defendant. On receiving confirmation from the immigration department that the defendant has exited the country, the court would authorise the claimant to proceed with notification processes. The process of notification would vary depending on whether or not the location of the defendant is known.

As per Article 8(6) of UAE Federal Law No 11 of 1992, the Civil Procedures Code, if the place of residence and workplace of the defendant is not known, the notification can be done through publishing twice in a daily newspaper issued in Arabic, and in English if the defendant does not speak Arabic.

After procedural requirements are complied with, the Family Court will proceed to issue the judgment in absentia if the defendant did not attend the hearing.

In accordance with Article 329 of Federal Law No 3 of 1987 (the Penal Code), the aggrieved parent can then, after the custody court judgment, file a criminal case against the other parent for child abduction or kidnapping. The judgment issued by the criminal court against the other parent can be used by the complainant to apply for an Interpol Red Notice on the child's passport for international extradition of the child back to the UAE or at least to blacklist the other parent internationally.

As the aforementioned processes are generally time-consuming, it is also advisable to seek legal advice from a family lawyer in the home country of the parent who absconded with the child and initiate legal proceedings in that jurisdiction simultaneously.

The fraught area of international child abduction: the Malaysian perspective

Goh Siu Lin
Shook Lin & Bok, Kuala Lumpur
siulin@shooklin.com.my

Marriages between persons of different nationalities are on the rise in Malaysia, and when a marital union breaks down, cross-border custody disputes naturally ensue when one parent returns to his or her country of origin with the child(ren) of the marriage. Thus, it is urgent to explore options to cushion the impact of collapsed marriages and to have this matter resolved by capitalising on the support network of Hague Member States.

The Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the 'Hague Convention'), provides a cross-border mechanism to ensure that children who have been forcibly uprooted by one parent and taken to another country are speedily returned to their country of habitual residence before they form an attachment in the new country, where the courts of the country of habitual residence will determine the merits of the custodial dispute. The aim is to avoid forum shopping, uncertainty and relitigating the issues of custody and access. This would benefit the left-behind parent who may lack the financial resources and requisite contacts to secure the return of the abducted child(ren).

However, Malaysia has yet to accede to the Hague Convention, despite being flanked by neighbouring Hague signatory countries: Singapore,[1] Thailand[2] and the Philippines.[3] It may well be that Malaysia, a predominantly Muslim country, has held back from acceding to the Hague Convention on the misunderstanding that substantial changes to domestic law are involved for it to be effective. This was an explanation proffered by Judge Anselmo Reyes at the recently-concluded International Malaysia Law Conference 2016.[4] Malaysia has a dual legal system for family law under which the civil courts govern non-Muslims, whereas Sharia courts govern Muslims. This article will focus on the civil perspective and the jurisdiction of the Malaysian civil courts as set out in section 3(1) of the Law Reform (Marriage and Divorce) Act 1976.

Mahabir Prasad

The apex court in the case of Mahabir Prasad [5] held that the merits of the matter would be considered afresh based on the best interests and welfare of the child. The existence of a foreign custody order would be one element to be considered, but was not automatically conclusive of the matter. In this case, the father, who was a Malaysian citizen, had married an Indian national and they had two daughters. Upon the breakdown of the marriage, the mother returned to India and the girls remained with their father in Malaysia based on a deed of separation. The mother later obtained orders for a divorce and custody of the children from the Mumbai court. The Federal Court considered the matter and held that '[i]t is the law of this country and as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit'.

After lengthy and expensive litigation, the Federal Court in Mahabir Prasad ultimately decided in the mother's favour, using the 'best interests of the child test' and also took into consideration the uncertain immigration status of the children in Malaysia.

Herbert Thomas Small v Elizabeth Mary Small[6]

This case involved the issue of child abduction, where the husband, wife and child were all Australian citizens. The husband removed the child from Australia and entered Malaysia without the wife's knowledge. The husband obtained interim custody orders from the Malaysian civil courts. In the meantime, the wife had obtained custody and return orders from the Australian courts and applied to set aside the husband's Malaysian court orders. The Malaysian court ordered the return of the abducted child for three broad reasons forum non conveniens: special consideration to the Australian court orders; the court of habitual residence; and the welfare of the child.

A similar approach was taken by the Malaysian courts in Nicholas Tan Chye Seng v Au Gek Wee,[7] which involved the abduction of a Malaysian child to Singapore by the Malaysian mother. As Malaysia is a non-Hague country, the Malaysian father did not have the benefit of the summary return of his child under the Hague processes. This is prejudicial to the interests of all Malaysian children who have been abducted to Hague member countries.

