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Contrasts and Comparisons from Regional Bars

ENFORCEMENT OF CROSS-BORDER FAMILY LAW DISPUTE RESOLUTIONS

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INTRODUCTION

As is true with all trial work, remedies, including judgments, are only as good as the ability to enforce them. This paper examines the considerations to and barriers in efforts to implement remedies in family law cross-border cases. In such cases, the conclusion of the initial litigation resolving the dispute is often just the beginning of the legal process. For, enforcement of that judgment, whether reached by litigation or through agreement, is often as difficult, if not more so, than the litigation or negotiation of the issues. Family law cases are certainly no different and, in fact, in many instances, the enforcement of judicial decisions in cross-border family law cases can lead to layers and years of additional litigation.

These cases fall into two primary categories and sets of considerations. The first are those relating to property and support issues and the second are those relating to custody.

CROSS-BORDER REMEDIES – NON-CUSTODY FAMILY LAW CASES

Conventional wisdom would say that as more families move from country to country with greater regularity, the resolution of family law disputes across borders and the implementation of those resolutions would become more commonplace and impliedly, more easily accomplished. However, a review of the current status as to the enforcement of cross-border family law non-custody resolutions indicates that in most jurisdictions, the country being asked to recognize and enforce a judgment from another country is often rather reticent to adopt that foreign judgment for a variety of reasons. While each country's considerations differ based upon the particular jurisprudential tenants of that country, some common barriers become apparent.

The countries in the European Union have a seemingly straightforward process to enforce judgments across borders, thanks to the Brussels Regulation and its precursor, the Brussels Convention. In those cases, the party seeking to enforce a foreign judgment in another European Union Country need only follow the proper procedure and the foreign judgment must be recognized by the country in which that judgment is being registered. However, there are specific exceptions to the enforcement requirement. A foreign judgment will not be recognized if:

- it is contrary to the public policy of the country in which enforcement is sought;
- the judgment was obtained through a default procedure where the defendant was not served with the document that instituted the proceeding in sufficient time to allow the defendant to provide a defense;
- the judgment is irreconcilable with a judgment given in a dispute between the same parties in the country in which the judgment is sought to be enforced;
- the country rendering the judgment has decided a question as to legal capacity, property rights arising out of a marital relationship or other certain cases in a way that conflicts with the law of the country in which recognition is sought; or
- the judgment is irreconcilable with an earlier judgment that was given in another country involving the same cause of action between the same parties and would otherwise be recognized in the country in which enforcement is sought.[1]

Most non-custody judgments relate to the enforcement of a division of property between spouses. These are less likely to come within the exceptions to enforcement, as

[1] Article 27 of the *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil Matters ("Brussels Convention")*; the first, second, third and fifth exceptions are also part of the *Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters ("Brussels Regulation").*

they seldom run afoul of the enforcing country's public policy. Thus, within the European Union, non-custody judgments should meet little resistance in cross-border enforcement efforts.

Where countries do not have a treaty, convention or other similar reciprocal agreement for enforcement of judgments, whether a country will recognize and enforce a judgment from a foreign country is subject to an independent analysis by the country where the judgment is sought to be registered. Despite what many might think is a relatively easy process, enforcement of a cross-border judgment is subject to a set of fairly strict criteria and conditions that must be fulfilled in order for it to be recognized by another country.

First, the process typically requires the party seeking enforcement to bring a suit for enforcement. Secondly, in most countries, the court undertakes to examine the proceeding of the court in the originating country to determine if the process offends the due process requirements of the enforcing country. Finally, the enforcing country's public policy plays a critical role.

In family law cases, the public policy considerations can become the death knoll to enforcement actions. For example, since there is no treaty or agreement between the United States and the United Kingdom for enforcement of judgments issued by one country in the other, a request to enforce a United States judgment in the United Kingdom must satisfy the United Kingdom's common law rules for enforcement. In England, as most people attending this Conference know, several requirements must be met including: 1) that the defendant was a resident of or present in the country that issued the judgment against the defendant at the date the proceeding commenced; 2) that the

defendant was the plaintiff in the proceeding or had counter-claimed in the proceeding in the foreign court; 3) that the defendant agreed to submit to the jurisdiction of the foreign court; 4) that the foreign judgment is final and conclusive; and 5) the defendant was served with process in the foreign court and the judgment was not obtained by fraud or other cause of action that is contrary to the public policy of England.[2]

Like the United Kingdom, many other countries including many European Union countries such as Spain, France, Belgium and Switzerland, all have specific criteria that must be met in order for a foreign judgment to be recognized.[3] In each of these countries, public policy considerations play a prominent role. Those public policy considerations may take the form of a question over the exercise of jurisdiction. For example, the United States' concept of long-arm jurisdiction is not recognized by many other countries, and where long-arm jurisdiction has been used to obtain personal jurisdiction over a party, a foreign country may decline to recognize a United States judgment. Some may point to this as an issue of public policy and in other instances, simply a matter of the jurisdictional considerations of the European country being asked to recognize a United States judgment.

