IAFL European Chapter Meeting, Paris, France 4-8 December 2024

Session resources pack

Session 3:
35th Anniversary:
Landmark Law Decisions

Thursday 5 December 2024

12:30 – 13:00

International Academy of Family Lawyers
European Chapter

1989 - 2024 35th anniversary

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Albania

- Children and Finance

Abstract

DECISION 1

The Civil chamber of the Supreme court of the Republic of Albania, in the Decision No. 11111-04158-00-2014 Reg. fundamental No. 00-2023-of Decision Dated 06.03.2023 attributed to the following parties:

plaintiff/ and counter defendant:	Legal heirs of H. S.: B. S., L. A. (S.), Z. S.
Defendant/and counter plaintiff:	J. I.
object of the claim:	inheritance
legal basis:	Articles 349 etc of the civil code
object of the counter claim:	obligation to recognize as owner of the apartment located in neighborhood "Rilindja".
legal basis	Article 168 of the civil code

Based on the Supreme court discretion and competence to review (i) the legal validity of the WILL of the testamentary Z. I.; and (ii) in the alternative that such will is invalid the consequences of such invalidity. Only in case the will results as invalid, the Supreme Court shall continue in hearing the claims of the parties on the ownership title gained through adverse possession.

DECIDED: the suspension of the hearing of the case no. 11111-04158-2014 .... 2. request form the constitutional court to abrogate the article 377 of the civil code which has the following provision: "*The decedent who leaves no descendants or ascendants, or no siblings, has the right to dispose of his property by testament in favor of any natural or legal person.*", as in contradiction to the article 41 of the constitution.

The Constitutional court decided to admit this request and as a consequence declare the abrogation of the provision of the civil code with the aforementioned provision.

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Albanian language:

Facts of the case

1. the plaintiff Hadife Serjani is the sole heir of the se cujus Zeliha Isufi.

2. in accordance with the decision no. 531, dated 13.03.2007, of the Vlora district court, with which it is issued the me të cilin është lëshuar dëshmia e trashëgimisë ligjore të trashëgimlënëses Zeliha, rezulton se e ndjera ka qenë e martuar me Seit Isufi i cili ka vdekur më datë 03.04.1981.

3. Rezulton se trashëgimlënësja Zeliha Isufi ka disponuar pasurinë e saj pas vdekjes me testamentin nr.11742 rep. nr.139 Kol., datë 04.10.1993. Sipas këtij testamenti ajo ka caktuar si trashëgimtar "...të vetëm testamentar për gjithë pasurinë..." e saj "...të luajtshme e të paluajtshme, për gjithçka që do të rezultojë në aktivin e pasurisë sime pas vdekjes sime, nipin tim, JASIN ISUFI, i biri i Mehmetit ..., duke përjashtuar kështu nga trashëgimia çdo trashëgimtar timin tjetër ligjor, të çdo radhe qoftë".

10. Gjykata e Rrethit Gjyqësor Vlorë, me vendimin nr. 285, datë 05.02.2008, ka pranuar padinë duke detyruar të paditurin kundër-paditës Jasim Isufi "...të njohë si trashëgimtare ligjore të Zeliha Isufi dhe të dorëzojë

pasurinë e paluajtshme dhomë, kuzhinë aneks e banjë të ndodhur në Lagjen "Rilindja", pallati 1125 Vlorë" dhe ka rrëzuar kundër padinë.

13. Gjykata e Apelit Vlorë, me vendimin nr. 402, datë 22.10.2009, ka lënë në fuqi vendimin e gjykatës së shkallës së parë përsa i përket rrëzimit të kundërpadisë dhe e ka ndryshuar atë për pjesën tjetër, duke vendosur edhe rrëzimin e padisë".

II. Vlerësimi i Kolegjit Civil të Gjykatës së Lartë

35. Më konkretisht, Gjykata e Lartë do të duhet që të vlerësojë fillimisht (i) vlefshmërinë ose jo të testamentit të testatores Zeliha Isufi; dhe (ii) në alternativën që testamenti është i pavlefshëm, cilat janë shkaqet e kësaj pavlefshmërie. Vetëm nëse testamenti rezulton i pavlefshëm atëherë Gjykata e Lartë do të mund të vijojë më tej me pretendimin e palës së paditur kundërpaditëse për fitimin e pronësisë me parashkrim fitues. Siç e ka lënë detyra Gjykata e Lartë në vendimin e saj të vitit 2014, shkaqet e pavlefshmërisë që mund të konstatohet për rastin e testamentit do të vlerësohen nëse janë shkaqe ndalimi edhe për mënyrën e fitimit të pronësisë me parashkrim fitues. Për rrjedhojë vlerësimi i parashikimit ligjor të nenit 377 të Kodit Civil dhe pasojave që ai sjell, detyrimisht kushtëzon gjithë rrjedhën e këtij procesi në Gjykatën e Lartë.

VENDOSI:

1. Pezullimin e gjykimit të çështjes civile nr. 11111-04158-2014 Regjistri Themeltar, datë 14.11.2014 regjistrimi.

2. T'i kërkojë Gjykatës Kushtetuese të shfuqizojë neni 377 të Kodit Civil me përmbajtjen si vijon: "Trashëgimlënësi që nuk lë të paslindur ose të paralindur, ose vëllezër apo motra ka të drejtë të disponojë me testament pasurinë e vet ,në favor të çdo personi fizik apo juridik", pasi vjen në kundërshtim me nenin 41 të Kushtetutës.

3. Urdhërohet sekretaria gjyqësore që një kopje të këtij vendimi t'ua njoftojë palëve dhe të kryejë veprimet përkatëse për dërgimin e dosjes në Gjykatën Kushtetuese.

Tiranë, më 06.03.2023

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DECISION 2

THE civil chamber of the court of Appeal of Tirana in case no.: 11117-00461-30-2018 no.act:3585 Date of registration: 09-02-2018 with the object of the claim: request of the property deriving from in heritage of d*e cujus* V. Dh. from the defendant that are in possession and the handover of the property recognized ECHR judgment dated 17.03.2016 Rista v Albania no.4875522/10 and the council of Ministers Decisions no.613 dated 31.08.2016. the obligation to recognize the plaintiffs as heirs in this property;

DECIDED to endorse and sustain the decision of the First Instance Court and admit the claim of the claimants….; oblige the defendants/ respondents …..to fully recognize as co-owners the claimants …. as 2/3 of the sum of 4.416.900 euro recognized by ECHR judgement dated 17.3.2016, and ordered its execution by means of the council of ministers decision no.613 dated 31.08.2016.

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Albanian language:

GJYKATA E APELIT TIRANË

Me vendimin nr. 161, datë 24.10.1995 të Komisionit të Kthimit dhe Kompensimit të Pronave ish Pronarëve pranë Bashkisë Sarandë (në vijim përmendur si KKKPP), mbi bazën e kërkesës së Spiro Dhimërtika e ***** Dhimërtika, në cilësinë e trashëgimtarëve ligjorë të të ndjerit Vaso Dhimërtika,u vendos :

- Të njohë z. Vaso Dhimërtika si ish-pronar të një sipërfaqe prej 69186 m² ndodhur brenda 850000 m².

- Në bazë të nenit 19 të ligjit 7698 dt 15.4.93 i kthen trashëgimtarëve ligjor të z. VasoDhimërtika një sipërfaqe trualli prej 500 m² ...

- Në bazë të nenit 16 të ligjit 7698 dt. 15.4.93 i kompenson në natyrë trashëgimtarët ligjor të Vaso Dhimërtikës një sipërfaqe trualli prej 5000 m² ...

- Të kompensoj me obligacione trashëgimtarët ligjor të Vaso Dhimërtikës për një sipërfaqe prej 59184 m² sipas ligjit "Për kompensimin në vlerë të ish-pronarëve të tokës bujqësore".

