

Conflict of Law Conventions and their in National Legal Systems. New Zealand

Elsabe Schoeman, Tony Angelo.

STATISTICAL QUESTIONS

1) Which Hague Conventions have been ratified by your country?

- NEW ZEALAND
 - o Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents;
 - o Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; and
 - o Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

2) Which CIDIP Conventions have been ratified by your country?

- NEW ZEALAND

New Zealand does not participate in CIDIP Conventions.

3) Did your State participate and send delegations to the diplomatic conferences where these Conventions were adopted?

- NEW ZEALAND

Although New Zealand was not a member of the Hague Conference while these Conventions were adopted, and therefore did not send any delegations to such conferences, it has participated in the review of the Convention on the Civil Aspects of International Child Abduction 1980, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 and is currently assisting in the development of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

4) How many Hague and CIDIP Conventions have been signed but not ratified?
Please enumerate them.

- NEW ZEALAND

None.

B. CONFLICTS CONVENTIONS AND DOMESTIC LAW- A SUBSTANTIVE COMPARISON

5) Is the text of The Hague and CIDIP Conventions similar to norms in your domestic legislation?

6) Please explain similarities and differences.

7) Has being a Party to any of the Conventions had an impact on domestic law?

Hague Conventions implemented in New Zealand are consistent with norms in our domestic legislation. To this end, the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents 1961 is implemented through s 145 of the Evidence Act 2006. Similarly, the Hague Convention on the Taking of Evidence Abroad in

Civil and Commercial Matters 1970 is implemented through s 182 of the Evidence Act 2006. The Adoption (Intercountry) Act 1997 implements the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 and reproduces the Convention in Schedule 1 of the Act. The Hague Convention on the Civil Aspects of International Child Abduction 1980 is implemented through the Child Care Act 2004, which incorporates the provisions of the Convention within the body of the Act and also reproduces the Convention in Schedule 1 of the Act.

In regard to international child abduction, the Convention has influenced the approach of New Zealand Courts in non-Convention cases. The Courts are prepared to return children wrongfully abducted here from originating non-Convention countries. The following are expressions of the sentiment to attain parity across Convention and non-Convention cases:

- *Lynch v Lynch* [1992] NZFLR 523, 524: “... put into effect what the Act [implementing the Convention] intends to the greatest possible degree.”
- *Lehartel v Lehartel* [1993] 1 NZLR 578, 583: “... have regard to the principles of the convention as a factor to take into account in deciding how the Court should exercise its discretion” and “[w]here it is consistent with the welfare of the child as the paramount consideration, this Court should act in a way that will discourage the abduction of children across national borders” and avoid “possibility of inconsistent orders in the two countries.” (586)
- *Jayamohan v Jayamohan* [1995] NZFLR 913, 921: “Section 4 has been amended (by s 2(1) of the Guardianship Amendment Act 1994) to put the matter beyond any doubt in future Convention cases. In my view in non-Convention cases the Court should act by analogy. After all, they are only non- Convention cases because the other country involved has not committed itself to a now internationally accepted practice. But New Zealand most certainly has.”

CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND DOMESTIC LAW

8) Precedence of domestic law or international Conventions according to your Constitution.

- NEW ZEALAND

New Zealand does not have an entrenched constitution or a single document that would be considered to be a constitution. Instead, New Zealand's constitutional framework is made up of a collection of statutes, cases, conventions, and customs.

New Zealand has a dualist system where international law is a different system of law from domestic law and it operates on the international plane and not the domestic plane. In the past courts could not apply an international treaty to New Zealand domestic law until the government had adopted the treaty into domestic law.

It is a fundamental constitutional principle that Parliament is sovereign (Bill of Rights Act 1688, art 1) and that courts cannot interfere with legislative action or acts or acts of State. However, it is the courts' role to interpret legislation. When interpreting legislation or the meaning of specific words the courts look primarily at the purpose of that particular Act (Acts Interpretation Act 1924, s 5(j)) and may refer to its Regulations.

The traditional dualist approach is no longer as clearcut as it once was, especially in the field of human rights (see *Tangiora v Wellington District Legal Services Committee* [1997] NZAR 118). Although international law cannot override domestic law, the obligations created by a treaty may impact upon related domestic law. The courts can presume that Parliament does not intend to legislate in breach of international law or treaty obligations

9) How are inconsistencies between domestic law and the Conventions resolved?

