

**SYMPOSIUM: INTRODUCTION TO INTERNATIONAL
FAMILY LAW
BRISBANE, AUSTRALIA 20 FEBRUARY 2024**

Burning Issues in International Family Law

Session Materials Pack

***What is HOT in Property Division in Cross Border
Disputes?***

- *Definition of matrimonial property, whether including premarital assets, or gifts/ inheritances?*
- *Any new developments and unique considerations in determining apportionment?*
- *Recognition of prenuptial agreements and property regimes?*
 - *Implications in cross border disputes?*

*Tuesday 20 February 2024
02:45 – 04:15*

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 - Inger Blackford, New Zealand
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President, European Chapter. President Elect, European Chapter 2021 - February 2023; IAFL Vice President 2016-2021; Parliamentarian 2014-15. Has a wide experience in all kinds of family law matters. Practice includes mainly divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 also deals with cross border disputes and works closely with accredited family law specialists in the United Kingdom and the United States of America. Is an accredited family lawyer and member of the Dutch Association of Family Law Lawyers and Divorce Mediators (vFAS).

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Admitted to the New Zealand bar in 1994, Inger is a specialist family law barrister based in Trinity Chambers in Auckland. A member of the Family Law Section of the Law Council of Australia and past Chair of the Family Law & Family Rights Section of LAWASIA; currently the New Zealand representative for the Family Law & Family Rights Section of LAWASIA (since 2005). A past member of the International Family Law Issues Standing Committee for the Family Law Section (New Zealand Law Society) and past convener for the committee. Inger is a Hague Convention on International Child Abduction and the international recovery of maintenance specialist and receives instructions from the New Zealand Central Authority in relation to such matters. Inger's practice focuses predominantly on Hague Convention matters, international parenting disputes and relationship/matrimonial property. Inger also specialises in child support/spousal maintenance and estate litigation.

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Isabelle Rein Lescastereyres has been a partner at bwg since 2005.

She is bilingual and has many years of experience in complex international situations, in particular with neighbouring French-speaking and English-speaking countries.

She favours a realistic and constructive approach in order to maximise chances for a rapid conflict resolution.

With her HEC (Ecole des Hautes Etudes Commerciales) training, Isabelle advises individuals, families and trusts and represents them in all aspects of divorce and family law, particularly in dealing with complex patrimonial and financial issues.

In particular, she assists French expatriates and foreigners residing in France on family and patrimonial issues relating to their international mobility.

Isabelle works closely with a network of foreign lawyers who are among the most reputable thanks to her involvement in international organisations. In particular, she is a past Vice President of the IAFL European Chapter.

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Damien has practised for over 35 years in the Family law and de facto relationship fields. Damien is an Accredited Family Law Specialist, a Mediator and an Arbitrator with extensive knowledge and expertise in all areas of family law. He has a particular interest in complex financial and property settlements and international family law matters. Damien is consistently recognised by his peers in published reviews as a leader in the field of family law. Damien was invited to become a Fellow of the International Academy of Family Lawyers in 1996, being one of the longest standing Fellows in Australia. Damien is an appointed expert witness on Australian Family Law before the High Court in the United Kingdom. He has also provided expert trial evidence on Australian Family Law in the United States. Damien is a regular presenter at legal and other professional seminars, presenting to the International Academy of Matrimonial Lawyers on two occasions. He has had numerous articles published both in legal and non-legal publications. Damien was a partner in a large Brisbane CBD and subsequently national firm for over 35 years before opening his own boutique family law practice where he can focus on his passion of helping clients achieve the best possible results during this very stressful time in their lives. While consistently being recognised by the Doyle's Guide to the Australian Legal Profession as a Leading Family and Divorce Lawyer for a number of years running, Damien has also been recognised as a Leading Family Lawyer in High-Value & Complex Property Matters.

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Suzanne heads the Withers premier family law and trust, estate and inheritance teams and is responsible for their strategy and continued top ranking in all legal directories. She is universally recognised in the marketplace as an expert in conflict resolution. She is a tenacious litigator and formidable opponent but with a compassionate edge. Suzanne's advice is always given strategically, discretely and with a commercial eye to the end game. Suzanne extolls her no-nonsense approach and her ability to de-mystify the legal technicalities of the divorce process alongside her calmness and clear thinking in the face of complex financial and emotional issues. Suzanne is the 'go to' lawyer in London for all Italian family law matters. She is fluent in Italian. Suzanne is a trained and practicing mediator and collaborative lawyer and lectures internationally on family law (often in Italian). She works for Founders, Senior City professionals, international families, individuals from the entertainment industry, the motorsport industry and their partners and often the female breadwinner. Suzanne is top ranked in Spears Top 50 Family Lawyers, the Tatler Address Book as a 'conscious uncoupler', Band One Chambers High Net Worth Directory and the Legal 500 both as a lawyer and a Mediator, and is an Honorary Woman of Influence & Power in the Global Leaders in Law.