Europeans may say the problem is even more difficult when trying to enforce a judgment in the United States. Because the United States has two separate court systems – federal and state – the first question is in which court system to seek enforcement. Since most family law matters are subject to state law rather than federal law, most enforcement actions will be brought in state courts. However, each state has its own

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[2] Loble, Steven, "Enforcement of Foreign Judgments in England" (2006); Committee on Foreign and Comparative Law, Association of the Bar of the City of New York. "Survey on Foreign Recognition of U.S. Money Judgments", p. 5 (2001).
[3] See, "Survey on Foreign Recognition of U.S. Money Judgments", pp. 5-7.

separate set of requirements that must be satisfied for a state court to agree to recognize the judgment of a foreign country under the principals of comity. Within that context, each state has its own public policy considerations.

In a family law situation, it is understandable that, to the extent countries have different public policies relating to children, families, and property, divorce judgments issued in one country, even if no other barriers to enforcement exist, may still not be enforced because of a difference in public policy. This may take the form of a failure to enforce a judgment of divorce because of a difference in public policy as it relates to jurisdiction, as it relates to the provision of support for children or a former spouse, or as it relates to the manner in which property is divided or debts are allocated as between the parties in a divorce action.

In light of these barriers, where parties have assets in several countries, it may be advisable to bring a divorce proceeding in each country so that there will be a greater likelihood of enforcement with respect to the assets held in that country. Obviously, there may be some other hindrances to such an approach, not the least of which may be an issue of personal jurisdiction and the cost involved.

Where the parties reach an agreement concerning their division of property, there could still be jurisdictional barriers. If the agreement is to have any chance of enforcement in another country, it must be incorporated into a judgment issued by a court. If it does not have the imprimatur of a court's authority, then the likelihood that its terms will be enforced is severely compromised.

ENFORCEMENT OF CROSS-BORDER REMEDIES IN CUSTODY CASES

As difficult as the enforcement of property and non-custody matters may be, the enforcement of custody remedies is even more difficult in cross-border cases because of the potential for at least two separate lawsuits. As was discussed in a paper presented by this author at this conference two years ago, many custody issues involving cross-border families arise in the context of one parent who has taken the child or children from one country to another. If a parent took children from one country and relocated them to another country where that taking was considered wrongful, then the parent from whom the children were taken may have a remedy under the Hague Convention more formally known as *The Convention on the Civil Aspects of International Child Abduction Done at the Hague on October 25, 1980* (hereinafter referred to as the "Convention" or the "Hague Convention")[4] While the Hague Convention anticipates that a court will hear and resolve the request for the return of the child to his or her habitual residence within a matter of months, case law shows that often that is not what happens.

In a case brought under the Hague Convention, the only issue to be resolved by the court is a determination of the child's place of habitual residence. If the court determines that the child's habitual residence is the country from which the child was taken, then the court must order the return of the child to his or her place of habitual residence. It is not the purview of a court hearing a Hague Convention case to make a custody determination. Rather, the custody determination must be made by the country found to be the child's place of habitual residence. This then presents the potential for two lengthy court cases – the first being a Hague Convention case to determine the child's place of habitual residence and the second being the custody determination itself.

[4] The terms of the Convention are codified in the United States statues under 42 U.S.C. § 11601 *et seq*.

A review of Hague Convention cases that have been decided in the last several years show that numerous problems still abound as courts undertake to enforce the terms of the Hague Convention. For example, *Duarte v. Bardales,* 526 F. 3d 563 (Fed. 9th Cir. 2008), the case became even more convoluted when the district court in Southern California dismissed Ms. Duarte's Hague Convention Petition because she failed to appear and then refused to vacate that judgment when she filed a timely motion requesting that the court do so. Once the Court of Appeals for the 9th Circuit reversed the district court and held that the Motion to Vacate should have been granted, the issue then became whether the principal of equitable tolling would apply to Ms. Duarte's Petition under the Hague Convention. For a variety of reasons, some clear and some not, Ms. Duarte had filed her Hague Petition first with the Central Authority in Mexico in September 2003. It was then transferred to the United States the following month. The Petition, however, was not filed in a California State court until April of 2005. The district court first scheduled a hearing on her matter on September 1, 2006, but Ms. Duarte was not present because her passport had been stolen several days earlier and so she was unable to enter the United States. Ultimately, the 9th Circuit held that equitable principles could be applied to toll the one-year period in that case.[5] That Decision was filed May 20, 2008, a period of nearly five years after Ms. Duarte first filed her Hague Petition.