There has been some judicial recognition of international treaties being used as a ground for judicial review in relation to the exercise of statutory power. In *Tavita v Minister of Immigration* [1994] 2 NZLR 257 the Ministry of Immigration had served an expulsion notice on a Samoan citizen. The main issue in the proceedings before the Court of Appeal was whether unincorporated treaty obligations should be taken into consideration by administrative authorities when exercising their discretionary powers. The two relevant international instruments being discussed were the International Covenant on Civil and Political Rights 1966, and the Convention on the Rights of the Child 1989. Both treaties

had been entered into by the New Zealand government and were therefore binding on New Zealand at international law but the international instruments had not been incorporated into New Zealand's domestic law. The Court noted that the Crown's argument, that the Minister of Immigration could ignore New Zealand's international human rights obligations when making an expulsion notice, was an "unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing" (266; per Cook P for the Court (CA)).

The Court therefore observed that: "A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms, or obligations, the Executive is necessarily free to ignore them." (266; per Cook P for the court (CA))

The Court did not deal with the effect of international Human Rights Conventions on national legislation in general or rule that mandatory consideration of international instruments be undertaken by administrative authorities. *Tavita* resulted in new procedures being introduced so that statutes relating to immigration matters must now be read conformably with New Zealand's international obligations.

Furthermore, in *Punter v Secretary for Justice* [2007] 1 NZLR 40, the approach of the New Zealand Courts to the interpretation of domestic statutes implementing international conventions was yet again confirmed: the statute should be interpreted "consistently with the Hague Convention and the manner in which it is interpreted in other contracting states" (para [10]). The Court (Glazebrook and Robertson JJ) referred to the Vienna Convention on the Law of Treaties 1980, which requires treaties to be interpreted in good faith in accordance with the ordinary meaning of the words as seen in their context and in the light of the treaty's object and purpose. In *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (paras [128] - [130]), Glazebrook J said that this approach was effectively the same as the approach to the interpretation of statutes adopted in New Zealand's Interpretation Act 1999 (see s 5). There are, however, provisions in the Vienna Convention that have no counterpart in the Interpretation Act, such as the principle that subsequent practice in the application of

a treaty by state parties is to be taken into account in its interpretation (art 31(3)(b) of the Convention). The closest analogy to this provision would be s 6 of the Interpretation Act, which provides that enactments apply to circumstances as they arise. In *Zaoui*, Glazebrook J (para [131]) expressed the view that, in the event of a divergence in interpretation between domestic principles and the Vienna Convention the question, whether domestic or international interpretation principles should apply, must be resolved through statutory interpretation. For example, in the case of international child abduction, the direct reference to the Convention on the Civil Aspects of Child Abduction in the Care of Children Act 2004 and its annexure to the Act, point to the application of international principles of interpretation in the event of a divergence: *Punter* (para [12]).

C. IMPLEMENTATION OF CONFLICTS CONVENTIONS

10) How has the implementation of the Conventions ratified by your country taken place?

- **NEW ZEALAND**

If New Zealand is to fulfill the promises made in the treaty the government has to adopt that treaty into New Zealand's domestic law. It is the responsibility of Cabinet (the executive branch of government) to

ratify international treaties. There are three authoritative and primary sources of law: statute, precedent (case law), and customs or usage (these usually have historical origins). For treaties to be enforceable in

New Zealand, they have to be incorporated into one of the primary sources of law – usually statute.

How the government incorporates treaty obligations into domestic law can differ considerably (*Law Commission Report 45: The Treaty Making Process Reform and the Role of Parliament* (December 1997)

Wellington, New Zealand). To directly give effect to the treaty, the government will pass a statute that adopts the treaty into domestic law. A less direct effect of giving effect to treaty obligations is to pass a statute that encompasses the ‘spirit’ of the treaty without quoting directly from that particular treaty.

11) Cite jurisprudence applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

• NEW ZEALAND

In this section aspects of the above Conventions that have been the subject of jurisprudence in New Zealand will be identified and briefly explained within the context of the relevant legislative framework before turning to applicable case law.