What is HOT in Property Division in Cross Border Disputes?

Sandra Verburgt (The Netherlands)
Suzanne Todd (England)
Isabelle Rein-Lescastereyres (France)
Inger Blackford (New Zealand)
Damian Greer (Australia)



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What's HOT in Property Division in Cross Border Disputes?

Netherlands: Definition of matrimonial property

Dutch matrimonial law is **codified in the law**: matrimonial property regimes are the basis for Dutch matrimonial law

Statutory regime: limited community of property: spouses share all property except inherited wealth, donations and pre-marital property

Marital contract regimes: if spouses want to deviate from the statutory regime, they shall enter into a pre- or postnuptial agreement.

No limitation to type, but most common regimes:

- "cold exclusion",
- exclusion of community of property with "as-if clause"
- exclusion of community of property with periodical netting clause
- "tailor made"- regime

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England: Matrimonial Property

- No matrimonial property regimes
- So what is matrimonial?
 - Property acquired during the marriage through the endeavours of the spouses
 - Contrasted with: property which is 'external' to the marriage in some way
 - "Matrimonialisation"?

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What's Hot in Property Division in Cross Border Disputes?

France: Definition of matrimonial property

- Definition depends on the MPR Under French law, 4 big types of MPR

- Separation of assets

- community limited to acquisitions

- universal community

- Participation to acquisitions

+ anything "haute couture", including a pocket of community in a separation of assets regime or excluding some assets from the common assets of common value.

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New Zealand:

Definition of matrimonial property, whether including pre-marital assets, or gifts/inheritances?

- ▶ Property (Relationships) Act 1976 (“the Act”)
- ▶ Relationship Property v Separate Property
- ▶ Section 8 defines relationship property; includes the family home whenever acquired and ostensibly all property derived from/during the relationship/partnership (married/de facto; same sex couples included)
- ▶ Section 9 defines separate property as basically everything that isn't relationship property
- ▶ Section 10 excludes assets acquired from outside the relationship such as gifts, inheritances/succession and via a trust settled by someone other than the partners
- ▶ Section 9A – when separate property becomes relationship property

Inger Blackford, Barrister, New Zealand

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Definition of Matrimonial Property

- Family Law Act 1975 (Cth), s4.1 defines property as:
 - (a) in relation to the parties to a marriage or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; or
 - (b) in relation to the parties to a de facto relationship or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.
- “... is the most comprehensive of all terms which can be used in as much as it is indicative and descriptive of every possible interest which the party can have”.
- Is confined to presently existing entitlements and does not extend to future, contingent or potential interests.
- Either party to the marriage or de facto relationship is at the relevant date:
 - an Australian citizen,
 - ordinarily resident in Australia, or
 - is present in Australia.

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What's HOT in Property Division in Cross Border Disputes?

New developments in the Netherlands

Last update of the matrimonial regime in 2018: from general community of property to a limited community of property

Dutch Supreme Court decision 5 April 2019 on compensation rights between spouses

EU regulation on MPR's since 29 January 2019 (Council Regulation (EU) 2016/1103) and for partnership regimes (Council Regulation (EU) 2016/1104): jurisdiction, applicable law and rules on the formal and material requirements for marital contracts.

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What's HOT in Property Division in Cross Border Disputes?

unique considerations in determining apportionment

Dutch courts have no discretionary powers to divide or reallocate assets or resources other than that provided by the law or the marital contract of the spouses.

the concept of reasonableness and fairness may be applied when the law provides for an open norm. The court is bound by the applicable matrimonial regime. The Dutch court cannot deviate from a pre- or postnuptial agreement.

Exceptions in rare cases: HR 7 December 1990 (*Murder marriage, NJ 1991,593*)



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The English court's approach

- Wide discretion
- Aim is to achieve fairness
- Starting point is that matrimonial assets are divided equally and non-matrimonial assets are retained by the person who brought them into the marriage
- Needs



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New developments and unique considerations

1) Recent decisions of the French supreme court and a law project which worsen the fate of Participation to acquisitions regime

The clause excluding professional property under the regime of participation to acquisitions = a matrimonial benefit that disappears upon divorce

