IAFL European Chapter Young Lawyers' Essay Competition 2023

Introduction

The first step when instructed to establish a marital agreement in a common law system[1] is to determine who will be the client[2]. The priority then is to take advice from specialist family lawyers with experience of international cases in every country in which the parties have – or are likely to have – a material connection. This is particularly important when England[3] is involved because it has a significantly different approach to (a) treatment of marital agreements and (b) financial provision on divorce generally. As the UK Supreme Court held in *Radmacher v Granatino*[4]:

> *"The approach of English law to nuptial agreements differs … significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard…*

Several agreements or one master document

Practice internationally varies with national preferences. Some lawyers want separate marital agreements, with similar terms as to outcome, for each jurisdiction and adapted to national laws. Other practitioners prefer one master agreement, translated as necessary, including the specific words required for each jurisdiction. The latter overcomes minor discrepancies which risk litigation, but this aspect needs early review in each case. If one document is not possible care should be taken, including when dealing with translations, to ensure there is no inconsistency in the documents. In any event it is essential for one lawyer to be responsible for overseeing the document(s).

Junior and Eva

Junior lives in France and Eva in England, so advice is needed in both countries. In addition, Junior is from Brazil and Eva has dual British/American citizenship. We need to know how Eva acquired her American citizenship and with which state(s) she has a connection. Although neither Brazil nor the US seem the most obvious locations for any divorce presently, given their connections at least provisional advice should be taken regarding potential divorce jurisdiction and the treatment of marital agreements. Advice will also be needed from Spain and Germany as Junior may move to live in either country soon.

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[1] As distinct from many civil law systems where a lawyer/notary may act for both parties

[2] England is developing a practise of one lawyer acting for both parties although this still in infancy and not recommended for international marital agreements

[3] All references in this article to England include Wales which is part of the same jurisdiction

[4] [2010] UKSC 42, para 3

Some issues to be considered in each jurisdiction are:

1. What are the jurisdiction grounds for any divorce and, if different, financial proceedings and can there be standalone applications;
2. Is it possible to defend the divorce and/or financial proceedings and, if so, on what basis;
3. Is it possible to contest the forum of the divorce and/or financial proceedings and, if so, on what basis;
4. Does lis pendens/"first to issue" apply or carry any weight if there were a jurisdiction dispute;
5. Is there a separation period required before divorce and/or financial proceedings can be issued;
6. What is the court's approach to finances on divorce including (a) treatment of non-marital property (b) treatment of marital property and (c) claims for maintenance;
7. What is the court's approach to marital agreements including (a) any safeguards/procedural requirements and pre-condition and (b) whether they are legally binding;
8. Are jurisdiction and/or applicable law clauses possible and/or binding; and
9. If the parties envisage that they may have children in the future, what is the court's approach to financial provision for children.

England

When the UK was a member of the EU the jurisdictional grounds for divorce were (almost) exactly the same as the rest of the EU[5]. On departure England introduced domestic legislation which largely replicated the position under Brussels II[6].

Since the introduction of no fault divorce in England in April 2022 it is only possible to defend a divorce in limited circumstances. One is on the basis England does not have jurisdiction. It is also possible to apply to stay English proceedings on the basis there is another jurisdiction which is the more appropriate forum. Since leaving the EU lis pendens no longer applies between England and EU Member States. Instead the same test of most appropriate forum applies between England and all other non-UK jurisdictions. There is no separation period (although the marriage must have lasted at least 12 months).

England has a very discretionary approach to finances on divorce. Although there is a statutory list of factors[7], subsequently case law has developed. The court should distinguish between marital and non-marital assets. A marital asset is anything acquired during the marital period. A non-marital asset is typically (a) acquired pre-cohabitation (b) came into the marriage by way of gift or inheritance and (c) sometimes accrued post separation. Marital assets are shared equally unless there is a good reason to depart from equality. The most common good reason is to meet needs. Non-marital assets are not shared unless again there is a good reason to do so, invariably to meet needs.

[5] With the nuance of the UK and Ireland adopting domicile instead of nationality

[6] Sole domicile became a substantive ground (with no maintenance/needs restriction on financial claims) rather than being a residual ground only available if no other member state had jurisdiction

[7] Section 25(2) Matrimonial Causes Act 1973

England also has the power to make orders for periodical payments. There is a statutory requirement to achieve a clean break as soon as possible[8]. Guidance from case law provides that the purpose of a periodical payments order is to allow the receiving party to transition to independence without undue hardship[9]. The court has a very broad discretion and although the pendulum has swung away from the large and lengthy maintenance orders of several years ago, the English court is still more generous than most countries.

