INTERNATIONAL PRIVATE LAW: THE CONFLICT OF LAWS

INTRODUCTION

Conflict of laws or private international law (both terms are used interchangeably) concerns relations across different legal jurisdictions between persons, and sometimes also companies, corporations and other legal entities. International law, or the conflict of laws, determines where, and what law is to be applied, to a dispute with an international context. In this part the following will be dealt with:

- Conflict of laws: Companies;
- Conflict of laws: Contracts;
- The Enforcement and Recognition of Foreign Judgments;
- Conflict of laws: Adoption, Family, Children and Divorce.

CONFLICT OF LAWS: COMPANIES

This is English conflict of laws rules on corporations (that is, companies and other legal persons). It covers the rules determining the domicile and residence of a corporation, and the system of law which governs its status, internal management and capacity to enter into transactions, in cases with a foreign element. The rules on cross-border corporate insolvency are discussed separately in Conflict of Laws: insolvency.

Domicile and residence: There are two different sets of definitions of domicile and residence of corporations: the first at common law for general purposes, and the second under EU Regulations for the purposes of the jurisdiction of the court and the law applicable to certain claims.

Under the common law definition, a corporation is domiciled in the country under whose law it is created. (This rule arose by analogy with the common law domicile of origin for individuals, which was determined by their place of birth). Thus, a company incorporated in France is regarded by the English courts as having a French domicile, regardless of where French law would consider it domiciled. Within the UK, a company incorporated under the Companies Act 2006 and registered in England has an English domicile, while one registered in Scotland has a Scottish domicile. The domicile of a corporation is separate from the domicile of its members.

The residence of a corporation is relevant for determining its liability for UK taxation. All companies incorporated in the UK are resident there, at least for taxation purposes. Under English conflict of laws rules, foreign-incorporated companies have their residence in the place where the central management and control of the company's business is found. This is irrespective of what the law of the foreign state would say about the company's residence. This will usually lead to only one place of
residence, although in exceptional cases there can be more (for instance as found in Swedish Central Railway Co Ltd v Thompson [1925] A.C. 495.)

When determining whether the English court had jurisdiction over a company, the relevant definition of the company's domicile is found not in the common law rules, but rather in Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast version), art.63 (the "Brussels Regulation") (for proceedings started before 10 January 2015, art. 60 of the original version, Regulation 44/2001, in identical terms). Under the Regulation, companies and other legal persons are domiciled in the place of their "statutory seat", central administration or principal place of business. For UK (and Irish and Cypriot), companies, "statutory seat" means the registered office or, where there is no such office, the place of incorporation or, where there is no such place, the place under whose law of which the company was formed. Under this test, a company can be domiciled in several states at the same time. The domicile of companies for the purposes of jurisdiction as between different parts of the UK is determined in a similar way by the Civil Jurisdiction and Judgments Act 1982, s.42.

Certain applicable law rules depend on a company's "habitual residence", including some of those in Regulation 593/2008 on the law applicable to contractual obligations ("the Rome I Regulation") and Regulation 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation"). In those cases, habitual residence means the place where the company has its central administration: art.19 and art.23 respectively.

Service of documents on overseas companies in England: Service of English court proceedings can be effected on overseas companies (that is, those incorporated outside the UK) which have branches or places of business in England, under rules found in the Companies Act 2006 Pt 34 and the Overseas Companies Regulations 2009/1801. An overseas company must register particulars in England and give particulars of persons who are authorised to accept service of document on behalf of the company, or a statement that there is no such person. Under the Companies Act 2006 s.1139(2) proceedings can be served on an overseas company whose particulars are registered by either (i) leaving it at or posting it to the registered address in the UK of a person who is authorised to accept service, or (ii) leaving it at or posting it to the company's place of business in the UK. In cases outside the Brussels Regulation, the English court will have jurisdiction over a foreign company served with proceedings in England.

The question of whether a foreign company is present in England (or another country) via a representative was extensively considered by the Court of Appeal in Adams v Cape Industries Plc [1990] Ch. 433. The principal test is whether the representative has the power to contract in England.
on behalf of the foreign company. Additional factors includes whether a purported representative of the company has a fixed place of business in England, whether he was remunerated by the company for acting for it and in what way, the degree of control the company exercised over him, whether the representative made contracts in the name of the company and whether he needed specific authority to do in order to bind the company.

Status: The status of a foreign corporation depends on the law under which it is formed. The English court will recognise its existence and dissolution as determined by the foreign law. Companies registered in foreign states are thus recognised in English law and can both sue and be sued as companies in England (subject to the rules on jurisdiction). A company in the process of being wound up under a foreign law can still sue and be sued in England, in the same way as English companies. But, once the winding-up process has ended and the company is dissolved under the foreign law, then it is also regarded as "dead" by the English court.

Whether a foreign company has been amalgamated into another is also determined by the law of its place of incorporation. If that law provides for universal succession of all assets and liabilities of the original company, then this will be recognised by the English court. However, liabilities of the new company can only be discharged by law of the place of incorporation if that law governs those liabilities.

It is usually simple to determine the law of the place of incorporation and thus the status of the foreign corporation. But, in the case of states unrecognised by the UK Government, the Foreign Corporations Act 1991 applies. Under s.1, where the unrecognised state has laws applied by a settled court system, questions of the legal personality of the corporation will be determined by those laws. Where two rival states claim sovereignty over a territory, the English court will apply a realistic view of which laws are actually applied in the territory.

Capacity: A corporation’s capacity to enter into transactions is determined both by its constitution (interpreted according to the law of the place of incorporation) and by the law governing the transaction. The corporation will be limited by restrictions in either one of these legal systems. For instance, a corporation which cannot hold land under its constitution (or under the law of the place of incorporation) has no power to do so anywhere in the world, even in a country where local corporations can do so. Similarly, a corporation which can hold land under its constitution cannot do so in a country where ownership by companies or by foreign persons is not permitted.

It was held by a majority of the Court of Appeal (Aikens and Pill L.J.J.) in Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579; [2012] Q.B. 549 that "capacity" was to be given a broad,
"internationalist" meaning, and referred to the legal ability of a corporation to exercise rights, such as to enter into contracts (in that case, Norwegian local authorities were prevented from entering into interest swap contracts). A lack of substantive power to do something was equivalent to a lack of capacity. Those powers were determined not just by the corporation's charter and articles of association, but by all sources of law in the place of incorporation, including statutes and other rules of law. The consequences of a lack of capacity or power on the transaction are determined by the law governing the transaction. Dissenting on this issue, Etherton L.J. considered that the concept of capacity should be confined to its narrower meaning in English law, which is related only to the question of whether an act is *ultra vires* the company, and should not be equated with the substantive power to do an act.

This was further discussed by the Court of Appeal in Integral Petroleum SA v SCU-Finanz AG [2015] EWCA Civ 144; [2015] Bus. L.R. 640, which held that where the law of the company's place of incorporation imposed requirements on how the company entered into contracts (in that case, Swiss law required two registered signatures for a contract to be binding), the issue of a breach of those requirements was governed by the law of the place of incorporation, and not by the law governing the contract. The Court held that this defect was not a matter of "formal invalidity" of the contract (which, under art.11 of the Rome I Regulation, is governed by the law of the contract) but rather a lack of authority of a single signatory to bind the company to the contract in the first place. A recent illustration is found in Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA [2016] EWHC 465 (Comm); [2016] 4 W.L.R. 49, in which a Portuguese transport authority entered into a swap contracts with Portuguese bank governed by English law but later argued that they lacked the capacity to do so. The court applied Haugesund and determined the issue as a matter of Portuguese law (outside the scope of the contracts and thus English law), holding that the authority had capacity since the contracts could have helped them to operate a transport system at a profit.

Execution of documents: The Companies Act 2006 ss.43, 44 and 46 govern the formalities of the making of contracts and the execution documents and deeds by English companies. They also apply to overseas companies doing business under English law, with the modifications specified in Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009/1917 reg.4.

Under the modified s.43, an overseas company can make a contract under English law by writing under its common seal, or in any other manner permitted by the law of the place of incorporation. A contract can be made on behalf of an overseas company by a person who, under the law of the place of incorporation, has the express or implied authority of the company.
Under the modified s.44, a document is executed by an overseas company by the affixing of its common seal or by any other manner permitted by the law of the place of incorporation. A document signed by a person who has express or implied authority company under the law of the place of incorporation and is expressed to be executed by the company is treated in the same way as would a document executed by an English company. A document which purports to be signed in accordance with this provision is deemed to be properly executed as regards a purchaser of the company’s property in good faith for valuable consideration.

Under the modified s.46, deeds are validly executed by an overseas company if they duly executed by the company and are "delivered as a deed"; that is the person executing it intends to be bound by it. But, delivery in this sense is presumed to occur upon execution unless the contrary is proven.

It appears from the discussion by the Court of Appeal in Integral Petroleum SA v Scu-Finanz AG that these regulations have a limited scope. At para.52, the Court suggested, without forming a concluded view, that the regulations only concerned the formalities of execution (as was said obiter in Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi v VSC Steel Co Ltd [2013] EWHC 4071 (Comm); [2014] 1 Lloyd’s Rep. 479). The Court held that the regulations did not govern the question of whether a document was executed by a person who has authority to bind the company (in that case, only one registered signatory, when the law of incorporation required two).

Internal management: All matters concerning the constitution and internal management of a corporation are determined by the law of the place of incorporation. This covers principally the corporation’s membership and powers, the appointment of directors and claims to enforce directors’ duties, the question of who may act for the corporation (including the right to bring derivative actions: Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 W.L.R. 1269), the extent of members’ individual liability for debts and the process by which the corporation can transfer assets and liabilities on merger. These matters fall outside the scope of the Rome I and Rome II Regulations: art.1(2)(f) and art.1(2)(d) respectively.

The English court will rarely, if ever, be an appropriate jurisdiction to raise these matters in relation to foreign corporations. In EU cases, Brussels Regulation art.24 (art. 22 in the original version) gives exclusive jurisdiction to the courts of the member state in which the corporation has its statutory seat (discussed above): art.24(2) covers the constitution of companies and the validity of decisions of their organs, while art.24(3) covers the validity of entries in public registers, such as Companies House entries in the UK.
In non-EU cases, the English court will rarely have jurisdiction over these matters and, even if it does, it will often decline to exercise it on the grounds of *forum non conveniens*. The English court will often give "reflexive effect" to Brussels Regulation, art 24, that is, applying the Regulation by analogy in a case concerning a company domiciled outside the EU in situations where it would apply directly if the company were domiciled in the EU: Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm); [2012] 1 Lloyd's Rep. 588. Similarly, the English court's jurisdiction over the governance of an English company will not be ousted, even if there is an underlying dispute in a foreign court relating to the shares in the company: see, for instance, Zavarco Plc, Re [2015] EWCH 1898 (Ch).

**CONFLICTS OF LAWS: CONTRACTS**

This part contains the rules of English law relating to jurisdiction and choice of law for claims relating to contracts. By "jurisdiction" is meant whether the English courts will hear the claim. By "choice of law" is meant which law the English courts will apply to the substance of the dispute. Caution is advised before relying on a summary in this complex area.

The relevant rules on jurisdiction are to be found principally in:

- EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (sometimes called the "(Recast) Brussels Regulation", this replaces Regulation 44/2001 for proceedings commenced on or after 10 January 2015);
- the Lugano Convention; and
- the domestic procedural law relating to Pt 6 of the Civil Procedure Rules 1998/3132.

The relevant rules on choice of law are to be found principally in:

- Regulation 593/2008 on the law applicable to contractual obligations (sometimes called the "Rome I Regulation") (for contracts concluded after 17 December 2009); and
- the Rome Convention (for contracts before that date).

**Jurisdiction - Brussels Regulation:** Regulation 1215/2012 lays down rules concerning jurisdiction other than within the United Kingdom in civil and commercial matters (but excluding revenue, customs and administrative matters, the liability of the State for *acta iure imperii* and matters concerning status, insolvency, social security, arbitration, maintenance, wills and succession).

Article 4 of the Regulation provides that generally persons domiciled in an EU Member State shall, whatever their nationality, be sued in the courts of that Member State. This general rule is however subject to important exceptions.
Of particular relevance to contractual claims are the rules on special jurisdiction in s.2 of the Regulation. By art.7(1), a person domiciled in a Member State may also be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question. In the case of sale of goods/services, unless otherwise agreed, the place of performance is the place in a Member State where the goods/services were or should have been delivered/provided. In Kolassa v Barclays Bank Plc (C-375/13) [2015] C.E.C. 753, the CJEU considered that art.5(1) of Regulation 44/2001 (now art.7(1) of Regulation 1215/2012) did not apply to the relationship between the issuer and the transferee holder of a bearer bond without the issuer having freely assumed an obligation towards that holder.

In Brogsitter v Fabrication de Montres Normandes EURL (C-548/12) [2014] 2 W.L.R. 1600, the CJEU considered the meaning of "matters relating to a contract" for the purposes of art.5(1) of Regulation 44/2001 (now art.7(1) of Regulation 1215/2012). (Old) art.5(1) is engaged where the conduct complained of may be considered a breach of the terms of a contract, which may be established by taking into account the purpose of the contract. Even though the claim may be classified under domestic law as a tort claim, it may fall within art.5(1).

Article 8 of the Regulation addresses proceedings related to existing claims. Of particular relevance to contractual claims are the rules that a person domiciled in a Member State may also be sued:

- on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
- in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property in the court of the Member State in which the property is situated.

There are also provisions relating to jurisdiction in matters relating to insurance (s.3), consumer contracts (s.4) and individual contracts of employment (s.5), which depart from the general rule set out above.

There are certain types of claim listed in art.24 for which, despite the rules set out above, certain courts have exclusive jurisdiction, such as proceedings which have as their object rights in rem in immovable property (which are to be determined in the courts where the property is situated), certain company proceedings (which are to be determined where the company has its seat) and proceedings concerned with the registration or validity of IP rights.

Where the jurisdiction of one court is established in accordance with the above rules, any other court shall decline jurisdiction (art.29(3)).
Jurisdiction in relation to a defendant who is not domiciled in a Member State is determined by reference to domestic law, unless there is a relevant jurisdiction agreement (art.25) or the case involves one of the special categories listed in art.24 of the Regulation (immovable property, patents, etc.). See the separate article on Conflict of laws: jurisdiction agreements for further details.

Jurisdiction - Lugano Convention: The Lugano Convention is in very similar terms to Regulation 44/2001 (the predecessor to Regulation 1215/2012). Signatories are the European Union, Iceland, Norway and Switzerland.

Jurisdiction - Within the United Kingdom: Within the United Kingdom (i.e. as between England/Wales, Scotland and Northern Ireland), jurisdiction is determined by reference to the rules in Sch.4 to the Civil Jurisdiction and Judgments Act 1982, which bear similarities to and are modelled on Regulation 44/2001 (the predecessor to Regulation 1215/2012). In particular, para.1 provides the general rule that persons domiciled in a part of the United Kingdom shall be sued in the courts of that part. Paragraph 3(a) provides that a person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question. Of note are the special provisions relating to jurisdiction over consumer contracts (paras 7-9), individual contracts of employment (para.10) and prorogation of jurisdiction (i.e. jurisdiction agreements) (para.12).

Jurisdiction - Other: Outside the scope of the provisions outlined above, the English court has jurisdiction to entertain a claim in personam against a defendant present and duly served with the claim form in England, as well as against a defendant who submits to the court's jurisdiction.

Outside the scope of the provisions outlined above, the English court may also grant permission to serve a claim form on a defendant out of the jurisdiction of England and Wales, in accordance with the rules of court in Pt 6 of the Civil Procedure Rules (CPR), specifically CPR 6.36.

The court will not grant permission unless satisfied that England and Wales is the proper place in which to bring the claim: CPR 6.37(3). The applicant for permission must explain why the claimant believes that the claim has a reasonable prospect of success and set out the ground in para.3.1 of CPR Practice Direction 6B which is relied on.

Paragraph 3.1 of CPR Practice Direction 6B lists various general grounds for service out of the jurisdiction, including for example where the claim is made for a remedy against a person domiciled within the jurisdiction. Of particular relevance for present purposes are the grounds listed under the heading "claims in relation to contracts", namely where: (1) a claim is made in
A defendant can ask the English court to decline jurisdiction on the grounds that the English court is not a convenient forum (forum non conveniens).

Choice of Law - Rome I Regulation: Regulation 593/2008 (sometimes called the "Rome I Regulation") sets out choice of law rules applicable to contractual obligations in civil and commercial matters (art.1(1)) where the relevant contract was concluded after 17 December 2009 (art.28). It does not apply to revenue, customs or administrative matters. There are other specific exclusions from its scope, including notably status, matrimonial property, negotiable instruments, arbitration agreements, choice of court agreements, questions of company law, agency, certain aspects of trusts law and certain insurance matters (art.1(2)).

The general rule is set out in art.3(1): a contract shall be governed by the law chosen by the parties. However, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (art.3(3)).

In the absence of express or clear choice, art.4 provides a method for determining the law governing the contract.

Article 4(1) lists rules for specific types of contract, in particular:

- A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence (art.4(1)(a)).
- A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence (art.4(1)(b)).
- A contract relating to a right in rem in immovable property shall be governed by the law of the country where the property is situated (art.4(1)(c), subject to the exception in 4(1)(d)).
- A franchise contract shall be governed by the law of the country where the franchisee has his habitual residence (art.4(1)(e)).
A distribution contract shall be governed by the law of the country where the distributor has his habitual residence (art.4(1)(f)).

A contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if this can be determined (art.4(1)(g)).

Article 4(2) states the default rule if none of the above provisions apply: the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

However, where it is clear from all the circumstances of the case that the contract is manifestly more connected with a country other than that indicated by art.4(1) or 4(2), the law of that other country shall apply (art.4(3)).

Where the law applicable cannot be determined in accordance with the above rules, the contract shall be governed by the law of the country with which it is most closely connected (art.4(4)).

There are special rules applicable where the law applicable has not been expressly or clearly chosen in relation to:

- Contracts of carriage (art.5).
- Consumer contracts (art.6).
- Insurance contracts (art.7).
- Individual employment contracts (art.8).
- Nothing in the regulation restricts the application of the overriding mandatory provisions of the law of the forum (art.9).
- The existence and validity of a contract or term is determined by the law which would govern it if valid (art.10(1)).

Choice of Law - Rome Convention: The Rome Convention, which appears at Sch.1 to the Contracts (Applicable Law) Act 1990, continues to apply to choice of law issues relating to contractual obligations before the Rome I Regulation came into effect (i.e. contracts concluded before 18 December 2009) and (seemingly) to the contracts of insurance where the risk is situated outside the European Union which are excluded from the scope of the Rome I Regulation.

