environment' in which they are not at risk of any harm'. If correctly applied, the UKSC regarded it as 'most unlikely' that there would be any breach of Art 8 of the ECHR. Thus in striking this fair balance under the competing provisions of the Hague Convention, the rights under Art 8 and other relevant provisions of the ECHR should equally remain protected.

Difficulty has evidently arisen in the course of these judgments where the ECtHR was called on to determine disputes arising in Hague Convention cases. In this regard it was noted by Wallace and Janeczko that 'the ECtHR tends to accord national courts with a wide margin of appreciation in assessing the facts of the case'.²² It appears that in terms of the co-existence of these three Conventions and the interplay of the relevant provisions, the Supreme Court has now confirmed that the guarantees to respect family and private life under Art 8 must be interpreted and applied in light of both the Hague Convention and the UNCRC. It appears that so long as the court in receipt of the request to return the child does not accede to this request mechanically but rather 'examines the case in accordance with the Hague Convention' that decision is unlikely to violate the requirements of the ECHR. However equally, the UKSC was at pains to emphasise that Art 8 of the ECHR must not be regarded as trumping the Hague Convention. The independent importance of the provisions of the Hague Convention is evident from the extra-judicial comments made by the President of the ECtHR, and quoted favourably by the UKSC. With reference to the decision of the ECtHR in *Neulinger*, the President rejected any suggestion that the decision should be regarded as signalling a change in direction in the area of child abduction, emphasising that 'the logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interest and welfare, and it is only there that his situation should be reviewed in full'.²³ Thus it is apparent that the starting point is one of return but this is now subject to a more detailed scrutiny of the circumstances prior to ordering the return of the child.

²² R Wallace and F Janeczko 'E (Children) (FC): the UK Supreme Court Sets the Record Straight' [2012] IJFL 11–17 at 16.

²³ Paper given at the Franco-British-Irish Colloque on Family Law 14 May 2011, cited by Lady Hale and Lord Wilson, above n 2 at para 25.

(b) Mediation – 2012 Guide to Good Practice under the Hague Convention

Between 2011 and 2013 significant progress has been made in relation to the development of agreed guidelines for the promotion of mediation as a means of resolving cross-border disputes in international family law. In April 2006, the Permanent Bureau of the Hague Conference was mandated by its member states to ‘prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject’.²⁴ Following on from the existing Guides to Good Practice in respect of the workings of the Hague Convention on Civil Aspects of International Child Abduction,²⁵ the Feasibility Study on Cross-Border Mediation in Family Law Matters, which explored areas for consideration in the context of mediation and other methods of bringing about agreed solutions in international family law, was presented to the Council on General Affairs and Policy at the 2007 Conference. Upon receipt of comments from Hague Conference members on this feasibility study, the Permanent Bureau commenced work in 2009 on a Guide to Good Practice in Mediation, assisted by a group of invited independent experts from different contracting states. Following the publication and distribution of a number of draft guides, the revised version was circulated in early 2012 to members and contracting states for final consultation and the Guide to Good Practice under the Hague Convention on the Civil Aspects of International Child Abduction was published in 2012.²⁶

The aim of the Guide is expressly stated as follows:²⁷

‘The Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the Hague Convention’.

This emphasis upon the importance of mediation is regarded as a continuation of the position adopted in other modern Hague Conventions which have encouraged the amicable resolution of family law disputes and expressly mentioned the use of mediation, reconciliation and other alternative dispute resolution methods.²⁸ The Guide has been developed as a means of providing ‘assistance to State Parties to the 1980 Convention, but also to State Parties to

²⁴ Conclusions of the Special Commission of 3–5 April 2006 on General Affairs and Policy of the Conference, Recommendation No 3.

²⁵ Four Guides to Good Practice had previously been published; Part I – Central Authority Practice (2003); Part II – Implementing Measures (2003); Part III – Preventive measures (2005); Part IV – Enforcement (2010).

²⁶ See www.hcch.net/upload/guide28mediation_en.pdf (accessed June 2013).

²⁷ Ibid at p 12.

²⁸ Article 31(b) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; Art 31 of the Hague Convention of 13 January 2000 on the International Protection of Adults; and Arts 6(2)(d), 34(2)(i) of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance.

other Hague Conventions that promote the use of mediation, conciliation or similar means to facilitate agreed solutions in international family disputes'.²⁹

In emphasising the general importance of promoting inter parte agreements in cross-border family disputes over custody and contact, the Guide notes the increasing use of mediation and similar processes to facilitate the amicable resolution of disputes in family law in many countries, and more broadly, points to the increased number of states that now encourage more party autonomy in resolving disputes, whilst safeguarding the rights of third parties, especially children.³⁰ Given the ongoing need for parents to continue to maintain cooperative relations with each other irrespective of the terms of the arrangements made for the care and custody of the child, a dispute that is to some or all extent negotiated between them is a far more positive approach to resolution and much more likely to be adhered to in an amicable manner. The removal of a judicial dictate and the lessening of inter parte conflict lends itself to a more workable relationship between the parents, of undoubted benefit to the child at the centre of the dispute. Thus the Guide points to the communication facilitated between the parties, the structure that nonetheless incorporates flexibility and subjective arrangements, the possibility for early intervention, the avoidance of cumbersome legal proceedings and the associated cost-effectiveness brought about by mediation.³¹

Given the challenges and complexities of international family mediation, the Guide has emphasised the importance of mediators having relevant additional training.³² It points expressly to the difficulties in mediation arising from the 'interplay of two different legal systems different cultures and languages' and the importance of properly understanding and taking into account the impact in different jurisdictions of the legal effect of mediated agreements and the long-term consequences of the arrangements made. Thus given the involvement of more than one legal system, parties need to have access to the legal information relevant to these jurisdictions and a means of understanding the applicable international legal framework.³³ The Guide also addresses the issues of cost, access, scope and models of mediation, the importance of the involvement of the child and the possible involvement of third persons in the mediation process. In light of the nature of mediation and the manner in which the process and outcomes are effectively 'owned' by the parties involved, the Guide does not seek to place any particular onus on central authorities in developing the mediation processes in international child abduction disputes. However, with reference to Art 7 of the 1980 Convention which states that

²⁹ Above n 26 at p 12. The Guide declares itself to be addressed to governments and central authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.

³⁰ Ibid at p 21, para 31.

³¹ Ibid at pp 21–22.

³² Ibid. At section 3, paras 90–110, the Guide sets out the detail relating to the need for specialised training for mediation in international child abduction cases in order to safeguard the quality of the mediation provided.

³³ Ibid at p 30, paras 66–70.

central authorities 'shall take all appropriate measures . . . to secure the voluntary return of the child or to bring about an amicable resolution of the issues', s 9.2 expressly encourages central authorities 'to take a pro-active and hands-on approach in carrying out their respective functions in international access/contact cases'.³⁴ The Guide points to the 'considerable assistance' that central authorities can provide in arranging for interim contact between the left-behind parent and the abducted child. Additionally the Guide emphasises the important role that the central authorities can play in arranging the necessary protective measures.³⁵

In 2012 at the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Conventions (Part II),³⁶ mediation was identified as a key topic for further consideration, and its potential for broader use in family law was highlighted. The Permanent Bureau noted, notwithstanding the long history and work of the Hague Conference in the field of cross-border mediation, the 'significant practical challenges' identified by the discussion of the 2011 Special Commission (Part I) concerning the enforceability of mediated agreements which, given the multiplicity of issues they might cover, could cause practical challenges, arising especially in the context of the multiple jurisdictions necessarily involved. Additionally, notwithstanding the fact of an agreement, achieved through mediation, the recognition and enforcement of the terms of that agreement can themselves give rise to a 'lengthy, cumbersome and expensive' process.

However, the Permanent Bureau, whilst noting the reservations of a number of experts present at the April 2012 Commission relating to the possible impact of further work on mediation and its capacity to divert attention and resources away from the original purpose of the Hague Convention, namely the expeditious return of the child and the need to allow the 1996 Convention the opportunity to prove its effectiveness before deciding on a new binding instrument, has recommended the establishment of an exploratory expert group on mediated agreements. To progress the issue and establish an environment conducive to the creation and enforcement of mediated agreements, the 2012 Council mandated the Hague Conference to 'establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention', calling on this group to identify 'the nature and extent of the legal and practical problems, including jurisdictional issues' in this area.³⁷ The importance and value of a

³⁴ Ibid at p 72, para 260, with reference to the Conclusions and Recommendation of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

³⁵ Ibid.

³⁶ Held in The Hague on 25–31 January 2012.

³⁷ Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17–20 April 2012); recommendation no 37.

‘global instrument’ on mediated agreements was emphasised given the international context and the assistance such an instrument would provide.