For many years marital agreements were seen as contrary to public policy. Then in the late 1990s the English courts started to give them some weight, particularly in second marriage cases where both parties came to the marriage with independent resources. In 2010 the Supreme Court held in a classic exposition of the law:

> *"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement[10]."*

That left the "*difficult question[11]*" as to the circumstances in which it would not be fair to hold the parties to their agreement. The Supreme Court went on to give some guidance: a marital agreement cannot be allowed to prejudice the reasonable requirements of any children of the family, the court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated, and preserving non-marital property may be a good reason for a marital agreement. The Supreme Court went on to say that it is likely to be unfair to hold the parties to an agreement that does not meet their needs but that (provided needs were met) the court may make an order that contracts out of the sharing principle.

That still leaves the very discretionary and broad assessment of a parties' needs. This will depend on a range of factors including the length of the marriage, the standard of living during the marriage, any sacrifices made during the marriage for the benefit of the relationship, the health of the parties and the presence of children. In appropriate circumstances "needs" can mean a property worth several million pounds or more along with a capital fund to provide a high level of income for the rest of the receiving party's life.

As marital agreements are only persuasively binding in England there are no statutory pre-conditions/safeguards, although the courts and the Law Commission have made recommendations. The Law Commission recommended[12] that Parliament legislate for Qualifying Nuptial Agreements (QNAs) which would need to (a) be contractually valid, have been made by deed and contain a statement signed by both parties that they understand it will partially remove the court's jurisdiction (b) not have been made within 28 days of the wedding and (c) require that both parties have received disclosure of material information about the other's financial situation and independent legal advice. Although QNAs have not been introduced it is good practice to comply with these requirements.

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[8] Section 25(A) Matrimonial Causes Act 1973

[9] *SS v NS* [2014] EWHC 4183 (Fam)

[10] *Radmacher v Granatino* [2010] UKSC 42, Para 75

[11] *Radmacher v Granatino* [2010] UKSC 42, Para 76

[12] *Matrimonial Property, Needs and Agreements* (Law Com No 343)

Case law has provided that[13]:

- There is no material distinction between pre and post nuptial agreements;
- It is important that each party has the opportunity to obtain all the information that is material to their decision;
- There should be respect for individual autonomy;
- There should be no vitiating factors (duress, fraud or misrepresentation);
- The court should give effect to a marital agreement that is freely entered into by each party with a full appreciation of its implications unless it would be unfair to do so;
- The parties are unlikely to have intended that one of them should be left in a predicament of real need whilst the other enjoys a sufficiency or more; and
- It is the court (not the parties) that ultimately determines the financial outcome on divorce.

Jurisdiction clauses are not binding in England; they may be one of the factors the court takes into account when deciding whether it is the appropriate forum, but no more. Applicable law clauses are not possible in England; the English courts only apply English law.

France, Spain and Germany

As France, Spain and Germany are members of the EU, divorce jurisdiction is within Art 3 Brussels II[14]. The jurisdictional grounds are a mixture of habitual residence, residence and nationality. Lis pendens applies where there is a jurisdiction dispute between two or more EU Member States[15]. If the dispute is between one Member State and a third state (not a member of the EU) their respective domestic laws apply. In these circumstances many EU Member States still often apply the first to issue principle.

In civil law systems there are two primary matrimonial property regimes: community of property and separation of property. If the spouses have not entered into a matrimonial property regime the regime which applies shall be determined by the court by applying its laws regarding conflict of interests.

On 29 January 2019 Council Regulation (EU) 2016/1103[16] came into force in 15 EU Member States including France, Spain and Germany. The Regulation allows parties to choose the law applicable to their matrimonial property regime provided one of them is habitually resident in or a national of the country where the agreement is concluded[17].

The Regulation provides that (a) the matrimonial property agreement must be expressed in writing, dated and signed by both parties and (b) if only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that state lays down additional formal requirements for matrimonial property agreements, those requirements shall apply[18].

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[13] *WC v HC* [2022] EWFC 22, para 22

[14] Council Regulation (EC) No 2201/2003

[15] Brussels II, Art 19

[16] *Implementing Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Matters of Matrimonial Property Regimes*, hereinafter referred to as the Matrimonial Property Regimes Regulation

[17] Art 22

[18] Art 25

The Regulation also provides that a party may when seeking to dispute the validity of the agreement rely upon the law of the country in which they had their habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect in accordance with the law nominated in the agreement[19].

France[20]

France has recently had a major change in its divorce law. The grounds for divorce are (a) mutual consent (b) the acceptance of the principle of marital breakdown (c) fault and (d) breakdown of communal life.

There are various matrimonial property regimes in France including community of assets and separation of property. The default regime is the community of assets which applies where (a) both spouses reside in France at the time of their marriage and have France as their first habitual residence after the marriage and (b) the parties have not entered into a marital agreement electing another matrimonial property regime. On divorce the parties' assets will be divided in accordance with the relevant matrimonial property regime.