- ...

pranëGjykatës Evropiane për të Drejtat e Njeriut, kjo gjykate me vendimin e saj datë 17.03.2016 nëçështjen Rista dhe të tjerët kundër Shqipërisë (ankimet nr. 5207/10, 24468/10, 36228/10, 39492/10, 39495/10, 40751/10 dhe 48522/10) ka vendosur:

7. Gjykon a) Se shteti i paditur duhet të sigurojë, me anë të mjeteve të duhura, zbatimin e vendimit të Gjykatës së Lartë, të datës 27 shtator 2001, i dhënë në favor të ankuesit në ankesën nr. 5207/10, brenda tre muajve; b) Se shteti i paditur duhet t'i paguajë së bashku ankuesit, për ankimet nr. 24468/10, 39492/10, 39495/10, 40751/10 dhe 48522/10 brenda tre muajve, shumat e përmendura në paragrafët 65 dhe 71 të vendimit dhe të pasqyruara në tabelën në shtojcën 3, plus çdo taksë që mund të jetë e tarifueshme, për t'u shkëmbyer në monedhën vendase në normën e zbatueshme në datën e shlyerjes; c) Se që nga përfundimi i tre muajve të përmendur më sipër deri në momentin e shlyerjes, interesi i thjeshtë do të jetë i pagueshëm në shumat e sipërpërmendura në një normë të barabartë me normën huadhënësemarxhinale të Bankës Qendrore Evropiane gjatë periudhës së mospagimit plus tre për qind; 8. Rrëzon pjesën e mbetur të kërkesës së ankuesve për kompensim të drejtë. Përgatitur në anglisht dhe njoftuar me shkrim më 17 mars 2016, sipas rregullit 77 §§ 2 dhe 3 të Rregullores së Gjykatës…

Sipas shtojcës 3 të vendimit, për Dhimërtika dhe Nika, nr. 48522/10 dëmi monetar dhe jo monetar është EUR 4,416,900 së bashku me kostot dhe shpenzimet për të shtatë ankuesit EUR 850 (botuar vendimi në Fletoren Zyrtare nr.74/2016).

Këshilli i Ministrave me vendimin nr. 613, datë 31.8.2016 "Për ekzekutimin e vendimit të Gjykatës Evropiane për të Drejtat e Njeriut, datë 17.3.2016, për çështjen "Rista dhe të tjerë kundër Shqipërisë" (për ankimet nr. 5207/10, 24468/10, 36228/1, 39492/10, 39495/10, 40751/10 dhe 48522/10)" ka vendosur:

1.Ekzekutimin e vendimit të Gjykatës Evropiane për të Drejtat e Njeriut, datë 17.3.2016, për çështjen "Rista dhe të tjerë kundër Shqipërisë", për ankimet nr.24468/10 (Gjikolli dhe Molla), nr. 39492/10

(Galanxhi dhe të tjerë), nr. 39495/10 (Frashëri dhe të tjerë), nr. 40751/10 (Merlika dhe të tjerë) nr. 48522/10 (Dhimertika dhe Nika), sipas listës së ankuesve në shtojcën 1 dhe shumat e përcaktuara në shtojcën 2, bashkëlidhur këtij vendimi dhe që janë pjesë përbërëse e tij…

Sipas shtojcës 2 të vendimit, Dhimërtika e Nika, nr. 48522/10, dëmi monetar dhe jo monetar është 4.416.900 Euro dhe kosto e shërbime 850 Euro.

Lidhur me themelin e kërkimit, rezulton se shuma e dëmshpërblimit të akorduar ankuesve, që i'u drejtuan GJEDNJ-së synon të rivendosë të drejtën e pronësisë të cenuar nga shteti shqiptar në kuadër të procesit të njohjes së të drejtës së të ndjerit VasoDhimërtika. GJEDNJ, nuk mori në shqyrtim çështjen e rrethit të trashëgimtarëve të pronarit VasoDhimërtika, çështje kjo që zgjidhet sipas ligjit të brendshëm, por u fokusua vetëm në drejtën e njohur nga organet e shtetit shqiptar dhe të parealizuar ende, në favor të aplikuesve/trashëgimtarë të ish pronarit. Për rrjedhojë GJEDNJ u fokusua në shkeljen e së drejtës së pronësisë të mbrojtur nga KEDNJ si dhe në detyrimin e shtetit shqiptar për të akorduar shumën në të holla për pronën e njohur. Gjithsesi evidentohet se pavarësisht se në Republikën e Shqipërisë ishte zhvilluar një gjykim për plotësimin e vendimit të KKKPP, për përcaktimin e të gjithë trashëgimtarëve të ish pronarit, ky fakt nuk i'u bë me dije GJEDNJ.

Gjykata e apelit vlerëson se e drejta e çdo individi për t'iu drejtuar GJEDNJ për mbrojtjen e të drejtave themelore, në asnjë rast nuk mund të rezultojë si një mekanizëm për të përjashtuar nga gëzimi i këtyre të drejtave, subjektet e tjera që janë titullarë të tyre. Përkundrazi çështjet që shtrohen para GJEDNJ-së vendosin përballë individin dhe shtetin përkatës që pretendohet të ketë shkelur të drejtën.

- Lënien në fuqi të vendimit nr. 4349, datë 17.05.2017 të Gjykatës së Rrethit Gjyqësor Tiranë.

DECISION 3

The joint chambers of the Supreme court of the Republic of Albania in its decision No. 19 Reg. fundamental no. 24 of Decision Dated 13.3.2002 with the following parties:

plaintiff/ and counter defendant:	R. Ll.
Defendant/and counter plaintiff:	V. Ll.; I. P.; K. P./ F. Ll.
object of the claim:	Declaration of the invalidity of the legal action, contract of endowment
legal basis:	Articles 92 etc. of the civil code
object of the counter claim:	declaration of the invalidity of the legal action, contract of endowment in favor of the defendant F. Ll.

in a unified decision, the joint chambers decided to unify the practice as follows: the inheritance is opened by the time that the *de cujus* is physically dead. the determination of the momentum of death is crucial because in this function it is determined the list of the heirs, their rights and obligations and the moment of the transfer of the inheritance. this momentum will determine the applicable law and the legal effects deriving from the inheritance. Based on the principle that the civil material law as a rule has no retroactive effect, and in the aforementioned case has no ultra-active effect either, the unified opinion is that the law applicable for the relation of inheritance is the law in force on the time of opening of the inheritance. therefore, the inherited property of the claimant shall not be considered as a joint legal property included in their legal property regime but as a property derived from inheritance before the marriage regime, thus she is entitled to administer her as a sole owner and donate or transfer to third parties without the consent of the husband.

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Albanian language:

Facts of the case

Gjykata e Rrethit Gjyqesor Tirane me vendimin Nr.1505, date 27.4.1998,

Ka rrezuar padine dhe pranuar kunderpadine, duke deklaruar te pavlefshem kontratat e dhurimit me Nr. 11614 Rep. e Nr.5208 Kol. dhe Nr.11615 Rep e Nr.5209 Kol., date 12.6.1996, si kontrata te fallsifikuara duke kthyer palet ne giendjen e meparshme.

Gjykata e Apelit Tirane, me vendimin Nr.829, date 14.9.2000,

Ka lene ne fuqi vendimin e mesiperm te Gjykates se Shkalles se Pare Tirane.