The provisions of the Rome Convention are similar to the Rome I Regulation but there are some important differences. For example, the specific rules in art.4(1) of the Rome I Regulation are new, as are the specific rules for insurance contracts in art.7, and the rules on giving effect to overriding mandatory rules are of narrower scope.
Hague Conference principles on choice of law: On 19 March 2015, the Hague Conference on Private International Law approved principles on the choice of law in international contracts.

INTERNATIONAL LITIGATION: PROTECTIVE MEASURES

The use of protective or injunctive measures in civil litigation has long been of interest to litigants and practitioners alike. They can often make the difference between court proceedings with a useful, tangible outcome on the one hand, and pyrrhic victories on the other. Obtaining - and holding onto - pre-trial remedies can also be a legitimate way of applying great pressure on an opponent and thereby bringing a dispute to an early conclusion.

For several decades now the courts in England and Wales have recognised the benefits of such orders - in particular freezing injunctions and search and seizure orders - in the context of domestic litigation. They preserve assets or information which could subsequently be lost, dissipated or destroyed with the result that the purpose of the litigation is defeated. Parliament subsequently legislated to permit English, Welsh and Northern Irish courts also grant such orders in support of litigation (and arbitration) proceeding overseas. This is a long-arm jurisdiction which makes the UK an attractive forum for overseas litigants seeking protective relief. More recently we have also seen the increasing use of anti-suit injunctions to block the commencement of litigation overseas.

This article will provide a summary of the principles applicable to freezing injunctions, search and seizure orders and also anti-suit injunctions in the context of cross-border disputes.

The principles relating to the granting of freezing orders, search and seizure orders and anti-suit injunctions - being the three most important and draconian types of protective measures that the English Courts will grant - will be dealt with in turn below. The requirements and tests explained apply both to orders sought in the context of English proceedings, as well as those sought in support of proceedings on foot, or about to be commenced, abroad.

Before that it is important to consider the basis upon which an English (and also Welsh and Northern Irish) Court can make such orders in support of foreign litigation at all.

UK Courts: Long-arm Jurisdiction to Grant Protective Measures: Section 25 of the Civil Jurisdiction and Judgments Act 1982 (as amended) confers jurisdiction on the High Court of England, Wales and Northern Ireland to grant interim relief in support of civil litigation being conducted overseas. An equivalent power is conferred by s.44 of the Arbitration Act 1996, read together with s.2(3)(b) of that Act, where overseas arbitrations are concerned (although this can be contracted out of). Notably, the kind of protective measures contemplated here can be ordered whether or not the respondent is
domiciled, present or resident within the High Court's jurisdiction (s.37(1) of the Senior Courts Act 1981). If the respondent is based outside of England/Wales/Northern Ireland, permission to serve out of the jurisdiction will need to be obtained when the originating claim or application is made, in the ordinary way.

The types of relief available will include asset freezing orders and search and seizure orders, as well as other injunctive relief such as disclosure orders under the Norwich Pharmacal jurisdiction. The overriding purpose is to ensure that practical justice is achieved through international judicial cooperation.

In addition to the legal tests applicable to each specific remedy sought (see below), before making an Order in support of international litigation the Court will want to be satisfied that:

- the substantive proceedings (for instance for breach of contract, or misuse of confidential information, or misappropriating company monies) have been or are about to be commenced; and
- the fact that the English Court does not have jurisdiction over the substantive proceedings does not make it "inexpedient" for the Court to grant the ancillary order sought (or "inappropriate" in the case of a foreign arbitration).

The "inexpedient" or "inappropriate" tests are intended to address the risk that any order the English Court might make could hinder, cut across or otherwise be inconsistent with any order made (or refused) by the home court or arbitral tribunal. The legislation itself provides no guidance on how the Court should approach these tests. The case law has filled this gap: see in particular Haiti v Duvalier (Mareva Injunction) (No.2) [1990] 1 Q.B. 202, Credit Suisse Fides Trust SA v Cuoghi [1998] Q.B. 818, Refco Inc v Eastern Trading Co [1999] 1 Lloyd's Rep. 159, Motorola Credit Corp v Uzan (No.6) [2003] EWCA Civ 752; [2004] 1 W.L.R. 113 and (where arbitrations are concerned) Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 532 (Comm); [2008] 2 All E.R. (Comm) 1034.

The position in simple terms is that (subject to the other substantive tests being satisfied, as to which see further below) the Court will presume that it is expedient to grant relief if the respondent is located in England (or Wales or Northern Ireland, depending on which Court is being asked to make the order), and likewise if the assets to be frozen, or property to be searched (etc.) are within the jurisdiction. If that is not the case, satisfying the Court that it is "expedient" or "appropriate" to make the order sought will be more difficult, although not impossible (especially in a compelling fraud case).

The High Court will also consider the home court's view(s) on these matters, if any, and will have regard to principles of comity generally. It will also be reluctant to make orders it cannot enforce, so
it will be important to have in mind how the Court would police the order you are asking it to make, for instance by sequestrating assets, imposing fines or in serious cases committing non-compliant individuals to prison.

Freezing Orders: A freezing order is an injunction designed to prevent the dissipation of assets pending judgment. It does not preserve specific assets (and is therefore not proprietary in its effect) but operates in personam against named respondents, restraining them from dealing with assets up to a certain value (which would typically be the value of the underlying claim). It is therefore different in kind from most forms of pre-judgment "attachments" that one encounters in foreign courts (especially in the United States).

A freezing order granted by a UK Court is typically coupled with an order requiring disclosure by the respondent of all of his assets up to the value of the amount frozen (including all legally and/or beneficially owned assets). Plainly, this can yield extremely valuable information.

As will be clear from this description, a freezing injunction is a very powerful and invasive measure and has been described by English Judges as a "nuclear weapon" in civil litigation (Bank Mellat v Nikpour [1982] Com. L.R. 158). It was first approved by the English Court of Appeal in 1975, in Nippon Yusen Kaisha v Karageorgis [1975] 1 W.L.R. 1093, and subsequently in the better known case of Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva) [1980] 1 All E.R. 213. In England it is now enshrined in the English Court rules at CPR 25.1(f) and (g).

Notably, the order can extend to assets outside of England - this is the so-called "Worldwide Freezing Order". There is no absolute requirement to prove that there are any relevant assets within England at all (which again tends to differ from the orders, e.g. New York or Swiss courts tend to be willing to make). This emphasises again the generosity of the English Court, where protective measures are concerned, when compared with many other jurisdictions.

In the same vein, the English Courts have made it clear that the relief they are prepared to grant will be flexible where appropriate, in particular where this is necessary to deal with cunning respondents or sophisticated scenarios. That being said, once freezing orders have been made they will be construed narrowly, bearing in mind the penal consequences of breaching them (see generally JSC BTA Bank v Ablyazov [2015] UKSC 64; [2015] 1 W.L.R. 4754).

In addition, that being said, the relevant criteria for obtaining a freezing injunction are robust. An overriding "just and convenient" test applies (s.37 of the Senior Courts Act 1981 and the case of American Cyanamid Co v Ethicon Ltd (No.1) [1975] A.C. 396). In addition, two specific criteria must be met:
- a good arguable case on the merits (of the underlying case) must be established; and
- the applicant must also be able to prove a real risk of dissipation of assets by the respondent, other than in the ordinary course of business.

As to practicalities, the application is usually made without notice and heard ex parte in the first instance. If the freezing injunction is ordered, a return or discharge hearing on notice to the respondent will follow some time later, at which time the respondent will have an opportunity to argue that the injunction should be discharged (for example, because on a balanced analysis the criteria have not been met).

Importantly, when making the initial application "full and frank" disclosure must be given by the applicant - this obligation is taken very seriously by the Court, especially given the ex parte nature of the original application. Effectively, the applicant must draw to the Court's attention any possible shortcomings in its application, for instance that there are possible defences to the underlying claim.

The applicant will also be required to give a cross-undertaking in damages, in case the injunction should prove wrongly granted (save where the applicant is a public body). This acts as a guarantee to the respondent, in case the injunction causes it to suffer loss and is subsequently discharged. Whilst this may seem a technical requirement, it is important not to overlook it since it can sometimes represent a stumbling block for commercial entities unfamiliar or uncomfortable with undertakings of this kind.

As mentioned, the hearing on the return date will provide the respondent with an opportunity to contest the injunction: arguments available to a respondent will essentially be that one of the criteria has not in fact been satisfied (i.e. no good arguable case, or no real risk of dissipation of assets) or that full and frank disclosure has not in fact been given or potentially that the respondent will not be good for the cross-undertaking in damages. The discharge hearing can be of great strategic importance in the wider litigation, since if the injunction is retained this can severely hamper the respondent in the manner in which it deals with its assets, and may drive them to a negotiated resolution. The Court may also on occasion be driven to express a view on the merits of the claim, which can also be of strategic importance. For completeness it should be noted that a respondent who does not wish to contest the injunction in principle may consider giving undertakings to the applicant and to the Court if he wishes to get the order discharged.

Search and Seizure Orders: Typical cases where orders for the search of premises and the seizure of documents or data will be sought will involve alleged infringements of intellectual property rights, misuse of confidential information in the context of business competition, or commercial fraud. As with freezing injunctions, they may also be used in matrimonial disputes (on this topic see: Tchenguiz
v Imerman [2010] EWCA Civ 908; [2011] Fam. 116 in which the Court of Appeal encouraged the use of such protective measures in divorce proceedings, and firmly discouraged the unauthorised seizure by a litigant of a spouse's personal information e.g. as to assets).

The standard order - obtained without notice to avoid tipping off, like freezing orders - will require the respondent to permit the applicant's representative to enter his premises to search for and remove property which is either the subject matter of the action (e.g. counterfeit goods) or documentary evidence pertaining to it (e.g. computer hard disks in a fraud case). The property in question will need to be clearly identified in the application and order.

As with freezing orders, this form of pre-emptive remedy was originally deployed by the Courts in the mid-1970s (without any specific statutory basis), and received the approval of the Court of Appeal for the first time in Anton Piller KG v Manufacturing Processes Ltd [1976] Ch. 55. It has since put on a statutory footing, see s.7 of the Civil Procedure Act 1997 and the English Court rules at CPR 25.1(h). In developing the relevant principles, the Courts have been keen to emphasise that the order is not a search "warrant" - it does not permit the applicant to break into the respondent's premises. Rather, it forces the respondent to allow the applicant in, failing which he will be in contempt of court and subject to further sanction (including potentially imprisonment).

In theory a search and seizure order will only be made in exceptional cases - although this is not always strictly adhered to in practice. The legal requirements, in summary are (see generally Indichii Salus Ltd (In Receivership) v Chandrasekaran [2006] EWHC 521 (Ch)):

- strong prima facie case of a civil cause of action (domestic or foreign) must be established;
- there must a "real possibility" of the destruction of important evidence which is clearly likely to be in the respondent's possession; and
- the harm likely to be caused to the respondent or his business must not be disproportionate to the aim of the order

In many respects this is probably the most draconian order the English Court can make - in practical terms, once done it cannot be undone. Indeed, although technically - as with freezing orders - an on notice return Court date will be ordered when the original order is made, at which the respondent can contest it and request that the order be discharged, in reality of course the relevant inspection and seizure of property will already have taken place. The order therefore constitutes a significant infringement on personal and business privacy and raises human rights concerns - in particular when making the order the Court will need to be satisfied that the interference sought is necessary for the protection of the rights and freedoms of others, per art.8(2) and Protocol 1, art.1 of the European
Convention on Human Rights Ultimately the Court will want to be satisfied that the order is necessary in the interests of justice, and will prefer to order less intrusive relief if this will suffice.

As you would expect, the process by which search and seizure orders are sought and obtained contains important safeguards for the benefit of respondents: as with freezing orders, full and frank disclosure and cross-undertakings in damages must be given by the applicant. In addition, the entire process is conducted through and in the presence of an independent "supervising" solicitor, and searches may not be conducted unless the respondent or his representative is present. In addition, the respondent has a (limited) right not to allow inspection or removal of material where doing so would violate his right not to incriminate himself (see generally the English Court rules at CPR 25A PD.7).

Anti-suit Injunctions: An anti-suit injunction is an injunction granted to restrain the respondent from instituting or continuing proceedings in a foreign court or arbitral process, where it is necessary in the interest of justice to do so.

At the outset it is important to understand that as a matter of law, the order is not directed at the "other" court or tribunal - rather, it is addressed to a specific party which is subject to the English Court's jurisdiction, which will then be in contempt of court if it breaches the order (see generally Turner v Grovit (Reference to ECJ) [2001] UKHL 65; [2002] 1 W.L.R. 107).

There are two broad categories of case where an anti-suit injunction may be granted (these are explained in more detail below):

- where the applicant has the benefit of a legal or equitable right not to be sued in the foreign court or tribunal. This will usually consist of a contractual jurisdiction or arbitration clause that the applicant is seeking to protect and insist upon, when faced with a counterparty that is threatening to disobey it; and

- where there is no such contractual right, but it is nevertheless vexatious and oppressive for the respondent to bring or continue the claim in the other court or tribunal.

Jurisprudentially, the making of the injunction does not involve (or require) a denial by the English Court of the foreign court or tribunal's jurisdiction. Whether that foreign court does or does not have jurisdiction remains, technically, a matter for it to determine in accordance with its own laws (see Barclays Bank Plc v Homan [1992] B.C.C. 757). So, the anti-suit injunction does not, in theory, engage the question of whether the foreign court or tribunal has jurisdiction. Indeed, it is typically sought in circumstances where that foreign court is prepared to accept - potentially exorbitant - jurisdiction over the underlying dispute, hence the need for the injunction. Rather, it involves an assessment of the conduct of the respondent in seeking to invoke that foreign jurisdiction.
As to the practicalities and requirements relating to anti-suit injunctions, ultimately, the decision for the Court is a discretionary one. In recognition of the importance and potential ramifications of its decision, and the fact that, in practice, it involves interfering with foreign judicial processes, the Court will weigh up all of the circumstances of the dispute in reaching its view (see Donohue v Armco Inc [2001] UKHL 64; [2002] 1 All E.R. 749). For this reason, there is a heavy burden on the applicant to provide the Court with the fullest possible knowledge and understanding of the case. The applicant must also apply promptly and before the foreign proceedings are too far advanced (REC Wafer Norway AS (formerly REC Scanwafer AS) v Moser Baer Photo Voltaic Ltd [2010] EWHC 2581 (Comm); [2011] 1 Lloyd's Rep. 410). Notice of the application must be given to the respondent, unless there is evidence that to do so might defeat the point of the application, for instance because the respondent might then attempt to obtain a pre-emptive injunction in the other jurisdiction (and if the application is originally made without notice and heard ex parte, then as with the other types of injunctions considered above the Court will order a return hearing, on notice, at which the respondent will have an opportunity to contest the order).

To grant the injunction, the English Court will want to be satisfied that it has a sufficient legitimate interest in the foreign proceedings. As mentioned above, typically this will require that the applicant has a contractual right not to be sued in the courts of the foreign country, and the English Court will be satisfied that there is no breach of comity if it is merely enforcing an exclusive jurisdiction or arbitration clause governed by English law, for example (see for instance Deutsche Bank AG v Highland Crusader Offshore Partners LP [2009] EWCA Civ 725; [2010] 1 W.L.R. 1023). Essentially, the English Court will always be keen to enforce compliance by the parties with whatever contractual bargain they have struck - unless the party suing in the different forum can show strong reasons for doing so.

The Court will factor in the interests of third parties, as well as the undesirable risk of inconsistent decisions or parallel proceedings, before making a decision (for instance where the foreign dispute involves a number of issues which are suitable for determination together, of which only one is the subject of an exclusive jurisdiction clause that is not in favour of the foreign court concerned - see for example OceanConnect UK Ltd v Angara Maritime Ltd [2010] EWCA Civ 1050; [2011] 1 All E.R. (Comm) 193).

Where contractual jurisdiction is not clear cut (for instance there is a non-exclusive jurisdiction clause, or no jurisdiction clause at all) the party seeking the anti-suit injunction must establish that it is vexatious or oppressive for the other party to pursue the claim in the foreign court. The courts have avoided giving a comprehensive definition of vexatious or oppressive litigation, so this is an
open-ended category; however, in general terms the doctrine of forum non conveniens will apply, and it will generally be necessary to show:

- that England is clearly the more appropriate (natural) forum; and
- that justice requires that the other party should be restrained from proceeding in the alternative forum.

In addition, in circumstances where the English Court is not being asked to enforce a jurisdiction clause, in order for it to have a sufficient legitimate interest in the dispute there must be an English claim that the Court is being asked to protect.

The Court will also (as always) consider matters of comity. Although case law had previously suggested that, anti-suit injunctions could not be obtained from the English Court in order to prevent a party from commencing or continuing proceedings in another European Union State, even where the other party was doing so deliberately to obstruct the course of justice in England (Turner v Grovit (Reference to ECJ) [2001] UKHL 65; [2002] 1 W.L.R. 107), and even where there they were doing so in breach of an arbitration agreement: Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07) [2008] 2 Lloyd's Rep. 661), in fact recent legislation (Judgments Regulation 1215/2012, amended with effect from 10 January 2015) has softened the position and strengthened the respect for arbitration clauses within the EU.

Consistent with this increasing desire to enforce arbitration agreements, the English Court has shown itself willing to grant anti-suit injunctions preventing the pursuit of Court proceedings overseas when the disputed contract contains a London arbitration clause, even where the foreign court has deemed the arbitration clause invalid for violating local public policy and even where arbitral proceedings are not in contemplation (AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 W.L.R. 1889).

Conclusion: As will be apparent, the UK Courts have wide-ranging powers to grant protective measures, both in the context of civil litigation within their jurisdiction as well as in support of claims proceeding overseas. They will be ready and willing to step in and make very powerful extra-territorial orders concerning foreign parties and assets where a good case can be made and doing so will not be futile. So long as this remains the case, the UK will remain a popular jurisdiction with international litigants seeking to protect their commercial or financial interests.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A foreign judgment does not have any direct effect in England, but it can be recognised and enforced under various systems of rules, depending on its country of origin. Enforcement involves the successful
party seeking to execute the judgment in England, using normal English methods of execution. Recognition is a lesser step and involves the English court accepting that a foreign court decided on a claim or issue and not permitting it to be re-litigated. This can be relied on as a defence to a claim on the same or connected facts. The rules for enforcement and recognition of foreign judgments depends on the state in which the judgment was given:

Common law: judgments from all states not covered by the regimes below, including from major states such as the USA, China and Russia;

Part II of the Administration of Justice Act 1920 (1920 Act): judgments from a large number of Commonwealth countries and British overseas territories;

Part I Foreign Judgments (Reciprocal Enforcement) Act 1933 (1933 Act): judgments from other major Commonwealth countries, the Channel Islands, the Isle of Man and some other countries;

Regulation 44/2001 (Brussels Regulation): judgments from EU member states, and the identical Lugano Convention for judgments from EEA states (Iceland, Norway and Switzerland);

Part II of the Civil Jurisdiction and Judgments Act 1982 (1982 Act): judgements from other parts of the UK.