In *Pielage v. McConnell*, 516 F. 3d 1282 (Fed. 11th Cir. 2008), the petitioner, Ms. Pielage, filed her action in federal court in Alabama claiming that the State court action involving Ms. Pielage and Mr. McConnell, the father of her son constituted a "wrongful retention" under the Hague Convention. Mr. McConnell had filed an action in the State

[5] *Id.* at 570.

of Alabama court seeking to have a paternity test done to determine whether he was the biological father of Ms. Pielage's son and then to make a determination as to visitation and child support issues.[6] Ms. Pielage voluntarily came to Alabama, decided to stay in Alabama for the birth of their child and voluntarily submitted herself to the jurisdiction of the Alabama court. In denying her Petition under the Hague Convention, the court noted that where a child remains in the physical care of the petitioner, it is impossible to return the child to the petitioner and, therefore, there can be no retention within the meaning of the Convention and thus, no wrongful retention.[7]

In what perhaps is one of the most straightforward applications of the Hague Convention in the last several years, Mr. Kufner filed a Hague Convention Petition against his wife, Ms. Kufner, for wrongfully removing their two minor sons from Germany to Rhode Island.[8] Ms. Kufner argued that returning their sons to Germany would create "a grave risk of harm", a defense to return under Article 13(b) of the Hague Convention. However, the district court granted Mr. Kufner's Petition and ordered that the sons be returned to Germany and the First Circuit Court of Appeals affirmed that Decision.

The only issue raised in that case was a series of photographs that Mr. Kufner had taken of the children. Of the 43 photographs that were submitted to the court, the court found 39 of them to be what it considered relatively innocuous of the children playing and laughing naked in the living room of their father's house. It noted that the other four photographs were more graphic in nature, but ultimately after employing the services of a court-appointed independent expert in pediatric child abuse and child sexual abuse

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[6] *Id.* at 1285.
[7] *Id*. at 1289.
[8] *Kufner v. Kufner*, 519 F. 3d 33 (Fed. 1st Cir. 2008).

determined that there was no evidence to suggest that the pictures were inappropriate or that the children were at all adversely affected.[9]

In that case, the divorce proceedings had already begun in the German court at the time Ms. Kufner took the children from Germany and, in fact, the German court had forbidden Ms. Kufner from traveling to the United States with their sons. In direct violation of that German court order, Ms. Kufner took the children with her to the United States in January 2007.[10] There was no question that the children's place of habitual residence was Germany. Thus, the next consideration under the Hague Convention was whether Mr. Kufner had rights of custody over his sons under German law and whether he was exercising those rights and would have exercised them but for the wrongful removal. The court found that Mr. Kufner did, indeed have rights of custody and that he was exercising those rights and would have continued to but for the wrongful removal. Noting that the Hague Convention is not the proper forum for determining custody, the court properly ordered that the children be returned to Germany where custody proceedings were already in progress. The Hague case took over thirteen months to be decided.

One of the issues that came up in *Kufner* and in several other recent cases is that of "undertakings", i.e., conditions placed by the court ordering the children to be returned to their place of habitual residence. "Undertakings" are not expressly part of the Convention, but they are often imposed where the court has found there to be a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation. The court then has the discretion to refuse to order the return of the

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[9] *Id*. at 38.
[10] *Id.* at 37.

child under Article 13(b) of the Convention. Court's have noted that there are often significant problems with the enforcement of those undertakings and, therefore, must be looked at carefully to determine whether the undertakings will provide sufficient protection for the children. In *Kufner*, the undertaking was that Mr. Kufner secure dismissal of criminal charges against his wife that arose out of their custody dispute.[11] Mr. Kufner represented that he could do so and, therefore, it was likely that that undertaking would be easily accomplished.

More problematic are the kinds of undertakings described by the court in *Baran v. Beaty,* 526 F. 3d 1340 (Fed. 11th Cir. 2008), where Ms. Beaty wrongfully removed their son from Australia to the United States, but raised the defense of the grave risk of harm if he were returned to Australia because of Mr. Baran's physically abusive behavior, his alcoholism and his history of abuse toward both Ms. Beaty and their son. In that case, the court of appeals discussed the use of undertakings as a way to prevent reviewing courts from becoming involved in the custody disputes, while effectuating the terms of the Convention's purpose to ensure that the child is returned to that child's place of habitual residence.[12] However, it raised other concerns that the court issuing the undertakings as conditions for return has no ability to enforce those orders in that other country and, therefore, the question is whether undertakings, if not implemented, place the child at grave risk of harm, despite the Convention's intention that such risk be avoided.