Raja Bahrin: the clash between civil and Sharia jurisdictions

The legal quandary posed by Malaysia's dual legal system is illustrated by the Raja Bahrin case,[8] which captured international headlines and involved a Trengganu prince who abducted his two children via land and sea from Australia to Malaysia. At that time, Australia was a non-Hague state. The husband, a Malaysian citizen and the wife, an Australian citizen married under Islamic law. They had two children and the family lived in Malaysia. Marital difficulties followed.

The wife took the children for a holiday in Australia and while there, obtained ex parte orders for guardianship, custody and maintenance. The wife held a precarious immigration status in Malaysia. The husband then applied and was granted orders for guardianship and custody of the children from the Malaysian Sharia courts. He also filed proceedings in the Australian court, and the parties and children were ordered to return to Malaysia and have the issue of custody determined by the Malaysian civil courts.

In 1992,[9] the father discovered that the wife, now remarried, had, without his knowledge and consent, baptised the children and changed their Muslim names to her surname. Unhappy with this development, he abducted the children and returned to Malaysia. The father and children were Muslim; thus, under Islamic law, when the mother remarried, she would have been disqualified from having custody of the children. The mother did not return to Malaysia, and being non-Muslim, the Sharia courts were not conferred jurisdiction over her; neither could she file an application in the civil courts because the father and children were Muslims and they would be governed by the Sharia courts. This remains an unresolved legal conundrum.

Hypothetically, if the Hague rules were applied to the Raja Bahrin case today, the Australian court would have ordered an immediate return of the children who were habitually resident in Malaysia within the spirit and intent of the Hague Convention.

It would be pertinent at this juncture to highlight other practical problems when

a parent seeks the return of an abducted non-Muslim Malaysian child or even when applying to bring the child into Malaysia for a holiday. Regrettably, as a non-Hague country, Malaysia is often viewed with suspicion by Hague member countries, resulting in a general reluctance to order a return or holiday access, a problem exacerbated by the issue of unilateral conversions of children to Islam[10] by the abducting spouse.

Sadly, because of the absence of local legislation to facilitate the prompt return of abducted children, many children suffer in silence, trapped in the maelstrom of marital dispute, deprived of the emotional contact of the left-behind parent.

I say that the time has come for the Malaysian government to revisit the issue. There can no longer be any hesitation about the importance of Malaysia being a Hague signatory. There is much to be gained from leveraging the international cooperation of Hague nations to combat parental child abduction. Furthermore, by doing so, Malaysia would be fulfilling its international commitments under the United Nations Convention on the Rights of the Child regarding protecting the rights and interests of all Malaysian children in custodial disputes while facilitating access to justice for the left-behind parent.

Notes

1 Singapore acceded in 2010.
2 Thailand acceded in 2002.
3 The Philippines acceded in 2016.
4 See www.malaysianbar.org.my/_international_malaysia_law_conference_2016/imlc_2016_%7C_the_hague_convention_beacon_of_light_in_a_dark_tunnel.html.
5 Mahabir Prasad v Mahabir Prasad (1981) 2 MLJ 326 (Federal Court).
6 Herbert Thomas Small v Elizabeth Mary Small (2006) 6 MLJ 372.
7 Nicholas Tan Chye Seng v Au Gek Wee (2013) 1 LNS 600.
8 In the marriage of Y&K Raja Bahrin (1986) 11 The Family Law Report 233.
9 Chew Swee Yoke, 'Child-Abduction Across Borders: Is there a need for a commonwealth understanding?' (1999) 12th Commonwealth Law Conference.
10 Viran Nagapan v Deepa Subramaniam (2016) Federal Court www.kehakiman.gov.my/directory/judgment/file/02(f)-5-01-2015_&_02(f)-6-01-2015.pdf: '32. …The Civil Courts have the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the [Law Reform (Marriage and Divorce) Act 1976] and to make all other ancillary orders including custody care and access of the children born out of that marriage and all other matters ancillary thereto. It is an abuse of process for the spouse who has converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah [Sharia] Courts. This is because the dispute between parties is not a matter within the exclusive jurisdiction of the Syariah Courts. Therefore, Article 121(1A) of the Federal Constitution which deprives the Civil Courts jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts is not applicable in this case'.