Cross-Border Tribunals for Child Litigation - Some Thoughts on Arbitration in Custody Cases

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Good afternoon, everybody. It’s wonderful to see all of you. I am delighted to welcome you at the University of Geneva.

I am also speaking on behalf of the Dean of our Faculty, who was not able to attend and asked me to extend his warmest welcome as well as his best wishes to all of you.

Before I start this afternoon session, I want to thank Helia and Sajika for allowing me (and for allowing the University of Geneva) to be part of this summer school. They are extraordinary young ladies who worked tirelessly not only to make this event happen, but, more importantly, to make this event a smashing success, which is what it is or will be – I am pretty sure you will concur with my assessment.

And it goes without saying that, as an academic institution, the University of Geneva is strongly supportive of this kind of educational initiatives.

That’s what we are here for: To provide young students with learning opportunites as well as the opportunity to get to know each other, and to exchange views and ideas.

I think one of the academia’s roles in the contemporary world is to offer a platform – not a virtual platform, a physical platform – where young people from different countries, backgrounds, races, religions, may get together and meet and learn from each other and debate about issues of common interest and concern, and ultimately, contribute to shape the world of tomorrow.

And that’s what summer schools are particularly well placed to do.
Now, turning to the substance of my speech, I was originally asked to talk a little bit about the comparative advantages and disadvantages of arbitration vs traditional litigation before state courts, on the differences between litigating before arbitration courts and litigating before the courts of law.

Now, I said I would try to cover this issue but I would do so in a somewhat unconventional fashion, i.e. by presenting you a paper I am writing, the idea being to get your feedback and good counsel, which means a lot to me.

The paper is on whether arbitration may have a role to play in dealing with cross-border child custody disputes.

Why child law? you may wonder.

Child law is not an area that is commonly associated with arbitration. In fact, the prevailing attitude around the world is that children issues – typically those on custody and visitation rights – are altogether excluded from arbitration.

Now I am not sure this is the right thing to do… and the smart thing to do.

And reflecting on this will inevitably lead us to reflect on what makes arbitration so special and unique and what kind of benefits it may offer to the litigants, and what kind of drawbacks or weaknesses it may present.

In order to do so, I want to start out by telling you two stories.

These are real stories, involving flesh-and-blood human beings, like you and me.

Keep in mind law should serve the individuals and the entities they create.

And so arbitration services and judicial services are intended to serve the people.

So it’s altogether fitting and proper to embrace the perspective of the individuals in order to figure out what are their legitimate needs and expectations and how best a dispute-settling system may satisfy those needs and expectations.

Two stories, I said.

My first story – in which I was involved as a counsel – is about a man and a woman, both Lebanese of Sunni faith, who got married in Lebanon.

A child is born out of their union.

Nael is his name.
Nael and his parents live for a while in a nice neighbourhood in Beyrouth and then move to Switzerland.

They settle down in a beautiful mansion on the Geneva lake.

But after some years, the marriage breaks down.

The parents decide to split.

The mother remains in Switzerland and, understandably, she wants Nael to continue to live with her in Geneva.

The father wants to move back to Lebanon, just as understandably, he wants his son to reside with him in Beyrouth (where Nael’s four grand-parents live).

So a custody dispute erupts.

It happens countless times every day around the world.

That’s a clash between two unilateral, subjective views – held by Nael’s parents – as to what is best for him.

A judge is needed precisely to put to rest this kind of disagreement.

Except that here we’ve not only two parents, but potentially two courts and two States to which they belong, Switzerland and Lebanon, that may have a reasonable claim to determine the child’s destiny.

In fact, here is what happened:

Nael’s mother files for custody in Switzerland.

And shortly after, the father files for custody in Lebanon.

The Geneva court reaches the conclusion that it has the power to hear because of the Swiss residence of Nael.

And it awards custody to the mother while granting visitation rights to the father.

The Swiss court says: “Nael should continue to live in Switzerland with his mother and go to school in Geneva”.