The potential for a free-standing instrument on mediated agreements, a consideration of related alternative dispute mechanisms and the ongoing challenges relating to the recognition and enforcement of mediated agreements remain key issues for consideration, but it is apparent that mediation as an effective means of resolving international family disputes remains a priority in the context of the Hague Convention on International Child Abduction. Ultimately these developments are to be both welcomed and encouraged, it is commendable that there is a growing awareness of the practical difficulties that habitually arise and the capacity for mediation to develop more conciliatory and nuanced approaches to the resolution of these cases.

II EUROPEAN INFLUENCES ON FAMILY LAW – THE IMPACT OF ROME III

Rome III represents the most recent development in ongoing attempts by the law and policy-makers of the European Union to move towards a more harmonised system of family law in a European context. Whilst it remains generally accepted that the EU has no competence under the EC Treaty to enact legislation governing substantive national family law provisions, it does and has for some time exercised jurisdiction in respect of the enforcement of existing domestic orders. The importance placed upon cross-European judicial cooperation in civil law matters formed the basis of the Judicial Cooperation in Civil Matters (Treaty of Amsterdam) (1998) and this has created the gateway through which the general area of international family law has been introduced into the EC Treaty.³⁸

More broadly, the EU has had competence in respect of the recognition and enforcement of judgments since Brussels I, but given the traditional reluctance to impose regulations on member states in this area of social policy, Brussels I did not apply to judgments affecting matrimonial property, save in respect of maintenance orders. Subsequently, family law judgments were included within the remit and effect of Brussels II, and its successor Brussels II *bis*.³⁹ The general objective of the European Union to ‘create an area of freedom, security and justice, in which the free movement of persons is ensured’ mandated the

³⁸ A Fiorini ‘Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?’ (2008) 22 *IJLP&F* 178. Fiorini explains at 179, 180 the aims of the Vienna Action Plan of December 1998 as being ‘to make life simpler for European citizens by improving and simplifying the rules and procedures on cooperation and communication between authorities and on enforcing decisions, by promoting the compatibility of conflict of law rules and on jurisdiction and by eliminating obstacles to the good functioning of civil proceedings in a European judicial area’.

³⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000.

adoption of measures ‘in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market’⁴⁰ and this was extended to family law matters by Brussels II *bis* which concerns the issues of jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. However, whilst its provisions apply to the dissolution of matrimonial ties, it does not address issues such as the grounds for divorce, property consequences of the marriage or any other ancillary matters.⁴¹ Evidently European governance in this area has taken very small steps, avoiding the imposition of cross-member-state standards, preferring to create structures for the recognition and enforcement of those orders determined exclusively by domestic legal systems. Additionally the provisions of Brussels II *bis* do not apply to maintenance arrangements,⁴² as they were (then) separately covered by Council Regulation 44/2001. The most recent developments have seen the maintenance element of Brussels I being replaced by the Maintenance Regulation, Council Regulation 4/2009⁴³ which has had direct effect on all member states since 18 June 2011 and Brussels II *bis*, insofar as it relates to family law judgments, being replaced in those member states opting in, by Rome III.⁴⁴

Rome III was initially drafted with a view to addressing the shortcomings of Brussels II *bis* namely, to tackle the difficult issue of where to best file proceedings upon marital breakdown. Whilst the rules are relatively well settled in respect of the recognition and enforcement of family law judgments, there remained an ongoing lack of clarity as to uniform choice of law rules. The European Commission cited the growing mobility of citizens within the EU, and thus the increasing number of international couples, together with the high divorce rates as the general context within which the Proposal for the amendment of Brussels II *bis* was made.⁴⁵ What is most obvious from the proposals which grounded Rome III is the desire on the part of European law-makers to create a system of rules on applicable law, which had been absent from Brussels I,⁴⁶ Brussels II and Brussels II *bis*.⁴⁷ Thus at proposal stage, the

⁴⁰ Ibid, recital 1.

⁴¹ Ibid, recital 8.

⁴² Ibid, recital 11 – Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

⁴³ [2008] OJ L7/1.

⁴⁴ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

⁴⁵ Proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (17/7/2006 COM (2006) 399 Final).

⁴⁶ The first Community instrument in the area of family law, Council Regulation (EC) No 1347/2000 set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not include rules on applicable law.

⁴⁷ Neither Brussels II nor Brussels II *bis* addressed the issue of applicable law, carrying over for the most part, the provisions on matrimonial matters from Brussels I. Brussels II *bis* did allow

primary objectives of Rome III were stated by the Commission as being ‘to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court’.⁴⁸ Consequently, Rome III, reflects the international trend favouring private ordering and the development of regimes which facilitate the exercise of private autonomy by couples in the context of relationship breakdown, and sought to create a body of rules on the law applicable on separation or divorce, either based on the agreed election by the parties or with reference to a hierarchy of rules to determine the applicable law. Thus whilst falling well short of creating or harmonising the laws of member states, it does seek to impose a structure for the law to be applied in each instance. However, in light of the failure by all member states to agree to the introduction of Rome III and its necessary introduction by way of enhanced cooperation, Brussels II *bis* continues to act as a key regulatory measure, and remains the governing EU cooperation and recognition mechanism for the 12 EU member states not signatories to the Rome III Regulation.⁴⁹

(a) Shortcomings of Brussels II *bis*

Article 3 of the Brussels II *bis* addresses the jurisdiction of the courts of the member states but in so doing does not create any hierarchy of rules or principles. This is what is regarded as one of the key weaknesses of the structures imposed by Brussels II *bis*, the priority accorded to the laws of the jurisdiction where proceedings are first issued and ultimately was one of the key motivators in drafting Rome III. Thus in matters relating to divorce, legal separation or marriage annulment, Art 3 provides that jurisdiction shall lie with the courts of the member state in whose territory one of the seven, identified grounds can be proven.⁵⁰

Brussels II *bis* identifies seven possible, unranked grounds on the basis of which jurisdiction can be asserted, the extensive scope of which permits the legitimate

spouses to choose between alternative grounds of jurisdiction. Once proceedings issued, the decision regarding the applicable law is determined by the court with seising of those proceedings based upon the national conflict of law rules of that state, and unhelpfully varying approaches to this issue co-existed in member states.

⁴⁸ Above n 38 at 180, 181, quoting from para 5 of the proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules applicable law in matrimonial matters, SEC (2006) 949, 23.

⁴⁹ The 12 member states not party to the enhanced cooperation procedure are; Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Poland, Slovakia, Sweden and the United Kingdom.

⁵⁰ Article 3(1)(a)–(b). Further, Art 5 of the Regulation provides that without prejudice to these provisions, a court of a member state that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that member state so provides.

issuing of proceedings in a number of member states.⁵¹ The lack of hierarchy amongst these stated grounds accords the power to choose the jurisdiction to one or other of the parties and fails to impose any principle-based identification of appropriate jurisdiction. The obvious consequence of this approach is to encourage a party to issue proceedings without delay in order to lay claim upon the jurisdiction whose rules promote the most favourable outcome for that party. From a policy viewpoint this has a very negative impact upon the possibility of a more conciliatory approach through inter parte negotiations or mediation, arising from an entirely reasonable fear of being 'beaten' to the choice of jurisdiction. Very obviously this can give rise to a number of problems, namely: an underlying lack of certainty and predictability inherent in the process, an associated incentive for parties to rush to litigation and shun more conciliatory approaches as well as a real possibility of outcomes that do not reflect the original and legitimate expectations of the parties to the marriage.⁵²

Additionally Brussels II *bis* removed the safeguard of the capacity to invoke the principle forum non conveniens by the courts which had permitted the staying of proceedings, premised upon the notion that a jurisdiction other than place of issue might be better suited to hear the suit, the fact and identity of that better placed jurisdiction to be determined by the court.⁵³ However the retention of the lex fori principle, which requires the application of the laws of the jurisdiction where proceedings have issued, merely serves to strengthen the capacity and practice for forum shopping, crudely imposing without question the laws of the jurisdiction first seised of the action. The associated obligation on the court second seised of proceedings relating to divorce, legal separation or marriage annulment, to stay its proceedings until such time as the jurisdiction of the court first seised is established strongly favours the rights of the person who has filed first and engenders a practice of 'race to issue', in order for one party to successfully claim a favourable jurisdiction.⁵⁴

⁵¹ Under Art 3 proceedings could legitimately issue in the member state where:

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident, or
- in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she is resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there.'

⁵² See further the original Commission proposal to amend Brussels II, above n 45 at pp 3–4.

⁵³ The European Court of Justice confirmed the removal of the doctrine of forum non conveniens as a valid basis for refusing to hear proceedings in C-281/02 – *Owusu v NB Jackson and Others* [2005] ECR I-1383. The overriding aims of the EU appear to have been the creation of harmonised jurisdictional rules across the EU and to eliminate the discretion previously exercisable by individual courts.

⁵⁴ Article 19 of Brussels II *bis*. Once the jurisdiction of the court first seised is established the court second seised is obliged under Art 19(3) to decline jurisdiction in favour of that court.