Convention on the Civil Aspect of International Child Abduction: *protection of human rights and fundamental freedoms*

The norms underlying the Convention and New Zealand domestic law in regard to the protection of human rights and fundamental freedoms are largely similar. More specifically, s 106 of the Child Care Act 2004 enacts art 20 of the Convention, in terms of which the return of a child may be refused if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. S 106(1)(e) incorporates art 20, but goes further by stating that the Court may, within this context, consider

- whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum;
- whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

In interpreting this ground of refusal to return a child, within the specific fact scenario before the Court in *S v M* [1993] NZFLR 584, MacCormick J said that it was the situation

in a particular overseas country or in particular overseas countries that was crucial, rather than the situation in a particular home or household. Since the Convention was a treaty between state parties, it related to the responsibilities of those state parties. As a representative and official organisation of a state party (New Zealand), the Court could refuse to return the children in the particular circumstances of a case in order to protect them from the illicit/unlawful use of drugs or involvement in the production or trafficking of drugs, provided there was sufficient evidence to support such a finding.

Convention on the Civil Aspects of International Child Abduction: *rights of custody and access*

The interpretation of the concepts “rights of custody” and “rights of access” in Convention cases by the New Zealand Courts has generated differences with other jurisdictions, notably the English Courts, on the international level. Presumably, the interpretation of these concepts has been informed by domestic norms that are at variance with the norms of the Convention as perceived by other jurisdictions.

As stated in art 1 of the Convention, the objects of the Convention are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”.

It is clear, therefore, that the Convention draws a clear distinction between rights of custody and rights of access. Art 5 stipulates that “rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”, while “rights of access shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence”.

Art 3 of the Convention deals specifically with wrongful removal or retention of children in relation to the prompt return of abducted children to the country of their habitual residence. Within this context, removal or retention is wrongful if it is in breach of existing rights of custody, actually exercised at the time or bound to have been exercised but for the removal or retention. It is clear that art 3 deals with abduction in the sense of a breach of custody rights by the taking parent, which will trigger the return mechanism provided for in the Convention.

Rights of access are dealt with in art 21, which aims to organise and secure the effective exercise of rights of access, focusing, amongst other things, on “the removal of obstacles to the exercise of such rights”. S 21 does not provide for an order for return.

When the Convention was implemented in New Zealand the Minister of Justice made it clear that the Convention was intended to provide only for the return of a child in the event of a breach of custody rights and that the Convention should not be invoked to require the return of a child in order to enforce access rights.

In New Zealand, the original definition of “rights of custody” in s 4 of the Guardianship Amendment Act 1991, which first implemented the Convention, required an applicant to show that he/she had both the right to possession and care of the child *and* the right to determine where the child was live. This seemed to be at odds with the Convention, which included rights relating to the care of the person of the child and the right to determine the child’s place of residence within its definition of custody rights. S 4 of the Act was subsequently repealed and replaced with a new definition to bring it in line with art 5(a) of the Convention. In *Gross v Boda* [1995] 1 NZLR 569, McKay J had commented that (574): “It is unfortunate that for reasons which are not readily discernible the Act [in the original s 4] has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries.” The amended s 4 defined rights of custody as including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence. The current s 97 of the Care of Children Act 2004 defines rights of custody as “rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and … in particular, the right to determine the child’s place of residence”.

In their interpretation of custody rights within the context of the Convention, the New Zealand Courts have accorded a wider scope to custody rights than their English counterparts and have not drawn a sharp distinction between custody rights and access rights. In *Gross v Boda* [1995] 1 NZLR 569 Cooke P said that the definitions of “rights of custody” and “rights of access” were not mutually exclusive. A right of intermittent possession and care of a child could fall under rights of custody, but it could also fall under rights of access, so there was a possibility of overlap (571). According to Hardie Boys J,

there was no reason to differentiate between the so-called “primary care giver” (who had rights of custody) and the parent who only had “visiting rights”. That would defeat the objective of the Convention, namely “to ensure that questions of residence along with other questions affecting the child's welfare are normally to be dealt with by the Courts of the child's habitual residence” (574; see also *Dellabarca v Christie* [1999] NZFLR 97).