Per kete Kolegjet unifikojne praktiken gjyqesore si me poshte:

Trashegimia celet ne momentin e vdekjes se trashgimlensit, fizikisht te konstatuar , ose te percaktuar me vendimin gjyqesor te shpalljes se vdekjes. Percaktimi i ketij momenti eshte i nje rendesie te vecante praktike pasi ne funksion te tij percaktohet rrethi i trashegimtarve qe thirren ne trashegimi, te drejtat e tyre dhe momenti i kalimit te se drejtes se trashegimise. Eshte ky moment, ai qe percakton edhe ligjin e aplikueshem lidhur me efektet qe pasojne celjen e trashegimise. Duke u bazuar ne parimin ligji civil, si rregull, nuk ka fuqi prapavepruese

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(retroaktive) dhe ne rastin konkret, as fuqi pasvepruese (ultraktive), arrijme ne perfundimin se ligji qe i zbatohet marrdhenies se trashegimise, eshte ligji ne fuqi ne kohen e celjes se saj.

Kolegjet e Bashkuara te Gjykates se Larte per te arritur ne kete konkluzion i referohen legjislacionit civil, Dekreti "Mbi trashegimine" i vitit 1954, neni 2 i tij, Kodi Civil i vitit 1981, neni 95 dhe nenit 318 te Kodit Civil ne fuqi. Sipas ketyre dispozitave, por edhe ashtu sikurse praktika gjyqesore ka pranuar, momenti i celjes se trashegimise eshte ai i vdekjes se trashegimlenesit dhe ligji qe aplikohet ne kete rast, eshte ligji qe ka qene ne fuqi ne ate kohe.

Duke ju referuar praktikes gjyqesore, rezulton nder te tjera se Gjykata e Larte, me vendim te Plenumit te saj Nr.2, date 28.2 dhe 2.3.1964, eshte shprehur se: 'Per trashegimite e celura perpara hyrjes ne fuqi te dekretit "Mbi trashegimine zbatohet ligii qe ka qene ne fuqi ne kohen e celjes se trashegimise". Ky qendrim i Plenumit te Gjykates se Larte eshte mbajtur edhe ne praktiken e mevoneshme gjyqesore, gje qe ka buruar drejtperdrejt nga legiislacioni civil i cili megjithese i ndryshuar ne vite, ka mbetur konseguent lidhur me momentin e celjes se trashegimise dhe ligjin e aplikueshem.

Ne ceshtjen ne gjykim, rezulton se e paditura kunderpaditese dhe njekohesisht dhuruese, Vjollca Llapaj, eshte nje nga trashegimtaret e trashegimlenesve Hysni Mulleti, Aishe Kazazi e Fehmi Kazazi, te cilet kane vdekur respektivisht ne vitet 1972,1979 dhe 1981. Pasuria qe ata kane lene ne trashegim, ka qene pasuri e konfiskuar ne favor te shtetit per shkaqe politike dhe qe u eshte kthyer trashegimtareve te tyre, perfshi edhe te padituren kunderpaditese, me vendim te organeve kompetent ne vitet 1993 e 1994. Duke qene se e paditura kunderpaditese ka hyre ne posedimin e nje pjese te pasurise trashegimore ne kete periudhe, nga paditesi i kunderpaditur duke marre per baze faktin se neni 86 i Kodit Civil te vitit 1981 eshte akoma ne fuqi, e konsideron kete pasuri, si pasuri te ardhur (fituar) gjate marteses, e per pasoje, bashkeshortore.

Duke marre per baze kete percaktim ligjor, rezulton se pasuria trashegimore e fituar nga e paditura kunderpaditese nuk duhet te konsiderohet si pasuri bashkeshortore dhe per pasoje, si pronare e vetme ajo ka patur te drejte ta disponoje ate me vullnet te lire, duke edhe e tjetersuar ne pronare te tjere, ne respektim te dispozitave ligj ore ne fuqi. Kontratat e dhurimit, me te cilat pasurine e saj trashegimore te percaktuar ne to, ajo ja ka dhuruar femijeve te saj pa pelqimin e bashkeshortit, paditesit te kunderpaditur, jane veprime juridike te ligjshme dhe te vlefshme e per pasoje, nuk mund te shfuqizohen me vendim gjyqesor.

Kolegjet e Bashkuara te Gjykates se Larte ne mbeshtetje te nenit 485/a te Kodit te Procedures Civile dhe nenit 17 te ligjit Nr.8588, date 15.3.2000, "Per Organizimin dhe Funksionimin e Gjykates se Larte",

V E N D O S Ë N

1. Lenien ne fuqi te vendimit nr.829, date 14.09.2000 te Gjykates se Apelit Tirane.

2. Unifikimin e praktikes gjyqesore sikurse percaktohet ne kete vendim.

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CASE 4

SUBMITTED case no: 23000-00119-00-2024 (civil case) by: A.H., German citizen, registration date: 06/03/2024 before the Supreme Court duly represented by Att. Brikena KASMI

object of the claim: return of the child E>H> in Germany.

Legal basis: Hague's convention on civil aspects of international child abduction, dated 25.10.1980, ratified by means of the Albanian law no. 9446, dated 24.11.2005.

the status of the case: in process

submitted for unification of practice

suggested questions for unification:

- the term of 6 weeks as determined in the convention for the hearing of the case, includes only the district court or all trials of the case (including appeal and recourse)?
- the modalities of the trial and in case of discrepancy in between of convention and civil procedure provisions, which one shall prevail?
- the inclusion of the evidence via an expert appointed by the court
- the de=termination of the preliminary residence and/or permanent residence in the meaning of the conventions and its effect on the Albanian jurisdiction court decision
- re-integration of the child after 1 year
- the determination of the role and parties in trials with specific importance for the ministry of justice
- the discrepancy in between of supreme court decisions in terms of evidence as in (i) 11241-03303-00-2014 and (ii) 00-2022-2856 dated 12.10.2022.
- the definition of the violation of the private family right in cases of non-binding decisions of the international jurisdiction in the field of psychotropic substances

England & Wales

- Children and Finance

. Children (parental responsibility, abduction/relocation, parentage, public child care, etc.)

The criteria for the nominations are:

- *The decision should have been rendered between 25 April 1989 and 25 April 2024*

- *Made a significant change in your jurisdiction on family law*

- *Has an international element/is relevant for international family law (jurisdiction, conflict of law, recognition of foreign order)*

Would you be able to put your heads together and let me have a nomination for the landmark children decision in England & Wales? You will need to justify your nomination, of course, with a few paragraphs.

ANSWER

We at 4pb would like to nominate the seminal case of **Mecredi and Chaffe**:

C-497/10 PPU Barbara Mercredi v Richard Chaffe (First Chamber) [2010] ECR I-14309

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0497

Summary

This was the first ever family case from England to go to the Court of Justice of the European Union, which was the senior court in these matters until Brexit

Facts

The unmarried father issued proceedings 2 days after the mother removed the child to France. The High Court ordered the return of the child and subsequently made provisional and then final Declarations that the child was habitually resident in England at the time the proceedings commenced

and that her continued retention in France was in breach of rights of custody of the father and the court. Meanwhile the father pursued Hague Convention proceedings in France. The French Court did not refer to the provisional English declarations and concluded that the father had no rights of custody at the time of removal and rejected the Hague application. The High Court then made final declarations and the father sought to appeal the French Hague Convention decision. The French Central Authority failed to lodge an appeal in time. The mother then appealed against the Declarations and return orders made by the High Court. The Court of Appeal referred 3 questions to the Court of Justice of the European Union. They were.

'(1) Please clarify the appropriate test for determining the habitual residence of a child for the purpose of:

– Article 8 of … Regulation [No] 2201/2003;

– Article 10 of … Regulation [No] 2201/2003.

(2) Is a court an "institution or other body" to which rights of custody can be attributed for the purposes of the provisions of … Regulation [No] 2201/2003?

(3) Does Article 10 have a continuing application after the courts of the requested Member State have rejected an application for the return of the child under [the 1980 Hague Convention] on the basis that Articles 3 and 5 are not made out?