COMMON LAW

At common law, a foreign judgment will be enforced and/or recognised in England if it satisfies the following criteria:

- the judgment is for a debt or definite sum of money;
- the judgment is final and conclusive on the merits;
- the court which gave the judgment had jurisdiction over the defendant, as viewed by English rules of the conflict of laws;
- the judgment cannot be impeached on the grounds of fraud, public policy or breach of natural justice.

Judgment for a debt: The judgment must be for a definite sum which has been ascertained by the foreign court, including judgments for debts, assessed damages and costs. If the judgment is for some other relief, such as an injunction or specific performance, it cannot be enforced in England, but may be relied on to create a res judicata or issue estoppel on the underlying issues. The English court will not enforce foreign penal or revenue judgments, that is judgments which order sums payable to the state rather than a private claimant. In a criminal case in which the defendant is
ordered to pay compensation, the English court will sever the criminal decision and enforce the judgment for compensation.

Final and conclusive: The judgment must be “final and conclusive” on the merits, so that it creates a res judicata between the parties: Nouvion v Freeman (1889) 15 App. Cas. 1. It must conclusively determine the existence of the debt and not be subject to revision or setting aside by the court which gave it. A default judgment may be final and conclusive, if the foreign law considers it final unless subsequently varied; but not if it can be revised when it is enforced. A right of appeal to a higher court does not affect the finality of the judgment; a judgment is final even if an appeal against it is pending, but the English court would usually stay enforcement to wait for the appeal.

Jurisdiction of the foreign court: For a foreign judgment to be capable of enforcement or recognition, the foreign court must have had jurisdiction in personam over the defendant, from the perspective of English conflict of laws rules. That the foreign court had jurisdiction under its own law is irrelevant if this does not satisfy English rules. Jurisdiction is established in any of the following cases:-

- the person against whom the judgment is made was present in the foreign country at the time of the proceedings;
- the person was a claimant or brought a counterclaim in the foreign proceedings;
- the person appeared in the foreign court;
- the person agreed to submit to the jurisdiction of the foreign court.

Presence: Presence can be permanent or temporary, even a brief visit to the country: Carrick v Hancock (1895) 12 TLR 59, but it must be voluntary and not induced by force or fraud. Companies are present in a foreign country if they have a fixed place of business or representative carrying on business, for more than a minimal time: Adams v Cape Industries Plc [1990] Ch. 433.

Claimant or counterclaimant: A party who brings a claim or counterclaim in a foreign court submits to its jurisdiction and must accept the judgment should it go against him.

Appearance: A defendant who appears in a foreign court and participates in a case on the merits accepts the court’s jurisdiction. Under s.33 of the 1982 Act a defendant is not regarded as having submitted to the jurisdiction if he only appears to (a) contest jurisdiction, (b) ask for a dismissal or stay of proceedings because the dispute must be submitted to arbitration or to the courts of another country, or (c) protect or obtain the release of property seized or threatened in the proceedings. If after doing one of those things, the defendant goes on to contest the merits, he will have submitted to the jurisdiction. Steps taken by a defendant which would not be regarded
by the foreign court as a submission to the jurisdiction will not be regarded as such by the English court: Adams v Cape Industries Plc [1990] Ch. 433 at 461 per Scott J. Even if the foreign court would regard steps taken by a defendant as a submission, it is still open to the English court to find there was no submission for English conflict of laws rules: AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2011] EWCA Civ 647; [2012] 1 W.L.R. 920. So long as the defendant is obviously (and probably with rational grounds) disputing jurisdiction, but also takes steps on the merits, he will not be treated as having submitted to the jurisdiction.

*Jurisdiction agreement:* If the parties have agreed a contract providing that all disputes shall be referred to the exclusive jurisdiction of the courts of a particular country, those courts along will have jurisdiction. Such agreements must be express and cannot be implied. They can be established by an agreement to accept service at a specified address. Jurisdiction is not established by the fact that the parties chose the law of that country to apply to their agreement, nor for the fact that the cause of action arose in that country.

*Jurisdiction not established:* Jurisdiction is not established by any of the following matters, although some are relied on by foreign courts: (a) the defendant's possession of property in the foreign country, (b) the defendant's presence in the country when the cause of action arose, (c) the defendant being a national of the country, (d) the defendant being domiciled (but not present or resident) in the country, (e) reciprocity with the courts of the foreign country, (f) a real and substantial connection between the case and the foreign country. Jurisdiction is also not established if the defendant is present in the foreign country but the proceedings are brought in breach of a jurisdiction agreement in favour of the courts of another country (unless the defendant submits or brings a counterclaim).

*Jurisdiction in rem:* A foreign court has jurisdiction to give a judgment on movable or immovable property situated in the country at the time of the proceedings. However, the foreign court does not have jurisdiction to determine the title to or possession of immovable property situated outside that country. (There may be exceptions to this rule, based on the equivalent rule limiting English jurisdiction, such as where there is a contract or equity between the parties, but none have yet been formulated in case law: Dicey, Morris & Collins at para.14-114.)

Defences: An action to recognise or enforce a foreign judgment can be defended on the grounds that the above criteria are not met. There are also specific free-standing defences: where the judgment can be impeached for fraud, where its enforcement or recognition would be contrary to public policy, or where the proceedings in which it was given were contrary to natural justice.
**Fraud:** A foreign judgment can be impeached for fraud committed either by the successful party, or by the court which gave the judgment. Fraud includes bribing witnesses or the judge, or giving perjured or forged evidence. It can conceivably also be fraud by the court in receiving a bribe from a third party to give judgment in favour of a particular party to the case, although this can also be considered as a breach of natural justice.

English domestic judgments can only be set aside for fraud with evidence discovered after the trial and which could not reasonably have been discovered earlier. In contrast, foreign judgments can be impeached for fraud without any newly discovered evidence, even if fraud could have been alleged in the foreign proceedings, or even if it was alleged and rejected in those proceedings: Abouloff v Oppenheimer & Co (1882) 10 Q.B.D. 295. Doubts were expressed about this decision in subsequent cases and in Commonwealth authorities, but it was applied by the Court of Appeal in Jet Holdings Inc v Patel [1990] 1 Q.B. 335 and by the House of Lords in Owens Bank Ltd v Bracco [1992] 2 A.C. 443 (a decision on the equivalent rule in the 1920 Act).

**Public policy:** The cases decided under this head do not offer a consistent set of principles for what is covered by public policy, but it includes the following. In principle it will be contrary to public policy to recognise a judgment obtained in disobedience to an injunction not to proceed with the case in a foreign court: AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 W.L.R. 1804 at para.121. *Res judicata* is a principle of public policy, so that a foreign judgment will not be recognised if it inconsistent with an earlier decision of the English court in proceedings between the same parties or their privies: Verlaveke v Smith [1983] 1 A.C. 145, ED&F Man (Sugar) Ltd v Haryanto (No.2) [1991] 1 Lloyd's Rep. 429. It has not been decided whether to enforce a judgment which is exemplary, punitive or manifestly excessive is contrary to public policy.

Public policy also includes cases which would breach the Human Rights Act 1998 and the European Convention on Human Rights. This is clear where a foreign court is also a party to the Convention. In Pellegrini v Italy (30882/96) (2002) 35 E.H.R.R. 2, the ECHR decided that Italy could not recognise a judgment from the Vatican City where recognition itself would violate the Convention, despite the recognition being required by prior treaty between Italy and the Vatican. The House of Lords held in United States v Montgomery (No.2) [2004] UKHL 37; [2004] 1 W.L.R. 2241 that enforcement of a US judgment could only be refused under the European Convention where the defects in the foreign proceedings were "flagrant". The English court can also decide under this head whether the foreign court was to be regarded as lacking in independence and partial (and will not substitute the view of a foreign court of a third country which had previously refused

*Natural justice*: A foreign judgment will be refused enforcement where the proceedings offend the English view of substantial or natural justice: Pemberton v Hughes [1899] 1 Ch. 781, at 790 per Lord Lindley. Natural justice traditionally required the foreign court to have given notice to the litigant that it would determine the claim and allowed the litigant the opportunity substantially to present his case before the court: Jacobson v Frachon (1927) 138 LT 386, CA, at 392 per Atkin LJ. In Adams v Cape Industries, the Court of Appeal held that natural justice was broader than just notice and the opportunity to be heard. In that case, a denial of substantial justice was found in the failure by the foreign court, in the United States, to follow its own procedure for the assessment of damages after a default judgment (in US law, as English, damages were assessed by a judge after a hearing, but here the judge had not held any hearing or objectively assessed the evidence). A mere procedural irregularity which does not deny substantial justice will not suffice.

The existence of a remedy in the foreign court may be relevant. The foreign court's view of the fairness of the proceedings is not conclusive: Jet Holdings Inc v Patel at 345 per Staughton LJ (obiter). In Adams v Cape Industries, the Court held that the where the breach of natural justice consisted of lack of notice or lack of opportunity to be heard, the judgment debtor may raise an objection in England even if there were a remedy in the foreign court. But where the breach consists of anything else, the existence of a remedy is relevant (although this will depend on whether the debtor knew of the breach in time to use the foreign remedy).

Recognition: If the criteria above are satisfied, the judgment is conclusive as to law and fact on any matter decided by the foreign court, and cannot be questioned in England. As well as being enforced, it can also be recognised as a good defence to any claim on the same facts between the same parties or their privies on the ground that it creates an issue estoppel: Carl Zeiss Stiftung v Rayner & Keeler Ltd [1967] 1 A.C. 853.

**THE 1920 ACT**

Introduction: Part II of the 1920 Act creates a scheme for the enforcement of judgments from the majority of Commonwealth countries, codified in Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984/129.

Criteria for enforcement: Section 9(1) of the Act provides that a judgment creditor who has obtained in a superior court of a country covered by the Act may apply to the High Court to register the judgment within 12 months of the date of the judgment (or longer if an extension is granted).
On such an application, the Court may order the judgment to be registered, if it is just and convenient to do so. The judgments to which the Act applies are the same as those enforceable at common law: judgments for a debt or definite sum. Although it does not say so specifically, the Act is likely to exclude judgments for fines or penalties, as at common law. A judgment registered under the Act has the same effect and its execution is subject to the same control of the Court as if it were an English judgment: s.9(3).

Defences to enforcement: Section 9(2) provides that no judgment shall be registered if certain criteria apply, which are largely the same as the defences to enforcement at common law, except for the following three points. First, there is no specific defence of breach of natural justice, but s.9(2)(c) provides that the judgment shall not be registered if the debtor was a defendant in the foreign proceedings, who was not duly served with process and did not appear in the foreign court. Secondly, a judgment cannot be registered under the Act if an appeal against it is pending against it in the foreign court, or if the debtor is entitled to and intends to appeal: s.9(2)(e). Thirdly, the public policy defence prevents registration of a judgment where the underlying cause of action could not be entertained in England for public policy (s.9(2)(f)), whereas at common law the defence is that enforcement of the judgment would be contrary to public policy.

Recognition: Recognition of foreign judgments is not covered by the 1920 Act and are thus covered by the common law principles above.

THE 1933 ACT

Scope: Part I of the 1933 Act applies to most Commonwealth countries not covered by the 1920 Act, including Australia (federal and state courts), Canada (federal courts and provincial courts except Quebec), India, Pakistan, the Channel Islands and the Isle of Man. It applies to certain other states and formerly applied to most Western European states, although between those states it is now superseded by the Brussels Regulation discussed below.

Criteria for enforcement: Under s.2(1) a judgment creditor may apply to the High Court within six years of the date of the judgment (or of any appeal) for the judgment to be registered in England. The Court must order the registration of the judgment, subject to proof of the matters prescribed by the Act. This does not apply to judgments which have been wholly satisfied or could not be enforced by execution in the foreign country. The Act covers judgments or orders made in civil proceedings and those in criminal proceedings for the payment of a sum of money as compensation or damages to the injured party: s.11(1). Unlike the position at common law, this covers both final and conclusive judgments, and also judgments for interim payments: s.1(2)(a). A registered foreign judgment has the same effect as an English judgment: s.2(2).
Section 4(2) provides the grounds on which the foreign court has jurisdiction, which are very close to those at common law except for three matters. First, presence in the country at the time of the proceedings is not sufficient to found jurisdiction under the Act. Secondly, there is only jurisdiction founded on the presence of a company's office in the foreign state where the cause of action against a company arises out of a transaction carried out by that office (unlike at common law where it does not matter if the transaction relates to that office). Thirdly, the Act allows for jurisdiction over an individual with a place of business in that country.

Defences to enforcement: Section 4(1) provides for the grounds on which registration of the judgment must be set aside which are the same as the defences at common law.

Recognition: Section 8 provides that judgments to which the Act applies (whether or not they are registered or are capable of registration) will be recognised as conclusive between the same parties founded on the same action, and can be relied on as a defence or counterclaim. However, this does not apply where the registration of the judgment was been or could be set aside on the compulsory grounds (such as lack of jurisdiction, fraud, lack of notice or public policy). The House of Lords decided in Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] A.C. 591 that these provisions were intended to cover recognition of foreign judgments dismissing a claim, so long as the dismissal was on the merits and not on a procedural ground.

**BRUSSELS REGULATION**

Scope: The Brussels Regulation applies to the recognition and enforcement all judgments in civil and commercial matters given by courts of EU member states. The identical Lugano Convention applies to the same judgments from courts in Iceland, Norway and Switzerland. (See Conflict of laws: jurisdiction for a discussion of the scope of the Regulation and Convention in general.) The Regulation is not restricted to final judgments ordering the payment of money but also covers non-money judgments and interim judgments, such as for final or interim injunctions.

Recognition: Article 33 provides that all judgments covered by the Regulation shall be recognised in all other member states without any special procedure being required. Once recognised, a foreign judgment should be afforded the same effectiveness and authority as a judgment as it has in the member state of origin: Hoffmann v Krieg (145/86) [1988] E.C.R. 645. The member state recognising it should make an order which most closely resembles the order which would be made in the original state.

The judgment shall not be recognised on the following grounds:
- it is manifestly contrary to public policy of the member state in which recognition is sought: art.34(1);
- it is a default judgment, the defendant was not served with the document instituting the proceedings in sufficient time so that he could defend the claim, unless the defendant failed to start proceedings to challenge the judgment when it was possible to do so: art.34(2);
- it is irreconcilable with a judgment given between the same parties in the member state in which recognition is sought: art.34(3);
- it is irreconcilable with an earlier judgment in another state (an EU member state or not) on the same cause of action and between the same parties, which fulfils the criteria for recognition in the relevant member state: art.34(4);
- it conflicts with one of the exceptional grounds for jurisdiction under the Regulation, Ch II s.3 (insurance contracts), s.4 (consumer contracts), s.6 (exclusive jurisdiction): art.35(1), or art.72 which preserves pre-existing treaties with third party countries which prevent recognition of judgments based on 'exorbitant' jurisdiction.

Public policy: The public policy defence under the Regulation is intended to apply only in exceptional circumstances, as shown by the use of "manifestly". Recognition and enforcement of the judgment must infringe a fundamental rule of law in the recognising member state: Apostolides v Orams (C-420/07) [2011] Q.B. 519. Where the original court had refused to hear a defendant who was in contempt of court, the recognising court was entitled to consider this a breach of art.6 of the ECHR and refuse recognition of the judgment on the grounds of public policy: Bamberski v Krombach (C-7/98) [2001] Q.B. 709. There is no separate "fraud" defence to recognition under the Regulation. Alleged fraud by the original court could theoretically infringe public policy of the recognising state, but this will be very difficult in practice, since all member states allow a party who alleges fraud to bring proceedings to challenge the judgment. It will therefore not be manifestly contrary to public policy to recognise the judgment in another state. For this reason in Interdesco SA v Nullifire Ltd [1992] 1 Lloyd's Rep. 180, it was held that the English court would not refuse enforcement of a French judgment for alleged fraud, even with evidence newly discovered since the trial, because the debtor had a remedy in the French courts.

Right to defend: Article 34(2) applies to all judgments in default of appearance, which is judged autonomously and not defined with strict reference to the law of the original court: Hendrikman v Magenta Druck & Verlag GmbH (C-78/95) [1997] Q.B. 426. The Court considers the way in which service was effected (whether or not it complied with the law of the original state on service) and whether the defendant had sufficient time and opportunity to conduct his defence. If the
defendant has found out about the proceedings, the onus is on him to apply to set aside the judgment in the original court, where such a procedure exists and could be used.

*Irreconcilable with other judgments:* Article 34(3) is somewhat limited in effect: not many judgments from an EU member state will be irreconcilable with a judgment in the recognising member state, because of the rules in arts.27-30 of the Regulation, which give priority to the court first seised with the dispute. But where it occurs, the recognising court can refuse recognition of the judgment, even if it was given before the irreconcilable judgment given by that court. To be irreconcilable the judgments must grant remedies which are mutually exclusive. Article 34(4) allows a member state to refuse recognition of an EU judgment which is irreconcilable with an earlier judgment from a non-EU state which also qualifies for recognition in that member state.

*Jurisdiction:* The recognising court may only investigate the jurisdiction of the original court if the case falls within one of the special grounds for jurisdiction listed in art.35(1). If the original court did not apply the exclusive jurisdiction provisions listed there, the judgment shall not be recognised. But the recognising court is bound by findings of fact made by the original court in its jurisdiction decision: art.35(2). Thus, the recognising court cannot refuse recognition on the ground that it believes the original court decided jurisdiction wrongly; that is a matter for the original court.

*Other matters:* Article.36 provides, importantly, that the foreign judgment may not be reviewed as to the merits in any circumstances. Recognition may be stayed pending an appeal (and in the case of UK or Irish judgments enforced in other states where the courts of the original state have granted a stay pending the appeal): art.37

Enforcement: A recognised judgment can be enforced in a member state by a declaration of enforceability (also called "exequatur"). The Regulation set out the broad procedure which should apply in Ch.III s.2 (arts 38-52) but leaves the detail to be prescribed by member states according to their own law. In England, the procedure is governed by CPR Pt 74, which is discussed under "Procedure" below. This procedure is simplified by the recast Regulation (Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) as from 10 January 2015, which is discussed under Latest Developments below.