(b) Rome III – Council Regulation 1259/2010 implementing enhanced cooperation in the area of law applicable to divorce and legal separation

Following the grant of authorisation by the Council for the implementation of the Council Regulation in the area of the law applicable to divorce and legal separation through the enhanced cooperation process,⁵⁵ Council Regulation 1259/2010 was published. Although multifaceted, the essence of the Regulation was the creation of uniform rules on the law applicable to divorce and legal separation, regulating the manner in which parties can agree to collectively elect the applicable law⁵⁶ or, in the absence of such agreement, the creation of a hierarchy of rules which will dictate the applicable law.⁵⁷

Article 5 outlines the manner in which the spouses can collectively elect the law to apply to the determination of their separation or divorce. Spouses can agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- ‘(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
- (d) the law of the forum.’⁵⁸

⁵⁵ An added interesting dimension to these attempts to develop some element of EU-wide governance in family law is the manner in which the provisions of Rome III have been introduced. Given the lack of consensus between member states and the fact that only 14 member states have agreed to be bound by these provisions, the enactment of these provisions in the form of a Council Regulation has required reliance upon the enhanced cooperation mechanism. This process allows a minimum of nine EU member states to establish advanced integration or cooperation in an area within EU structures where not all member states are in agreement.

⁵⁶ Above n 44.

⁵⁷ Ibid, Art 8. Following the publication by the Commission in 2006 of the proposed Regulation, the lack of unanimity on the proposal was confirmed by the Council in 2008. In order to be able to progress the proposal further the 15 jurisdictions in support of the proposal sought to establish an enhanced cooperation between them with a view to creating provisions binding upon participating member states. This process of enhanced cooperation in the area of applicable law on divorce and legal separation received Council approval in July 2010, leading to the publication of the Council Regulation (Rome III) in December 2010, with effect in the acceding member states since June 2012. The 15 participating states were identified in recital 6 of Council Regulation 1259/2010 as Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia; Greece withdrew its support in March 2010. Lithuania subsequently joined the enhanced cooperation process, its participation was approved by the Council in November 2012, and the laws will have effect in Lithuania from May 2014.

⁵⁸ If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum – Art 5(3). Without prejudice to this provision, an agreement designating the applicable law can be concluded and modified at any time, but no later than the time the court is seised – Art 5(2).

Article 8 provides a co-existing structure to govern circumstances where the parties have not or cannot agree to the applicable law to govern their divorce or legal separation. In the absence of a choice of applicable law under Art 5 of the Regulation, the divorce or legal separation will be subject to the law of the state:

- ‘(a) where the spouses are habitually resident at the time the court is seized; or, failing that
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or failing that
- (c) of which both spouses are nationals at the time the court is seized; or failing that
- (d) where the court is seized.’

Certainly, the legislative policy behind the enactment of Rome III is more evident than that underlying the previous Brussels regulations, given its development of a predictable and considered system of applicable law and the creation in the abstract, of a system of governance in the context of cross-jurisdictional disputes. However, shortcomings remain, most especially in respect of the common law/civil law divide which it amplifies, the perception being that the EU is both driven and dominated by civil law European jurisdictions. Whilst it is not a novel matter for civil law countries to apply the law of a country where parties to a dispute have a particular connection, common law jurisdictions are very opposed to the notion of determining a dispute with reference to the laws of another jurisdiction, placing the aims of Rome III quite beyond the comfort zone of those presiding in common law jurisdictions. Interestingly however, the decision of the UK Supreme Court in *Radmacher v Granatino*⁵⁹ untypically saw the marked influence of the laws of Germany in the determination of the divorce hearing and the effective implementation of the prenuptial agreement between the parties. It demonstrated a significant willingness to look to the substantive provisions of another jurisdiction and a notable shift away from the absolute application of the principle of *lex fori* and arguably represents a tentative approval of applicable law choices.

Of course from a practice viewpoint, a key challenge arising from the provisions of Rome III is the capacity of a domestic court to correctly understand and apply the laws of another member state. This challenge is further compounded by Art 4 which provides that the law designated by virtue of the application of the provisions of Rome III shall apply, whether or not it is the law of a participating state. This universal application provision makes it possible that in appropriate circumstances the law of any international jurisdiction might apply. Given the reliance in family law proceedings upon perceived values of fairness, equality and equity, as well as the influences of domestic cultures and social policies, significant challenges exist in relation to

⁵⁹ *Radmacher v Granatino* [2011] AC 534.

interpretations and understanding. Whilst this predetermination of the rules of applicable law creates certainty as well as principle-based resolution where inter parte agreement cannot be reached, the outcomes of a case decided in a country applying its own laws as distinct from the outcomes in another country applying those same rules can differ dramatically. It is certainly arguable that a more effective approach, giving rise to a greater purity of application, would be to give the parties the capacity to elect the applicable jurisdiction and then apply the *lex fori*. Such an arrangement would allow the parties to elect the applicable law, which in turn would be applied by informed and experienced judges. These perceived shortcomings are only added to by the fact that 12 EU member states remain outside the provisions of Rome III, and thus continue to be governed by the structures and rules of Brussels II *bis*. The impact of this fragmented approach to governance is difficult to predict but seems far from the outcome originally anticipated by those seeking to harmonise the recognition and enforcement of domestic orders within member states.

(c) Maintenance – Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

Commonly known as the Maintenance Regulation, Council Regulation 4/2009 addresses issues of maintenance in a cross-border context and is directly applicable in all EU member states from 18 June 2011. In essence the aim of the Maintenance Regulation is to provide a set of common rules relating to jurisdiction, applicable law, recognition, enforcement, cooperation and standardised documents to facilitate the effective recovery of maintenance within the European Union. The Regulation forms part of a concerted effort in relation to civil law matters generally, but also within family law to develop insofar as is possible, a suite of legislative enactments to further bring about mutuality of recognition and enforcement of orders, and reflects the shift towards agreeing rules on applicable laws.⁶⁰ The Maintenance Regulation is a dedicated family law measure and replaces the related provisions of Brussels I,

⁶⁰ Recital 3 recognises the multiple EU enactments that seek to collectively address these long-standing issues in order to better achieve the aims of cross-border freedom and a better functioning of the internal market. In this respect, the Community has among other measures already adopted Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

which covered civil litigation more broadly. Although the Regulation certainly covers the traditional concept of maintenance, ie inter spousal or parent-child financial support through lump sum or periodical payments, it also has the potential to apply to transfers of property where the aim of such a transfer is to provide for the needs, including accommodation needs of the spouse and/or child(ren).⁶¹ The scope of what is covered by the Regulations is also not certain, recital 11 requires that the term ‘maintenance obligation’ be interpreted autonomously, and the ruling of the ECJ in *Van den Boogard v Laumen*⁶² demonstrates the latitude likely to be given to the concept of maintenance. In that decision, the ECJ confirmed that where ‘provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance’.⁶³ It further confirmed that the classification of the provision ordered as maintenance is not affected by whether payment is provided for in the form of a lump sum or periodical payments. A lump sum payment remained within the remit of Brussels I (in this case) given that the capital sum was designed to ensure a predetermined level of income.⁶⁴

In 1999, the European Council invited the Council and the Commission to establish special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, inter alia, maintenance claims. Additionally it also sought the abolition of the existing intermediate measures required for the recognition and enforcement in the requested state of a decision given in another member state, particularly a decision relating to a maintenance claim.⁶⁵ In November 2004, the European Council adopted a new programme entitled ‘The Hague Programme: strengthening freedom, security and justice in the European Union’ and in 2005, the Council adopted an action plan to implement the Hague Programme including specific reference to the need for proposals concerning maintenance obligations. The important issue of jurisdiction is governed by Arts 3 and 4; Art 4 permits the parties to agree to elect the jurisdiction to govern the issue of maintenance providing that they do so in writing, choosing from one of the options identified in Art 4:⁶⁶

⁶¹ The Regulation does not define ‘maintenance obligations’, stating only that the scope of the Regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity; see recital 11 and Art 1 of the Regulation.

⁶² (1997) ECR I-1147.

⁶³ Ibid at para 22. Conversely the court noted that ‘where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship’ and therefore be enforceable as a maintenance payment (under Brussels I in that case).

⁶⁴ Ibid at para 23. Consequently, it was concluded by the ECJ in *Van den Boogard v Laumen*, above n 62, at para 27 that ‘a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse’s maintenance’.

⁶⁵ Recitals 4–5; Council Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

⁶⁶ Ibid. Furthermore Art 4 provides that the conditions relied upon to agree jurisdiction must

- ‘(a) a court or the courts of a Member State in which one of the parties is habitually resident;
- (b) a court or the courts of a Member State of which one of the parties has the nationality;
- (c) in the case of maintenance obligations between spouses or former spouses:
 - (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or
 - (ii) a court or the courts of the Member State which was the Member State of the spouses’ last common habitual residence for a period of at least one year.’

Notably, although Art 4 permits the parties to agree to elect the jurisdiction to govern the issue of maintenance, Art 3 provides that in the absence of such agreement a member state will have valid jurisdiction to make a maintenance order where:

- ‘(a) the defendant is habitually resident there, or
- (b) the creditor is habitually resident there, or
- (c) according to its own laws, the court has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- (d) according to its own laws, the court has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.’