In particular, how should a conflict between a determination of the requested State that the requirements of Articles 3 and 5 of [the 1980 Hague Convention] are not met and a determination of the requesting State that the requirements of Articles 3 and 5 are met be resolved?'

Held

The Court of Justice declined to answer the 2nd questions but answered the 1st and 3rd as follows

1. The concept of 'habitual residence', for the purposes of Articles 8 and 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been

removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.
If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation.
3. Judgments of a court of a Member State which refuse to order the prompt return of a child under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction to the jurisdiction of a court of another Member State and which concern parental responsibility for that child have no effect on judgments which have to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State.

Significance of the Decision

1. The CJEU re-affirmed and explained the test that must be applied in relation to the determination of 'habitual residence'. This test must be taken to supersede all domestic authorities on the point. However the Court of Appeal subsequently concluded that the test was essentially the same as existing English jurisprudence. The CJEU judgment became seen as the primary source of law on the issue of habitual residence and was at the time the senior Court in Englandd and Wales.

2. Up until this decision the English Courts had always shied away from a full judicial definition of the term "habitual residence" thereby causing much confusion, despite it being a factual determination but after Mercredi and Chaffe, a number of UK Supreme Court cases flowed and they all approved and relied upon Mecredi and Chaffe.

3. The question of course is , now that the UK has decided to break away from the European Union , whether it will start to redefine the European jurisprudential definition of habitual residence (reasserted of course in UD v XB C-393/18 PPU https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62018CJ0393) or stick with it. For example in the UKSC there was a judgment by Lord Hughes a number of years ago, stating that a child could be habitually resident in a country where he had never set foot in. This was at odds with the CJEU decision in UD v XB but now that the UK has cut common law and regulatory ties with EU, this issue could be be reargued.

4. For the time being, however, *Mercredi and Chaffe* remains the most significant case in international family law concerning children.

Teertha Gupta KC

4pb

IAFL landmark decisions – England and Wales, Finances

***White v White* [2001] AC 596**

This House of Lords decision transformed the way the courts of England and Wales dealt with financial claims on divorce. It was the most far-reaching change in the law since the coming into force of the Matrimonial Causes Act 1973 and it is arguably the primary reason why London became such a sought-after centre for litigation, often described as the "divorce capital of the world".

The 1973 statute gave the court a wide discretion to consider all the circumstances in each particular case and it required the court to take into account a number of specified factors including the resources available to the parties, their financial needs and their contributions, but with first consideration given to the welfare of any children. In the decades that followed, the court developed a doctrine of "reasonable requirements" which meant that, in big money cases, the wife (and it was always the wife) would be awarded only enough capital to meet what the court assessed to be her (generously interpreted) reasonable needs no matter how long the marriage or how much wealth was built up during the marriage. One of the starkest examples of the pre-*White* approach was the 1997 case of *Conran v Conran*, in which the wife received an award of £6.2m for her needs out of the husband's total assets of £80m, after a 30 year marriage during which she had supported him in building up a very successful retail business (as well as raising their children).

The House of Lords (what is now the UK Supreme Court) struck down this doctrine in their decision in *White v White* in 2000, telling judges and practitioners that they had all fundamentally misunderstood the law.

Mr and Mrs White were dairy farmers who had been married for more than 30 years. Mrs White was an active participant in the family farming business as well as raising the parties' three children. They had each contributed a similar amount of capital and their net wealth at trial was approximately £4.5mllion. The judge at first instance gave Mrs White what he considered to be her reasonable requirements.

The House of Lords (upholding the Court of Appeal's decision to award Mrs White 43% of the total assets) condemned this approach as discriminatory. They held that the doctrine of reasonable requirements was based on the assumption that the financial contributions of the breadwinner were of greater valuer than the contributions of the homemaker, which discriminated against the economically weaker spouse. The House of Lords held that equality should not be departed from unless there were good reasons for doing so where the assets in the case were sufficient to meet the needs of both parties.

Although the House of Lords was not ready to say that this meant there should be a presumption of an equal division of the assets built up during the marriage, the direction of travel had been set.

The 24 years since that judgment have seen a dramatic increase in the awards which the courts have made to the economically weaker spouse. A number of arguments were developed to counter a presumption of an equal division of assets. Chief amongst them was the concept of "special contribution" which has been held to apply where the wealth earned by (typically) the husband was so large that it could only have been acquired by exceptional skill or effort unmatched by the wife. This did find favour for a few years following *White v White.* It was for this reason that the wife in *Charman v Charman* (2007) was awarded 30% of the assets (£48million), and the wife in *Cooper-Hohn v Hohn* (2014) received 36% of the assets (USD$530million), although both awards were still at a level far beyond what would have been ordered in the pre-*White* era. The concept of special

contribution has itself been criticised as being discriminatory, and is now very rarely if ever applied. More frequently, if there is an unequal division of assets in a big money case, it is because of such factors as liquidity, or the presence of non-matrimonial wealth, such as inherited or pre-acquired assets.

The availability of very substantial awards to the economically weaker spouse has encouraged jurisdiction races (*Chai v Peng* in 2017, for example, where the wife received an award of £64m) and it has led to the increased use of the Part III jurisdiction which allows the English Court to make financial awards following a foreign divorce (with the latest and largest being *Potanina v Potanin* in 2024).

It is not only the big money cases that have been affected, however. Although in smaller cases the needs of the economically weaker spouse and children will often predominate in the court's determination, the principle that the homemaker's contribution should not be valued any less than the financial contribution of the breadwinner is one which is now embedded in every financial remedy case. The world in which a paternalistic court ignored the contribution of a homemaker over a long marriage seems a very long time ago. The case of *White v White* brought the English family courts into the 21st century.

Renato Labi

Hughes Fowler Carruthers

France

- Children and Finance

Recognition of filiation established abroad – The “Mennesson” case

The Mennesson case is one of the most emblematic French court cases of the last thirty years concerning the recognition of filiation established abroad.

Under French law, surrogacy is prohibited[1]. Even more, it is considered to contravene French law essential principles[2] , preventing recognition in France of the effects of a surrogacy legally contracted abroad.

In the present case, in early 2000, the Mennesson couple, both French citizens, signed a surrogacy agreement in the United States. In accordance with Californian law, a ruling was handed down by the State Supreme Court recognizing Mr. Mennesson as the "biological father" and Mrs. Mennesson as the "legal mother" of the unborn children - *the unborn children being biologically related to the father but not to the mother*. A few months later, the surrogate mother gave birth to twin girls.

The U.S authorities naturally drew up two birth certificates. The Mennesson couple then contacted the French Consulate to obtain the transcription of these birth certificates into French civil status registers, enabling the recognition of their filiation in France. Although the transcription was initially ordered by the public prosecutor, the latter decided to file a case against the Mennesson family to get the annulment of the transcription.

After a ruling by the Créteil Judicial Court, followed by a decision of the Paris Court of Appeal stating the appeal inadmissible, the French *Cour de Cassation*, on December 17, 2008[3] finally recognized the Public Prosecutor's action for annulment of the transcription as admissible.

On the merits, a decision was ruled on March 18, 2010, by the Paris Court of Appeal that decided to annul the transcription of the children's birth certificates, on the grounds that transcription would tacitly recognize a practice contrary to French international public policy. This annulment was confirmed by the French *Cour de cassation* on April 6, 2011[4].

This refusal had important consequences: as the filiation was not recognized, the twins did not have French nationality for example.