- 2 kinds of matrimonial benefits:
 - Matrimonial benefits which take effect during the marriage: divorce has no impact on them
 - Matrimonial benefits which only take effect upon the dissolution of the MPR: divorce entails automatic revocation of these benefits unless the spouse who granted them wishes otherwise
- News:
 - Cass Civ. 1st, 18 Dec. 2019, no 18-26.337 + Cass Civ. 1st, 31 March 2021, no 19-25.903 + Ministerial reply no 14362, JO French Senate 28 May 2020
 - ? Countermeasure : Bill "aiming to ensure property justice within the family", no 1961, filed on 5 December 2023
 - Cass Civ. 1st, 13 Dec. 2023, no 21-25.554, 666 FS-B

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2) A series of caselaw that result in refusing making accounts between spouses at the time of the divorce

Case: a spouse settles certain expenses and debts of the other spouse

At the time of the divorce => big surprises

A series of caselaw have shrunk that possibility to capital contributions by opposition to repayment of a loan (= part of the contribution to the matrimonial expenses):

- Matrimonial home: Civ. 1st, 8 Oct. 2014, n°13-24.949; Civ. 1st, 25 Sept. 2013 no 12-21.892
- Secondary home: Civ. 1st, 20 May 1981, no 79-17.171; Civ. 1st, 18 Dec. 2013, no 12-17.42

Civ. 1st, 10 Jan. 2024, no 22-10.278: may be going even further (proof of the intent of a loan)

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Any new developments and unique considerations in determining apportionment?

- ▶ New Zealand approach to assume 50/50 once the relationship is more than 3 years rebuttable in certain circumstances
- ▶ **Section 13** – exception to equal sharing “extraordinary circumstances”, “repugnant to justice”
- ▶ **Section 15** – Economic disparity awards; significant difference in income AND living standards after separation due to the operation of the division of functions in the relationship- a fraught and movable feast of caselaw
- ▶ **Section 18A, 18B and 18C** – adjustments for increasing or decreasing the relationship property pool, used for “occupational rental” adjustments

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New developments and considerations in determining property

- Introduce family violence as a new factor for consideration when determining property settlement orders.
- The principle in *Kennon & Kennon* is that the effect of family violence can be relevant if there is a course of conduct that made the victim's contributions within the current s 79 "significantly more arduous than they ought to have been" so there is a "discernible impact" upon the contributions.
- Unfortunately, the prevalence of family violence is wide and artificial barriers to its recognition, such as trying to limit its recognition in property cases to exceptional or narrow cases, has no basis in principle.
- Proposed amendment:
"The effect of any family violence, to which one party to the marriage has subjected the other party, on the current and future circumstances of the other party, ..."
- "It is possible that the same conduct could be relevant to the assessment of contributions and current and future considerations. The proposed amendments do not curtail the court's discretion in making these assessments and to respond to the wide variety of factual circumstances that come before it."

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What's HOT in Property Division in Cross Border Disputes?

Recognition of prenuptial agreements and property regimes in the Netherlands

- **Primary function** of a Dutch pre-marital agreement is to provide for rules on how the spouses shall deal with capital and wealth during their marriage.
- **Secondary function** of a Dutch pre-nuptial agreement is how to deal with capital and wealth after marriage, either through death or divorce / separation (estateplanning).
- **In order to be valid:** entered into by notarial instrument, signed by parties and notary. Pre- and postnuptial agreements are enforceable and fully binding the parties. If entered into the Matrimonial Property Registry, it is also binding to third parties

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Pre-nuptial agreements

“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”.

Radmacher v Granatino, [2010] UKSC 42



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Pre-nuptial agreements versus matrimonial property regimes

XW v XH
[2017] EWFC
76/ [2019]
EWCA Civ
2262

No weight given to an Italian *separazione dei beni* signed at a wedding conducted in Italian (which the wife did not speak) because the wife had not understood the implications of the agreement outside of Italy. The court nonetheless took account of the fact that some of the wealth was non-matrimonial, and so (on appeal) the wife received 34.5% of the parties' combined wealth.

Versteegh v
Versteegh
[2018] EWCA
Civ 1050

Two Swedish nationals signed a simply drafted pre-nuptial agreement which provided for separation of property the day before their wedding in Sweden. Neither received legal advice but the English court noted that such agreements were commonplace and binding in Sweden and both parties had a full appreciation of what they were signing. The agreement was therefore upheld, with legal advice being desirable rather than necessary in the circumstances.

AD v BD
[2020] EWHC
857

No weight given to a *separation de biens* signed the day before a wedding. There had been no previous discussions about the agreement and the wife has not sought advice on its contents. She had not therefore understand its implications. The matrimonial property was therefore divided broadly equally and each party kept the value of their non-matrimonial property (which was significant in each case).

