Nimble evolution is the lifeblood of international family law

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> 'Speed, it seems to me, provides the one genuinely modern pleasure'.

We wonder what Aldous Huxley, who described the modern pleasure of speed in this way, would have made of those ticketing systems that you sometimes find at the cheese or delicatessen counters of the modern supermarket. You know, where in order to control the queue of people ordering Camembert, Dolcelatte, Edam and Stinking Bishop, the customers have to collect a numbered ticket from a machine, and wait for their number to be read out by the server before they can make their luscious choices of fromagerie.

That numbered ticketing system is PRECISELY what happens to customers of legal services in some countries.

We recently had one such case where speed was of the essence. Our client could issue a divorce application in England, and could also issue in one other European country. In the normal way, the client had to decide, based upon expert advice, where to first issue her application. She had received English advice over Skype at the touch of a button and out of hours. But to obtain advice from her chosen lawyer in her own European country, she had to drive to the nearest town, take a numbered ticket from the lawyer's machine, and wait for her number to be called by the receptionist. All for the privilege of receiving a fifteen-minute slot for advice some time later that day.

The alternative was to make an appointment with the lawyer in two weeks' time which would last for an hour.

You can imagine our frustration at the delay built into this supermarket system for a client needing a speedy answer. And the client's frustration, as she was prevented from deciding, quickly, as she had to, where she would issue her application.

In today's international family law practice, the cheese-ticketing system just doesn't work.

In the age of the smartphone, and indeed the ability in England to file divorce petitions online, most would think communications with lawyers have become easier. Instant messenger applications like WhatsApp and WeChat are now major communication tools in our daily lives. and this presents a dilemma for family lawyers – how to strive for speed and efficiency, while at the same time protecting yourself from too fast a pace of working life.

It is not uncommon for lawyers to refuse the use of such communication methods. Clauses contained in retainers often specifically exclude the use of them. Of course, there are distinct advantages of using instant messenger softwares, such as building rapport with the clients, but some lawyers find them too invasive, especially in an environment which promotes the wellness of the lawyer as well as the client. Lawyers are human after all, and they have their own lives. Understandably, for the wellbeing of their mental health, it is not always appropriate to deal with clients' pressing, and often depressing, family issues after working hours on a routine basis. Security and record retention are also obvious and serious potential issues when advice is given through these platforms.

Another factor to consider, when it comes to the speed of lawyer services, is the jurisdiction in which they operate. The

efficiency of lawyers in a particular jurisdiction may be more or less good due to the operational efficiency of the judicial system of which they are part. Clients often have to wait for a considerable duration, sometimes years, for their time in court. Being stuck in a broken marriage is sad enough, waiting for years to get out of it can add to the despair.

There will of course never be a global code relating to the priority of originating applications. Human beings and cultures are so beautifully diverse. What might seem appropriate for one culture may be entirely inappropriate for another culture.

And us international family lawyers simply have to make the most of the tools at our disposal to best help our clients.

Yes, as a former President of the International Academy of Family Lawyers ('IAFL') commented to us over lunch recently, the practice of family law has become increasingly complex and demanding. You work in teams across borders, hand in hand with best of breed lawyers in other jurisdictions.

And yes, it has generated increasing pressure on us family lawyers to provide an expert family law service promptly which dovetails with the expert advice being provided to our clients in the other relevant countries.

And as we will argue in this article, the complexity is the best friend of us family lawyers. It provides us with countless opportunities to provide clever and bespoke solutions for clients undergoing what are anyway stressful family break-ups. The complexity is the life-blood of international family law. It is forever nourishing and educating. It has the capability of providing benign solutions in the most difficult of circumstances.

We have already alluded to the nimbleness of service that is now required of family lawyers. To be aware, for example, that a family court in the state of Texas in USA is likely to respect the prior rights of the party who applies for a divorce first in time; whereas an English or Hong Kong court won't. Unless of course we are taking about the transition period till 31 December 2020 in a European Union case; who knows what will happen after then to clients consigned to the English system and the first past the post system in EU cases – Prime Minister Boris Johnson certainly doesn't!

The nimbleness of the international lawyer will therefore include smart use of technology to suit the needs of the international client on varied time zones. A collateral benefit from the recent coronavirus spread is how quickly people have picked up the use of video conferencing software. While telephone conferencing has been commonly used in arbitral proceedings, it was never used in the judicial system in Hong Kong, until Coleman J. conducted a telephone hearing on 25 February 2020 when the court was closed during the General Adjournment Period implemented due to the coronavirus spread.[1] Hopefully the judiciary in Hong Kong has become aware of the benefits that telephone hearings can offer when it comes to case management.

The writers have just been invited to be experts showcased on the TIMON app which will instantly connect family law clients to best of breed family lawyers in specific countries. The world is now an oyster.

Such nimbleness will also include the ability to communicate not only quickly but efficiently, bearing in mind the different languages that may be required to make your advice understood; and the nuances of language and culture.

Agility will also factor in the effect of the media, especially social media, in disseminating information and gossip about your client's marital or family status. Will the family proceedings in your country be confidential – in your country or outside it?

1 *Remedy Asia Limited v Patrick Tong Hing Chi and others* [2020] HKCFI 347.