The Mennesson family did not give up and decided to take their case to the European Court of Human Rights, arguing that the French authorities' refusal to transcribe the birth

(1) Articles 16-7 and 16-9 of the French Civil Code
(2) see in particular French *Cour de cassation*, May 31, 1991: Bulletin 1991 A.P., no 4, p. 5, having ruled that this practice contravenes both the principle of the inalienability and non-patrimoniality of the human body and that of the inalienability of the status of persons.
(3) French *Cour de Cassation*, on December 17, 2008, no. 07-20.468
(4) French *Cour de cassation*, April 6, 2011, no. 09-66.486

certificates had a disproportionate impact on their private and family life, protected by Article 8 of the European Convention on Human Rights.

In a decision ruled on June 26, 2014, the European Court of Human Rights[5] held that there was no violation of the right to private and family life for the parents, because they had been the authors of the misuse of French rules, but that there was indeed a violation of the right to privacy for the children (who had nothing to do with it).

As the French decision became final and was now violating international rules, the legislator was forced to create a new Court, the Court for the Reconsideration of Civil Decisions, on November 18, 2016.
Consequently, the Mennesson family filed a request for reconsideration on May 15, 2017. This request was considered admissible, and the Court for Reconsideration made a request for an opinion to the European Court of Human Rights.

Thus, in an advisory opinion dated April 10, 2019, the European Court of Human Rights[6] considered that respect for the right to privacy of a child born of a surrogacy performed abroad requires that a domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, but does not necessarily require that this recognition be made by transcription into civil status registers of the birth certificate legally established abroad. The Court even specifies that this can be done by another means like adoption.

The Mennesson saga came to an end on October 4, 2019, when the Court of Cassation, meeting in full court, decided to order the transcription of the Mennesson twins' foreign birth certificates into French civil status registers, going further than what the European Court prescribed.

It took fifteen years of proceedings, three *Cour de Cassation* rulings, one decision and an opinion from the European Court of Human Rights and a legislative amendment[7] for the Mennesson couple to be recognized by the French State as the legal parents of their twin daughters resulting from a surrogacy carried out in the United States.

(5) Request no. 65192/11
(6) Request no. P16-2018-001
(7) Introduction of Article L.452-1 of the Judicial Organization Code

The end of the privilege of jurisdiction of the French defendant
***French Cour de cassation*, 1st civ, May 23, 2006, no 04-12.777, the "*Prieur case*"**

Article 15 of the French Civil Code - which has remained unchanged since 1804 - states that "*a French citizen may be brought before a French court for obligations contracted by him or her in a foreign country, even with an alien.*". The defendant then benefits from what is known as a "*privilege of jurisdiction*".

For almost a century, the French Court of Cassation transformed this "*may"* into a "*shall*"[1] . Thus, if the defendant had not waived his privilege of jurisdiction[2], decisions handed down by foreign courts against him could not be recognized and enforced in France.

Such a solution greatly obstructed the circulation of judgments. As a result, in an emblematic ruling of May 23, 2006, known as the "Prieur decision", the *Cour de cassation* decided to follow a Court of Appeal's resistance, and reversed its usual case law.

In the present case, a woman filed an action to get the exequatur in France of a Swiss judgment annulling the marriage she had contracted three years earlier with her husband. Both spouses had been born in Switzerland, got married in Switzerland, had signed a marriage contract governed by Swiss law and had established their habitual residence in this country. However, the husband contested the recognition and enforcement of the Swiss judgment in France, arguing that the Swiss courts did not have jurisdiction due to the exclusive jurisdiction of the French courts, since he was a French citizen, on the basis of Article 15 of the French Civil Code.

The Court of Appeal rejected his argument, holding that Article 15 of the French Civil Code only established optional jurisdiction for French courts, not exclusive jurisdiction that would prevent recognition of the foreign judgment.

In a decision ruled on May 23, 2006, the *Cour de cassation* upheld the appeal ruling, stating very explicitly that "*Article 15 of the French Civil Code establishes only the optional jurisdiction of the French court, which does not exclude the indirect jurisdiction of a foreign court if the dispute is clearly related to the State before the court it is heard and that the choice of court is not fraudulent".*

With this ruling, the Cour de cassation put an end to the exclusive jurisdiction of French courts when the defendant is a French national, thus putting a great stop to the *privilege of jurisdiction*. This solution was transposed to article 14 of the French Civil Code, concerning the jurisdiction of French courts based on the plaintiff's French nationality, in the equally famous

(1) In particular, two rulings handed down on May 2, 1928 (DH 1928, 334; S. 1928.1.281; Sem.jur. 1928, 843; DP 1929.1.50; JDI 1929, 76) and May 14, 1935 (D. 1935.1.68, rapp. Dumas; S. 1936.1.281 note Ch. Rousseau)
(2) By defending himself in front of the foreign judge without contesting his competence for example

Fercométal ruling of May 22 2007[3]. These developments reflect the desire of French courts to promote a smoother circulation of judgments throughout the world and are part of a more global trend of Courts to adapt to the liberalization of the exchanges and the relationship between citizens of different countries.

(3) French Court of Cassation, May 22, 2007, no. 04-14.716

Germany

- Children and Finance

Summary

Decision of the Federal Court of Justice (Bundesgerichtshof) dated 28 April 2010 - XII ZB 81/09.

Lead sentences of the decision

1. If the parents have joint custody and the caregiving parent intends to relocate to a distant country (here: Mexico) with the child, the primary criterion for the decision on the transfer of the right to determine residence is **the best interest of the child.**

2. The parental rights of both parents must be considered in the decision. The parent wishing to relocate enjoys a general freedom of action. This means that the possibility of this parent remaining in Germany cannot be considered as an alternative, even if this would be in the best interest of the child. The parent's reasons for wanting to relocate are only relevant insofar as they have a negative impact on the best interest of the child.

The facts:

The daughter had lived with her mother since the parents separated and attended primary school. The mother intended to relocate with her daughter and live with her new partner in Mexico. The partner owned a house with a large plot of land in Mexico, where he had been living for some time. He wanted to open a guesthouse with the mother. The mother also intended to work in her partner's business. The child's father did not give his consent to the child moving to Mexico. He feared that the child's relationship with him would be severely affected and considered the mother's decision to relocate to be a risky life plan because she would be tying her personal and professional fate to her new partner.

The parents submitted opposing applications for the transfer of the right to determine the child's place of residence. In accordance with the recommendations of the Youth Welfare Office involved and the guardian ad litem, the local family court ruled against relocating the child to Mexico and rejected the applications of both parents. Following the mother's appeal, the Munich Higher Regional Court transferred the right to determine residence to the mother. The father appealed and continued to seek the transfer of the right to determine the child's place of residence to himself.

The grounds:

According to Section 1671 I 2 of the German Civil Code (BGB), the application for transfer of custody is to be granted if this is in the best interest of the child. The right to determine the child's place of residence as a component of parental custody in accordance with Section 1631 of the German Civil Code is a prerequisite for a lawful relocation with the child. This means that the conflict pursuant to Section 1671 of the German Civil Code must be decided in accordance with the best interest of the child.

It is disputed what importance should be given to the aspects of the best interest of the child on the one hand (educational suitability, will of the child and ties), and the parental rights (custody and access rights), and to the fundamental rights of the person wishing to emigrate under Art. 2 I of the German Constitution (Grundgesetz) on the other hand.

The assessment must be based on the assumption that the person wishing to emigrate is exercising his/her right to freedom of action. The court's powers are then limited to reviewing how the relocation affects the best interests of the child. The limitation of contact rights is not in itself contrary to the best interests of the child. Rather, contact with both parents must be taken into account as an element of the child's best interest when making a decision in accordance with Section 1671 of the German Civil Code (BGB). The application for transfer of the right to determine residence must be granted if the investigation and consideration of all relevant facts reveals that relocation with one parent is the more favourable solution for the child than remaining in Germany with the other parent.