**THE 1982 ACT**

Criteria for enforcement: Section 18 of the 1982 Act creates a code for the enforcement of judgments between different parts of the UK. The section applies both to money judgments, regulated by Sch.6, and non-money judgments, regulated by Sch.7. Judgments includes all court
judgments and tribunal and arbitral awards in civil proceedings: s.18(2), with exceptions under s.18(3). The judgment creditor applies for a certificate of the judgment, stating the amount awarded in the case of a money judgment, or a certified copy of the judgment, in the case of a non-money judgment: Sch.6 and Sch.7 para.2. No certificate can be issued if the time for bringing an appeal has expired without any appeal being brought, or the appeal has been finally disposed of: Sch.7 para.3.

Within six months of the issue of the certificate or certified copy of the judgment, the creditor can register them with an officer of the High Court in England and Wales, and Northern Ireland, and of the Court of Session in Scotland: Sch.7 para.5. On registration, the judgment has the same effect as if it were a judgment of the part of the UK in which it is registered and can be enforced by the normal methods available in that part: Sch.7 para.6.

Recognition: Judgments from different parts of the UK are conclusive between the parties as to the matters decided, as at common law and will thus be recognised and can be relied on as a defence or counterclaim. Section 19 also provides that recognition of judgments of one part of the UK shall not be refused in another part solely on the ground that the court did not have jurisdiction as a matter of the conflict of laws rules in that other part.

PROCEDURE

Enforcement at common law: A judgment creditor enforces a judgment at common law by starting a new claim in England based on the judgment. If the conditions for enforcement are satisfied and there is no defence, the claimant will be able to obtain summary judgment. A judgment creditor can also serve a statutory demand based on the foreign judgment, but if there is a dispute as to the judgment, this will have to be tried to determine whether the debts exists as a matter of English law. If the creditor obtains judgment in England, he can enforce it like any other English judgment. A party who seeks recognition of a foreign judgment for any other purpose must also plead it in his particulars of claim or defence, as appropriate.

Enforcement under statute: CPR Pt 74 provides rules for the enforcement of judgments under the 1920, 1933 and 1982 Acts and under the Brussels Regulation and Lugano Convention. Applications for registration must be made to the High Court and may be made without notice: r.74.3. The normal rules on applications under CPR Pt 23 apply here. The application must be supported by evidence in writing and r.74.4 provides details of what the evidence should contain in for each statutory regime. Rule 74.6 provides that the court may grant a registration order, permitting registration of the judgment and gives details relating to such orders. Rule.74.7 set out the process for applying to set aside the registration order.
The 1920 Act still allows the judgment creditor to take enforcement proceedings at common law, but provides that the claimant shall not be entitled to recover costs of the action unless he previously applied for registration under the Act and was refused: 1920 Act s.9(5). All the other statutory regimes provide that no enforcement action can be taken apart from under the provisions of the relevant Act or Regulation: 1933 Act s.6, 1982 Act s.18(8) and, as for the Brussels Regulation, this is the effect of the European Court's judgment in De Wolf v Harry Cox BV (42/76) [1976] E.C.R. 1759. This does not stop a defendant relying on a foreign judgment covered by the 1933 Act as a defence to a claim (that is seeking recognition of it), so long as this does not amount to enforcement of the judgment at common law.

INTERNATIONAL LAW: CONFLICT OF LAWS: FAMILY LAW

Adoption

There are increasing numbers of international adoptions; both children leaving the UK to be placed permanently abroad and children being adopted abroad and coming into the UK. Both directions of movement can involve some conflict of laws between the UK and other countries. This note does not give information on the mechanics or details of foreign legislation. Each country may have specific and complex legislation covering the movement of children from and to its jurisdiction. Specialist advice should always be sought in that country or from lawyers with expertise in that region. This area will be closely linked with the laws of immigration for each jurisdiction. Some of the more complex cases in this area have dealt with issues of child welfare as well as immigration concerns.

International adoptions can be split into those adoptions that are from and between Hague Countries, those that are not and those from the designated list. The non-legal term "intercountry adoption" describes the adoption of a child habitually resident in one country by an adopter (single or couple) who are habitually resident in another country.

Every child that leaves this country for the purpose of adoption will need to have been placed by an adoption agency. There is no private unregulated adoption in the UK, unlike the USA and other jurisdictions. In order to inhibit the trafficking of children and to closely monitor the movement of children between countries, the Adoption and Children Act 2002 ("ACA 2002") makes movement without compliance with conditions a criminal offence (ss.83(7) and 83(8) ACA 2002).

Section 66(1) of the Adoption and Children Act 2002 defines adoption. By virtue of s.89 of the same Act an overseas adoption can be impugned by the High Court on the grounds that it is contrary to
public policy or that the authority which purported to authorise the adoption was not competent to do so.

Hague Convention Adoptions ("Convention Adoptions"): The Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption was put into law by the Adoption (Intercountry Aspects) Act 1999 and further ratified by the ACA 2002. It has been in effect since 2003 in the UK and is now signed by over 50 states. The object of the Convention in this regard is to ensure inter-country adoption takes place in the best interests of the child. It recognises that the child should be in a family environment and that each contracting state has to take appropriate steps to have safeguards and standards since inter-country adoption could provide the child with a family. Profit should not be made from the process.

It sets up a framework that, if adopting from Hague Convention countries, the foreign adoption will be recognised here and the child will automatically have British citizenship if one or both of the adopters is a British citizen at the time of the adoption. This would be the situation with a British adoption. Adopting from a Hague Convention country puts the adopter in the same position as if they had adopted here. It also allows the adoption to be registered on the Adopted Children's Register managed by the Registrar General. (s.77 ACA 2002). The effect of registration is that, for most practical purposes, the adoption is treated as if it were the result of a UK court order. There is no need for the child to be re-adopted under a UK adoption order.

The effect of a British adoption is to confer on the adopters parental responsibility for the child and to extinguish the parental responsibility of the birth mother (and father if he has it by virtue of marriage or presence on the birth certificate in the UK). It follows that any adoption that can be registered as above will have the same effect. This allows the child to be legally part of the adoptive family. Adoption in the UK is regulated by the ACA 2002. A central authority in each state is responsible for ensuring appropriate measures are taken to prevent the Convention being contravened. The Department for Education (DfE) is the central authority for England. The adoption will be automatically recognised in the UK and other contracting states.

Section 83 ACA 2002 (as amended by the Adoptions with a Foreign Element Regulations 2005/392 ("AFER 2005") restrictions on bringing a child into the UK for adoption do not apply to a Convention adoption order. Adopting from a Hague country puts the adopter in the same legal position as if they had adopted in the UK.

The Regulations require that the British resident has been assessed and approved as suitable before bringing the child into the UK. Approval is obtained from the Adoption Panel at the agency
(reg.4(2)(a)(i), AFER 2005). The adopter applies to the DfE for a certificate of eligibility and suitability to adopt (issued on behalf of the Secretary of State). It must be received before an adopter can bring a child into the UK for adoption. The certificate should also contain confirmation that the child will get leave to permanently remain in the UK if adopted (reg.4(2)(a)(ii), AFER 2005). Once the DfE is satisfied that the adoption agency has discharged its duties, it sends the documents required by reg.18(2) of the AFER 2005 to the central authority in the child’s state of origin. These documents include the certificate of eligibility and suitability mentioned above. The documents need to be notarised (that is, guaranteed that the documents are bona fide) and then apostilled by the Foreign and Commonwealth Office confirming that the notary is bona fide.

Different countries have different requirements for notarisation, which can greatly increase the cost. The documents may also need to be translated. Papers are sent to central authority in the state of origin. If satisfied with the documents, the central authority in the state of origin will try to find a match. Each adopter visits the child in the state of origin and confirms that the adoption should proceed. The agency must notify the DfE that these steps have been taken and that it is happy for the adoption to proceed. The DfE agrees with the central authority in the state of origin that the adoption may proceed under the terms of the 1993 Hague Convention (reg.17, AFER 2005). The central authority in the country in which the adoption order is made issues a certificate under art.23 of the 1993 Hague Convention certifying the adoption was made in accordance with the Convention. All signatory states are required to recognize adoptions certified under art.23. Note, however, that India, whilst a signatory to the Convention, excludes private (often kinship) placements from convention adoptions.

The prospective adopter must accompany the child on entering the UK unless, in the case of a couple, the adoption agency and the relevant foreign authority have agreed that it is necessary for only one of them to do so (reg.4(3), AFER 2005). The Home Office will need to see that the adoption is legitimate and the certificate of eligibility from the DfE.

Some countries impose post-adoption obligations, such as post-placement reports. These must be done by the social worker at the local authority at specific intervals (depending on the country). They must be translated, notarised and apostilled (by the adopters). Some countries have specific procedures and requirements, e.g. the Philippines (which despite being on the Hague list is an exception) and China (www.bAAF.org.uk has useful information and links).

In order for a British child to go abroad for adoption the adopter must obtain a parental responsibility order pursuant to s.84 of the ACA 2002. Without this, the removal of the child is a criminal offence.
(s.85(4)). The need for the child to have spent ten weeks preceding the application with the proposed adopters has caused difficulties for some adopters, but the Courts have taken a flexible approach to this and allowed for a rather wide interpretation of the word "home" and its location G (A Child) (Adoption: Placement outside Jurisdiction), Re [2008] EWCA Civ 105; [2008] Fam. 97 and also allowed the use of Sch.2 para.19 of the Children Act 1989 as a way around the concept of placement for the purposes of adoption. A LBC v Department for Children, Schools and Families [2009] EWCA Civ 41; [2010] Fam. 9. What these demonstrate is the significance of the child's welfare as the determinative factor and that if the Court has decided that the placement is so in the welfare interests of the child it will strain to ensure that compliance is found.

Designated Countries: Countries listed in the Adoption (Designation of Overseas Adoptions) Order 1973/19 ("the designated list") are recognised in UK law so the adoption is recognised in the UK. These countries include the countries of Western Europe, the USA and many Commonwealth countries, but not all. It will not, however, confer British citizenship. Adopters will need to apply to the Home Office (s.1(5) British Nationality Act 1981). There is detailed guidance on the process and criteria applied at www.gov.uk/government/publications. On 3 January 2014, the Adoption (Designation of Overseas Adoptions) Order 1973/19 (the "designated list") will be revoked and replaced by the Adoption (Recognition of Overseas Adoptions) Order 2013/1801 (the list can be found at www.ukba.homeoffice.gov.uk).

Foreign Adoption: As at 7 January 2014, there are restrictions in place for the following countries: Cambodia, Guatemala, Nepal and Haiti. The Children and Adoption Act 2006 requires the Secretary of State for Education to publish the list of countries on which there are adoption restrictions. Russia has stopped all adoptions to the UK; Kyrgyzstan has just allowed them again after a corruption scandal led to a ban on such adoptions.

The more complex areas of adoption, where there may be a conflict of laws, are those from non-designated countries and where the adopters will need to seek either an adoption order in the UK following the procedures set out in the ACA 2002 or a declaration of recognition from the High Court of the other country's adoption. This is increasingly common as the numbers of children coming in from other countries (i.e. non-Hague and non-designate) is increasing. The application for this recognition is often required to allow for entry clearance at the border.

The Court has jurisdiction to recognise a foreign adoption pursuant to s.57 of the Family Law Act 1986, which allows for declarations to be made in respect of adoptions granted overseas, i.e. is the person an adopted person for the purposes of the Adoption Act 1976 and 2002. There are four methods of
such recognition (three dealt with above as convention adoptions, British adoptions, designated adoptions) the last route is by recognition under common law. The Applicant has to be both domiciled and habitually resident in England and Wales for at least one year preceding the date of the application in order to adopt in the UK.

Further pursuant to s.57(3) Family Law Act 1986:

"... a court shall have jurisdiction to entertain an application for such a declaration in subsection (1) if and only if the Applicant is domiciled in England and Wales on the date of the application or has been habitually resident on England and Wales throughout the period of one year ending with that date."

Habitual residence is a legal concept that is defined by case law. Whether a person is considered habitually resident, will depend on all of the facts of their individual case; there has been recent jurisprudence on this issue in the arena of child abduction between parents (LC (Children) (International Abduction: Child's Objections to Return), Re [2014] UKSC 1; [2014] 2 W.L.R. 124). The Supreme Court has adjudicated that a child can have a different habitual residence from that of the parent with whom he resides. Habitual residence is an area of law that has stretched the concept into a very wide one indeed.

However, it is clear that in the event that a court is of the view that, overwhelmingly, the adoption is in the best interests of the child (applying s.1 ACA 2002 "throughout the child's life"), the concept of habitual residence can be stretched, (this case was decided before the LC case) see Z v Z (Recognition of Brazilian Adoption Order) [2013] EWHC 747 (Fam); [2013] Fam. Law 937. Theis J. said "the question of habitual residence is very fact sensitive. So, it is for a court, on a case-by-case basis to consider whether the facts of that case satisfy the test ...". The question of physical presence has also been stretched to allow for long periods of absence. However, if there is any suggestion that the Applicant is "forum shopping", or acting in bad faith, the test is unlikely to be satisfied.

The case law on recognition of foreign adoption sets out the specific criteria that must be satisfied as follows: (1) the order must have been lawfully obtained in the foreign jurisdiction, (2) the concept of adoption in that jurisdiction must substantially conform to that in England, (3) the adoption process undertaken must have been substantially the same as would have applied in England at the time (4) there must be no public policy consideration militating against recognition (5) recognition must be in the best interests of the child. R (A Child) (Recognition of Indian Adoption), Re [2012] EWHC 2956 (Fam); [2013] 1 F.L.R. 1487 and T v OCC [2010] EWHC 964 (Fam); [2011] 1 F.L.R. 1487, also A Council v M [2013] EWHC 1501 (Fam); [2013] Fam. Law 933.
Most of the case law in respect of recognition of foreign adoption deals with cases where there is no opposition to the adoption being so recognised, but the Courts are careful to examine the circumstances of each adoption in order to satisfy the common law test as set out above. Often there is a conflict between the issue of domicile and habitual residence. To ensure that the adoption was lawfully carried out in the foreign country the adopters often have to be domiciled there. This can obviously then conflict with the need to be habitually resident in the UK (J (Recognition of Foreign Adoption Order), Re [2012] EWHC 3353 (Fam); [2013] 2 F.L.R. 298).

Often the tests are set out above are flexibly applied to reach a just outcome, per Moor J. in Re J (supra) at para.13:

"... although this adoption does not conform exactly to the way in which we do it in this jurisdiction, this is an adoption under which, following the adoption, the child is deemed to be a child of the adopting parents for all purposes from the date of the adoption order."

The effect of art.8 ECHR (right to respect for family life) will also impact on these applications (see Jackson J. in Re A Council v M para.70 ff).

Public policy considerations might override the best interests of the children; for example, where the consent of the birth parents was not obtained in the proper way, making the foreign adoption order unacceptable here, or where the adoption was made for some other criminal reason such as prostitution or money. In Re A Council v M (supra) Jackson J. stated:

"... something more exceptional is required before public policy is used to deny recognition to an adoption that might be in the interests of an individual child."

In effect, just as in the granting of s.84 ACA 2002 orders and other matters, the paramountcy of the welfare principle has the effect of making the courts apply and construe the tests in a way that meets that welfare need. This is entirely in line with European jurisprudence on the issue.

Recognition of the adoption does not confer citizenship on the children unless the parents are British citizens.

**Conflict of laws; children**

This article contains an overview of the provisions of English law relating to the area of Conflict of Laws or Private International Law as it relates to children. More particularly, this article explores when the courts of England and Wales have jurisdiction in matters relating to children and the exercise of
parental responsibility. It also considers the provisions for recognition and enforcement in England and Wales of orders made in other jurisdictions, or the recognition and enforcement in other jurisdictions of orders made in England and Wales. This article will also explore circumstances of competing jurisdictions, conflicting orders from different jurisdictions and international co-operation. This is a complex area of law requiring detailed knowledge of the relevant conventions and regulations and this article is not intended to be a substitute for more detailed research.

Children cases involving some jurisdiction other than England and Wales, or having the potential to do so, require consideration of whether the courts of England and Wales have jurisdiction to hear the case or make orders, whether there is also some other country or state which has jurisdiction to hear the case or make orders, or has already done so, which country should hear the case if there is a conflict, which law is applicable to the case, and whether and how any orders made by the English Court will be recognised or enforced elsewhere. If orders have already been made elsewhere, the issue of their recognition and enforcement in England and Wales also requires consideration. The Court of Appeal has made it very clear that in any case with a foreign element the jurisdiction issue must be addressed, whether or not it is raised as an issue by a party, and the court's approach to it to be recorded; B (A Child) (Hague Convention Proceedings), Re [2014] EWCA Civ 375; [2015] 1 F.L.R. 389. See also PD12A FPR 2010 which requires jurisdiction to be considered within 2 days of issue of care proceedings in cases with an international element.

The outcome of any enquiry as to jurisdiction may vary widely dependent upon the circumstances and the countries involved or potentially involved; there is no unifying instrument which makes worldwide provision. In particular there are five different categories of cases, and the determination of the issues will depend on which category the case falls within:

Cases involving England and Wales and another part of the British Islands and other dependent territories (which includes Scotland, Northern Ireland, the Channel Islands and the Isle of Man, per Dicey & Morris 15th Ed. para.1-076) which are governed by the Family Law Act 1986 ("the FLA 1986").

Cases involving England and Wales and another Member State of the European Union, which are subject to Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, more commonly known as "BII bis" or "Brussels II revised" or "BIIR".

Cases involving England and Wales and another Contracting State of the The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect
of Parental Responsibility and Measures for the Protection of Children, more commonly known as "the Child Protection Convention".


Cases involving England and Wales and other jurisdictions which do not fall into any of (a)-(d) above.