The difference in approach between the New Zealand Courts and the English Courts came to a head in *Hunter v Murrow* [2005] EWCA Civ 976 (CA) where the English Court of Appeal reached a different conclusion from that reached by the New Zealand High Court on the same set of facts in *M v H* [2006] NZFLR 623. The New Zealand Court had decided that the regular exercising of access by a father to his son over a period of some years, as well as the existence of a defined and committed relationship with his son, constituted substantial intermittent possession and care of the child and therefore the father had rights of custody in respect of his son. The English Court of Appeal decided that that was wrong and that the father had not enjoyed rights of custody. Lloyd LJ lamented the lack of comity between the English and New Zealand Courts (para [66]) and Dyson LJ was of the opinion that the New Zealand Courts’ interpretation, based on a failure to distinguish sharply between custody rights and access rights, was wrong (para [58]; see also *In Re D (a child)* [2006] UKHL 51 paras [35], [42], [43] and [44]; para 19). The need for international uniformity in the interpretation of “rights of custody” was endorsed in a recent New Zealand case: in *Fairfax v Ireton* (HC Auckland, CIV-2008-404-4279, 24 November 2008) Priestly and Cooper JJ stated that it was undesirable for New Zealand law to be out of step with the law of other signatory states, pointing out that the expansive interpretation of “rights of custody” (with reference to the decision in *M v H*) ran counter to the jurisprudence of other significant Convention signatories (para 107).

The Convention on the Civil Aspects of International Child Abduction and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: *habitual residence*

“Habitual residence” is employed as a connecting factor in both Conventions, but the concept is not defined in these or any other Hague Convention. Habitual residence is a new concept in New Zealand law. Traditionally, New Zealand, like other Anglo-Common law

jurisdictions, used domicile as the primary connecting factor for private-law status related matters as well as other child and family related issues. However, habitual residence appears to be “particularly suited to the family law context as it is a factual concept and thus has the flexibility to respond to modern conditions, which is lacking in the concepts of domicile or nationalities” (*SK v KP* [2005] 3 NZLR 590 para [71], per Glazebrook J).

Since habitual residence is not the same as domicile, New Zealand courts have had to interpret and define the concept of habitual residence themselves. This is mainly done in comparative vein with reference to jurisprudence from other countries, as evidenced by, for example, the extensive reference to both Anglo-Common law and Civilian jurisdictions in *Punter v Secretary for Justice* [2007] 1 NZLR 40. In that case it was also emphasised that the Hague Convention was an international agreement and therefore there should not be any differences between civil and common law jurisdictions in regard to the interpretation of the concept of "habitual residence" (paras [171], [172]). Particularly within the context of international conventions, international consistency in the interpretation of habitual residence will promote certainty, predictability and uniformity of result.

According to New Zealand case law, habitual residence is essentially a matter of fact. Policy considerations relevant to the acquisition or retention of habitual residence (for example the policy of deterring retention of children and the policy in favour of upholding parental agreements) cannot override the factual nature of the inquiry, and should only be considered in borderline cases (*Punter v Secretary for Justice* [2007] 1 NZLR 40 paras [176] - [187]). Despite habitual residence being a matter of fact, an appeal may be granted (with leave) on matters of fact and law (*Punter v Secretary for Justice* [2007] 1 NZLR 40 para [49]; see also s 145(1)(b) of the Care of Children Act).

Habitual residence is determined with reference to the circumstances of each case: *SK v KP* [2005] 3 NZLR 590 (para [71]). The following principles for the determination of habitual residence have been developed, mainly within the context of international child abduction: A new habitual residence is established through actual residence for an appreciable period in a place coupled with a settled purpose to remain there (*SK v KP* [2005] 3 NZLR 590 para [73]).

For purposes of the Convention on the Civil Aspects of International Child Abduction, it is

the habitual residence of the child that is crucial, which will, in turn, depend on that of the child's parent(s). According to *Ingerson v Johnston* (District Court, Hamilton FP 476/94, 16 September 1994), it is accepted that the habitual residence of young children whose parents are living together is the same as the habitual residence of those parents. Within the context of married persons living together, habitual residence refers to their home in a particular country, which they have adopted voluntarily and for settled purposes as part of the regular order of their lives for the time being. "Settled purpose" requires that the parents' shared intentions in living where they do should have a sufficient degree of continuity so as to be described as settled. This cannot be changed unilaterally by one of the parents (*SK v KP* [2005] 3 NZLR 590 paras [74] and [76]).