The issue of undertakings was also raised in *Simcox v. Simcox*, 511 F. 3d 594 (Fed. 6th Cir. 2007), where the court of appeals remanded the case to the district court to consider whether the undertakings that were attached to the trial court's order to return

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[11] *Id.* at 41.
[12] *Id.* at 1349-1351.

children to Mexico were sufficient to prevent them from being exposed to serious risk of harm if returned to Mexico. In that case, there was little question that the children's place of habitual residence was Mexico. There was also little question that Mr. Simcox was both verbally and physically violent with both his wife and children, with episodes recounted in court of the children being belt-whipped, spanked, kicked, yelled at, screamed at, and having their hair and ears pulled.[13] Noting the problems that arise when seeking to enforce undertakings in domestic violence situations, the court of appeals was very concerned that the undertakings conditioned by the trial court were unworkable.[14]

It noted the U.S. State Department's recommendation that undertakings be limited in scope to ensure the prompt return of the children to the jurisdiction of their habitual residence to allow that country to make the custody determination. It further noted that undertakings that seek to do more than that, are questionable under the Convention.[15] Where there are instances of abuse that are substantially more than minor, but are less obviously intolerable, the court must conduct a fact-intensive inquiry and should adopt undertakings only where the court is satisfied that the parties are likely to obey them.[16] Finding that the district court's undertakings were unworkable, it ordered the court to determine how to ensure the safety of the children if returned to Mexico for custody proceedings.[17]

In another twist to a straightforward application of the Hague Convention, the parties in *Carrascosa v. McGuire,* 520 F.3d 249 (Fed. 3rd Cir. 2008), signed a parenting agreement in New Jersey where they had been living to resolve their custody disputes,

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[13] *Id*. at 599.
[14] *Id.* at 610.
[15] *Id.* at 606.
[16] *Id.* at 608.
[17] *Id.* at 610.

but did not file with any court. Several months later, Mr. McGuire filed an action for divorce in the New Jersey court. Days later Ms. Carrascosa filed an action in Spain to nullify their marriage. Approximately four weeks later Ms. Carrascosa took their daughter to Spain without Mr. McGuire's knowledge or permission. Mr. McGuire obtained an order from the New Jersey court that their daughter be returned. He also filed an application in Spain for their daughter's return and for enforcement of the New Jersey court order.

The Spanish court acknowledged that it lacked jurisdiction because the daughter's habitual residence was the United States but, on appeal, determined that the parenting agreement that the parties had signed implicitly gave full custody to Ms. Carroscosa and, therefore, refused to return their daughter to the United States.[18] Ms. Carroscosa returned to New Jersey to challenge that court's jurisdiction. She was incarcerated on a civil contempt action for her failure to return their daughter to the United States. The court of appeals upheld the district court's denial of her writ of *habeas corpus*, holding that the New Jersey court properly had jurisdiction over the case, that the Spanish court never applied New Jersey law, despite recognizing that it was the child's place of habitual residence, and that the New Jersey court was within its jurisdiction and authority to find her in contempt.[19] Once again, this case took years to be resolved to this point. The parties signed their parenting agreement on October 8, 2004. The court of appeals' decision affirming the action of the lower court was not issued until March 20, 2008.

Finally, the decision in *Robert v. Tesson*, 507 F. 3d 981 (Fed. 6th Cir. 2007), is representative of how the implementation of a Hague decision, as it relates to the actual

[18] *Id*. at 257.
[19] *Id*. at 262-263.

custody decision, becomes sometimes far more problematic than ever anticipated. This case began when Ms. Tesson removed the parties' children from their French residence where their father was living and returned with them to the United States where she had been with them previously for extended periods of time. Mr. Robert filed a Hague Petition in the federal district court in Cincinnati in May 2004. After several days of trial deposition testimony and nine days of trial, the court issued a decision on June 29, 2005, some thirteen months later. In the meantime, Ms. Tesson had filed an action for legal separation in the Ohio court in December 2003 and Mr. Robert filed for divorce in the French court in January 2004. The French court gave Mr. Robert temporary custody of the children and, ultimately, final custody. The district court found that France was not the children's place of habitual residence, but that the United States was, and refused to order a return of the children to France. Mr. Robert appealed that decision, which was ultimately affirmed by the 6th Circuit Court of Appeals in November 2007, four years after the children were taken by their mother to the United States.

Mr. Robert was then faced with the dilemma of how he would be able to have a meaningful relationship with his children since his contacts with the United States were extremely minimal, but the Ohio court had jurisdiction to determine his children's custody. Mr. Robert attempted to enforce the French court order in the Ohio case but that was denied. As this paper goes to press, the *Robert* case continues. Mr. Robert does not feel that he should be required to come to the United States in order to see his children, but the court in the United States is concerned that if the children go to visit him in France he will not return them.

These cases are indicative of the issues involved in cross-border custody cases. To the extent that attorneys can effectuate agreements between the parties on a voluntary basis, they are more likely to be followed. The alternative is the potential for years of litigation, perhaps without seeing the children at all while the litigation is pending. Thus, while there are laws in place to assist in resolving cross-border family law disputes, they are cumbersome and inefficient in bringing about timely resolution of these issues.