Jurisdiction: The Family Law Act 1986 unites the law relating to the jurisdiction of the courts of England and Wales to make the orders listed in s.1 of that Act by making overall provision for categories (a)-(c) above. The court's jurisdiction to make a Pt 1 order with respect to a child as listed in s.1 of the FLA 1986 is circumscribed by ss.2 and 3 of the FLA 1986:

" Jurisdiction: general: 2(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless (a) it has jurisdiction under the Council Regulation or the Hague Convention, or (b) neither the Council Regulation nor the Hague Convention Applies but (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or (ii) the condition in section 3 of this Act is satisfied s.2(2A) relates to special guardianship proceedings s.2(2B) and (2C) relate to adoption proceedings s.2(3) relates to jurisdiction in the "care and control" aspects of inherent jurisdiction cases, namely;

"2(3) A court in England and Wales shall not make a section 1(1)(d) order unless - (a) it has jurisdiction under the Council Regulation or the Hague Convention or (b) neither the Council Regulation nor the Hague Convention Applies but the condition in section 3 of this Act is satisfied but (i) the condition in section 3 of this Act is satisfied, or (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection. "

" 2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings "

" Habitual residence or presence of child: 3(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned- (a) is habitually resident in England and Wales, or (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom or a specified dependant territory, and, in either case, the jurisdiction of the court is not excluded by subsection (2) below. (2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings or civil partnership proceedings are continuing in a court in Scotland or Northern Ireland or a specified dependant territory in respect of the marriage or civil partnership of the parents of the child concerned. "
The structure of the 1986 Act is to start by considering whether the court has jurisdiction under Regulation 2201/2003 - or the 1996 Hague Convention. If it does have jurisdiction under either of those instruments it may not have exclusive jurisdiction. If it does not, this is determinative of jurisdiction, unless:

The case is outside the scope of s.1 of the FLA 1986, (but note it may still be within BIIR); or

neither the Regulation 2201/2003 nor the Hague Convention 1996 applies, and; either

the question of the making of the order arises in connection with matrimonial proceedings pending in the UK: s.2A FLA 1986; or

the child is habitually resident in England and Wales or is present in England and Wales and is not habitually resident in any other part of the UK or a specified dependent territory; or

the child is a British National and the case falls within the exceptional cases where the court may exercise jurisdiction based on nationality when the child is outside the jurisdiction

Other circumstances in which the court may make an order relating to a child where it does not otherwise have jurisdiction under Regulation 2201/2003 or the Hague Convention 1996 are where the court has jurisdiction to take protective measures pursuant to art.20 of Regulation 2201/2003 or art.11 of the Hague Convention 1996. Additionally, the FLA 1986 does not govern jurisdiction to make orders relating to children pursuant to the Child Abduction and Custody Act 1985, which is governed by that Act, in ss.3., 4 and 5, or the jurisdiction to make Parental Orders pursuant to Human Fertilisation and Embryology Act 2008 s.54 (HFEA 2008). Nor does it govern orders pursuant to the Inherent Jurisdiction of the High Court unless falling within s.1(1)(d) of the 1986 Act, see In the matter of A [2014] AC 1 including Wardship: See the M (Children) (Wardship: Jurisdiction and Powers), Re [2015] EWHC 1433 (Fam); [2016] 1 F.L.R. 1055 as to the circumstances in which the court may make a Wardship order in relation to a child who is not present in the UK and has not been unlawfully removed.

The cornerstone of jurisdiction in children matters is habitual residence: it is the basis for jurisdiction in relation to children in many countries. The English courts have jurisdiction in matters of parental responsibility where the child concerned is habitually resident in England and Wales at the time the court is seised. The Family Law Act 1986, the Regulation 2201/2003, art.8 and the Hague Convention 1996, art.5 all afford jurisdiction to the country of a child's habitual residence. The preamble to Council Regulation 2201/2003 expressly provides that "jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility". Additionally,
in matters of child abduction, habitual residence is central to the objectives of the Hague Convention 1980 to ensure that matters of parental responsibility relating to children are determined by their country of habitual residence; per Baroness Hale in D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51; [2007] 1 A.C. 619:

"The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country not only so that they can return to the place which is properly their home, but also so that any dispute about where they should live in the future can be decided in the courts of their home country."

Habitual Residence is so significant that the President has determined that in every care case where there is a European dimension, the starting point is an enquiry as to where the child is habitually resident at the very outset of proceedings, whether or not it has been raised by one of the parties. N (Children) (Adoption: Jurisdiction) [2015] Fam Law 1444.

The concept of habitual residence has generated a great deal of domestic and European case law, and is discussed in more detail below. Habitual residence is not, however, the only determining factor when considering whether the courts of England and Wales have jurisdiction to make orders relating to children pursuant to the arts 8-14 of Regulation 2201/2003, or the provisions of the Family Law Act 1986. See Dicey & Morris 15th Ed. Ch.19 r.106 for a complete analysis of jurisdiction in children matters. Other circumstances than habitual residence in which jurisdiction may arise are:

The courts of a Member State dealing with an application for divorce, legal separation or nullity shall also have jurisdiction in any matter relating to parental responsibility in connection with that application where at least one of the spouses has parental responsibility relating to the child and the jurisdiction has been unequivocally accepted by the spouses and the holders of parental responsibility and it is in the superior interests of the child - art.12 of Regulation 2201/2003. This is an important provision, sometimes referred to as prorogation of jurisdiction.

Jurisdiction may be based on a substantial connection with a Member State where there are other proceedings pending and the jurisdiction of the court has been unequivocally accepted by the parties to the proceedings at the time the court is seised and is in the best interests of the child: art.12(3) of Regulation 2201/2003.

Jurisdiction can be founded on the child's presence pursuant to art.13 of Regulation 2201/2003 where habitual residence cannot be established, or the child is not habitually resident anywhere, and there is no prorogation of jurisdiction pursuant to art.12.
Another Member State may already be seised of proceedings relating to the child. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of the first court: art.19.

Another part of the UK may already be seised of proceedings relating to the child: s.3 FLA 1986.

There may be a transfer between Member States or Contracting States pursuant to either the Regulation 2201/2003 art.15 or the Hague Convention 1996 art.9.

The child may have been wrongfully removed to this country, in which case jurisdiction remains with the Contracting State where the child was habitually resident immediately prior to removal: Hague Convention 1980, Regulation 2201/2003 art.10.

The child may be a refugee or internationally displaced child: art.6 Hague Convention 1996.

If no court has jurisdiction pursuant to arts 8-13 of Regulation 2201/2003 jurisdiction shall be determined by the laws in each member state: art.14 Regulation 2201/2003.

The child may be present but not habitually resident in England and Wales, in circumstances where Regulation 2201/2003 or the Hague Convention 1996 do not apply.

Emergency protective measures may be required.

It is of particular importance to note that Regulation 2201/2003 is not only applicable to the question whether the courts of England and Wales have jurisdiction where the other jurisdiction which is concerned is a Member State of the EU. The Supreme Court specifically considered this issue in the case of I (A Child) (Contact Application: Jurisdiction), Re [2009] UKSC 10; [2010] 1 A.C. 319 which concerned a child habitually resident in Pakistan, but in relation to whom the court had previously accepted jurisdiction pursuant to art.12 of Regulation 2201/2003. Baroness Hale considered the issue at para.17:

"Can article 12 apply at all where the child is lawfully resident outside the European Union? In my view it clearly can. There is nothing in either article 12.1 or article 12.3 to limit jurisdiction to children who are resident within the EU. Jurisdiction in divorce, nullity and legal separation is governed by article 3 of the Regulation, which lists no less than seven different bases of jurisdiction. It is easy to think of cases in which a court in the EU will have jurisdiction under article 3 but one of the spouses and their children will be resident outside the EU."

See also Re H (Jurisdiction) [2015] 1 FLR 1132 and MA v MN [2015] EWHC 3663 (Fam): art.10 Regulation 2201/2003 allows the Member State of origin to retain jurisdiction following a wrongful removal even when the child is now living in a non-Member State.
Article 12 Regulation 2201/2003: Enables jurisdiction to arise either in connection with pending divorce, annulment or legal separation proceedings, or in where there are other pending proceedings and there is a substantial connection with a Member State and one of the holders of parental responsibility, or the child, is a national of that State and jurisdiction has been accepted in an unequivocal manner by all the parties to the proceedings. Once jurisdiction has been accepted under art.12, it is not open to the parties to withdraw from it at any time prior to the conclusion of the case: I (A Child) (Contact Application: Jurisdiction) [2010] 1 A.C. 319 at para.23. Where jurisdiction arises pursuant to art.12(1) (in connection with pending matrimonial proceedings) jurisdiction comes to an end with the making of a final order E v B (C-436/13) [2014] 3 W.L.R. 1750. Where it arises under art.12(3) (other proceedings), those proceedings need not be related and can, for example, be a maintenance application:L v M (C-656/13) EU:C:2014:2364. See Gogova v Iliev (C-215/15) EU:C:2015:710 on the meaning of "accepted expressly or otherwise in an unequivocal manner".

Hague Convention cases: A Practice Guide to the Hague Convention 1996 was issued by the Ministry of Justice in February 2013, and endorsed by Lord Justice Thorpe which includes a helpful flowchart through the issue of jurisdiction in scenarios 2(a)-(e) above, and which provides detailed guidance about the inter-relationship between the Council Regulation and the Hague Convention and priority. Although many of the contracting States to the Hague Convention 1996 are also Member States, there are some additional contracting States which are not. The Hague Convention is also different in scope, relating to the ability "to take measures directed to the protection of the child's person or property" per art.5 of the Convention as compared to civil matters relating to "the attribution, exercise, delegation, restriction or termination of parental responsibility" per art.1 of Regulation 2201/2003. The Hague Convention also specifically grants jurisdiction to the contracting State where the child is present to take protective measures in cases of urgency. Measures of protection go far wider than public law measures of protection, and specifically can include a prohibited steps order or a return order: See J (A Child) (1996 Hague Convention: Morocco), Re [2015] UKSC 70; [2015] 3 W.L.R. 1827 for a discussion of this and the meaning of "urgency". The Supreme Court in that case also held that decisions of the CJEU in connection with art.20 BIIR are of limited assistance in interpreting and applying art.11 of the Hague Convention. The Hague Convention has been invoked to enable the court to assume jurisdiction in cases where it has not been possible to establish the habitual residence of a child: NH (1996 Child Protection Convention: Habitual Residence), Re [2015] EWHC 2299 (Fam); [2015] Fam. Law 1342.

Adoption: The President sitting in the Court of Appeal Re N (Children) (Adoption:Jurisdiction) [2015] Fam Law 1444 has recently specifically considered the jurisdiction of the courts of England and Wales to make a non-consensual adoption order in relation to a child who is a foreign national. By virtue of
"decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption" do not fall within Council Regulation 2201/2003. The court held that whilst care proceedings with a view to adoption do fall within art.1(b) (see case C-435/06) proceedings for a placement order are outside the scope of the Regulation 2201/2003. This has the consequence that different parts of the same case may have different jurisdictional considerations, and specifically that an art.15 application for transfer can be made in respect of care proceedings but not placement proceedings. Note that applications for permission to oppose the making of an adoption order also fall outside the scope of Council Regulation 2201/2003: CB, Re [2015] EWHC 3274 (Fam). In respect of adoption and placement proceedings falling outside Council Regulation 2201/2003 jurisdiction is governed by s.49 Adoption and Children Act 2002 relating to the domicile and habitual residence of the adoptive parents, whether or not the child is a British national or domiciled or habitually resident here: Re N (Children) (Adoption: Jurisdiction) [2015] Fam Law 1444. See also s.2(2B) and (2C) FLA 1986.

Jurisdiction based on nationality: In exceptional circumstances, the court may make an order pursuant to its inherent jurisdiction in respect of a child who is neither present nor habitually resident in this country but who is a British National. Note that this jurisdiction does not include applications for care of or contact with a child which fall within s.1(1)(d) FLA 1986, and therefore is largely restricted to Wardship applications. Article 14 of Regulation 2201/2003 provides:

"Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13 jurisdiction shall be determined in each Member State by the laws of that State."

The Supreme Court in the case of A v A (Children) (Habitual Residence) [2013] UKSC 60; [2013] 3 W.L.R. 761 specifically considered whether the court might have jurisdiction in respect of a British national where the court did not otherwise have jurisdiction pursuant to the Family Law Act 1986. Baroness Hale held at paras 59 and 60:

"Is there another basis of jurisdiction? 59. Article 14 applies where no court of a Member State has jurisdiction under articles 8 to 13. No other Member State is involved in this case. Either the courts of England and Wales have jurisdiction under article 8 or no court of a Member State does so. In that case, the jurisdiction of England and Wales is determined by the laws of England and Wales. 60. We have already established that the prohibition in s.2 of the 1986 Act does not apply to the orders made in this case. The common law rules as to the inherent jurisdiction of the High Court continue to apply. There is no doubt that this jurisdiction can be exercised if the child is a British national."

In that case the child was present with his mother in Pakistan solely because his mother was being detained there against her will when she became pregnant and gave birth to him. It was significant
that the orders sought in relation to the child were orders pursuant to the inherent jurisdiction and not therefore within the scope of the Family Law Act 1986. The Wardship jurisdiction has always been available in respect of British Nationals irrespective of presence or habitual residence, although it should be exercised with caution: per Lord Hughes A v A (Children) (Habitual Residence) [2013] UKSC 60; [2013] 3 W.L.R. 761 at para.70.

The Court of Appeal again considered the extent to which jurisdiction can be invoked on grounds of nationality in the case of B (A Child) (Habitual Residence: Inherent Jurisdiction), Re [2015] EWCA Civ 886; [2015] Fam. Law 1339 and when the inherent jurisdiction ought to be exercised. The Court of Appeal reiterated the extremely limited circumstances in which such jurisdiction can be invoked, and on that occasion declined to invoke it. The appeal in this case was allowed by the Supreme Court B (A Child) (Habitual Residence: Inherent Jurisdiction), Re [2016] UKSC 4; [2016] A.C. 606, but was allowed on the different ground that habitual residence had not yet been lost. The dissenting judgments do however give further guidance on the issue of the exercise of jurisdiction based on nationality. See also JB v D [2016] EWHC 1607 (Fam) for the operation in practice of the parens patriae jurisdiction where another EU state had substantive jurisdiction.

Habitual Residence: The European Court of Justice has held that in order to ensure the uniform application of community law, the terms of a provision of community law must be given an autonomous meaning and uniform interpretation throughout the European Community. Moreover, the term habitual residence will have a different autonomous meaning in matters concerning children than in other contexts: see Proceedings Brought by A (C-523/07) [2010] Fam. 42. The CJEU in that case identified that the criteria for determining habitual residence when deciding upon jurisdiction under art.8 of Regulation 2201/2003 is as follows:

"[38] In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. [39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. [40] As the Advocate General pointed out in point 44 of her opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state. [41]"
By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State. [44] ... the concept of 'habitual residence' under Art 8(1) of the regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case. "

In the subsequent decision of the CJEU in the case of Mercredi v Chaffe (C-497/10 PPU) [2012] Fam. 22 the European Court of Justice further held:

" [51] In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case. [52] In the main proceedings, the child's age, it may be added, is liable to be of particular importance. [53] The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. [54] As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. [55] That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant. "
There have been a number of significant cases in the High Court and Court of Appeal determining the child’s place of habitual residence in a variety of circumstances. This is considered in detail in Dicey & Morris Ch.6. See also David Hodson, The International Family Law Practice, for a detailed discussion of habitual residence in relation to children.

The domestic law of England and Wales on the issue of habitual residence has not always entirely coincided with community law. In the Supreme Court case A v A (Children) (Habitual Residence) [2013] UKSC 60; [2013] 3 W.L.R. 761 at para.35 Baroness Hale confirmed that it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice. To the extent that there has been a difference previously, earlier cases may now need to be treated with some caution in so far as they applied a different test to the Court of Justice. In para.54 of the judgment, Baroness Hale confirms that habitual residence is a question of fact and not a legal concept such as domicile, and brings together the different strands for consideration. See also the Supreme Court decision in DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75; [2014] A.C. 1017 as to the need for a consistent approach to habitual residence.

The case A v A (Children) (Habitual Residence) [2013] UKSC 60; [2013] 3 W.L.R. 761 also considered the particular issue of whether a child can be habitually resident in a country where (s)he has never been. This issue has not yet been considered by the CJEU, and Baroness Hale felt unable to dispose of the case on the basis of habitual residence without a reference to the CJEU. The case was remitted to the High Court in A v A (Return Order on the Basis of British Nationality) [2013] EWHC 3298 (Fam); [2014] 2 F.L.R. 244.

The question of Habitual Residence by dependence was revisited by the Supreme Court in relation to the habitual residence of adolescents, and in particular whether their habitual residence is necessarily the same as their parents. The Supreme Court held that where the child was older, in particular an adolescent, and perhaps also where the child’s residence with the parent proved to be of short duration, the inquiry into her integration in the new environment had to encompass more than the surface features of her life there, and may be capable of being different to that of their parents: LC (Children) (International Abduction: Child’s Objections to Return), Re [2014] UKSC 1; [2014] A.C. 1038.

The Supreme Court revisited the issue of habitual residence in the case of R, Petitioner [2015] UKSC 35; [2015] 2 W.L.R. 1583 in connection with children who had moved from Scotland to France just four months prior to the issue of jurisdiction arising, for what was intended to be a limited period of 1 year. It was held that the absence of a joint parental intention to live permanently in a country was not decisive, nor was an intention to live in a country for a limited period inconsistent with becoming
habitually resident there. The Supreme Court further upheld the decision in the case of H v B (Wardship: Jurisdiction) [2014] EWCA Civ 1101; [2015] 1 W.L.R. 863 that there is no rule preventing one parent from unilaterally altering a child’s habitual residence.

The Supreme Court in the Scottish case of AN v RN (Scotland) [2015] UKSC 35 considered whether habitual residence could be acquired where a move to the new jurisdiction was not intended to be permanent, and concluded that it was the stability of the residence that was important and not whether it was intended to be permanent.

Most recently, the Supreme Court in the case of B (A Child) (Habitual Residence: Inherent Jurisdiction), Re [2016] UKSC 4; [2016] A.C. 606 reconsidered the circumstances in which habitual residence comes to be lost in the light of the European approach to habitual residence. In particular, it should no longer be regarded as correct that a person may cease to become habitually resident in a country in a single day if they leave it with a settled intention not to return.