On the Lebanese front, the religious court in Saida affirms jurisdiction based on the common nationality and religion of all family members.

This head of jurisdiction is for Lebanon exclusive and, as a consequence, the Lebanese court disregards the prior action – or lis alibi pendens – that is going on in Switzerland…

Substantively, the Lebanese court tells Nael “You should live with your father in Lebanon and attend the American school in Beyrouth (as your father requests)”. 
Which brings me to ask:
Is the dispute between Nael’s parents settled?
And if so, how?
Who has custody over Nael?

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I think it is safe to say that, legally, the dispute is not over.
Legally, it’s a standstill:
The mother may wave the Swiss judgment in the father’s teeth, and the father may reply by no less defiantly waving the equally authoritative Lebanese judgment in the mother’s teeth.
We are faced with – and more importantly Nael is faced with – a Swiss/Lebanese conflict of custody orders.
The Lebanese decision, which emanates from a mono-national (wholly Lebanese) court, is the product of a mono-national justice.
I will be using the designation mono-national court to mean a court that takes its power from a single country only and whose task is to deliver justice on behalf of a single State community.
By the same token, mono-national justice is the view embraced by a single country on what justice requires in a multi-national human relationship.
And so, no less than the Lebanese custody award, the Swiss custody award is the product of a mono-national justice.
The two State decisions clash against each other.
They are mutually exclusive.
They annihilate each other.
This cross-border family is ultimately denied justice.
An irreconcilable conflict between two State views on justice ends up delivering no justice at all to the human beings affected.

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Let me add that Nael was physically present in Switzerland at the time when the Swiss custody award was rendered.
And so the Geneva judge was concerned that, if allowed to travel to Lebanon to visit with his father, Nael might be retained in Lebanon by Lebanese law enforcement (police).

That retention would have been perfectly *lawful* under a Lebanese perspective because it would be consistent with, and in satisfaction of, the Lebanese custody order who favoured the father.

And so what the Geneva court did was to restrain our poor child from travelling to Lebanon (as I said Nael’s four grand-parents were living in Lebanon and they wanted to continue to occasionally see him).

As a matter of fact, this travel restriction affected not only Lebanon but to the whole Arab countries, which might be supportive of, and willing to enforce, the Lebanese judgment.

Nael’s passport had to be handed in to the Swiss police.

But hostilities did not end there. By way of retaliation, the Lebanese judge was requested by the father to order the mother to pay a penalty for each day of delay in handing over the child to him.

Bottomline is: there was a hard-fought quickly escalating judicial battle going on which was obviously contrary to the interests of the child, by any standard or metric.

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My second story is no less dramatic.

The most important difference is that it plays out within the *European Union* (maybe ELSA students feel more concerned by it).

It’s about another boy, whose name is Marko Kampanella.

Today Marko is aged 15.

He was born in Italy in 2002, out of a non-married couple.

Mrs Sneersone, citizen of Latvia, is his *mother*.

Mr Campanella, Italian, is his *father*.

Marko holds dual citizenship, Latvian and Italian.

He was four when his Mom and Dad broke up.

The mother continued to live in Rome with Marko.

The father moved to another flat in Rome, so as to be able to see his son almost as often as he pleased.
But after a while, Marko’s mother felt she had no professional prospects in Italy. She also complained about Marko’s father failing to provide financial support. So she decided to relocate to Latvia. And she brought Marko with her to Riga, which is the capital city of this Baltic country. She did so without asking for the father’s permission nor the Italian court’s permission, which – she feared – in all likelihood would have been withheld. And what’s the point of asking if the answer is no? So what she did was an *abduction* within the meaning of the 1980 Hague Convention. This is a multilateral instrument which empowers the left-behind parent to seek immediate return of the child who’s been unlawfully taken away from him or her, most often by the other parent. How did Marko’s father react to this? When he learned about this unilateral move, he became furious. He filed an application for immediate return. But his application was dismissed by the Riga court on the ground that, on the hand, Marko’s return to Italy without his mother would expose him to a significant harm and that, on the other, Marko’s mother may not be reasonably expected to go back with him, based on the particular circumstances. ***