Importantly, Art 4(3) expressly excludes the right of the parties to elect jurisdiction from applying in disputes concerning child maintenance.

Given that one of the primary aims of the Regulation is to ensure that a maintenance creditor can easily obtain in a member state a decision which will be automatically enforceable in another member state without further formalities,⁶⁷ the Maintenance Regulation includes measures relating to jurisdiction, conflict of laws, recognition and enforceability, enforcement and legal aid, and is designed to bring about cooperation between central authorities.⁶⁸ The obligation for the terms of the original order to be enforced without modification is very definite within the terms of the Regulation, and under no circumstances may a decision given in a member state be reviewed as to its substance in the member state in which recognition and enforcement is

exist at the time the choice of court agreement is concluded or at the time the court is seised. Additionally, the jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

⁶⁷ Ibid, recital 9.

⁶⁸ Ibid, recital 10.

sought.⁶⁹ Thus the net effect of the Regulations is to bar the ability of the court of a member state not seised of the action from making new or associated orders.⁷⁰

The breadth of the potential scope of the Maintenance Regulation has caused concern given the obligation on a member state to give effect to orders from other jurisdictions where maintenance obligations arise from family relationships, parentage, marriage or affinity, where such legal obligations, for example in the case of obligations rising from affinity, may not exist in the jurisdiction where enforcement is sought (but now guaranteed under the terms of the Regulation). However, the impact of this imposition of standards and entitlements arising in other jurisdictions is tempered by recitals 21 and 25; the former confirms that the rules ‘determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based’⁷¹ and the latter limits the recognition on the part of the enforcing state to the entitlement to recover the maintenance debt owed, confirming that such enforcement does ‘not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision’. However, the inability to query or amend the existing order does mean that a member state court will now be obliged to automatically give effect to the maintenance entitlements, even if the relationship upon which those rights are based is not one that is legally recognised in the enforcing jurisdiction.

The broader objective of harmonised family law provisions across the European Union still appears beyond reach. The dramatically varying perceptions of maintenance and property entitlements across Europe mean that the attempts to regularise and harmonise the position necessarily stops at the capacity to identify the most appropriate forum. Any movement towards a harmonisation of the substantive provisions would fail to overcome the fundamentally distinctive approaches of the individual member states. Boele-Woelki has noted this lack of significant capacity to harmonise the substantive provisions of family law across European member states given ‘there is neither the political will nor any legislative competence for the EU to do this’.⁷² The cultural constraints arising from the distinctly varying approaches of individual member states is likely to prevent the development of a ‘pan-European culture’ at any time soon.

⁶⁹ Ibid, Art 42.

⁷⁰ For a broad overview of the Maintenance Regulation, see D Eames ‘The New EU Maintenance Regulation: A Different Outcome in *Radmacher v Granatino*?’ [2011] Fam Law 389–393.

⁷¹ Rather, Art 21 states that the establishment of family relationships continues to be covered by the national law of the member states, including their rules of private international law.

⁷² K Boele-Woelki ‘The European Agenda: an Overview of the Current Situation in the Field of Private International Law and Substantive Law’ [2006] IFL 148.

III PRIVATE ORDERING – A CONTINUAL SHIFT IN FAVOUR OF ENFORCEABLE MARITAL AGREEMENTS

When examined across multiple jurisdictions, it is evident that distinct regulatory approaches exist in respect of the governance of asset distribution on marital breakdown. The substance of these approaches varies significantly, and they are impacted by numerous issues, including the concept of marital property, perceptions of need and spousal entitlements, expectations regarding the financial rehabilitation of dependent spouses and the capacity for a clean financial break. The issue of private ordering and the support for the creation of regulatory structures which facilitate and give effect to the autonomous decision-making powers of couples on relationship breakdown is another factor, and one which is very much growing in significance. However, the extent to which a married couple can elect to sidestep the governing rules of their jurisdiction and self-determine the details of their marriage dissolution in respect of asset distribution and ongoing financial ties is very much dependent upon the laws in individual jurisdictions.⁷³ Certainly, some jurisdictions, including the common law jurisdictions of Ireland and England and Wales, adopt strict policy positions in respect of the importance of state retention of residual control over the interspousal obligation to make proper financial provision for the dependent spouse and any children of the marriage and thus the capacity to entirely avoid the governing regulatory structure is not possible. Conversely the approach of many European civil law jurisdictions includes a respect for the parties' autonomous arrangements, representing an interesting contrast to the common law jurisdictions where reliance upon judicial discretion remains dominant. In most civil law jurisdictions, giving effect to a properly executed agreement by two consenting, informed parties does not receive any special treatment under the principles of contract law. Whilst the resolution by parties of the terms of their dissolution *after* breakdown has long been endorsed by many jurisdictions, there is now an increased tendency to address the issues prior to even the solemnisation of the marriage by way of prenuptial agreement.⁷⁴

The growing importance of private ordering and the creation of regulatory structures which facilitate the private autonomy of individual couples were evident in the 2012 publication of *Marital Agreements and Private Autonomy in Comparative Perspective* which presents a comparative statement of the relevant laws of 14 jurisdictions, setting out the different matrimonial property regimes and related rules on marital agreements.⁷⁵ The project, the brainchild of

⁷³ The possibility of parties executing a matrimonial agreement is envisaged by most jurisdictions, but not all forms of agreement are necessarily recognised or indeed expressly enforceable.

⁷⁴ The collective concept of marital property agreements includes prenuptial agreements, post-nuptial agreements and separation agreements, which ultimately can form the basis and in some jurisdictions, the terms of the marital dissolution. The growth in importance of these agreements is reflected in the significant attention given to them by academics and law-makers as well as their increased use in practice.

⁷⁵ JM Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart

Dr Jens Scherpe, which was launched at a 2-day conference in June 2010 at Gonville and Caius College, Cambridge, provides a very useful overview of existing approaches, outlining the regulatory framework in each jurisdiction including the default rules applied by the courts, in respect of the distribution of marital and other relevant assets. The status and impact of marital agreements in each of the jurisdictions are outlined, and for the most part the work demonstrates a favourable approach to private ordering and a discernible regulatory preference for the use of marital agreements. The distinctions in treatment across the jurisdictions considered arise typically in relation to the extent to which the agreements are enforceable as drafted, and the co-existing right, if any, of state supervision and intervention. Additionally, where the law in a jurisdiction is in transition or indeed in need of reform, the relevant chapters explore the recommendations for change.

(a) Current developments in England and Wales

Perhaps the jurisdiction currently most engaged with the issue of private ordering and the reform of existing regulatory structures to govern the recognition and enforcement of marital agreements is England and Wales, and for two distinct reasons. The English Law Commission is currently nearing the end of a 3-year project on marital property agreements, which seeks to determine the extent to which the financial consequences of divorce or dissolution can be resolved by agreement in advance, before a separation is finalised.⁷⁶ This necessitated an examination of the law relating to prenuptial agreements, post-nuptial agreements and separation agreements and it is noted in the Consultation Paper that this project was undertaken in the context of a number of recent high profile cases where the resolution of the ancillary relief issues in the context of a marriage dissolution was ‘determined, or heavily influenced, by a pre-nuptial or post-nuptial agreement’.⁷⁷

Secondly, the restatement by the Supreme Court in *Radmacher v Granatino*⁷⁸ of the law relating to prenuptial agreements in England and Wales has brought the matter even more to the fore and demonstrates a very definite policy shift in support of the autonomy of individuals and the significant weight that can be

Publishing, 2012). The book examines the relevant laws of 14 jurisdictions; England and Wales, Australia, Austria, Belgium, France, Germany, Ireland, the Netherlands, New Zealand, Scotland, Singapore, Spain, Sweden and the United States.

⁷⁶ The terms of reference for the project were set out formally in the *Tenth Programme of Law Reform* as follows: ‘The project will examine the status and enforceability of agreements made between spouses and civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. Such agreements might regulate the couple’s financial affairs during the course of their relationship; equally they might seek to determine how the parties would divide their property in the event of divorce, dissolution or separation. They might be made before marriage (often called ‘pre-nups’) or during the course of the marriage or civil partnership. They need not be made in anticipation of impending separation; but they might constitute separation agreements reached at the point of relationship breakdown.’ *Tenth Programme of Law Reform* (2007) Law Com No 311, paras 2.17 to 2.18.

⁷⁷ *Marital Property Agreements* Law Com Consultation Paper No 198 at para 1.4.