Conclusion:

Even if the Federal Court of Justice has referred the proceedings back to the Higher Regional Court due to procedural errors, it has laid out clear rules in this respect: The only decisive factor is the best interest of the child. Whether the parent wishing to emigrate has his or her own reasonable, comprehensible reasons for wishing to emigrate is therefore generally irrelevant, unless these reasons have a detrimental effect on the child's welfare. The hypothetical assumption that the parent wishing to emigrate would ultimately remain in the country after all if the right to determine residence were not transferred to him or her is rejected by the Federal Court of Justice with regard to the freedom of action of the parent wishing to emigrate.

Marie von Maydell

GERMANY - JULIA PASCHE

I attach the translated decision of the Federal High Court of Justice (Bundesgerichtshof) dated 11 February 2004 - XII ZR 265/02.

The Supreme Court deals with the validity of prenuptial agreements under German law, based on a decision of the Federal Constitutional Court (Bundesverfassungsgericht) dated 6 February 2001 - 1 BvR 12/92). The constitutional court clarified that an agreement cannot undermine the proper application of the law. This is not guaranteed if there is an unequal negotiation position and unjustified burden on one party.

The Supreme court directs the fact-finding judge in proceedings where prenuptial agreements are challenged. Two dates are significant:

1. The date of the marriage
2. The date of divorce

To define the central issues, the Federal Court of Justice (BGH) set up a ranking and order of the legal consequences of a divorce in regard of the possibility to deviate from the legal provisions. According to the abovementioned judgment of the Federal Court of Justice (BGH) the following sequence of priority shall be decisive for the question of whether an interference in the private autonomy in the modification of the legal consequences of divorce is admissible:

- First rank: Maintenance due to childcare, Sec. 1570 BGB
- Second rank: maintenance due to sickness and old age, Sec. 1572 BGB, Sec. 1571 BGB as wells as equalization of pension rights
- Third rank: maintenance due to unemployment, Sec. 1573 BGB
- Fourth rank: maintenance due to health care/old age provision, Sec. 1578 BGB
- Fifth rank: maintenance due to top-up maintenance/education maintenance, Sec. 1573/1575 BGB
- As the Civil Code expressly allows the separation of property as a matrimonial property regime, prenuptial agreements regarding matrimonial property will rarely be considered inequitable and there must be truly extraordinary circumstances for an agreement providing for modification of the statutory regime.

However, also regulations affecting the central issues (especially the first rank) will be possible if such effects are mitigated by other advantages or moderated by a compensation, or if they are justified by special circumstances of the spouses, the type of marriage desired or lived by them or by other important interests of the benefiting spouse.

The consequence can be the invalidity of the contract or an adjustment to the actual circumstance to compensate the unequal negotiation position and unjustified burden on one party.

(German National Emblem)

FEDERAL COURT OF JUSTICE

(Bundesgerichtshof)

IN THE NAME OF THE PEOPLE

JUDGMENT

XII ZR 265/02

Pronounced on:
February 11, 2004
Breskic,
Court Employee
as Registrar of the
Court Registry

in the Lawsuit

Reference book: yes

BGHZ:[1] yes

BGHR:[1] yes

Civil Code *(8GB)* sees. 138 Cd, 242 Cd, D, 1410, 1585c

Regarding the Review of Contents of Marriage Contracts

Federal Court of Justice *(BGH),* Judgment of February 11, 2004 - XII ZR 265/02 -
Higher Regional Court of Munich *(OLG MOnchen*
Local Court of Augsburg *(AG Augsburg)*

[1] Reference for decisions of the Federal Court of Justice (BGH)

The XIIth Civil Division of the Federal Court of Justice *(BGH*, upon oral proceedings on December 10, 2003, by the Presiding Judge Dr. Hahne (Ms.) and the Judges Sprick, Weber-Monecke, Prof. Dr. Wagenitz and Dr. Ahlt,

held:

Upon the appeal *(on questions of law only)* of the Appellant, the judgment of the 4th Civil Division - which at the same time is the Family Court – of the Higher Regional Court of Munich, Civil Division in Augsburg, dated October 1, 2002, is wholly annulled with respect to Nos. 1. 2. and II. of the operative provisions of the judgment , and is annulled with respect to No. I. 1. of the operative provisions to the extent that the Apellant was ordered to pay maintenance exceeding € 1,278.23 per month.

To the extent of the annulment, the matter is remanded to the Higher Regional Court *(Oberlandesgericht)* to be heard and decided anew, also with respect to the cost of the proceedings on appeal.

Value: € 235,365.

As of Right

Facts:

The Parties who were divorced by decree absolute dispute about post-nuptial maintenance and the equalization of the surplus.

The Appellant who was born in 1948 and the Respondent who was born in 1955 contracted marriage with each other on November 22, 1985, from which they had issue, viz., the children M. and V. born on March 24, 1986, and Mai 21, 1989, respectively.

The Appellant has been working as a business consultant since 1985. The Respondent who had acquired a Master of Arts degree in ancient history, art history, and Germanic studies, directed archeologic excavations, but gave up these activities because of her pregnancy. Upon her husband's wish, she did not any longer pursue her intention to acquire a doctor's degree; she dedicated herself to the household and the education of the children.

On February 17, 1988, the Parties concluded a notarial marriage contract. In this contract, they waived „for the case of divorce ... mutually all and any post-nuptial claims for maintenance, with the exception of the claim for maintenance of the wife for child care." In addition, they agreed on the matrimonial property regime of separation of property. They declared that, so far, no surplus had accrued; as a matter of precaution, they mutually waived all claims to an equalization of the surplus,if any, accrued so far. They excluded the adjustment of pension rights. They based the Respondent's waiver on the condition that the Appellant, not later than from June 1988, effect a capital sum life insurance in the amount of DM 80,000 payable upon completion of the Respondent's sixtieth year of life, with the right to choose an annuity, and that the Appellant regularly pay the respective contributions during the existence of the marriage. In the case of divorce, he was to pay the triple amount of the annual contribution to this insurance in one sum as lump sum settlement. Additional payments were not to be owed by him in the following.

On April 27, 1988, a capital sum life insurance in the amount of OM 80,000.00 was effected for the Respondent with P.L. to which the Appellant made payments in the following. On November 13, 2001, in the divorce proceedings in the Local Court *(Amtsgericht),* he agreed, in deviation from the original contract, to pay the instalments continuously until expiry of the insurance on May 2, 2015.

According to the findings of the Higher Regional Court *(Ober/andesgericht),* the Appellant gained, „in the last few years", a monthly net income of OM 27,000 on the average from employment and self-employment. The Respondent has managed, since 1994, an ,,alternative" toy shop at her place of abode, since recently together with a mail agency. According to her statement, her monthly income from this activity amounts to DM 1,084 before tax. The Parties lived in a house with a flat floor space of 200 sq.ms., on a property of approx. 1,200 to 1,300 sq.ms., which the Parties had rented from the Appellant's brother for a monthly basic rent of OM 2,548. The Respondent received from the Appellant a monthly housekeeping money of OM 2,692 and a compensation of OM 500 per month for her cooperation in his domestic office. Otherwise, the matrimonial standard of living, as far as clothing, furniture and other fittings were concerned, were modest, according to the findings of the Higher Regional Court *(Oberlandesgericht).*

Since February 1999, the Parties lived in permanent separation. The children, according to the concurrent wish of both Parties, have their habitual abode with the Respondent; the Appellant pays maintenance for them in accordance with the highest rate of the O0sseldorf Table *(D0sseldorfer Tabelle).*

The Local Court *(Amtsgericht),* with joint judgment, has divorced the marriage of the Parties and has declared that no adjustment of pension rights will take place.

In addition, the Court ordered the Appellant to pay to the Respondent a basic maintenance of OM 3,671 and a maintenance for old age provision of OM 1,081; the Court refused the Respondent's petitions for maintenance exceeding the foregoing, and the petitions for disclosure and payment of an equalization of the surplus filed under an action by stages. With respect to the dictum on the divorce and on the adjustment of pension rights, the judgment of the Local Court *(Amtsgericht)* has been final since April 13, 2002.