So, what happened next? The mother files for custody in Latvia. Latvia court affirms jurisdiction based on the new habitual residence of Marko. And they conclude – quote – “*it’s in Marko’s overriding interests that the custody be awarded to the mother*”. In the meantime, the Tribunal in Rome, on application by the father, had also entertained jurisdiction based on what they regarded as the last lawful residence of the child… …and reached a different conclusion: (quote) “*it comports with Marko’s welfare that he grows up in Italy with his father*”. That’s a *déjà vu*. 
The end result is that Marko is not only caught up in the middle of a conflict between Mom and Dad but he also falls prey and becomes hostage of a disagreement between the two States with which he has close ties:

Latvia, that is his Motherland in the proper sense of the word, the land of his mother (mère patrie in French), and Italy, which is Marko’s Fatherland, the land of his father (Vaterland in German).

We also say in French “l’enfant du pays”.

Well, Marko is “l’enfant des deux pays”, the child of two countries.

He has not only two parents, who share parental responsibility with regard to his welfare.

He also has two countries – of which he’s national, of which he is the common child – who share subsidiary responsibility over his welfare.

(The State responsibility for protecting the child is subsidiary in that it is triggered when the parents are not able to discharge their primary responsibility, typically because they are fighting against each other, and through their fight, they put their children’s welfare at risk).

Except that here Italy and Latvia, who have joint responsibility over Marko, who have a common duty to protect him, to minimise the harm flowing from the disagreement between his parents, are just as much in disagreement as the parents.

Rather than dispensing even-handed justice to Mother and Father, Motherland and Fatherland seem to be themselves competing against each other for Marko’s residence.

Italy and Latvia feed parental war, rather than bringing peace to the family.

The bottomline is both countries are failing on their duties towards their common child.

That’s a joint, bi-national failure.

That’s a failure of State justice.

Let me note that the two proceedings, in Latvia and in Italy, involved significant costs for the taxpayers of the two countries.

Think about the salary of the courts for the time they spent on this case.
The complex, costly judicial machineries have been running *in vain*, because they have been running *against each other*.

Rather than squandering public money in feeding conflicts between the members of their communities, wouldn’t Latvia and Italy be better off (and the European Union) investing this money in building schools, hospitals, clean-energy facilities?

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Regretfully, there’s nothing unique in the fate of Marko and Nael.

Disagreements between States on how best to solve disagreements between parents arise every day across the world.

Here’s yet another example from last month.

A Tunisian tribunal awards the custody over the child to the father, who’s Tunisian.

Mother is Swiss.

Mother is strongly opposed to recognition in Switzerland because she thinks the decision is *biased*.


The way is then paved for the mother to seek a *counter-decision* on custody by the Swiss authorities.

The Swiss decision may be favourable to her and will then clash against the Tunisian decision, which continues to be enforceable in Tunisia.

This irreconcilable conflict between Tunisia and Switzerland will ultimately deny the child the benefit from the Rule of Law.

The cross-border human relationship involving the child and his or her parent plays out in a *legal non man’s land*, in a *legal mess* as opposed to a *legal order*.

That’s anarchy, not law.

And because the conflict between his parents is not settled by law, nothing will prevent it from being ended through *state-of-nature behaviours*: the parent who shouts louder – like the chimpanzees at the Taronga zoo in Sydney, Australia, which I visited not long ago: some of them can be very vocal –, the parent who runs faster, the most robust, psychologically, financially, may prevail.

This law notoriously dominates not only the jungle, but also the savannah (where lions live), the forest as well as the oceans.
In a similar case I was involved in – where the Swiss court had awarded custody of the bi-national Swiss and French child to the Swiss father, and the French court had awarded custody to the French mother – one of the lawyers said to me (quote):

“The child is in the greatest dismay. He feels responsible for the conflict between his two parents. Now, he also feels responsible for the conflict between his two home countries.