⁷⁸ *Radmacher v Granatino* [2011] AC 534; [2010] UKSC 42.

attached to private contracts, even in the context of marital breakdown. Although in *Radmacher v Granatino* the court did not go so far as to permit the parties to simply oust the jurisdiction of the court and enforce the terms of the prenuptial agreement, the Supreme Court did confirm its obligation to ‘give appropriate weight to the agreement’ which in this instance ultimately required the court to essentially give effect to the terms of the agreement. The majority decision (7:2) saw the appellant husband being denied his claim for a share in the vast wealth of the respondent, on the basis that this is what was dictated by the prenuptial agreement and the circumstances in which the agreement was entered into demonstrated that he ‘had well understood the effect of the agreement, had had the opportunity to take independent advice, but had failed to do so . . . [and] the absence of negotiations merely reflected the fact that the background of the parties rendered the entry into such an agreement commonplace’.⁷⁹ Importantly when considering the merits of the appellant’s claim, the majority discounted the relevance of need, compensation and sharing in the circumstances.⁸⁰

More generally, a number of important statements were made by the Supreme Court; the majority of the court held that the traditional common law rule that public policy requirements defeat the validity of a prenuptial agreement, on the basis that such an agreement anticipates a future divorce, is ‘obsolete’.⁸¹ Additionally the court did not surrender its discretionary powers grounded in s 25 of the Matrimonial Causes Act 1973, which accord the court the sole power to determine the effect that an interspousal agreement is to have. The court is empowered to uphold such an agreement that has been freely entered into by the parties, unless the court determines that it would be unfair to do so:

‘The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.’

More broadly it was emphasised that there ‘can be no question of this Court altering the principle that it is the Court, and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in legislation’.⁸² Notwithstanding this, the starting point adopted by the Supreme Court is one

⁷⁹ Ibid at paras 114–116.

⁸⁰ Ibid at paras 118–123. For an examination of the impact of the SC decision, and the recent proposals of the Law Commission see further J Miles ‘Marriage and Divorce in the Supreme Court and the Law Commission: for Love or Money’ (2011) 74 MLR 430–444.

⁸¹ Above n 78 at para 52, the Court ‘wholeheartedly’ endorsed the views of the Board of the Privy Council in *MacLeod v MacLeod* [2008] UKPC 64 at para 38 that the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away given that there is no longer an enforceable duty upon a husband and wife to live together, the husband’s right to use self-help to keep his wife at home is gone, noting that such actions would now constitute the offences of kidnapping and false imprisonment.

⁸² Ibid at para 7.

of a presumption of enforceability, quite a leap from the pre-existing position where the discretion of the court trumped any such private arrangement.⁸³

‘Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be give to it.’

(b) Law Commission – marital property agreements

The Law Commission project on marital property agreements is ongoing, but the Consultation Paper published in January 2011 demonstrates the extent of the work carried out to date by Professor Elizabeth Cooke and her colleagues at the Law Commission. The 139 page Consultation Paper presents an in-depth examination of the law on ancillary relief, the consequences of the existing scope for judicial discretion⁸⁴ and the current treatment of marital agreements.⁸⁵ The paper is written very much in light of the current overarching supervisory powers of the judiciary in respect of the enforceability of marital agreements, as enunciated by the majority of the Supreme Court in *Radmacher v Granatino*.⁸⁶

‘Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between the parties is only one of the matters to which the court will have regard.’

Whilst expressly stating that the fact that the law in England and Wales on this issue is unusual does not *in itself* justify calls for its reform, the Consultation Paper reports that ‘the vast majority of European countries operate marital property regimes’ that ‘all involve the facility for couples to opt for a change of regime, before or after marriage, by contract’.⁸⁷ Beyond Europe, the Consultation Paper sets out the varying approaches currently operating, noting first the community of property regimes which facilitate private election by couples,⁸⁸ and secondly regimes that derive from the common law and more

⁸³ Ibid at para 70. It was noted that following this judgment a party could no longer claim to have believed that ante-nuptial agreements were void under English law and therefore likely to carry little or no weight. It should now be understood that this is no longer the case.

⁸⁴ Above n 77 part 2; entitled ‘The Current Law of Ancillary Relief’ explores ancillary relief law and the consequences of discretion, tracing the exercise of judicial discretion in the case law that has shaped the governance of ancillary relief issues on divorce.

⁸⁵ Ibid, part 3 entitled ‘Marital Property Agreements: The Law and its Evolution’ examines the law governing separation, prenuptial and post-nuptial agreements, and in particular the decision in *Radmacher v Granatino*, above n 78, and its implications for the law relating to marital agreements and the law on ancillary relief.

⁸⁶ Above n 78 at para 3, quoted in the Consultation Paper at p 37.

⁸⁷ Above n 77 at p 61, para 4.6. These European countries are regarded as sharing three features; they provide for systems of rules for the division of property on death, divorce or bankruptcy, namely equal division unless otherwise provided by contract between the parties; they are not typically concerned with maintenance or income provision for spouses and children after divorce and thirdly they all involve the facility for couples to opt for a change of regime, before or after marriage, by contract.

⁸⁸ Whilst noting that community of property regimes are found throughout the world, the

typically result in substantial redistribution as determined by the governing laws and obligations, rather than allowing separate ownership of property to remain unaffected. Somewhere at the median point, jurisdictions are also identified where inter parte contractual arrangements can be agreed, but do not in most instances extend to a capacity to avoid maintenance obligations.⁸⁹

The project commenced by the Law Commission in October 2009 sought to consider the extent to which private marital agreements should dictate the resolution of financial issues on divorce. A range of provisional proposals together with consultation questions for further development was published in part 8 of the Consultation Paper. Whilst the 2011 paper asked more questions than it answered, some very definite positions were adopted by the Law Commission. It was proposed that agreements made between spouses, before or after marriage or civil partnership, should no longer be regarded as void or contrary to public policy, simply by virtue of the fact that an agreement provides for the financial consequences of a future separation, divorce or dissolution.⁹⁰ Emphasis was placed on the importance of the principles of contract law and the need for any qualifying nuptial agreement to be compliant with such principles including undue influence, disclosure, compliance with formalities, and the securing of independent legal advice. Additionally the Commission expressed strong preliminary views on issues of social policy, including the fundamental requirement that children of the union be adequately provided for and that no spouse should become dependent upon state benefits where this could be prevented through an order for the payment of ancillary relief.⁹¹ It was also argued that scope to vary the terms of the agreement should be retained where enforcing it would produce significant injustice for one of the parties as well as in other limited circumstances.⁹²

Following the publication of the Consultation Paper in 2011 and within the context of this project the Law Commission was additionally charged with conducting a targeted review of two aspects of the current ancillary relief law, regarded as causing confusion for separating parties and creating excessive potential for uncertainty and ultimately inconsistent outcomes. Specifically, the Law Commission was tasked with examining the extent to which one party should be required to meet the other party's needs after the relationship has ended and, secondly, to consider how 'non-matrimonial' property should be treated on divorce or dissolution.⁹³ Given the identification of these additional issues for consideration, the project was renamed Matrimonial Property, Needs and Agreements and a Supplementary Consultation Paper was published by

Consultation Paper specifically identifies South Africa as a particularly interesting example, given that it has a system of immediate total community, derived largely from Dutch law, but notes equally that couples have the option of contracting into community of acquests or into separation of property; above n 77 at p 64, paras 4.16–4.17.

⁸⁹ Ibid. These jurisdictions typically derive from the common law of England and Wales and thus this interspousal duty to maintain remains.

⁹⁰ Ibid at p 57, para 3.84.

⁹¹ Ibid at p 117, para 7.16.

⁹² Ibid at p 127, para 7.65.

⁹³ For the purpose of this review, non-matrimonial property is defined as property acquired by

the Law Commission in September 2012. As part of the background to this extension of the project, it is interesting to note one of the preliminary observations made by the Commission in its original Consultation Paper; that whilst the major question being considered is whether the law relating to marital property agreements ought to be changed to allow such agreements to oust the jurisdiction of the courts in ancillary relief, if the call for such change is to assist couples to avoid the uncertainty of the underlying property distribution regime, then perhaps the focus for reform should in fact be on the underlying law?⁹⁴ In essence if changing the law to facilitate reliance upon enforceable agreements is simply a means of sidestepping the undesirable regime in place, perhaps it is that regime that is in need of reform, thereby eliminating the need for such agreements and thus the related need for them to be regulated. This supplementary paper commences with the legal background to the extended scope of the project and an explanation of the manner in which the law needs to be developed, including an exploration as to why such reform is necessary. Possible approaches to the reform of the law surrounding spousal needs and related obligations are presented in part 4 of the paper, and limited legislative amendments being proposed for consideration are set out in part 5. Part 6 of this supplementary paper proposes that the concept of non-matrimonial property be defined and raises queries as to how this might best be approached. Ultimately both consultation papers seek the views of consultees to contribute to the formulation and publication of the final recommendations, expected in Autumn 2013.