Parental Responsibility: Nothing in Regulation 2201/2003 or the Hague Convention 1996 determines the status of a child or a parental relationship. Article 4 of the Hague Convention 1996 specifically provides that it does not apply to the establishment of a parent-child relationship. The lack of cross-border recognition of status can cause particular difficulties where a legal relationship in one country is not recognised in other countries. For example, a child of two female parents in the UK pursuant to the provisions of the Human Fertilisation and Embryology Act 2008 would not necessarily be treated as having two female parents in another Member State of the EU. Similar difficulties arise in the context of cross-border surrogacy arrangements. During 2014 France was found to be in breach of art.8 of the European Convention on Human Rights and Fundamental Freedoms in the case of Mennesson and Labassee v France [2014] for failing to provide a mechanism for the registration of parentage in France of children born pursuant to surrogacy arrangements in the USA. The Hague Convention 1996, which only came into force in the UK on 1 November 2012 not only defines parental responsibility, it also provides for the first time for cross-border recognition of parental responsibility and makes clear the laws by which the existence of parental responsibility is to be determined and exercised. For the first time the question of the existence of parental responsibility may be determined by the laws of another State, and a change of habitual residence can result in parental responsibility being conferred by the laws of the new country of habitual residence. In the light of these changes, the requirements of the Family Procedure Rules 2010 rule 12.4 to give notice to every person holding foreign parental responsibility become particularly pertinent, and disputes may arise as to whether a person has parental responsibility as a matter of the law of another State, and how that parental responsibility may be exercised. Further guidance has been given by Mr Justice Moylan in the case of
P (Recognition and Registration of Orders), Re [2014] EWHC 2845 (Fam) as to the procedure on an application for recognition or enforcement under the 1996 Convention. The operation of the Hague Convention 1996 in this respect does not appear to be limited to situations where the other State(s) concerned are Contracting States:

"Article 16 (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect. (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State. (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

"Article 17 The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence."

"Article 18 The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention."

Applicable Law: The applicable law in matters relating to children in the courts of England and Wales is the law of England and Wales. The principle of Renvoi has no application following the Hague Convention 1996. The provisions of arts 16-18 of the Hague Convention 1996 do, however, require parental responsibility to be determined in accordance with the law of the state of the child's habitual residence, and to this extent the applicable law is the law of that state.

Conflicting Jurisdictions: The principle purpose of the Family Law Act 1986 was to provide a uniform scheme for jurisdiction, recognition and enforcement of custody and related orders as between the three different jurisdictions within the United Kingdom: Baroness Hale in A v A (Children) (Habitual Residence) [2013] UKSC 60; [2013] 3 W.L.R. 761. Similarly, a primary purpose of the Council Regulation and the Hague Convention 1996 is to avoid the courts of two different Member States or Contracting States from giving inconsistent judgments. It is sometimes the case that more than one state or territory within a state has jurisdiction in relation to children matters. Alternatively, different states or territories may not be agreed about which state or territory has jurisdiction.
As between the different territories of the UK, the FLA 1986 applies, specifically s.3. Chapter III of the FLA 1986 relates to the jurisdiction of the courts in Scotland, and Ch.IV of the FLA 1986 to the jurisdiction of the courts in Northern Ireland.

For the purposes of the Regulation 2201/2003 the UK is one territory, excluding the Isle of Man and the Channel Islands: Dicey & Morris 15th Ed. para.1-075. Determination that the UK has jurisdiction does not, therefore, determine which part of the UK and regard must then be had to the provisions of the FLA 1986. The Hague Convention 1996 arts 47-49 also contains specific provisions relating to convention states with more than one territory for the purposes of identifying the applicable law.

Section 3 of the FLA 1986 only gives the courts of England and Wales jurisdiction where the child is habitually resident here, or is present here and is not habitually resident in any part of the UK or a specified dependent territory.

Section 5 of the FLA 1986 gives the court the power to refuse to make an order where the issue has already been determined in proceedings outside England and Wales, and to stay the proceedings in favour of another jurisdiction (subject to the provisions of the Regulation 2201/2003). This would enable the English court to stay the proceedings in favour of another part of the UK. Stay is discussed further below.

Section 6 of the FLA 1986 relates to the duration and variation of orders, and in particular the circumstances in which the court has jurisdiction to vary a Pt 1 order made in England and Wales.

Regulation 2201/2003 governs the issue of competing jurisdictions between Member States by giving predominance to the State first seised. In particular art.19(2). See also arts 17 and 19(3):

"19(2) Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

See also P v Q (C-455/15 PPU) EU:C:2015:763: a court of a Member State which considers it has jurisdiction and that another State has erroneously seised jurisdiction cannot refuse to recognise the judgment of a Member State which has ruled on matters of parental responsibility on that basis alone.

Transfer of proceedings pursuant to art.15 BIIR: By way of exception, art.15 gives a Member State having jurisdiction the power to request another Member State to assume jurisdiction, or to stay the proceedings while a request is made. The other Member State must consent to the transfer. In care proceedings with a potential jurisdictional issue, the court must decide, as a matter of priority and

Competing jurisdictions between a BIIR Member State and a Contracting state to The Hague Convention 1996: A number of Contracting States which are not also Member States. Where the child is habitually resident in a Member State the Regulation 2201/2003 takes precedence: art.61. Where there is a conflict of jurisdiction between Contracting States, art.13 Hague Convention 1996 provides:

" (1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration. (2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction. "

The difference between the provisions of the Council Regulation and the Hague Convention 1996 can result in a complex situation if there is a change in habitual residence to a new Contracting State. Under the Convention art.5 the new state would acquire jurisdiction, but under Regulation 2201/2003 art.19 jurisdiction would remain with the Member State first seised. This is discussed in more detail in the Ministry of Justice guidance.

Competing jurisdictions as between the UK and a country which is not a Member State or a Contracting State to the Hague Convention 1996: The Court of Appeal has confirmed in the case of AB v CB (Divorce and Maintenance: Discretion to Stay) [2013] EWCA Civ 1255 that where England has jurisdiction pursuant to the Regulation 2201/2003 and competing proceedings are extant in a third, non-Member State, the court is not precluded from granting a stay of the English proceedings by operation of the Council Regulation. The Court of Appeal confirmed the decision in JKN v JCN (Divorce: Forum) [2010] EWHC 843 (Fam); [2011] 1 F.L.R. 826 that it was neither necessary nor desirable to extend the principle in Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02) [2005] Q.B. 801 to cases under
Regulation 2201/2003 where there were parallel proceedings in a non-Member State. To have held otherwise would have created a greater likelihood of conflicting decisions from different countries.

In children cases where there are parallel proceedings between England and a non-member state the usual rules applicable to determining the appropriate forum apply. Section 5 of the Family Law Act 1986 give the court the power to stay the proceedings on grounds that it would be more appropriate for those matters to be determined outside England and Wales, commonly referred to as "forum non conveniens". This principle is discussed in detail in Ch.12 of Dicey & Morris 15th Ed.. The basic principle remains per Lord Diplock in Spiliada Maritime Corp v Cansulex Ltd (The Spiliada) [1987] A.C. 460. See also more recently Lubbe v Cape Plc [2000] 1 W.L.R. 1545:

"If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (see the Spiliada case [1986] 3 All ER 843 at 856, [1987] AC 460 at 478; Connelly's case [1997] 4 All ER 335 at 344-345, [1988] AC 854 at 872) but on whether the plaintiff will obtain justice in the foreign jurisdiction."

As Waite J. (as he then was) observed in the case of H v H (Minors) (Forum Conveniens (Nos.1 and 2)) [1993] 1 F.L.R. 958

"The legal issues, complex enough in the commercial field, are further complicated in children case by the necessity to reconcile the ordinary common law principles most recently stated by the House of Lords in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 640 and De Dampierre v De Dampierre [1988] AC 92, [1987] 2 FLR 300 with specific statutory provisions, in this case s 5 of the 1986 Act, and the general requirement under what is now s 1(1) of the Children Act 1989 making the child's welfare the paramount consideration."

Note also:

The child's place of habitual residence is a significant factor in deciding whether to exercise jurisdiction - F (Residence Order: Jurisdiction), Re [1995] 2 F.L.R. 518.

The child's welfare is not the paramount consideration when deciding whether to exercise jurisdiction, although it is an important consideration - M v M (stay of proceedings: return of children) [2006] 1 FLR 138, M v B (Residence: Forum Conveniens) [1994] 2 F.L.R. 819.
Further guidance is provided by the Supreme Court in the case of DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75; [2013] 3 W.L.R. 1597 dealing with a situation in which conflicting return orders had been made in England and the USA. In considering whether the child should remain in the UK pursuant to the English order, to enable decisions about his welfare to be made here, or return to the USA in order to enable decisions about his welfare to be made there, the Supreme Court had considerable regard to the need to "restore the synthesis between the two jurisdictions". The court also particularly considered that he had the best chance of a relationship with both parents if he returned to the USA. It was also of significance that the Texan court's approach to issues of welfare would be similar to that of the English court.

Recognition and Enforcement: As between England and Wales and:

Other parts of the UK: Section 25 FLA 1986 - A Pt 1 order made in any part of the UK or a specified dependent territory it shall be recognised in any other part of the UK as having the same effect as if it had been made in that other part of the UK.

Other Member States of the European Union: Chapter III Regulation 2201/2003 art.21 provides for recognition of judgments without any special procedure being required, subject to the defined grounds for non recognition in Article 23. Article 28 provides for judgments of a Member State to be enforceable in another Member State when it has been declared enforceable there. The Member State making the order must, at the request of any interested party, issue an Annex II certificate to enable enforcement: art.39. If the decision is an art.11 decision following a non-return order the Member State must issue an Annex III certificate to enable enforcement: arts 40, 41. Authentic Instruments may be recognised and declared enforceable under art.46. The enforcement procedure is governed by the law of the Member State of enforcement: art.47. Note that the system of recognition and enforcement provided for by the Council Regulation is not applicable to protective measures which fell within the scope of art.20 where the Member State did not otherwise have jurisdiction: Purrucker v Valles Perez (C-256/09) [2011] Fam. 254. Article 23 of Regulation No 2201/2003, which sets out the grounds on which recognition of a judgment in matters of parental responsibility may be refused, must be interpreted strictly. A decision to refuse recognition must take into account the best interests of the child, and only where, taking into account the best interests of the child, recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, in that it would infringe a fundamental principle: P v Q (C-455/15 PPU) EU:C:2015:763. For interpretation of this in the UK see D (A Child) (Recognition and Enforcement of Romanian Order), Re [2016] EWCA Civ 12; [2016] 1 W.L.R. 2469 where the Court of Appeal dismissed an appeal against a Romanian order on grounds
that the children's wishes were a fundamental principle, breach of which constituted grounds for not recognising a foreign judgment: Upheld by the Supreme Court D (A Child) (Supreme Court: Jurisdiction), Re [2016] UKSC 34; [2016] 3 W.L.R. 145 on grounds that it did not have jurisdiction to hear a 2nd tier appeal under the terms of the Constitutional Reform Act 2005.

Other Contracting States to the Hague Convention 1996: The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States, unless one of the exceptions in art.23 of the Convention is fulfilled. Article 24 provides that any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State. Article 28 provides that "measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child." Where undertakings are given with the intention of being "protective measures" the Court of Appeal has held that these are capable of being enforced under the Hague Convention 1996 - Y (A Child) (Abduction: Undertakings Given for Return of Child), Re [2013] EWCA Civ 129; [2013] 2 F.L.R. 649

Other Contracting States to the Luxembourg Convention: European Convention on Recognition and Enforcement of decisions concerning Custody of Children: Provides for applications for recognition and enforcement via a central authority. In practice this is of reduced relevance following the implementation of Regulation 2201/2003 and the Hague Convention 1996, but may still be useful for signatories such as Iceland, Norway, Moldova which are neither Regulation States nor Contracting States under the Hague Convention 1996.


The Rest of the World: Can be divided into:

Recognition and enforcement elsewhere of judgments of the courts of England and Wales: it is always essential to take advice in the country concerned about whether an English order will be enforced there if they are outside the European Union or the Hague Convention 1996.

Recognition and enforcement in England and Wales of judgments of other countries: the courts will not automatically recognise decisions relating to the exercise of parental responsibility made in other
jurisdictions, but will give grave consideration to it, subject to the principle that such orders are always variable: McKee (Mark) v McKee (Evelyn) [1951] A.C. 352. Pursuant to s.1 of the Children Act 1989 the child's welfare is always the court's paramount consideration - DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75; [2013] 3 W.L.R. 1597. The English court retains a jurisdiction to refuse an application for an order where the matter has already been determined in proceedings outside England and Wales: s.5 of the Family Law Act 1986. Of significant relevance to the issue of whether a foreign judgment will be recognised is consideration of whether the person against whom the judgment was made was present in the foreign country and/or engaged in the proceedings. See Dicey & Morris at para.14R-054 onwards.


Registration of orders under the Family Law Act 1986 is governed by Pt 32 of the FPR 2010.

Co-operation: Beyond the strict system of recognition and enforcement provided for in the Regulation 2201/2003 and the Hague Convention 1996, both instruments contain provisions designed to increase inter-state cooperation.

Articles 53-56 of Regulation 2201/2003 provide for the establishment of Central Authorities in each Member State, and the Central Authorities are obliged to communicate information on national laws and procedures and to take measures to improve the application of the Regulation. Specific duties are imposed by art.55. For guidance as to what falls outside reasonable requests for assistance see B (A Child) (Care Order: Jurisdiction), Re [2013] EWCA Civ 1434; [2014] Fam. Law 20.

Articles 29-39 of the Hague Convention 1996 contain broad provisions for co-operation between Contracting States. It provides for a similar system of central authorities, their duties are drawn in very broad terms. Obligations are also placed on other statutory authorities.

Conflict of laws: marriage

This article contains an overview of the provisions of English law relating to the area of Conflict of Laws or Private International Law as it relates to marriage. In particular it discusses recognition of marriages solemnised in other jurisdictions, and when they will be treated as valid, void, voidable or as a non-marriage by the courts of England and Wales. The article includes consideration of recognition of civil partnerships and same sex marriages conducted in other jurisdictions, following the coming into force of the Marriage (Same Sex Couples) Act 2013. Related articles can be found in the Marriage, Forced marriage and Civil partnerships specific articles. For a detailed analysis refer to Dicey, Morris & Collins, The Conflict of Laws 15th Ed. referred to as "Dicey & Morris" in this article.
Status of Marriage: It is important to determine the status of any marriage contracted in another jurisdiction. A marriage may be valid, void (so that it is regarded as never having taken place), voidable (so that it is valid until annulled), or non-existent which is no kind of marriage at all. The distinction between these categories affects the question of whether a decree and/or and financial relief can be granted pursuant to the Matrimonial Causes Act 1973 or the Matrimonial and Family Proceedings Act 1984. The status of a marriage also has implications for issues such as legitimacy and succession. See Rayden & Jackson on Divorce and Family Matters for a detailed discussion of the status of marriage.

The key distinction is that void and voidable marriages may be annulled - Roberts (Deceased), Re [1978] 1 W.L.R. 653. A marriage which is non-existent is not entitled to a decree of nullity - Hudson v Leigh [2009] EWHC 1306 (Fam); [2013] Fam. 77. The fact that a marriage entered into here which is not compliant with the provisions of the Marriage Act 1949 is recognised in another jurisdiction does not make it valid, void or voidable here, it remains a non-existent marriage - Shagroon v Sharbatly [2012] EWCA Civ 1507; [2013] Fam. 267 approving Hudson v Leigh above.

Criteria for Recognition of a Foreign Marriage between a man and a woman: See further below for a discussion on recognition of same sex marriages and civil partnerships. Dicey & Morris Ch.17 contains a detailed discussion of the requirements for a marriage to be valid. The rule can be summarised from Dicey & Morris r.73 as follows; A marriage between a man and a woman will be recognised as formally valid when:

- it was celebrated in accordance with the form required, or recognised as sufficient, in the country where the marriage was celebrated; or
- it was celebrated in accordance with the requirements of English Common law in a country where the use of local form is impossible, or the country is in the belligerent occupation of military forces;
- it was celebrated in accordance with the Foreign Marriage Act 1892 and one of the parties is serving in HM Forces in a foreign territory. Note that the Foreign Marriage Act 1892 was repealed by the Marriage (Same Sex Couples) Act 2013 and replaced by Sch.6 to that Act. The repeal and Schedule are not yet in force but Pt 3 of Sch.6 provides for marriage of forces personnel. The relevant statutory instruments anticipated by this schedule have not yet been published;
- it was celebrated in accordance with the Foreign Marriage Act 1892 and one of the parties is a UK National, and it was performed by a British Consul or Ambassador or a member of their staff holding a marriage warrant from the Secretary of State, in circumstances where insufficient facilities exist for the parties to be married by local law. Note that the Foreign
Marriage Act 1892 was repealed by the Marriage (Same Sex Couples) Act 2013 and replaced by Sch.6 to that Act. The repeal and schedule are not yet in force but Pt I of Sch.6 provides for consular marriage in foreign territories. The relevant statutory instruments anticipated by this schedule have not yet been published.

Marriages Celebrated in the Form Required by Local Law: Whether the marriage is valid in the country where it was solemnised is determined by the law of that country alone, irrespective of the parties' domicile - Berthiaume v Dame Dastous [1930] A.C. 79. The general rule includes marriages conducted, for example, by proxy if that is permitted in the country of solemnisation, the relevant country being that where the proxy takes part in the ceremony - Apt (otherwise Magnus) v Apt [1948] P. 83. In the case of McCabe v McCabe [1994] 1 F.L.R. 410 the marriage was recognised as having taken place in Ghana in accordance with Akan law despite neither party being present at the ceremony or in the country where it was formed. In some instances, it may be difficult to ascertain in which country the marriage has taken place, for example where the marriage has taken place by telephone - Westminster City Council v C [2008] EWCA Civ 198; [2009] Fam. 11.

An exception to the general rule (a) above may arise in a number of circumstances:

- A foreign marriage between two persons of the same sex is not currently recognised. Such marriages will be recognised when s.10 of the Marriage (Same Sex Couples) Act 2013 comes into force.
- Where it would be contrary to public policy to recognise the marriage - Westminster City Council v C [2008] EWCA Civ 198; [2009] Fam. 11.
- Where either of the parties lacks capacity to marry the other according to their ante-nuptial domicile (r.74 Dicey & Morris) unless such incapacity is, penal, discriminatory or contrary to public policy (Exception 6 to r.74 Dicey & Morris).

If the marriage is bigamous. If the earlier marriage has been dissolved or annulled by an English court or the dissolution / annulment is recognised in England, it will not be treated as bigamous even if the parties' countries of domicile do not recognise the dissolution/annulment (s.50 of the Family Law Act 1986).

The Gender Recognition Act 2004 s.21(2) currently provides that a person is not to be regarded as being married by reason of having entered into a foreign post-recognition marriage. The Gender Recognition Act 2004 was amended by Sch.5 to the Marriage (Same Sex Couples) Act 2013, which is not yet in force, but which repeals s.21(2) in relation to England and Wales.
If either of the parties has not consented. The questions of which country’s law governs consent, and the method of giving consent are difficult issues - see Apt (otherwise Magnus) v Apt [1948] P. 83 and Szechter v Szechter [1971] P. 286. In some circumstances lack of consent may justify a declaration that a marriage had never taken place capable of recognition - for example, in some Forced marriage situations - see B v I (Forced Marriage) [2010] 1 F.L.R. 1721 see also SH v NB [2009] EWHC 3274 (Fam); [2010] 1 F.L.R. 1927.