What agreements or restraints will you need or be able to obtain in order to ensure privacy of disclosure about your client's personal and financial affairs? Or does your client actually want to use publicity as a lever to obtain more money?

The writers recently looked after an international celebrity who wanted a prenup. There was a sweeping non-disclosure agreement ('NDA') in place already which prevented the fiancée or any of her relatives from talking to any friends or third parties about the relationship. It had been drafted by 'the best lawyers in New York'. This was pre-Weinstein and pre-#me-too.

And the NDA was completely unenforceable in England, where our celebrity client lived. The New York lawyer had neglected to check the English law provisions when drafting her NDA.

So we had to totally redraft the NDA to provide English law protection.

That's a cute example of the awareness that the international family lawyer has to have of what the experts in other jurisdictions need to deploy. It's both what you know, and who you know. Who is in your network of best advisers? International organisations such as the Union Internationale des Avocats, the IBA and the IAFL provide good networks.

The international family lawyer will have her/his ear to the ground to pick up best practice. The state of Minnesota in USA gave birth to collaborative law in 1991. This has transformed by its spirit the way that family law is now practised in multiple jurisdictions. Even though relatively few purely collaborative law cases are actually done.

Client services can be significantly improved by multi-jurisdictional perspectives. An international family lawyer will obtain this by working with different lawyers in varying jurisdictions.

And our fast-developing societal models are forever being helped by dissemination of legal principles.

Prenups are an obvious example of the fluidity of our practices. The bigger picture for the Supreme Court's earth-shaking case of *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 in 2010 was autonomy: and the right of the modern person to choose how she/he wishes to organise her/his life and marital relationship. That translates into the right to contract out of the nanny state systems and their patronising divorce laws. But what is right in this respect for USA, Australia, South Africa and now England, Wales and Hong Kong may not be right for the cultures of, say, Pakistan or Iran.

Same sex marriages are an example of how varying jurisdictions may create problems for individuals and highlight the necessity of fluidity in international dealings. Couples that got married in a western country, like the UK, may now live in a jurisdiction where same sex marriages are not recognised, like Hong Kong. Such couples may think that they can simply go back to the UK to get divorced, but may find out that the UK court doesn't have the authority to hear the case at all.

Another example of a fluid international family law system, and how international family lawyers can roll their sleeves up to source remedies from abroad, is the concept of parenthood. Parenthood is now multi-faceted. It's of course much, much more than biological parenthood. As our understanding and embracing of different norms, including sexual and gender norms, has developed, so has our growing familiarity with a variety of parenthood. Surrogacy is illegal in Hong Kong, whether it takes place in Hong Kong or abroad, but it does not prevent aspiring parents from seeking solutions in other jurisdictions. However, the complexity of legal issues that are involved, from parenthood to citizenship, is often underestimated. The joy of becoming new parents can become overshadowed when a couple's legitimacy as parents is being questioned.

The American academics Goldstein, Freud and Solnit, gave birth in 1973 to the sense of a wider kind of parenthood that could apply to any adult who adopted the role of parent to a child, even if that adult was not a biological parent. This would include, most obviously, the relationship between parties to an equal marriage, only one of whom was the biological parent. Their work, *Beyond the Best Interests of the Child* defined the status of psychological parenthood thus.

> 'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent.'

It has been exciting to see this concept spread through USA, where its apogee is in the Supreme Court of Wisconsin in 1995, in *Holtzman v Knott (In re Custody of H.S.H-K)*.

The concept then become rooted in English law to provide relationship status for parents and children who may not be biologically related. And the concept was a factor in the Supreme Court case In the matter of *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] 1 FLR 561, helping a left behind lesbian psychological parent argue for the return to England of a child abducted to Pakistan.

Another feature of that Supreme Court case, in which we were privileged to appear as lawyers for Reunite, was the redefinition of habitual residence. That concept, the key which opens the door to jurisdiction in children cases, was itself recently under scrutiny in the US Supreme Court case of *Monasky v Taglieri*, No 18–935 (Feb 25, 2020). And this is the way in which international family law constantly educates and improves.

English and Hong Kong financial remedy cases have become, on one view, a parroting of continental European separate and community property regimes, with needs thrown in as an additional and important factor. International family law is always evolving and reinventing itself, through the blood, sweat and tears of us family lawyers. This can be illustrated by the increasing popularity of forming offshore structures to be used as wealth management tools. These vary substantially, from simple asset holding vehicles to a multi-layered trust structures with assets held: by a professional trustee; directly or indirectly; in the Channel Islands or Caribbean. These assets should form part of a married couple's matrimonial pool, but they could be so far away that they can only be retrieved with the assistance of an international family lawyer and their effective understanding of these structures.

Our journey through this topic has taken a path across oceans and civilisations, but it must end where it began – at the cheese counter. We may seek to do better in providing advice to clients than those who use the ticketing system of queuing or getting in line for service. But just as the cheese lover may relish that taste of ripe French brie oozing its lusciousness and ripeness; so the eager international family lawyer will appreciate the new ideas for helping and serving fractured families that ooze so regularly from the law reports and developments of the international family law community. To infinity and beyond!