(c) Conclusion

The Consultation Paper of the Law Commission regards the judgment of the UKSC in *Radmacher v Granatino* as a ‘restatement of the law’ which has taken the governing law in England and Wales ‘as far towards an enforceable status for marital property agreements as is possible within the current statutory framework’.⁹⁵ Clearly one of the key issues for determination now by the Law Commission is the extent to which statutory intervention remains necessary, in order to remove or at least minimise the scope of judicial discretion currently necessitated to determine the extent to which a marital property agreement should be given effect. Notwithstanding the presumption of enforcement asserted by the Supreme Court, the extent of the discretion exercisable by the courts in order to determine the ‘fairness’ of the agreement is still likely to require statutory intervention. Certainly in the course of its judgment the majority of the Supreme Court rejected as not desirable the creation of rules ‘that would fetter the flexibility that the court requires to reach a fair result’.⁹⁶ Rather what is fair ‘will necessarily depend upon the facts of the particular

either party prior to the marriage or civil partnership, or received by gift or inheritance: Law Commission press release ‘Clarifying the law on financial provision for couples when relationships end’ 6 February 2012.

⁹⁴ Above n 77 at p 82, paras 5.62–5.63.

⁹⁵ Ibid at p 3, para 1.11.

⁹⁶ Above n 78 at para 76.

case'.⁹⁷ By engaging in this wide-scale consultation process, it is anticipated that the Law Commission will be in a position to trigger the necessary reforms to address the deficiencies in the current system, ultimately formulating a considered legal response in England and Wales to the complicated issue of asset distribution on marital breakdown and the regulation of inter parte marital agreements.

IV SAME-SEX MARRIAGE – SOME CURRENT INTERNATIONAL DEVELOPMENTS

Marriage equality is an issue of significant social and legal importance, yet quite differing approaches remain evident in many developed countries. Although there is a distinct absence of international consensus on the issue, these are very much changing times and the legal recognition of what might be regarded as a non-traditional union is slowly becoming more typical of the regulation of opposite-sex unions. This part will present an insight into the current legal standing of same-sex marriage, as distinct from civil partnership, with reference to a number of selected jurisdictions where there have been recent legal developments.

(a) Europe

Nine European countries recognise same-sex marriage as lawful, namely Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.⁹⁸ Although lawful in Spain since July 2005, the first 8 years of same-sex marriage in Spain has evidenced much legal challenge in light of significant political disagreement. Law 13/2005 reformed Spanish law governing marriage and established that 'a marriage will have the same requirements and effect whether the contracting parties have the same or different sex'.⁹⁹ Consequently the law draws no distinction between heterosexual and homosexual marriage. Upon its enactment, the constitutionality of the law was challenged by the Peoples Party, which was in opposition at the time of the reform, but subsequently came to power in 2011. The judgment of the Constitutional Court was delivered in late 2012, with a majority ruling (8:3), upholding the constitutionality of the provisions.¹⁰⁰ The court rejected

⁹⁷ Ibid.

⁹⁸ The Netherlands was the first European country to legally recognise same-sex marriage in 2001, followed by Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010), Portugal (2010) and Denmark (2012). An additional 14 have a legally recognised form of civil union or unregistered cohabitation.

⁹⁹ Amending and adding a second paragraph to s 44 of the Spanish Civil Code. See M Ahumada-Ruiz 'Spain: Constitutional Tribunal rejects challenge to same-sex marriage – law 13/2005 that modified the Civil Code, constitutional' [2013] *Public Law* 428.

¹⁰⁰ Judgment 198/2012, unreported 6 November 2012 (Trib Const (Sp)). The matter came before the Constitutional Court when 71 deputies in the Lower House signed the brief challenging the constitutionality of the Law and the Constitutional court admitted the application. See further Ahumada-Ruiz, n 99 at 428–429.

the argument that the provisions conflicted with the constitutional limitations of the right to marry being that of heterosexual couples, confirming that, whilst marriage as an institution is to be protected, its scope is subject to evolution in light of public perceptions and social norms, as noted by Ahumada-Ruiz: ‘the marriage protected by the Constitution is the one recognised and identified as such by the law and the society at a given time, not a static or immutable form fixed at the time of adopting the Constitution’.¹⁰¹ Despite the strong Catholic tradition in Spain and the vehement opposition voiced by the Church, the Spanish regulatory provisions do not expressly include an opt-out clause for religious bodies, which appears an important aspect of the current debates in the United Kingdom, discussed below. Rather, the Spanish law, regarded as particularly liberal, merely provides that pre-2005 laws relating to marriage now apply equally, and have the same requirements and effect when the two people entering into the contract are of the same sex or of different sexes.

A number of European jurisdictions are in a state of legal change at present; England and Wales and Scotland are at the cusp of fundamental law reform on the issue of same-sex marriage, with draft laws before each of their respective Parliaments. In England and Wales marriage has always been defined as the permanent union of one man and one woman, to the exclusion of all others.¹⁰² Reflecting this long-standing position, s 11(c) of the Matrimonial Causes Act 1973 declares that a marriage is void if the parties are not respectively male and female. Since 2005 by virtue of the Civil Partnership Act 2004 same-sex couples can validly enter into a civil partnership which although providing the legal consequences of marriage is not classified as marriage. The legality of this distinction between opposite-sex and same-sex couples was challenged in the English High Court in *Wilkinson v Kitzinger*.¹⁰³ The parties, a lesbian couple, had married in Canada in 2003, where same-sex marriages are permitted. Although their union attained the status of civil partnership under English law following the enactment of the Civil Partnership Act 2004, they sought recognition of their union as a marriage, under English law. They argued that, given that their marriage was legal in the country in which it was solemnised and met the requirements for recognition of overseas marriages, it should thus be treated in the same way under English law as one between opposite-sex couples. The High Court ruled against them, refusing to grant their union marital status. The President of the Family Division, Sir Mark Potter, whilst accepting the fact of the discriminatory treatment of their union in classifying it as a civil partnership but not marriage, regarded this distinction as justified given that ‘such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States’.¹⁰⁴ Additionally, in light of the protections afforded to the couple by the 2004 Act he stated that ‘abiding single sex relationships are in no way inferior, nor does English Law suggests that they are by according them recognition under the name of civil partnership’ but are, as a matter of nature

¹⁰¹ Above n 99 at 429.

¹⁰² *Hyde v Hyde and Woodmansee* (1866) LR 1 PD 130.

¹⁰³ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) (31 July 2006).

¹⁰⁴ *Ibid* at para 122.

and common understanding different.¹⁰⁵ In support of this difference, he approved of the statement of Lord Nicholls in *Bellinger v Bellinger*¹⁰⁶ regarding the distinct traditional categorisation of marriage: 'Marriage is an institution or a relationship deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex.'¹⁰⁷

However, given the ever-evolving nature of the law and shifting social perceptions in this area, this decision is one that is likely to be revisited. Whilst another case is awaited to challenge this position, it may be overtaken by change in the legislative context. Following a consultation process,¹⁰⁸ in January 2013 the UK Conservative Government introduced the Marriage (Same Sex Couples) Bill to permit and regulate same-sex marriage. Section 1(1) of the Bill provides, very simply, that marriage of same-sex couples is lawful.¹⁰⁹ The aims of the Bill are (inter alia) to make provision for the marriage of same-sex couples in England and Wales and to address the issue of gender change by married persons and civil partners.¹¹⁰ Additionally it would enable religious organisations to opt-in to conduct same-sex marriages if they wished to do so, thereby deliberately protecting religious organisations and individuals from being forced to conduct same-sex marriages. Reflecting the controversial nature of the measures being introduced, religious protection forms a very prominent aspect of the Bill, including provision to ensure that there can be no compulsion upon religious orders or members of a religious order to solemnise a marriage between a same-sex couple.¹¹¹ Finally, of note, the Bill also enables civil partners to convert their civil partnership to a marriage and married

¹⁰⁵ Ibid at para 113; see further J Herring *Family Law* (Longman Law Series, 5th edn, 2011) at 79.

¹⁰⁶ *Bellinger v Bellinger* [2003] 2 AC 467.

¹⁰⁷ Ibid at para 46.

¹⁰⁸ In March 2012 the Government launched a consultation 'Equal Civil Marriage: A Consultation' which looked at how to enable same-sex couples to get married. The consultation ran for 13 weeks, closing on 14 June 2012. Just over 228,000 responses were submitted, together with 19 petitions, the largest response ever received to a Government consultation. See www.gov.uk/government/uploads/system/uploads/attachment_data/file/133258/consultation-document_1_.pdf (accessed June 2013).

¹⁰⁹ Section 1(2) provides that '[t]he marriage of a same sex couple may only be solemnized in accordance with—

- (a) Part 3 of the Marriage Act 1949,
- (b) Part 5 of the Marriage Act 1949,
- (c) the Marriage (Registrar General's Licence) Act 1970, or
- (d) an Order in Council made under Part 1 or 3 of Schedule 6'.

¹¹⁰ Available at www.publications.parliament.uk/pa/bills/lbill/2013-2014/0034/14034.pdf (accessed June 2013).

¹¹¹ Section 2 (1): 'A person may not be compelled to—

- (a) undertake an opt-in activity, or
- (b) refrain from undertaking an opt-out activity'.