Since the coming into force of the Marriage Same-Sex Couples Act 2013 s.10, same sex-marriage is lawful and a foreign marriage is not prevented from being recognised under the law of England and Wales merely because it is a marriage of a same sex couple. This includes marriages conducted in Scotland. Note, however, that a same-sex marriage in England, Scotland or Wales will be recognised only as a civil partnership in Northern Ireland.

There are potentially particular difficulties for recognition in England and Wales of same-sex marriages according to the dual domicile rule where the ante-nuptial domicile of either of the parties to the marriage would prohibit same-sex marriage. Rule 74 strictly interpreted could lead to a situation where a person is regarded as not having had capacity to marry under their ante-nuptial domicile. This is irrespective of whether the marriage was conducted in the UK or abroad. However, it is likely that the marriage would fall within one of the exceptions to Rule 74, either if just one of the couple has an English domicile, or if the prohibition on same-sex marriage in the country of domicile is considered to fall within Exception 6 relating to incapacity under rules which are penal, discriminatory or contrary to public policy, or by the Marriage (Same-Sex Couples) Act being read in a manner consistent with the Human Rights Act.

Polygamous Marriages: A polygamous marriage is one in which either spouse is entitled to take another spouse, even if it is in fact monogamous, for ease of reference sometimes referred to as potentially polygamous. A potentially polygamous marriage entered into in a country which permits polygamy will be recognised as a valid marriage in England and Wales provided it complies with the required formalities of the country of solemnisation - s.5 of the Private International Law (Miscellaneous Provisions) Act 1995. An actually polygamous marriage will, however, be void if either party is domiciled in England and Wales - s.11 Matrimonial Causes Act 1973. This does not invalidate actually polygamous marriages between spouses domiciled elsewhere, but consideration will need to be given to the law of their country of domicile. See Dicey & Morris on the subject of polygamous marriages generally.

Presumption from Cohabitation and Reputation: Even where the procedural requirements have not been fully complied with, it has long been established that a ceremony of marriage followed
by cohabitation and reputation can establish a valid marriage. Sir Jocelyn Simon P in the case of Mahadervan v Mahadervan [1964] P. 233 held that:

" [Where] a ceremony of marriage is proved, followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage: it must be evidence which satisfies beyond reasonable doubt that there was no valid marriage. The presumption in favour of marriage applies not only to the requirement of the address, but also to the preliminaries to celebration. Moreover, it would apply also to the place of the ceremony. "

See also Pazpena de Vire v Pazpena de Vire [2001] 1 F.L.R. 460, where a valid marriage was found despite there being no record of the marriage in Uruguay and deficiencies with the certificate. In the case of M v M (Divorce: Jurisdiction: Validity of Marriage) [2001] 2 F.L.R. 6 Hughes J. found a valid marriage on the basis of the presumption in circumstances where it was not clear that a ceremony had taken place, but where it could have taken place with relatively little formality. The many authorities on this point are not always easy to reconcile and require detailed consideration beyond the scope of this overview.

Void, Voidable and Non-existent Marriages: Where a marriage in a foreign jurisdiction has not been solemnised in accordance with the formalities required by local law, in some circumstances it may be treated as a void or voidable marriage entitling the parties to a decree of nullity. See ss.12-14 of the Matrimonial Causes Act 1973 for the factors rendering a marriage void or voidable and the circumstances in which the validity of the marriage would fall to be determined in accordance with the law of a country outside England and Wales and Rayden and Jackson on Divorce and Family Matters Ch.7. Once the foreign law has determined whether a marriage was or was not valid, is for the lex fori to decide the implications, and to decide what remedies were available to a petitioner. By way of recent example see:

- Burns v Burns [2008] 1 FLR 813 - Coleridge court granted a decree of nullity following a marriage invalid in California.
- Asaad v Kurter [2013] EWHC 3852 (Fam) - Moylan J. found a marriage which was not valid as a result of a failure to comply with the required formalities and as such was to be properly described in English law terms as a void marriage.
- SH v NB [2009] EWHC 3274 (Fam); [2010] 1 F.L.R. 1927 - Moylan J. considered that the marriage was entered into without effective consent, rendering the marriage voidable. The time had passed for annulling the marriage. Moylan J. declared that the marriage was not recognised in this jurisdiction.
- Dukali v Lamrani [2012] EWHC 1748 (Fam); [2012] 2 F.L.R. 1099, Al-Saedy v Musawi (Presumption of Marriage) [2010] EWHC 3293 (Fam); [2011] 2 F.L.R. 287. If the marriage is not valid or void, but is no marriage at all, the presumption of marriage cannot apply to convert it into a valid marriage.

- K v A [2014] EWHC 3850 (Fam); [2015] Fam. Law 137: there was no binding authority in the Pakistani courts which conclusively answered the question of whether an inter-faith marriage, such that H and W's, would be valid. Despite the expert's provisional view, his report was not sufficiently clear for the court to say with certainty that H and W's marriage would not be recognised in Pakistan. In those circumstances, the court would proceed on the basis that the Nikah marriage form and its subsequent formal registration gave rise to a presumption of a valid marriage which had not been rebutted by any clear evidence to the contrary. Accordingly, the marriage should be recognised as valid in England and Wales.

Civil Partnership and Same Sex Marriage: Until the advent of the Marriage (Same Sex Couples) Act 2013, a marriage conducted between two people of the same sex in another jurisdiction was not recognised as a marriage in England and Wales, but would be treated as a civil partnership - Wilkinson v Kitzinger [2006] EWHC 2022 (Fam); [2007] 1 F.L.R. 295 and Civil Partnership Act 2004 s.215. The Marriage (Same Sex Couples) Act 2013 provides for recognition of marriages entered into overseas as marriages in England and Wales in s.10 of that Act, which is not yet in force.

"(1) A marriage under - (a) the law of any part of the United Kingdom (other than England and Wales), or (b) the law of any country or territory outside the United Kingdom, is not prevented from being recognised under the law of England and Wales only because it is the marriage of a same sex couple."

The Marriage (Same Sex Couples) Act 2013 does not abolish the Civil Partnership Act 2004 and civil partnerships entered into in other countries will continue to be afforded recognition where they fall within the definition of an "overseas relationship" and comply with the provisions of ss.212-216 of the Civil Partnership Act 2004. Same sex marriages conducted overseas are excluded from the definition of "overseas relationship".

Conversion of civil partnership to marriage: Section 9 of the Marriage (same-sex Couples Act) 2013 provides for the conversion of "an England and Wales civil partnership" into a marriage. This specifically includes consular civil partnerships conducted abroad provided one of the civil partners would have been eligible to register the civil partnership in England and Wales (per ss.210 211 CPA 2004). Overseas civil relationships cannot be converted to marriages in England and Wales, and civil partners cannot marry according to the Matrimonial Causes Act 1973 - any
overseas relationship would therefore have to be dissolved before a UK same-sex marriage could take place.

Declarations as to Marital Status: Provided its validity is not in dispute, a foreign marriage may be proved by production of the marriage certificate or similar document from the country where the marriage took place - Family Procedure Rules 2010 PD7A. The procedure for attaining formal recognition of a foreign marriage is to seek a declaration of marital status pursuant to s.55 of the Family Law Act 1986. The declarations which may be made in relation to a marriage under this section are:

" (a) a declaration that the marriage was at its inception a valid marriage;
(b) a declaration that the marriage subsisted on a date specified in the application;
(c) a declaration that the marriage did not subsist on a date so specified. "

Conflict of laws: matrimonial causes

This is an overview of the rules of private international law as they apply to divorce, dissolution and annulment of marriage and judicial separation. There are a number of different aspects to this which each merit in depth consideration and further reading. The key areas to consider are:

- Jurisdiction to entertain proceedings for a matrimonial cause.
- Matrimonial causes pending in different jurisdictions; forum and stay;
- Recognition of foreign decrees of divorce, dissolution, annulment or separation.

As the UK is a Member State of the European Union, the first two of these key areas are largely determined by Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Different considerations apply when there is no Member State with jurisdiction under the regulation and as between the different parts of the UK.

Frequently there will be more than one country or Member State with jurisdiction. Arguments as to jurisdiction largely take place because of a real or perceived advantage to a party in one jurisdiction or another dealing with the financial provision application which follows from the matrimonial cause. Closely linked to Regulation 2201/2003 concerning judgements in matrimonial matters is Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in relation to matters relating to maintenance obligations, which determines where jurisdiction lies in relation to maintenance obligations. Article 3 of Regulation 4/2009 confirms that jurisdiction in matters relating to maintenance includes the court which "according to its own law has jurisdiction to
entertain proceedings concerning status where the maintenance is ancillary to those proceedings" - namely what we used to call an application for ancillary relief. The maintenance regulation will also apply when the court is considering whether the English court has jurisdiction to entertain an application for financial provision after an overseas divorce pursuant to the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). Article 12 of Regulation 2201/2003 also enables a court to assume jurisdiction in relation to matters of parental responsibility where that court is dealing with divorce, separation or annulment in some circumstances. It will be apparent, therefore, that the question of in which jurisdiction the matrimonial cause proceeds has huge implications for the jurisdiction in which the financial and parental consequences of the breakdown of the relationship will be dealt with. This article gives an overview of the position when there are competing jurisdictions. It is outside the scope of this article to examine the nature and extent of financial provision following a decree in this or another country. In any case where there is more than one potential jurisdiction for a matrimonial cause it is imperative to take advice as to the law in relation to financial provision in all of the countries concerned, and to act swiftly to secure the jurisdiction of choice where available.

The Matrimonial Causes Act 1973 includes as matrimonial causes divorce, nullity, and judicial separation. This now includes marriages between same sex couples pursuant to the Marriage (Same Sex Couples) Act 2013. In addition, the Civil Partnership Act 2004 provides for dissolution, nullity and separation of Civil Partnerships. Whilst not strictly a "matrimonial cause" this article does include guidance as to issues of jurisdiction and recognition in respect of the breakdown of Civil Partnerships.

It will be important to know whether a marriage or civil partnership has been dissolved or annulled in another country. Sometimes a petition for divorce will be met with an assertion that the parties are already divorced in another jurisdiction. Both the Regulation 2201/2003 and the Family Law Act 1986 address recognition of foreign decrees. Different considerations apply in respect of same-sex marriages and civil partnerships because of the lack of uniform approach to same-sex unions within the EU and worldwide.

Jurisdiction - general: Jurisdiction in matrimonial causes derives from Regulation 2201/2003 in the first instance, as reflected in the Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973), which provides:

"(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if)- (a) the court has jurisdiction under the Council Regulation; or (b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are
begun.

(3) The court shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if)-
(a) the court has jurisdiction under the Council Regulation; or
(b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the
parties to the marriage-
(i) is domiciled in England and Wales on the date when the proceedings are begun; or
(ii) died before that date and either was at death domiciled in England and Wales or had been
habitually resident in England and Wales throughout the period of one year ending with the date of
death. "

Since the Marriage (Same Sex Couples) Act 2013 entered into force, the DMPA 1973 s.5 added a
further Sch.A1 to provide for jurisdiction in respect of same-sex marriages, and allowed for regulations
to be made to govern jurisdiction to entertain matrimonial causes in respect of same-sex marriages.
Arguably this was unnecessary: neither Regulation 2201/2003 nor the DMPA 1973 specifically state
that they only apply to opposite sex marriages. Whether a marriage is recognised as a marriage is a
matter of domestic law rather than EC law. Nonetheless, the resulting regulations in Marriage (Same
Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014/543 provide for the
provisions of Regulation 2201/2003 to be largely mirrored, without referring to the EC regulation so
that:

" The court has jurisdiction in proceedings for the divorce of, or annulment of the marriage of, a
same sex couple or for the judicial separation of a married same sex couple where-
(a) both spouses are habitually resident in England and Wales;
(b) both spouses were last habitually resident in England and Wales and one of the spouses
continues to reside there;
(c) the respondent is habitually resident in England and Wales;
(d) the petitioner is habitually resident in England and Wales and has resided there for at least one
year immediately preceding the presentation of the petition;
(e) the petitioner is domiciled and habitually resident in England and Wales and has resided there for
at least six months immediately preceding the presentation of the petition; or
(f) both spouses are domiciled in England and Wales. "

Neither the Regulation 2201/2003 nor the DMPA 1973 specifically provide for jurisdiction in relation
to dissolution, separation or annulment of civil partnerships, but the provisions of the Council
Regulation are largely mirrored in the provisions of the Civil Partnership Act 2004 which provide for
jurisdiction, namely s.219 CPA 2004 and the regulations made thereunder Civil Partnership
(Jurisdiction and Recognition of Judgments) Regulations 2005/3334 in the same circumstances as those in which the court would have jurisdiction in respect divorce, annulment or separation of a same-sex marriage.

In addition to the jurisdictional rules set out above, there are provisions in s.221 CPA 2004 and the DMPA 1973 Sch. A1 as amended by the Marriage (Same Sex Couples) Act 2013 which enable the court to dissolve a civil partnership or same sex marriage which was entered into in the UK if a party is domiciled in the UK and does not otherwise fall within the jurisdictional rules. These provisions were introduced because of the lack of recognition of same sex relationships in some other countries, potentially resulting in a situation where a person is unable to find a jurisdiction where they can dissolve their civil partnership or obtain a divorce.

Does the court have jurisdiction under Regulation 2201/2003 in respect of matrimonial causes? This is the starting point for any matrimonial cause application. Jurisdiction under the council regulation is governed by art.3 of that regulation which provides;-

" General jurisdiction 1 In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State (a)in whose territory:
-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 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;
(b)of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses. "

Jurisdiction under art.3.1(a) is founded on habitual residence and applies whether or not the parties are nationals of another EU Member State Sulaiman v Juffali [2002] 1 F.L.R. 479. The Court of Appeal in the case of Tan v Choy [2014] EWCA Civ 251 considered the meaning of "residence" and 'habitual residence' contained within art.3. In respect of habitual residence, this is an autonomous European concept, and the Court of Appeal reiterated the "centre of interests" test per M v M [2007] EWHC
2047 (Fam); [2007] 2 F.L.R. 1018, namely "the place where a person has established on a fixed basis the permanent or habitual centre of his interests". In relation to "residence" for a year prior to the application being made, Lord Justice Aitkens considered that there are at least 3 different possible interpretations of this requirement, which it was not necessary to determine for the purposes of that case. This remains an area of potential dispute where a person has not been residing consistently in their country of habitual residence. Mr Justice Bodey in the recent case of Chai v Peng [2014] EWHC 3518 (Fam); [2015] Fam. Law 37 considered whether the wife had genuinely been habitually resident here for the 12 months prior to issue, or whether it was contrived for the purposes of her application in circumstances where the family were resident in a number of different countries. Jurisdiction under art 3.1(b) can be founded on the nationality of both spouses or, in respect of the UK and Ireland, the domicile of both spouses. This provision has recently been considered in two cases. In the case of Sekhri v Ray [2014] EWCA Civ 119; [2014] 2 F.L.R. 1168 the Court of Appeal upheld a decision that the court had jurisdiction to entertain a divorce petition in circumstances where both parties resided in Singapore and it had been found that the husband had a domicile of origin in England due to his Indian father's intention to settle here, and his wife had acquired a domicile of choice here. In the case of Divall v Divall [2014] EWHC 95 (Fam); [2014] 2 F.L.R. 1104 the petitioner husband was not able to establish that his wife of Chinese origin who was a British Citizen had a domicile of choice in England at the date of issue, the parties were residing in the Netherlands.

In addition to jurisdiction under art.3, the court may have jurisdiction under arts 4 or 5 Regulation 2201/2003 to entertain a cross petition, or where the court has already given judgement on a judicial separation. Article 7 allows member states to assume jurisdiction based on their own laws only where no court of a Member State has jurisdiction. Articles 6 and 7 of Regulation 2201/2003 are to be interpreted as meaning that if, in divorce proceedings, a respondent is neither habitually resident nor a national of a Member State, the courts of one Member State could not base their jurisdiction to hear the divorce petition on national law, if the courts of another Member State had jurisdiction under art.3 of Regulation 2201/2003: Sundelind Lopez v Lopez Lizazo (C-68/07) [2008] Fam. 21

Residual jurisdiction: If the court does not have jurisdiction pursuant to Regulation 2201/2003 does it have jurisdiction on any other basis?: Only where no Member State at all has jurisdiction pursuant to Regulation 2201/2003 - per DMPA 1973 s.5.

If the court does not have jurisdiction pursuant to art.3 Regulation 2201/2003 it is irrelevant that the parties have assumed and proceeded as though it does: there is no room for the court to assume jurisdiction based on the parties' wishes or intentions: Saward v Saward [2013] EWCA Civ 1060
If another Member State has jurisdiction, the court is required to declare of its own motion that it has no jurisdiction, whether or not another Member State is seised: art.17 Regulation 2201/2003. Only if no other Member State has jurisdiction, may the court go on to consider whether it has jurisdiction based on domicile. When considering whether another Member State has jurisdiction it may also be appropriate to consider whether the other Member State would recognise the marriage - for example a same-sex marriage.

Another country which is not a Member State has jurisdiction, but no other Member State, has jurisdiction: Jurisdiction of the court of England and Wales is determined in the same way - either it has jurisdiction pursuant to the Council Regulation, or no Member State has jurisdiction and the court may consider whether it has jurisdiction based on domicile. See Divall v Divall [2014] EWHC 95 (Fam); [2014] Fam. Law 781 and Sekhri v Ray [2014] EWCA Civ 119; [2014] 2 F.C.R. 167 for consideration of jurisdiction based on domicile.

Jurisdictional issues between different parts of the UK: Where the UK has jurisdiction pursuant to art.3 Regulation 2201/2003 there may still be an issue as to which part of the UK has jurisdiction - the Council Regulation does not apply to internal territory disputes: Pt II of the DMPA 1973 sets out when Family Court of England and Wales has jurisdiction and Part III of the DMPA 1973 sets out when the Court of Session of Scotland has jurisdiction. In relation to Civil Partnerships, the Civil Partnership Act 2004 defines only when England and Wales has jurisdiction.