In regard to intercountry adoption, the settled purpose factor may be of less importance, because the biological parents of the child may remain in the host country. Also, the requirement in art 2, that the child will be or has been moved for the purposes of adoption, takes account of much of what would otherwise be considered under a settled purpose criteria: *Re Adoption Application by KGC and TGC* [2007] NZFLR 851 (para [50], per Hikaka J).

It is possible for a child to be without a habitual residence, for example where the previous habitual residence has been lost, but a new one has not been established yet: *Basingstoke v Groot* [2007] NZFLR 363 (para [12]).

Duration of residence is not necessarily decisive (*Smith v Chief Executive of the Department of Courts* (High Court, Christchurch AP 36/96, 2 March 1999) and neither is "indefinite residence" in a country essential to establish a habitual residence (*Secretary for Justice v Whenuaroa* (Family Court, Hastings FP 020/017/00, 19 July 2000). A limited period of residence with a sufficient degree of continuity may suffice (*SK v KP* [2005] 3 NZLR 590 para [77]). However, the length of stay in a place, the purpose of the stay and the strength of ties to the existing place are all relevant considerations to be taken into account when establishing a habitual residence: *SK v KP* para [80]. Cases involving shuttle custody agreements have provided a unique challenge for the determination of a child's habitual residence. In these situations the parents agree to the child residing with one parent for a specified period of time (usually relatively lengthy), followed by a specified period of time with the other parent, and this arrangement is

intended to continue until, for example, the child reaches a certain age. In *Punter v Secretary for Justice* [2007] 1 NZLR 40 it was stated that, in these shuttle custody situations, considerations of parental purpose and parental rights did not outweigh a factual, child-centred approach based on a consideration of all the relevant factors (paras [108], [109], [123]). Within this context there is the possibility of serial habitual residences in the sense of alternating habitual residences and this is the position in both Anglo-Common Law and Civilian jurisdictions. However, this does not follow automatically from an arrangement that is in the nature of a shuttle custody agreement; any conclusion as to habitual residence will depend on the combination of circumstances in the particular case (*Punter* para [169]).

The Convention on the Civil Aspects of International Child Abduction and the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: *welfare and best interests of children*

Abduction:

The Convention on the Civil Aspects of International Child Abduction states that the interests of children are of paramount importance in matters relating to custody. This is echoed in s 4 of the Care of Children Act 2004, which states that the welfare and best interests of the child must be the first and paramount consideration in matters regarding children.

However, the primary purpose of the Hague Convention to promptly return children who have been wrongfully removed from or retained away from the state of their habitual residence to that state, since it is in the best interests of the child that that state decides custody and access disputes related to that child. This has been endorsed in New Zealand case law: the decision is not about *what* is in the best interests of the child, but *where* their best interest should be determined (*A v A* [1996] 2 NZLR 517). Although the best interests of the child may also be paramount in the state of habitual residence, New Zealand Courts may not question the competence of other states' courts (*KS v LS* [2003] NZFLR 817).

Adoption:

Within the context of adoption, it has been argued that welfare and best interests mean the same thing: in *Director-General of Social Welfare v L* [1989] 2 NZLR 315, Richardson P was of the opinion that “welfare” was a broad expression and that “and interests” (in s 11(b) of the Adoption Act 1955) were merely added words of emphasis. In the same case, Bisson J said that there was a distinction between the terms. Welfare concerned the nurturing of a child, including the provision of shelter, clothing, food, love and affection, which demanded close physical and emotional involvement with the child. “Interests” of the child could, for example, pertain to the consequences for the child of the termination of the parent/child relationship. There could, therefore, be a conflict between the welfare and best interests of the child in the sense that current welfare demands are met (by a foster parent), but not the long-term interests of the child (for example, to have a relationship with a natural parent).

12) Cite jurisprudence applying to the CIDIP III Convention of 1984 on Conflicts of Law in

Adoption of Minors and the CIDIP IV Convention of 1989 on International Restitution of Minors.

- NEW ZEALAND

Since New Zealand is not a party of the said Conventions there is no jurisprudence applicable.