Section 2(2) 'A person may not be compelled—

- (a) to conduct a relevant marriage,
 - (b) to be present at, carry out, or otherwise participate in, a relevant marriage, or
 - (c) to consent to a relevant marriage being conducted,
- where the reason for the person not doing that thing is that the relevant marriage concerns a same sex couple.'

transgender people to gain legal recognition in their acquired gender without having to end their marriage. Section 9 provides that the parties to a civil partnership previously conducted in England and Wales may convert their civil partnership into a marriage under a procedure established by regulations made by the Registrar General. Further where a civil partnership is converted into a marriage, the civil partnership ends on the conversion, and the resulting marriage is to be treated as having subsisted since the date the civil partnership was formed. Any attempts to retain a distinction is defeated by s 11 which provides that: 'In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.'¹¹²

In February 2013, the Bill was passed by the members of the House of Commons, 400 votes to 175 following the second reading, and then considered by the Public Bill Committee. The committee considered many amendments and several new clauses, but ultimately none of these was agreed to and the Bill was reported to the House of Commons on 12 March 2013 without amendment.¹¹³ The Bill is due to have its report stage and third reading on a date to be announced. The controversial nature of the Bill is reflected in the views expressed by the four dissenting members of the Public Bill Committee who voted against the Bill at second reading and provided the main opposition to the Bill at committee stage, as is evident in the committee stage report. The amendments tabled (but all ultimately withdrawn) related, inter alia, to a proposed definition of the purpose of marriage,¹¹⁴ a confirmation of the capacity of the Church of England to make provision about marriage,¹¹⁵ a statement that premises owned by listed bodies could not be licensed for same-sex marriage¹¹⁶ and a provision regarding the protection of teachers who expressed dissenting views regarding same-sex marriage.¹¹⁷ In this context, the committee stage report noted the 'highly controversial' nature of the proposals in the Bill and the 'strong opinions' expressed by interested parties, both for and against same-sex marriage.¹¹⁸

Similar legislative developments have begun in Scotland; the Scottish government published its Consultation Paper in 2011, *The Registration of Civil Partnerships Same Sex Marriage, A Consultation* which had proposed the opening of marriage to same-sex couples, whilst equally providing protection for religious bodies with objections to such developments. Of note, however, is that the Consultation Paper provided that religious groups willing to become involved in the creation of civil partnerships through civil *and* religious

¹¹² Section 11(1).

¹¹³ Marriage (Same Sex Couples) Bill Committee stage report. Bill no 126 of 2012–2013 Research Paper 13/22 14 March 2013 at 2, para 5. Available at www.parliament.uk/briefing-papers/RP13-22 (accessed June 2013).

¹¹⁴ Ibid at para 6.2.

¹¹⁵ Ibid at para 6.3.

¹¹⁶ Ibid at para 6.6.

¹¹⁷ Ibid at para 6.10.

¹¹⁸ Ibid at 1. At the Public Bill Committee Stage four dissenters voted against the Bill, named in the Report as David Burrowes, Tim Loughton, Jim Shannon and Kwasi Kwarteng.

ceremonies should be permitted to do so.¹¹⁹ As regards marriage however, Norrie notes that, if the right to marry is to apply equally to all couples, difficulties might arise should discriminatory approaches be applied by religious bodies.¹²⁰ As in England and Wales, these legislative proposals take place in the context of the relatively recent regulation of civil partnerships, introduced by the Civil Partnership Act 2004. The draft Marriage and Civil Partnership Bill was published in December 2012 and the Scottish Government's consultation on its contents ran until 20 March 2013. Interestingly the draft Bill has cross-party support, reflecting a general mood for change, but is opposed by the Church of Scotland and the Roman Catholic Church. It will be put before the Scottish Parliament upon completion of the consultation process. It is envisaged that the enactment of the right to same-sex marriage will be provided for by way of amendment to the existing Marriage (Scotland) Act 1977, incorporating an amendment of the s 2(1A) definitions of spouses to include the parties to a marriage between persons of the same sex. Additionally, s 5(4)(e) of the 1977 Act will be repealed, and s 5(4)(f) modified as necessary in light of the repeal of s 5(4).¹²¹

France has become the ninth European member state to legalise same-sex marriage having very recently passed Bill 344¹²² to extend the right to marry and adopt to same-sex couples. Although the National Assembly voted against the legalisation of same-sex marriage in 2011, it became a key election issue in 2012 with the now President François Hollande making an electoral pledge to extend the right to marry and adopt to same-sex couples. Draft legislation to permit same-sex marriage was introduced by the Cabinet in November 2012 and completed its passage in the National Assembly on 12 February 2013.¹²³ Bill 344 was approved by the National Assembly on 12 February 2013 in a 329:229 vote. It passed through committee stage and was adopted by the French National Assembly on 23 April 2013 in a 331:225 final vote. Of note, these political and legal developments have taken place against a background of diverse public opinion and vocal opposition, with repeated public protests involving tens of thousands of French citizens who oppose the equalisation of the right to marry. This is reflected in the challenge to the law by the opposition UMP Party filed with the Constitutional Council, which has one month to rule.

Finally, 14 European states, including those set out above, currently legally recognise civil partnerships or unregistered cohabiting arrangements between same-sex couples but do not extend their laws to an equal right to marriage.¹²⁴

¹¹⁹ Under the relevant governing legislative provisions, opposite-sex couples can choose religious or civil solemnisation whereas same-sex couples are limited to civil registration. See further K Norrie 'Religion and same-sex unions: the Scottish Government's consultation on registration of civil partnerships and same-sex marriage' [2012] Edin LR 95 at 96.

¹²⁰ Ibid at 97.

¹²¹ Section 5(4)(e) currently provides that there is a legal impediment to a marriage where both parties are of the same sex.

¹²² *Projet de loi ouvrant le mariage aux couples de personnes de même sexe*, no 344. See also the chapter on France in this *Survey*.

¹²³ Available at www.assemblee-nationale.fr/14/ta/ta0084.asp (accessed June 2013).

¹²⁴ France (1999), Germany (2001), Finland (2002), Croatia (2003), Luxembourg (2004), Andorra

However, opinion polls across Europe indicate a ground swell in favour of the extension of the right to marry to same-sex couples and it is expected that in time, further legislative and judicial developments will see the gradual growth in the number of states that legislate to equalise the right to marry. Ireland is currently in the throes of political and social debate concerning the possible recognition of an equal right to marriage; the Irish Constitutional Convention, established to review the written Constitution of Ireland,¹²⁵ debated the issue of same-sex marriage in April 2013 and overwhelmingly voted in favour of putting the matter before the Irish people by way of referendum.¹²⁶ Of note is that the Convention has received 50 times the average number of submissions received in respect of all other issues debated to date.¹²⁷

(b) United States of America

In the United States of America, the Defense of Marriage Act (DOMA), enacted in 1996,¹²⁸ is a federal law which limits the definition of marriage to a legal union between one man and one woman as husband and wife, and provides that the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife.¹²⁹ This limited definition of marriage in turn prevents parties other than married heterosexual couples from accessing all federal benefits, including insurance benefits for government employees, social security survivors' benefits, immigration, and the right to file joint tax returns or receive spousal tax exemptions and benefits. More broadly the federal government is prevented from recognising any marriage between same-sex couples, even where those couples are considered to be validly married in their own state.

The political view of DOMA has dramatically altered since its enactment in 1996, and this is reflected in changes introduced by an increasing number of states in respect of the legality of same-sex marriages. At present, 10 individual states and the District of Columbia have legalised same-sex marriages¹³⁰ but 38 states still expressly prohibit same-sex marriage either through legislative or constitutional provisions. President Obama has long endorsed the repeal of

(2005), United Kingdom (2005), Czech Republic (2006), Slovenia (2006), Switzerland (2007), Hungary (2009), Austria (2010), Ireland (2011) and Liechtenstein (2011).

¹²⁵ See further www.constitution.ie/ (accessed June 2013). The Convention is tasked with considering certain aspects of the Constitution and to make recommendations to the Irish Parliament on future amendments to be put to the people in referenda. The Convention comprises 100 people; 66 randomly selected citizens; 33 parliamentarians and an independent Chairman.

¹²⁶ See www.irishtimes.com/news/social-affairs/constitutional-convention-backs-extension-of-marriage-rights-to-same-sex-couples-1.1359910 (accessed June 2013).

¹²⁷ 1029 submissions were received by the Constitutional Convention on this issue.

¹²⁸ 1 USC § 7 and 28 USC § 1738C.

¹²⁹ DOMA, s 3.

¹³⁰ The States of Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia allow marriages between persons of the same sex.

DOMA and in 2011, Attorney-General Eric Holder, on behalf of the President announced a radical shift in approach to the defence of DOMA:¹³¹

'After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases.'

In addition to this stance being adopted by the President, legislative and judicial developments in relation to same-sex marriage have also occurred. First, from a legislative viewpoint, a draft Bill, the Respect of Marriage Act,¹³² to repeal DOMA has been presented to both Congress and the Senate and is supported by President Obama.¹³³ Secondly, numerous judgments have been delivered by federal courts, pronouncing the definition under s 3 of DOMA to be unconstitutional and the opportunity has now been presented to the US Supreme Court to take a definitive stand on the issue.