CMX v EJX
(French
Marriage
Contract)
[2022] EWFC
136

French *separation de biens* signed following a one hour meeting with a notary and which excluded sharing was largely upheld. Such contracts were common in France and so should not simply be 'torn up' in England. A needs-based assessment was undertaken and the wife received 39% of the total assets of £24.3m.

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Recognition of prenuptial agreements and property regimes

Movements in opposite directions.

- While some anglo saxon jurisdictions give more consideration to our continental MPR
- New insecurities regarding French marriage agreements that seemed set in stone

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Recognition of prenuptial agreements and property regimes?

- ▶ Section 21 and 21A – a strict formula for agreements to be legally binding and valid – the process is the key to the enforcement and validity of an agreement
- ▶ Section 21 – pre nuptial aka “a contracting out agreement”
- ▶ Section 21A – a binding settlement agreement at the conclusion of the relationship
- ▶ Parties **MUST** be separately and independently legally advised as to the effects and implications of the agreement, must be in writing
- ▶ Disclosure/discovery of ALL property whether claimed as relationship property or separate property in settlement agreements crucial
- ▶ Valuation of the assets and confirmation of all liabilities being divided a requirement

Inger Blackford, Barrister, New Zealand

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Recognition of prenuptial agreements in property regimes

- Commenced on 27 December 2000.
 - before marriage,
 - in contemplation of a de facto relationship
- **minimum requirements are:**
 - It is in writing,
 - It specifies the section of the Act it is made under ,
 - It is signed by all parties,
 - It is between parties contemplation marriage or entering de facto relationship,
 - Deals with property, financial resources and/or spousal maintenance of the parties,
 - Before the agreement was signed, independent advice was provided by a legal practitioner about the effect of the agreement and the advantages and disadvantages,
- The legal advice must be provided by a legal practitioner with the right to practice in the Australian federal jurisdiction under s 55B Judiciary Act 1903 (Cth).

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What's HOT in Property Division in Cross Border Disputes?

The Netherlands: Implications in cross border arrangements and/ or disputes
implications of Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1103
Scope applicable law rule: universal application (art. 20) and unity of the applicable law (art. 21)
Choice of law is limited! (art.22)
Formal validity on choice of applicable law (art. 23) and **contract** itself (art. 25)
In the absence of choice of applicable law (art. 26) **hierarchy**, but exception in art. 26 para 3 -> multi-interpretable!

OF COURSE
THE LAWS ARE
ALWAYS FUNCTIONAL

THE ONLY
QUESTION IS

FOR WHOM

Loeije

Loeije
advocaten
1913 1914
1915 1916
1917 1918
1919 1920

05

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Implications for cross-border disputes

“A divorcing couple that has to litigate the consequences of marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed”

Wermuth v Wermuth [2023] EWCA Civ 50



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Implications in cross border arrangements and/or disputes

- **Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of MPR**

From the French point of view less security even if no very big change (except that) :

- ▶ Necessity to have the agreement of the defendant for the weaker criteria of jurisdiction
- ▶ Before: choice of jurisdiction in the marriage contract vs. today: automatic extension
- ▶ Some challenges are open regarding the law applicable (article 26 3°)

 Prenuptial agreement: this regulation also concerns third countries if one of the spouses has his/her habitual residence in a Member State (article 25).

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Implications in cross border disputes?

- ▶ Section 7 – application of the Act/jurisdiction ONLY to New Zealand based immovable and movable assets and foreign movables (not foreign immovables)
- ▶ New Zealand cannot even take into account in overall property calculations the existence of foreign immovables, we must wholly ignore its existence
Samarawickrema v Samarawickrema (1994) 11 FRNZ 502
- ▶ Section 7A – ability for parties to agree the Act will apply to property that would otherwise not be covered but caution is needed as to the content and clarity of that agreement – the New Zealand Court may consider the existence, content and intent of an overseas property agreement but it will not generally be considered to be binding unless it complies with our Section 21 and 21A requirements

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Implications in cross border disputes

- The power to adjust property interests under the Act operates *in personam*, not *in rem* (i.e. against the parties personally, not directly against the property itself).
- The court first decides it can exercise jurisdiction.
- Requires that the *forum non conveniens* test be satisfied. Australia is not a “clearly inappropriate forum”
- Make sure that the orders are enforceable.
- An overseas divorce is not a bar to property or maintenance proceedings being instituted in Australia.
- The same cause of action has been litigated in an overseas court *res judicata* estoppel prevents parties from making a claim in an Australian court.
- The legal and equitable interests in overseas property must be identified, similarly to Australian property

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Key points

• The line between matrimonial and non-matrimonial property is blurred so...

- Get a pre-nup
- Get advice on that pre-nup
- Live by that pre-nup
- Review that pre-nup if necessary



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Thank you!

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