All this is unbearable for him.

He attempted twice to commit suicide”.

I expect everybody in this room to agree, the welfare of our kids, of cross-border families requires us to try and prevent those situations.

But how?

Now, to receive a little illumination, I allowed myself to ask for the opinion of… a child.

Don’t we insist – don’t domestic, European and international instruments, – on how important it is to hear from the children, to have their views on how best to overcome the discords between their parents?

The child I sounded out is my niece.

Her name is Matilde. She has just turn twelve a couple of weeks ago. She’s Italian, like her mother, who’s my twin sister.

Matilde lives in Milan. She’s cute, clever and she thinks she is a star. And like some stars, she often spends vacation in Switzerland, in Sankt Moritz.

She likes the Swiss trains, the Swiss flag, the Swiss chocolate, the ski slopes of sunny Engadin…

Last August I was having trekking with her in the mountains. Having those issues swirling around my mind, I said to her: Imagine your Dad is Swiss. Imagine Mom and Dad have a quarrel. Dad moves to Switzerland. Mom remains in Italy.

Mom wants you to live with her in Italy. Dad wants you to live with him in Switzerland. So – you see Matilde – everybody wants to live with you, your are very popular!

Mom goes to the Italian judge. Dad goes to the Swiss judge. The Italian judge says “you should live with Mom”. The Swiss judge says “you should live with
Dad”.

So, Matilde, what can we do?

“We should fire them both” (the judges, not the parents!) (“li licenziamo entrambi”).

I said: “Hum, okay. But if we fire both judges, then, you still don’t know what to do”.

She thought for a while and ventured to say: “Let’s call President Obama” (mind you: not President Trump). I guess it’s the sense of President Obama’s wisdom coupled with his equal distance from the parties involved and the two countries involved that led my niece to think he might be a good adjudicator.

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Now, I will assume for a moment that the parties to our case-studies are inspired to follow the same approach.

Here is what I will assume Nael’s parents in the Swiss-Lebanese case are willing to do in order to overcome the standstill flowing from a conflict between Switzerland and Lebanon:

I will assume they are prepared to defer to a multi-national panel provided that they equally contribute to set it up.

And so the father appoints a Lebanese lawyer, practioner or academic or a retired Lebanese judge. The mother appoints a Swiss lawyer, practioner or academic, including a retired Swiss judge.

And to preside over this panel of wise men and woman, the two party-appointed members come together and they choose, for example, an English lawyer: an English-retired judge, or a German lawyer.

And I know a lot of people would be perfect for the job.

Our panel determines the following: 1) the child shall live with his mother in Switzerland until he is 16; 2) the father will enjoy access rights, to be exercised in Lebanon; and he should return the child to Switzerland after each visit; 3) when the child turns 16, he will be moving to Lebanon under the custody of his father and he will be attending the American school in Beyrouth unless he will be fiercely opposed to this moving.

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Now, we are faced with a hard choice.
We can say: « The decision by the Swiss-Lebanese panel is of no legal value because the agreement reached by the parents to submit the dispute to this panel has no legal effects, typically because this dispute is not arbitrable ». 

On the other hand, we may be willing to uphold this agreement, in which case the parents would be bound by and have to comply with the rather sensible determinations made by our Swiss-Lebanese adjudicative body.

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The crux of the matter seems to be whether or not cross-border custody disputes are arbitrable.

Let me first make this point.

The 1958 United Nations Convention on Recognition of Arbitral Awards does not prevent the signatory states from applying it to non-commercial disputes. Each State is free to make a reservation in this respect, which only few contracting states have done.

There’s no impediment flowing from this international treaty which is by far the most widely ratified private international law instrument in history, with over 150 States party to it, including Switzerland and Lebanon, Italy and Latvia.

If there are constraints on the parents, those constraints flow from domestic legislation on the category of disputes that may be subject to arbitration.