Upon the appeal *(on questions of fact and law)* of the Respondent, the Higher Regional Court *(Oberlandesgericht)* ordered the Appellant to pay basic maintenance to the Respondent, in monthly advance payments of € 2,897, and maintenance for old age provision in the amount of € 952. In other respects, the Court dismissed her appeal with respect to the request for maintenance. The Appellant's cross appeal by which he defended himself against the order to pay more than OM 2,500 (= € 1,278.23) per month for maintenance was likewise dismissed by the Court. With respect to the equalization of the surplus, the Court ordered the Appellant to disclose his assets at the end of the statutory property regime of the community of the surplus, and otherwise remanded the matter to the Local Court *(Amtsgericht)*. With the granted appeal, the Appellant objects against the appellate judgment, as far as he is burdened by it.

Reasons for the Decision:

The appeal leads to a partial annullment of the judgment appealed against and to the remand of the matter to the Higher Regional Court *(Oberlandesgericht)*.

I.

In the opinion of the Higher Regional Court *(Oberlandesgericht)* whose decision was published in FamRZ 2003, 35 (with notes, Bergschneider 39), a claim to an increased maintenance, in addition to maintenance for child care, and disclosure for the purpose of equalization of the surplus is due to the Plaintiff. The notarial contract of the Parties dated February 17, 1988, did not exclude these claims since, in terms of the standards set by the Federal Constitutional Court *(Bundesverfassungsgericht)* in its decisions of February 6, 2001 (FamRZ 2001, 343 with notes, Schwab 349) and of March 29, 2001 (FamRZ 2001, 985), it must be held to be ineffective.

As the Court stated, the Parties indeed mutually waived, under the said contract, all post-nuptial claims for maintenance with the exception of the claim for maintenance of the wife for child care,. By this, however, the Appellant had factually not given up any right, since it was not to be assumed that, with a property of more than one million DM and a high monthly income, he would be in need of maintenance in the case of divoirce. The Respondent, on the other hand, who had no property and – except for the DM 500 from the office work for the Appellant – earned no income, had been totally dependent financially on the Appellant. In accordance with his wish, she had dedicated herself to managing the household. Because of taking care of the daughter M. who at that time was not yet two years old and the daughter V. born on May 21, 1989, she had had practically no prospect of earning her living by gainful employment for years to come. Altogether, the Respondent had thus been unreasonably discriminated by the extensive waiver of maintenance because her contribution in the form of management of the household and taking care of the children - which was of equal value with the Appellant's financial contribution to the matrimonial standard of living - had remained unconsidered for the event of divorce.

The Court stated that, without any objective reason, she had been not only deprived of participation in the matrimonial standard of living which was to be guaranteed by the increased maintenance which was particular valuable due to the Appellant's monthly net income of DM 27,000. Rather, she alone had been also burdened with the risk to make ends meet on her own in old age, sickness or unemployment without any sufficient income.

In the opinion of the Court, the exclusion of any entitlement to maintenance in such cases was not compatible with the best interests of the joint children either. Even if the Appellant paid maintenance to the children in accordance with the highest income group of the Düsseldorf Table *(Düsseldorfer Tabelle),* there was the danger that the Respondent, in the case of invalidity, had to live in conditions which restricted the possibilities for development of the children to a far larger extent than was consistent with the joint economic situation. The insufficient safeguarding of the Respondent in the case of invalidity (disablement) was particularly due to the fact that, by her waiver to the adjustment of pension rights, she had not only lost possible expectancies to an old age pension but also to an invalidity support. This disadvantage was not nearly compensated by the stipulated capital sum life insurance, all the less, since pension expectancies in the amount of DM 590.94 would have been transferred to the Respondent had the adjustment of pension rights been carried through. For the constitution of such pension expectancies by way of a non-recurring contribution, referred to March 31, 2000, an amount of DM 128,748.74 would have been required, thus far more than the insurance sum of DM 80,000 stipulated for the Respondent. This, too, was an unjustified discrimination of the Respondent which causes the agreed waiver of the adjustment of pension rights to appear ineffective, although the decision of the Local Court *(Amtsgericht)* not to carry through an adjustment of pension rights was not appealed from.

The stipulated exclusion of the equalization of the surplus, too, was ineffective in the opinion of the Court, since the Appellant had misused his dominating position, as owner of a property and receiver of an income which by far exceeded the average, to the disadvantage of the Respondent who had no property and practically no income. The Appellant had not restricted himself to securing his inherited property which allegedly had been his motive for the conclusion of the marriage contract. Rather, he had excluded the Respondent from whose part no gains were to be expected from participating in the jointly earned assets. Due to the foregoing, the Respondent had particularly been affected in her old age provision, since, in the case of persons earning a good income, such as the Appellant, property was also used for such purpose, as experience showed.

These statements do not stand up to judicial review.

II.

By agreements made during the marriage, or, as a matter of precaution, already before the marriage, spouses are permitted by law to regulate, with binding force, post-nuptial maintenance and other matters of connected with the rights of provision for old age and property for the case of a later divorce (sec. 1408 paras. 1 and 2, sec. 1585 c Civil Code *[BGB]*).

1. Pursuant to the previous jurisdiction of the Division, full freedom to contract existed on principle for such agreements. A special review of contents as to whether a particular regulation was reasonable did not take place – except for agreements in accordance with secs 1587 o Civil Code *(BGB)* (decision by the Division dated

October 2, 1996 – XII ZB 1/94 – FamRZ 1997, 156, 157; cp. also judgment by the Division dated November 28, 1990 – XII ZR 16/190 – FamRZ 1991, 306). The waiver of post-nuptial maintenance did not affect any of the central issues of marriage (judgment by the Division dated April 24, 1985 – IVb ZR 22/84 – FamRZ 1985, 788). Neither was the essence of marriage defined by the creation of an „economic community for life" or by a participation, in the case of dissolution of the marriage, of the spouses in the changes of property which occurred during the existance of the marriage (judgment of the Division dated April 24, 1985 loc. cit. 789).

Limits to the effectiveness of such an agreement arose solely from secs. 134, 138 Civil Code *(BGB)*. Whether an agreement, in the individual case, was contrary to public policy depended on its overall character inferred from contents, motives, and purpose of such agreement; in this connection, additional aspects could arise from the space of time between such agreement and a divorce which was not intended but only considered to be conceivable (judgments by the Division dated April 24, 1985 loc. cit. and of November 28, 1990 loc. cit. 307).By itself, it was not sufficient that the agreement had been concluded with the intent to contract oneself out of all negative consequences of a divorce (judgment by the Division dated November 28, 1990 loc. cit.). Neither was it sufficient that the regulation could exclusively or predominantly affect one of the two spouses to his/her disadvantage (decision of the Division of October 2, 1996 loc. cit. 157). Finally, the violation of bonos mores of the agreement could not be solely deduced from the circumstance that the contracting woman had been impregnated by the man, and that he had made marriage with her conditional on the conclusion of this contract. Since the man, irrespective of the pregnancy of the woman, could have refrained from marrying and could have withdrawn to the legal obligations of a father not married with the mother, a misuse to be disapproved of a position of constraint of the woman could not be assumed (decisions by the Division of September 18, 1996 – XII ZB 206/94 – FamRZ 1996, 1536, 1537 and of October

2, 1996 loc. cit. 157 fol.). However, a waiver of maintenance could be contrary to public policy, and consequently be void, if the Parties had objectively regulated their family burdens arising from the marriage at the expense of social welfare (judgments by the Division BGHZ 86, 82, 88 dated April 24, 1985 loc. cit. and of July 9, 1992 - XII ZR 57/91 – FamRZ 1992, 1403). In this connection, it was not absolutely necessary that the Parties were conscious of damaging the social welfare institutions by their agreement; it could be sufficient that they had closed their eyes to the fact in a grossly negligent manner (judgment by the Division dated April 24, 1985 loc. cit.).