Competing jurisdictions: Schedule 1 para.7 to the DMPA 1973 imposes a duty on parties to inform the court of proceedings in another jurisdiction:

"While matrimonial proceedings are pending in the court in respect of a marriage and the trial or first trial in those proceedings has not begun, it shall be the duty of any person who is a petitioner in the proceedings, or is a respondent and has in his answer included a prayer for relief to furnish, in such manner and to such persons and on such occasions as may be prescribed, such particulars as may be prescribed of any proceedings which- (a) he knows to be continuing in another jurisdiction; and (b) are in respect of that marriage or capable of affecting its validity or subsistence."

Where the court has been alerted to such a conflict, different considerations apply depending on whether that conflict is within the territories of the UK, within the Member States of the EU, or with another country outside the EU.
Within the territories of the UK: Where proceedings for divorce or nullity of marriage are pending elsewhere in the British Isles Sch.1 para.8 DMPA 1973 provides that the court must stay the English proceedings in the following circumstances:

" (1) Where [...] it appears to the court, on the application of a party to the marriage-
(a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and
(b) that the parties to the marriage have resided together after its celebration; and
(c) that the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and
(d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun,

This duty only arises on the application of a party to the marriage before the beginning of the trial or first trial Sch.1 para.8(1) DMPA 1973. Thereafter there is a discretionary power of stay in Sch.1 para.9. This is discussed further below in the context of discretionary stays.

In respect of Civil Partnerships, the same provisions are applied by virtue of the Family Procedure (Civil Partnership: Staying of Proceedings) Rules 2010/2986.

More than one Member State is seised of proceedings: This situation is governed by the provisions of the Regulation 2201/2003. The primary Article is art.19 which provides:

" 1 Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
3 Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court."

This creates a "first past the post" test for dealing with the proceedings where there is potentially more than one Member State with jurisdiction. In circumstances where there is more than one potential jurisdiction, it is important to secure jurisdiction as a priority before engaging in dispute resolution. Neither an estoppel nor a jurisdiction agreement can displace the provisions of art.19: Jefferson v O'Connor [2014] EWCA Civ 38; [2014] 2 F.C.R. 112. A number of particular difficulties may arise:
It is not always easy to determine which court was first seised. Article 16 indicates that the relevant time is when the document instituting the proceedings is lodged with the court, or when it is lodged with the authority responsible for service if it has to be served first. Not all member states have the same rules for determining when an application is lodged. See for example Leman-Klammers v Klammers [2007] EWCA Civ 919; [2008] 1 F.L.R. 692 and C v C (Divorce: Jurisdiction) [2005] EWCA Civ 68; [2005] 1 W.L.R. 1469.

It can take a significant amount of time for the court first seised to determine jurisdiction. The person disputing jurisdiction is effectively having to engage in proceedings in that other Member State to refute that State's jurisdiction before the matrimonial cause can proceed. If proceedings have been issued in another Member State but jurisdiction is contested and it is believed that the UK has jurisdiction, proceedings can still be issued here but they must be stayed pursuant to art.19 while the jurisdiction of the court first seised is explored: see Wermuth v Wermuth [2003] EWCA Civ 50; [2003] 1 W.L.R. 942. In the case of Chai v Peng [2014] EWHC 3518 (Fam); [2015] Fam. Law 37 Holman J. held that a person who challenged the jurisdiction of a court could not be regarded as having submitted to its jurisdiction simply because he funded and instructed lawyers to attend before that court in order to register and argue his protest.

Member States don’t always interpret EU law uniformly. A Member State will sometimes consider itself to have jurisdiction in circumstances which the English court disagrees with. The question of jurisdiction of the court first seised must be established by the court first seised - there is no scope for the English court to disagree.

There is no scope for the court first seised to decline jurisdiction in favour of a more appropriate jurisdiction: Wermuth v Wermuth No.1 [2002] EWHC 3049 (Fam); [2003] 1 F.L.R. 1022 and Wermuth v Wermuth [2003] EWCA Civ 50; [2003] 1 W.L.R. 942

There may be an issue about when proceedings have come to an end. See for example G (A Child) (Jurisdiction: Brussels II Revised), Re [2014] EWCA Civ 680 in relation to parental responsibility. In the case of S v S (Brussels II Revised: Articles 19(1) and (3): Reference to ECJ) [2014] EWHC 3613 (Fam); [2015] Fam. Law 130 Mostyn J. referred a question to the CJEU concerning whether the jurisdiction of the court first seised had been "established" for the purposes of Regulation 2201/2003 art.19 where a husband had simply filed judicial separation proceedings but had not progressed with those proceedings before they lapsed. The outcome of this reference is not yet reported. In the case of de Bauge v China [2014] EWHC 3975 (Fam); [2015] Fam. Law 274 Nicholas Cusworth QC held that in circumstances where the Italian separation proceedings were not final until the time for appeal had
expired and no Italian petition for divorce could be issued in that period, no English petition could be issued either.

Competing jurisdiction with another country which is not a Member State: The Sch.1 para.9 to the DMPA 1973 provides the court with a discretionary jurisdiction to stay proceedings where proceedings are continuing in another jurisdiction and the balance of fairness and convenience as between the parties is such that it is appropriate for the proceedings in that other jurisdiction to be disposed of before further steps are taken in the English court. The same ability to allow discretionary stay of competing civil partnership proceedings is afforded by the Family Procedure (Civil Partnership: Staying of Proceedings) Rules 2010/2986, which also fall outside the Council Regulation. It is possible to both contest jurisdiction here and seek a stay. The Court of Appeal has recently confirmed in M v M [2013] EWCA Civ 1255; [2014] 2 W.L.R. 1033; that the provisions of Regulation 2201/2003 do not operate to prevent the courts of England and Wales from staying proceedings here where it has jurisdiction and where another country which is not a Member State of the UK also has jurisdiction. The Court confirmed that It was neither necessary nor desirable to extend the principle in Owusu v Jackson (t/a Villa Holidays Bal Inn Villas) (C-281/02) [2005] Q.B. 801 to cases where there were parallel proceedings in a non-Member State, and approved the decision in JKN v JCN (Divorce: Forum) [2010] EWHC 843 (Fam); [2011] 1 F.L.R. 826.

The question of whether the court should grant a stay in favour of another jurisdiction is a discretionary issue, and can have significant consequences because of the widely varying outcomes which might ensue in different jurisdictions. The excellent chapter in David Hodson's book The International Family Law Practice is essential reading in this area. There are numerous authorities in which the courts have considered and applied Sch.1 para.9 to the DMPA 1973 and the guidance in the leading authority of De Dampierre v De Dampierre [1988] A.C. 92. In particular see Butler v Butler (No.1) [1997] 2 F.L.R. 311; R v R (Divorce: Stay of Proceedings) [1994] 2 F.L.R. 1036; Armstrong v Armstrong [2003] EWHC 777 (Fam); [2003] 2 F.L.R. 375; A v L and F v F [2009] EWHC 1448 (Fam); [2009] 2 F.L.R. 1496. Most recently the series of cases between Pauline Chai and Tan Sri Peng of the Laura Ashley dynasty are essential reading in this area. Mr Justice Bodey at [2015] Fam Law 37 raises some questions about whether there is a conflict between Butler v Butler and De Dampierre as to whether a party must show the other jurisdiction is "clearly and distinctly" more appropriate, or, on balance more appropriate which would benefit from "more authoritative determination at some point". The Court of Appeal considered the issue of forum in some detail in the case of O v O (Appeal against Stay: Divorce Petition) [2002] EWCA Civ 949; [2003] 1 F.L.R. 192, concerning a dispute over jurisdiction with Nigeria. The court considered that the history of the litigation in the competing
jurisdictions was a significant factor, as was the issue of recognition of any decree granted here or in the competing jurisdiction. Further guidance was given as follows:

"It is my opinion that if the ancillary relief order is to be determined by a London judge (and any order would be manifestly enforceable against London assets) he should give due weight to what I might loosely describe as Nigerian factors and not ignore the differential between what the wife might anticipate from a determination in London as opposed to a determination in Lagos. The dispute to date, like most of these disputes as to jurisdiction, has undoubtedly been driven by the husband’s conviction that a Lagos award would be to his advantage and the wife’s contrary conviction that a London award would be more generous. These contests are particularly arid and in my view should be discouraged by permitting a reflection of the differential within the review under section 25(1) of the Matrimonial Causes Act 1973 of "all the circumstances of the case". I accept the consequence that the ancillary relief trial in London would be more complex, and more expensive, than it would be in a conventional case between British subjects. 58. I would also accept the judge’s conclusion that 'looked at overall this is, in the widest sense, a Nigerian family'. I would also accept that that is a factor rightly put into the scale in favour of a stay, both as a factor in measuring fairness to the husband and also in measuring to which court system family disputes naturally attach. However the judge’s statement is perhaps over succinct. The family is primarily and predominantly Nigerian but the extent to which it has elected a secondary attachment must not be overlooked.""

The Court of Appeal also suggested that there should be less of a distinction between EU and non-EU cases:

"But, as the judgment of Hobhouse LJ in Butler v Butler [1998] 1 WLR 1208 at 1215 reminds us, in the end the judge's discretion is bounded by the statutory considerations which rest upon an evaluation of fairness to the parties rather than upon a comparison of the competing jurisdictions, save insofar as the comparison relates to convenience of witnesses, delay and expense. Of course the issues that took the case of De Dampierre to the House of Lords could not now arise since with effect from March 2001 the Brussels II Regulation applied the rule of lies alibi pendens between the member states of the European Union. That has restricted the application of section 5(6) of the 1973 Act to competition between this jurisdiction and non-EU jurisdictions. I am of the opinion that in order to confine to some extent the effect of applying two different rules, greater weight should be given to the consideration of where proceedings were first issued in the exercise of the statutory discretion."

Whilst the courts of England and Wales may determine that the proceedings here should be allowed to continue, that of itself does not bring the proceedings in the competing jurisdiction to an end, and
a situation can arise where there continue to be two sets of proceedings and conflicting orders. Not all other jurisdictions have a mechanism for proceedings to be stayed, and the other party may wish to pursue a different outcome in the other jurisdiction. It may also occur that the other party is vigorously pursuing proceedings in the other jurisdiction whilst seeking a stay in this jurisdiction. Whilst forum is still being considered in this jurisdiction, the court may make a "Hemain" injunction seeking to prevent a party from pursuing the suit elsewhere: See Hemain v Hemain [1988] 2 F.L.R. 388 and R v R (Divorce: Hemain Injunction) [2003] EWHC 2113 (Fam); [2005] 1 F.L.R. 386. See also Golubovich v Golubovich [2010] EWCA Civ 810; [2011] Fam. 88 regarding the relationship between "Hemain" injunctions and recognition of decrees.

A "Hemain injunction" is an interim remedy pending resolution of jurisdictional issues. Much rarer are anti-suit injunctions intended to prevent a party from re-litigating matters in another country, or enforcing a party’s right not to be sued in another country. The Court of Appeal recently confirmed in the case of Ahmed v Mustafa [2014] EWCA Civ 277; [2014] Fam. Law 790 that the High Court does have the power to restrain a litigant from re-litigating matters in a foreign jurisdiction where it is unconscionable to do so, and reviewed the case law in this area. It is clear, however, that such injunctions will continue to be rare.

Recognition of Matrimonial Causes: Whether a divorce, dissolution, separation or nullity from another jurisdiction will be recognised again varies as between territories of the UK, Member States of the EU, and divorces, annulments and separations from non-EU countries.

Territories of the UK: The Family Law Act 1986 provides for divorces, annulments and judicial separations to be automatically recognised throughout the UK where they are granted by a court of civil jurisdiction. This means, for example, that a talaq pronounced in England is ineffective; Sulaiman v Juffali [2002] 1 F.L.R. 479. It also means that divorces granted in foreign embassies in the UK are not recognised as effective here, see for example Solovyev v Solovyeva [2014] EWFC 1546. Similarly, s.233 of the Civil Partnership Act 2004 provides that:

"the validity of a dissolution or annulment of a civil partnership or a legal separation of civil partners which has been obtained from a court of civil jurisdiction in one part of the United Kingdom is to be recognised throughout the United Kingdom."

Member States of the EU: Within the EU, there is automatic recognition in all Member States of divorce, annulment or legal separation orders made in other member states. The term judgment is specifically defined by art.2 Regulation 2201/2003 to mean "a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility". Note, however, that the Member
State in question is not required to recognise the marriage in respect of which the divorce took place. For example, if a married same-sex couple divorce here, another Member State may not recognise the divorce because it does not recognise the same-sex marriage which is the subject of the divorce. Note also that there is no automatic inter-State recognition of civil partnerships - regard will need to be had to the domestic law of each relevant Member State. In respect of civil partnerships, the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005/3334 provides for recognition of an "order for the dissolution or annulment of a civil partnership or the legal separation of civil partners, pronounced by a court of a Member State, however termed by that State".

Recognition of judgments within the EU falls principally within arts 21 and 22 Regulation 2201/2003. Article 21 provides that "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required". Article 22 sets out the grounds for non-recognition which includes circumstances which are manifestly contrary to the public policy of the Member State in which recognition is sought. This is the ground on which recognition most commonly fails, and might include refusing to recognise a divorce of a same sex couple.

Part 31 of the Family Procedure Rules 2010/2955 and Practice Direction 31A deal with the procedure relating to obtaining recognition in the UK of divorces, annulments and judicial separations obtained in other Member States, and pursuant to the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005/3334 and under the Hague Convention 1996. All applications must be made to the Principal Registry in accordance with those procedural rules.

Recognition of divorce, annulment or separation obtained outside the EU: It should be noted that even though the courts of England and Wales may recognise a divorce obtained outside the EU, that country will not necessarily recognise a divorce obtained here, and it may be necessary for the parties to be divorced in more than one jurisdiction. The Family Law Act 1986 Pt II governs the issue of recognition in England and Wales of overseas divorces, annulments and legal separations. Section 46 creates a distinction between a divorce, annulment or legal separation obtained by means of proceedings, and otherwise than by means of proceedings. See in particular the notes to rr.88 and 89 in Dicey & Morris, The Conflict of Laws, 15th Ed..

The different rules according to whether a divorce, annulment or separation has been obtained by proceedings necessitates consideration of what constitutes proceedings, and the distinction between them remains unclear. Proceedings is defined in the Family Law Act 1986 s.54 to mean "judicial or other proceedings". The consideration given by the House of Lords to this issue in the case of Quazi v Quazi [1980] A.C. 744 is instructive, but pre-dated the 1986 Act which also requires effectiveness in
the country where it was obtained. See also Chaudhary v Chaudhary [1985] Fam. 19, El-Fadl v El-Fadl [2000] 1 F.L.R. 175 and H v H (Validity of Japanese Divorce) [2006] EWHC 2989 (Fam); [2007] 1 F.L.R. 1318. What is clear is that "proceedings" has a much wider definition than simply court proceedings, can include an administrative procedure or some degree of formality which doesn't involve any independent body or authority - see Berkovits v Grinberg [1995] Fam. 142

Where the divorce, annulment or separation was obtained by way of proceedings, it is also a requirement of recognition that it is effective under the law of the country in which it was obtained, and at the relevant date either party to the marriage was:

" (i) habitually resident in the country in which the divorce, annulment or legal separation was obtained, or
(ii) was domiciled in that country, or
(iii) was a national of that country "

The relevant date is the date the proceedings commenced FLA 1986 s.46(3). If the country in which the divorce, annulment or legal separation was obtained has a number of independent territories or states, FLA 1986 s.49 applies to mean that each territory or state is treated as though it were a separated country for the purposes of determining those points (i), (ii) and (iii).

Where the divorce, annulment or separation was obtained otherwise than by way of proceedings there are additional requirements in FLA 1986 s.46;

" 2) The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; (b) at the relevant date- (i) each party to the marriage was domiciled in that country; or (ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date. "

The relevant date in these circumstances is the date on which the divorce, separation or annulment was obtained: FLA 1986 s.46(3). Divorces obtained otherwise than by way of proceedings may include divorces obtained on the informal act of one party to the marriage, and sometimes the other party is not even aware that they have been divorced. Informal acts can include the Muslim Talaq or the Jewish Ghet, but these forms of divorce are not always obtained otherwise than by proceedings. See in particular Abbassi v Abbassi [2006] EWCA Civ 355; [2006] 2 F.L.R. 415. In some cases there may be an
issue as to where the divorce was obtained. See for example Sulaiman v Juffali [2002] 1 F.L.R. 479. It is clear from the provisions of FLA 1986s.46(2) that such a divorce, separation or annulment will not be recognised if either party was habitually resident in the UK throughout the period of 1 year prior to it being obtained. This prevents parties who are habitually resident here simply hopping over to a jurisdiction where proceedings are not required, issuing a divorce by the informal act of one party, and then returning to the UK seeking to have it recognised.

Section 46 FLA 1986 deals with the proof of facts relevant to recognition and provides:

" (1) For the purpose of deciding whether an overseas divorce, annulment or legal separation obtained by means of proceedings is entitled to recognition by virtue of section 46 and 47 of this Act, any finding of fact made (whether expressly or by implication) in the proceedings and on the basis of which jurisdiction was assumed in the proceedings shall- (a) if both parties to the marriage took part in the proceedings, be conclusive evidence of the fact found; and (b) in any other case, be sufficient proof of that fact unless the contrary is shown. (2) In this section "finding of fact" includes a finding that either party to the marriage- (a) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or (b) was under the law of that country domiciled there; or (c) was a national of that country. (3) For the purposes of subsection (1)(a) above, a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them. "

As might be expected from the foregoing, FLA 1986 s.51 also provides a number of grounds for non-recognition of overseas divorces annulments or separations, which include circumstances where it was obtained without taking the steps to give notice to the other party to the marriage or opportunity to participate in the proceedings which ought to have been given - see Duhur-Johnson v Duhur-Johnson [2005] 2 F.L.R. 1042 and Ivleva (formerly Yates) v Yates [2014] EWHC 554 (Fam); [2014] 2 F.L.R. 1126. The court may further refuse to recognise divorces, annulments and separations obtained otherwise than by proceedings where there is no official document certifying that it is effective in the country where it is obtained. Recognition may also be refused on grounds of public policy. See El-Fadl v El-Fadl [2000] 1 F.L.R. 175 and Kellman v Kellman [2000] 1 F.L.R. 785. A divorce is not an overseas divorce merely because it is valid under foreign law if it is obtained within the precinct of England and Wales at foreign embassy or consulate; Solovyev v Solovyeva [2014] EWFC 1546.

Recognition of Civil Partnerships obtained outside the EU: Sections 235-237 CPA 2004 apply to effectively replicate the provisions of Family Law Act 1986 s.46 in respect of Civil Partnerships. The
same distinctions as to dissolutions, annulments or separations obtained by proceedings and otherwise than by proceedings applies.