This notion varies to some extent not only depending on the country but also sometimes depending on whether the dispute is domestic or international. Some jurisdictions still make arbitrability conditional on the controversy being patrimonial in character.

However, in recent years we’ve seen a growing trend that moves away from that equation in order to expand arbitrability.

Let me mention two of the countries that have been reforming their statutes on arbitration: Germany and Portugal. In Germany, the ZPO – civil procedure code – expressly allows arbitration to settle disputes that are distinctly non-patrimonial. The only requirement is that those disputes revolve around subject-matters “with respect to which the parties have the ability to reach a compromise”.

Do custody disputes satisfy that requirement? If by “parties” we means the parents, let’s face it, today more than ever the importance for the parents to reach a peaceful solution to their differences is emphasized.
Sociological studies reveal that a mutually agreed outcome has more chances to be voluntarily complied with, and to encourage future collaborative behaviour, than a court’s judgment.

Let’s further think of all the efforts, and the resources, that States are increasingly prepared to put into mediation, which ultimately aims to encourage the parties to reach an amicable settlement.

And so, it seems paradoxical to say to the parties, on the one hand: “You’d better reach an agreement yourself, and we are going to help you to do so” and, on the other “Actually, that agreement is worth nothing because you had no power to reach it, because the rights in dispute are not capable of being compromised”.

So I believe that to the extent that arbitrability of non-patrimonial disputes hinges on the ability of the parties to reach a compromise, some of the custody issues that may arise become arbitrable.

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But rather than focusing on the letter or language of that statute on arbitration or that other, I’d rather try to dig into the core of the problem.

And I will attempt to identify the traditional reasons for which international custody law is almost invariably characterized as incompatible with arbitration.

Surprisingly enough, those reasons seem never to be clearly stated and rationally discussed.

It’s almost like being faced with an axiom which does not require nor is capable of demonstration.

I detected three of them, which are closely interwoven.

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The first is about the public policy considerations that allegedly permeate this area of law.

“Ordre public” is the French word, literally “public order”.

Now the inter-country conflict of custody orders in the first case reflects the clash between Swiss and Lebanese public policies, none of which may ultimately be implemented because, in order to be implemented, it requires the cooperation of the other country.

Due to the conflict between their inconsistent views as to the kind of public order that should be pursued, the two countries miserably fail to shape the family
relationships in an orderly fashion but they rather end up puzzling the human beings affected and generating disorder for them.

Another version of the same argument stresses the mandatory – imperative – nature of the greatest bulk of the substantive rules governing custody issues.

Assuming those rules are really mandatory, the conflict between two courts of law making two custody orders both pretending to be mandatory on the parents, ultimately results in those two orders losing their authority because the parents cannot abide by them both.

Just like two equally ranked commanders-in-chief who pretend to issue contradictory orders to the same troops: they both lose their capacity to require obedience and create disarray for them.

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The second argument relies on the « unalienability » of the substantive rights at stake (droits indisponibles, in French).

This contention does not stand up to scrutiny either.

For let me insist on this point.

By submitting the dispute to this Swiss/Lebanese ad hoc tribunal, the parties are not “disposing of” their substantive custody rights, even less are they “relinquishing” or “waiving” those rights.

What the parents want to “dispose of”, to get rid of, is the legal uncertainty as to who’s custody and access rights.

The Swiss-Lebanese body is resorted to precisely to shape and protect those custody rights and obligations which mono-national courts, because they disagree with each other, have been unable to shape and protect.

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The third argument is probably the most momentous one. It lies in the supposedly private nature of the arbitration process that is at odds with the public nature of the interests, or with the State interests, involved in child custody litigation.

In England and Wales, the 1996 Arbitration Act provides under Section 1b) that « the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest ».

Let me quote a New York decision of the early 90ies that disregarded a domestic arbitration clause on the ground that (I quote) “the function of parens patriae cannot be usurped” by arbitrators.
So a court is characterized as *parens patriae*, “parent of the land”, representative of the State community that appoints him, responsible for the welfare of the children of that State community.