The French Civil Code provides for compensatory benefit (*prestation compensatoire*) which compensates for any disparity caused by the divorce. It is based on the needs of the spouses and can take the form of lump sums, property transfer orders and *usufruct*. The method and amount are discretionary and the judge must take into account a range of factors. Such orders are relatively rare, especially in contrast to England.

Germany[21]

A marriage can be dissolved by divorce in Germany where it has broken down. This is presumed where (a) the parties have lived apart for one year and both parties want to divorce or (b) the parties have lived apart for three years. A divorce can take place sooner if continuing the marriage would cause the applicant unbearable hardship. Fault does not play any role on divorce.

The statutory regime for matrimonial property in Germany is community of accrued gains. This provides that after marriage each spouse remains the sole owner of their own assets and the sole owner of any assets they acquire during the marriage. It is only the increase in the value of assets that will be shared on divorce. Spousal maintenance can also be ordered although these have been curtailed since reforms on 1 January 2008.

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[19] Art 24

[20] *Family Law: A Global Guide* (5th edition)

[21] *Family Law: A Global Guide* (5th edition)

Spain[22]

Divorce in Spain is no-fault and allows the Spanish court to make two forms of compensatory order for pensions and household work.

There are two types of matrimonial property regime: separation of assets which is the default in Catalonia and the Balearic Islands and community of assets which is the default in the majority of Spain including Madrid. The Spanish court is bound to apply the applicable matrimonial property regime and does not have discretion to depart from it.

In addition the Spanish court has the ability to make orders in respect of maintenance if there is a disparity in the economic positions of the parties with the aim of allowing the financially weaker party to address any financial disadvantage they may have suffered as a result of the marriage.

Conclusion

Although we are not told whether we would be acting for Junior or Eva, I am going to proceed on the basis they want the marital agreement to be as binding as possible.

To comply with The Matrimonial Property Regimes Regulation, the law applicable to the matrimonial property regime must be that of a country where either Junior or Eva are habitually resident or a national[23]. As Junior and Eva plan to stay living in Europe that narrows the most appropriate jurisdictions down to France and England. Given England's more discretionary approach to marital agreements, Junior and Eva may decide to elect that French law is applicable. It would be prudent to attach evidence that Junior was habitually resident in France at the time of signing to the agreement[24].

More information is needed about Eva's financial circumstances, but based on the available information a separation of property regime would give Eva protection that any assets acquired by way of inheritance would be kept separate (provided the asset was not acquired in joint names). More information is also needed regarding Junior's financial circumstances. Owing to the nature of his work he is likely to have a high income for a short period of time with perhaps comparatively modest capital. A high earning sports person's financial affairs can be complex with a mixture of remuneration sources so liaison with his advisors will be important. But on divorce, especially towards the end of high earnings, a lump sum may be needed to ensure Junior can meet his future needs.

Although it is not possible to have a binding agreement as to jurisdiction in England, the EU Maintenance Regulation allows Junior and Eva to have an agreement that would be binding in France, Germany and Spain as to where maintenance claims are determined provided there is a sufficient with the nominated country[25]. The Matrimonial Property Regimes Regulation also allows Junior and Eva to have a binding agreement in those countries as to which matrimonial property regime would apply

[22] *Family Law: A Global Guide* (5th edition)
[23] Art 22
[24] Alexandre Boiche, *The conflicts of laws rules applicable to marriage contracts in Europe after the entry into force of Reg 2016/1103 on matrimonial property regimes* [2022] IFL 92
[25] Council Regulation (EC) No 4/2009, Art 4

provided it is expressed in writing, dated and signed by both parties and one of them is habitually resident in or a national of the nominated state at the time the agreement is concluded[26].

To satisfy The Matrimonial Property Regimes Regulation, the marital agreement must comply with the requirements and formalities in France and England as that is where Junior and Eva are currently habitually resident. For France that would mean both Junior and Eva signing the marriage contract before a French notary in person. The position is less clear for England, but it would be best practice to ensure both Junior and Eva had separate independent legal advice, a full appreciation of the other's financial circumstances and for the agreement to be signed as a deed at least 28 days before the wedding.

As the English court would have the ability to interfere with the marital agreement in the event the divorce proceedings take place in England, steps should also be taken to ensure that the marital agreement meets the recommended safeguards in England. Crucially, to be upheld the agreement must meet both parties' needs. Although it is not possible to oust the jurisdiction of the English court whilst there is a sufficient connection to bring divorce proceedings, in recent years the judicial wind has continued to blow increasingly towards upholding marital agreements as encapsulated in the following comments of Mr Justice Moor in March 2023:

> *"Litigants must realise that it is a significant step to instruct top lawyers to prepare a pre-nuptial agreement prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement. These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide that certainty. Litigants cannot expect to be released from the terms that they signed up to just because they don't now like what they agreed[27]."*

[26] Art 22

[27] *MN v AN* [2023] EWHC 613 (Fam), para 85