In March and April 2013 arguments were made in two such high profile cases before the US Supreme Court: *Windsor v United States* and *Hollingsworth v Perry*. The impact of the limited definition of marriage upon the tax liabilities of a surviving same-sex spouse was demonstrated in *Windsor v United States*, and formed the basis for a challenge to the constitutionality of s 3 of DOMA. Windsor had succeeded in her action before the New York Circuit and presiding Judge Barbara Jones ordered a tax refund to be made to Ms Windsor. The decision was confirmed by the Second Circuit Court of Appeals in late 2012 and oral arguments were presented to the US Supreme Court in March 2013, with judgment expected in June 2013. Whilst it is difficult to predict the outcome, the growing public support to end discrimination and permit same-sex marriage suggests that the Supreme Court might very well strike down the federal law on the basis of unconstitutionality but may stop at imposing any new standard on individual states. It is more likely that a stance will be taken in respect of the constitutionality of s 3 but states will be permitted to develop their laws in line with their individual social policies.¹³⁴ The second case currently being considered by the Supreme Court relates to California's Proposition 8, which bans same-sex marriage. Although California

¹³¹ See www.justice.gov/opa/pr/2011/February/11-ag-222.html (accessed June 2013). The statement followed two lawsuits, *Pedersen v OPM* 10 CV 1750 and *Windsor v United States* 833 F Supp 2d 394 (SDNY 2012), affirmed in 699 F 3d 169 (2d Cir 2012), where s 3 of DOMA had been challenged. As a result of this new stance the Attorney-General confirmed that the Department would not defend the constitutionality of s 3 as applied to same-sex married couples in these two cases before the Second Circuit.

¹³² Bill HR – 1116.

¹³³ There are now 159 co-sponsors of the Bill (April 2013).

¹³⁴ Section 3 of DOMA has been found unconstitutional in eight federal courts, including the First and Second Circuit Court of Appeals, on issues including bankruptcy, public employee benefits, estate taxes, and immigration.

sanctioned same-sex marriages in 2008, it subsequently imposed Proposition 8, a ban on the performance of same-sex marriages in California, although it does continue to recognise the legality of same-sex marriages performed in other jurisdictions. In March 2013 in *Hollingsworth v Perry* the Supreme Court was asked to consider whether the guarantee of equal protection for all citizens under the law, as provided for in the 14th Amendment to the Constitution ought, to prevent states from defining marriage in a limited manner. The US Supreme Court is being challenged to rule upon a key social and familial issue in the context of two high profile cases; time will tell if they lead to a radical change to the legal landscape.¹³⁵

(c) Recent developments at the European Court of Human Rights

The capacity for parties to a same-sex partnership to secure protection under Art 8 of the ECHR, guarantee of respect for private and family life, was recently considered by the First Section Chamber of the ECtHR. Additionally the Chamber considered the extent, if at all, to which the guarantees under Art 12 (right to marry) and Art 14 (right to non-discrimination) can be relied upon by parties to same-sex relationships where they seek to vindicate their rights to equal treatment. First, in the context of a claim to assert the right to marry, the ECtHR accepted in *Schalk and Kopf v Austria*¹³⁶ that same-sex partnerships may come within the ‘protection of family life’ element of Art 8, an extension of the previously limited application of the right to protection of the parties’ ‘private life’ under Art 8. However, this judgment is equally significant given the willingness of the ECtHR to allow individual states a significant ‘margin of appreciation’ in respect of the equalisation of the right to marry, thereby limiting the impact of the extension of the application of Art 8. Interestingly, in *Schalk and Kopf v Austria* whilst it was the identified consensus on the right to legal recognition of same-sex partnerships which led the Chamber to recognise the right to respect for both private and family life for parties to a same-sex relationship, it was the *lack* of consensus amongst signatory states on the extension of the right to marry to same-sex couples that resulted in a reliance upon the ‘margin of appreciation’ of individual states rather than identify any actionable breach of the rights recognised by the ECHR under Art 12.

The challenge before the First Section Chamber of the ECtHR in *Schalk and Kopf v Austria* was made by a male same-sex couple in respect of the limitation of the right to marry to two persons of the opposite sex under art 44 of the

¹³⁵ For detailed commentary see WN Eskridge Jr ‘The California Proposition 8 Case: What Is a Constitution For?’ (2010) 98 Cal L Rev 1235; JA Garver ‘The Ninth Circuit’s Perry Decision and the Constitutional Politics of Marriage Equality’ (2012) 64 Stan L Rev Online 93.

¹³⁶ *Schalk and Kopf v Austria* [2010] ECHR 995. For an excellent commentary on the significance of this case and the subsequent case of *PB and JS v Austria* [2010] ECHR 1146 see N Bamforth ‘Families but not (yet) marriages? Same-sex partners and the developing European Convention “margin of appreciation”’ [2011] 23 CFLQ 128–143.

Austrian Civil code.¹³⁷ As per cases in other jurisdictions, including *Wilkinson v Kitzinger* in England and Wales, since the commencement of their domestic action challenging this exclusion from the right to marry, Austrian law had enacted the Registered Partnership Act which since 2010 permits same-sex couples to register as partners. Notwithstanding this domestic development, the applicants argued that Austrian law remained in breach of their Art 14 right to non-discriminatory treatment, the discrimination not being objectively justifiable in the circumstances. They claimed that the limited definition of marriage under Austrian law was a breach of their Art 12 right to marry, arguing inter alia that, as the Convention must be regarded as a living document, their right to marry should be interpreted to reflect the current international acceptance of the right of same-sex couples to have their relationships recognised by law. Whilst the Chamber did not deny the capacity of the ECHR to evolve so that its provisions reflect modern norms, in this context it did not accept the fact of a cross-jurisdictional consensus on the issue of same-sex marriage, noting that ‘at present no more than six out of 47 Convention states allow same-sex marriage’.¹³⁸ Thus any argument that the interpretation of the Convention provisions reflect modern consensus was swiftly defeated by the lack of that very consensus amongst signatory states in respect of a right to same-sex marriage. In further defence of the position adopted, the Chamber of the ECtHR, in exploring the nature of the right to marry both under the ECHR and EU human rights laws, relied upon Art 9 of the Charter of Fundamental Rights of the European Union which expressly refers to the determination of the scope of the right by individual national states.¹³⁹

‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’

This delegation of the determination of the nature and extent of the right to marry to individual signatory states and the corresponding lack of compulsion upon those states to provide an absolute right to marry was regarded as preventing the Chamber from rushing ‘to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’.¹⁴⁰ This combination of the lack of a consensus amongst signatory states on the issue of same-sex marriage and the express deference to the national laws governing the exercise of the right to marry and found a family in the Charter of Fundamental Rights thus permitted the Chamber to rely upon the ‘margin of appreciation’ exercisable by individual states.¹⁴¹

¹³⁷ Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides: ‘The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other.’

¹³⁸ Above n 136 at para 57.

¹³⁹ See www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed June 2013).

¹⁴⁰ Above n 136 at para 62.

¹⁴¹ For a critical examination of the ‘margin of appreciation’ doctrine see further F Hamilton ‘Why the margin of appreciation is not the answer to the gay marriage debate’ [2013] EHRLR 47–55.

However, Hamilton is critical of this approach, suggesting reliance upon the margin of appreciation leads to a lack of certainty, giving rise to confusion and a distinct lack of clarity in such a crucial aspect of human rights protection. Additionally she notes the unwelcome capacity for ECHR contracting states 'to introduce their own legislation . . . and decide on judicial supervision of such legislation, without the reasons behind their decisions having to be examined by the Court'.¹⁴²

In *Schalk and Kopf v Austria* the acceptance by the Chamber of a shift in societal attitude to a recognition of same-sex partnerships, albeit not marriages, formed the basis of its willingness to apply the respect of private *and* family life under Art 8 to the claimants' circumstances. However, this development is limited in its impact. Whilst the Chamber willingly recognised the right of same-sex couples to respect for their private and family life, that recognition did not translate into a right to marry, as exists for opposite-sex couples. The Chamber relied upon the margin of appreciation in assessing what discriminatory treatment is proportionate and justifiable, concluding that Art 12 does not impose a positive obligation upon the governments of signatory states to provide a right to marry to all citizens and further that Art 14 could not be invoked to create such a right on the basis of non-discrimination notwithstanding its acceptance of the application of both aspects of Art 8 protection to same-sex couples. Thus it is evident that the notion of equal rights for same-sex couples is very much dependent upon the eventual (if at all) development of a consensus between signatory states, which notwithstanding the evolving nature of the rights of same-sex couples, will remain unaffected by the rulings of the ECtHR for some time to come. As with the current developments in the United States of America, it is likely that this issue of social and political importance will remain within the remit of domestic/state law-makers for the foreseeable future.

¹⁴² Ibid at 50.