Now, the problem is that here we are faced with *two patriae*, two homelands involved, two State communities having ties with the child: Switzerland and Lebanon, Italy and Latvia…

And so there are two *parentes patriae*, two *parentes patriarum* (I hope I got the Latin right): the Swiss judge and the Lebanese judge, the Italian judge and the Latvian judge…

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But, more to the point, what exactly this “State interest” is about?

I believe the less controversial State interest is for a State to be able to do its job and to protect the child from the harm flowing from an ongoing quarrel between his parents.

In other words, the less controversial State interest for Switzerland as well as for Lebanon is to ensure that Nael’s parents may have their disputes settled legally in a way which is final and brings some peace to the family.

That’s a *shared interest* of both States.

Now, by allowing cross-border arbitration to overcome the legal standstill that flows from a conflict between their custody orders, Switzerland and Lebanon would further that common interest, whose satisfaction is made impossible if justice is sought on mono-national level.

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But the State interest may be of another kind.

It may refer to the ability of the public authorities to control the manner in which the dispute involving children are settled.

Here again, if the child and the parents have ties with two countries, each of those two countries – each of Motherland and Fatherland – may have an *interest* in resolving the dispute between Mother and Father *in a different way*.

And so, here’s my take (as Fareed Zacharia would put it):

If we are prepared to recognize that each of two State communities may have a *State interest* in how a dispute over a child that is member of both communities is settled, if we are prepared to recognize that those two State communities feature in the background of the parental dispute, *behind* the parents, and the two State
communities may find themselves competing against each other to secure control over their child, who’s a resource and wealth for the society, isn’t this tantamount to admitting that mono-national courts of each of those States may have a bias, may be caught in a conflict of interests?

If a State interest component exists, a court that speaks on behalf of one of the States, a court that is the organ of one of the States, may ultimately be regarded as not being independent from this State: but as a part of this State, just like an organ is part of the organism or body to which it belongs.

How can a court that in some measure is part of one of the parties be super partes?

Let’s return to case study 2.

Italy and Latvia may have an interest in seeing Marko be raised by the parent who has ties with them.

If the Latvian community is also to some extent a party involved, behind the Latvian mother, who’s the main party, and if the Italian community is also to some extent a party involved, behind the Italian father, who’s the main party, the Italian judge is no longer above the parties but, in his capacity as parens patriae, he ends up being “part of a party”, that is partial, and no longer “impartial”.

Let’s face it, the presence of a State interest in the resolution of a custody dispute, coupled with the presence of two States, far from disqualifying the international arbitration process, seems to disqualify the mono-national judicial process.

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In a standard book on arbitration, professor Kaufmann-Kohler state at the very beginning (quote): “The principal advantage of international arbitration is its neutrality”.

Now, let me remind that neutrality of a tribunal is not something optional, like a car accessory, or a clothing accessory.

It’s the very essence of justice.

Why then should we deny the benefit of this guarantee of neutrality to the human beings involved in an international family dispute where the inter-state component, and as a consequence the risk of partiality of a mono-national judge, may be more pronounced than in the commercial context?

By the way, it would be interesting to ask Nael and Marko the following question: “When it comes to the judge that will determine if you will be living with Dad or Mom, would you rather have a judge chosen exclusively by your mother or a judge
chosen exclusively by your father or a judge that is chosen by both your father and your mother together? What do you think is fairer?”

I asked Matilde and I let you guess the answer.

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We may have struck at the heart of this issue:

When it comes to multi-national disputes, multi-national adjudicative bodies may offer greater guarantees of impartiality, and of unbiased justice, that mono-national ones.

That’s our conclusion number 1.

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But let us try and leave this question of impartiality aside. And let’s focus on the ability or inability of a mono-national judge to appreciate the strengths and weaknesses of the competing contexts.

Here is my question:

Does a mono-national judge truly possess the required knowledge and vision to weigh up the options that are available for a bi-national child – whether it’s better for him to live with Dad in Lebanon or with Mom in Switzerland?

Let’s face it, an exclusively Swiss judge is not expected to have any first-hand knowledge about how Nael’s life would look like in Lebanon – in terms of schooling, sport facilities, subsidies allocated to the families; conversely, an exclusively Lebanese judge is not expected to know much about Switzerland.

Whereas a Swiss-Lebanese panel – a panel where a Swiss adjudicator is sitting next to a Lebanese adjudicator – should be able to rise up to a binocular vision: through his origin, his appointment process, the dual language spoken by the members of the panel, their dual culture, and sometimes religion, through all this the international nature of the panel better reflects the international nature of the family, and of the dispute, and of the context in which the child has been living and is supposed to continue to live, the international (bi-national) nature of its identity.

And so, there are greater chances that a Swiss-Lebanese panel possesses the consolidated knowledge that make it better positioned to evaluate the alternative social, family, religious contexts that the competing parents and societies promise to offer the child.

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Our conclusion n. 2 might be that a bi-national tribunal is inherently better suited to assess and evaluate the competing claims because of its binocular, bilateral field of vision, compared to mono-national, monocular field of vision, which is the one of mono-national courts.

It’s a little bit like the difference between having one eye and two eyes.

We see better with two eyes than with one.

We are better able to appreciate, and to evaluate, the things we see and draw conclusions from them and make decisions based on them.

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We haven’t said anything about the allegedly private nature of arbitration.

Here seems to be the equation: as a private judge, the arbitrator only has the ability to settle conflict of private interests, whenever a dispute displays a public interest component, that dispute inevitably lies outside the scope of arbitration power.

It’s easy to show the inaccuracy and falsehood of this contention however widespread and widely shared it might be.

A number of facts belie it.

First of all, arbitration in administrative law and tax law is no longer a rare occurrence. I expect everybody to agree that there is a public interest in tax law. The fact that arbitration is available to settle tax law disputes shows that public interest involvement is per se no hurdle to arbitrability.

Second, there is such thing as inter-state arbitration.

As some of you may know, the first arbitration of the modern era – the one that has propelled Geneva to become a prominent place of arbitration worldwide – is the so-called Alabama arbitration, which involved the United Kingdom and the United States.

It goes back to the years of the American civil war. It was conducted in the 1870ies in Geneva old town, in a richly decorated hall of the building that hosts today the Geneva Parliament (le Grand Conseil) and has been called ever since the “Salle de l’Alabama”.

Let’s also mention the arbitration that is currently under way between India and Italy with respect to the dispute arising out the death of two Indian fisherman who were accidentally shot by two Italian marines.
There is a clear criminal law dimension in this proceedings. Arbitration has been agreed by the two countries as the best way to try and settle the quarrel between them.

Let us also think about the branch of arbitration law that is designated as investment arbitration.

There is an obvious State component in international investment, one of the parties being a State.

It is precisely because the State, called the “host State”, may have in interest in the dispute arising from the investment, that the private investor is allowed to escape the mono-national courts of that State (that may not be impartial towards him) and submit the dispute to international court of arbitration.

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Conclusively, all the arguments commonly relied on to deny arbitrability seem to support the conclusion that, to the extent their courts issue inconsistent custody awards, the States should allow the individuals to refer the matter to a cross-border tribunal.

For the choice is here not between arbitration justice versus state justice but between arbitration justice versus the failure of state justice flowing from the conflict between two State justices.

But if we allow recourse to international arbitration to overcome a conflict between State custody awards, wouldn’t it make sense to also allow prior access to arbitration as to avert colliding State judgments in the first place?

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So let me wrap up.

I think that setting up cross-border courts, such as arbitration courts, in this area of law is a way to ensure progress of cross-border human relationships and ultimately to make the world more just, more peaceful and more prosperous.

Thank you so much for listening.