In addition, the divorced spouse against whom a claim for maintenance had been asserted might be prevented from relying on the waiver of maintenance by the other spouse by reasons of good faith (sec. 242 Civil Code *[BGB]*); in particular, this could be the case if the conditions prevailing at the time of the waiver of maintenance had subsequently developed in a way that predominant interests of joint children worthy of protection were opposed to the assertion of the waiver (judgments by the Division dated April 24, 1985 - IVb ZR 17/84 - FamRZ 1985, 787 fol., and dated October 15, 1986 - IVb ZR 79/85 – FamRZ 1987, 46, 47); here, the Parties might have foreseen the development which later indeed occurred - namely, the divorce with a continuing need of the children for care – already at the time when they concluded the agreement on the waiver of maintenance (judgment by the Division dated July 9, 1992 loc. cit. 1404). However, the duration and amount of the duty to pay maintenance was limited in such case to the extent the best interest of the child(ren) did not demand a continuance of the claim for maintenance (judgments by the Division dated November 28, 1990 loc. cit. 307, dated November 30, 1994 - XII ZR 226/93 – FamRZ 1995, 291, 292, and dated April 16, 1997 – XII ZR 293/95 – FamRZ 1997, 873, 874). With respect to the amount of the claim for maintenance, it was due to the spouse taking care of the child(ren) only to the extent he/she depended on such maintenance for meeting his/her own necessities of life in order to be able to fulfill his/her obligations of care; the spouse taking care of the child(ren)

should only be granted more than the necessary maintenance, if special reasons of the child's/children's best interests demanded such additional maintenance (judgments by the Division dated July 9, 1992 loc. cit. 1405, dated November 30, 1994 loc. cit. 291 fol,. and April 16, 1997 loc. cit 874 fol.).

2. The decisions by the Federal Constitutional Court *(Bundesverfassungs-gericht)* dated February 6, 2001 (loc. cit.) and dated March 29, 2001 (loc. cit.) give rise to review the jurisdiction represented in the foregoing.

a) With the decision dated February 6, 2001 (loc. cit.), by its Division, the Federal Constitutional Court *(Bundesverfassungsgericht)* continued its jurisdiction with respect to the review of the content of contracts of guarantee (NJW 1994, 36) and to the prohibition, without compensation, of competition by commercial agents (NJW 1990, 1469) and transferred the principles developed in those matters to marriage contracts and agreements on maintenance:

According to those principles, the private autonomy guaranteed under art. 2 para. 1 Basic Constitutional Law *(GG)* required that the preconditions for self-determination were actually fulfilled. As a rule, the congruent intent of the contractual parties expressed in the contract allowed to infer that an appropriate reconciliation of interests had been established by the contract which had to be respected on principle by the State. If, however, due to a particularly one-sided imposition of contractual burdens and a considerably unbalanced negotiation position of the contractual parties it was clear that, in the contractual relationship, one of the parties carried such weight that he/she could factually determine the contents of the contract alone, it was the duty of the law to work towards the safeguarding of the basic constitutional rights positions of both parties, in order to prevent that, for one contractual party, self-determination was transformed into hetero-determination.

This was also applicable to marriage contracts by which spouses regulated their strictly personal relations for the time of the marriage or afterwards. In this connection, Art. 6 para. 1 Basic Constitutional Law *(GG)* gave them the right to freely organize their community internally in conjugal responsibility and respect for each other and their family. Protection under the Basic Constitutional Law, however, was only granted to a marriage in which husband and wife enjoyed a partnership based on equal rights. The State, therefore, had to set limits to the freedom of the spouses to organize their matrimonial relations and mutual rights and duties with the help of contracts in cases where the contract was not the expression of a partnership for life based on equal rights, but reflected the one-sided dominance of one spouse based on an unequal negotiating position. Such dominance of one spouse had always to be assumed if an unmarried pregnant woman faced the alternative either to take over custody of the child alone, or to include the father of the child in such responsibility, even if it was at the price of a marriage contract to be concluded with him which, however, puts heavy burdens on her. Whether such a contract imposed noticeably heavier burdens on the wife than on the husband, depended essentially on the question which family constellation the contractual partners envisaged and took as a basis for their contract. If the spouses mutually waived post-nuptial maintenance there was no unequal burden in marriages in which both partners exercised more or less equivalent professional/occupational activities and shared house and family work. If, however, the partners' planning for their life provided that one of the spouses should dedicate himself/herself to the care of the children and to the management of the household, giving up a professional/ occupational activity at the same time, the waiver of post-nuptial maintenance constituted a discrimination of the person who had dedicated himself/herself to the care for the children and to housework. The more statutory rights were contracted out, or additional duties taken over, the more this effect of one-sided discrimination might be increased.

In the opinion of the Federal Constitutional Court *(Bundesverfassungsgericht)*, it was the duty of the courts to review the contents of a contract in cases of disturbed contractual parity with respect to the general clauses under civil law and, if necessary, to correct such contents in order to safeguard impaired basic constitutional rights positions of a spouse. The freedom to marry was not opposed to such review of contents since it did not justify an unlimited freedom of how to arrange a marriage contract nor, in particular, a one-sided distribution of burdens under the marriage contract. Correspondingly, a part of marriage law was traditionally mandatory law.

Whereas the abovementioned decision by the Division only concerned the effectiveness of a marriage contract stipulation concluded before the marriage in which a pregnant woman, inter alia, had agreed to partially release the husband and father of her child, in the case of divorce, from claims for maintenance of the child to be expected, the Federal Constitutional Court *(Bundesverfassungsgericht),* in the decision by its Division dated March 29, 2001, (loc. cit.) continued this jurisdiction and objected to a decision by a Higher Regional Court *(Oberlandesgericht)* which awarded to the wife only the necessary maintenance for child care, but had dismissed her additional petitions for maintenance, equalization of the surplus and adjustment of pension rights. The spouses had contractually excluded post-nuptial maintenance, equalization of the surplus and adjustment of pension rights. In the opinion of the Federal Constitutional Court *(Bundesverfassungsgericht),* the Higher Regional Court should have taken the special situation in which the wife as a pregnant woman with already one child - severely disabled, too - (from another relationship) had found herself at the time of the conclusion of the contract and which alone should have been a clear indication for her inferiority as a contractual party, as a reason to subject the whole of the contents of contract to a review; in this connection, the Court should have examined the question whether the marriage contract did not burden the wife – especially in her family situation and her economic constraint – in a one-sided and unjustified manner.

3. The question which consequences arise from the said decisions for the judgment of marriage contracts in general – that is, also in cases in which the wife was not pregnant at the time of the conclusion of the marriage contract – is answered differently in specialized literature and by the professional public.

a) Differences already exist in judging at which point – generally – a one-sided distribution of burdens in the case of divorce may be assumed.

According to one opinion, such one-sided distribution of burdens exists, at any rate, in cases where the „central issues of the statutory system of legal consequences of divorce" are affected. Such „central issues", in the said opinion, should include at least those regulations of post-nuptial maintenance which are connected with a need caused by the marriage, possibly also the adjustment of pension rights, not, however, the equalization of the surplus, at least not automatically (Dauner-Lieb AcP 200 [2001] 295, 319 fol.).

According to a further opinion, the understanding of marriage of the Civil Code *(BGB)* did not require a definite attribution or participation on the level of property. Neither did conjugal solidarity demand a mutual participation in property since such solidarity was not connected with states of need and thus did not have to fulfill a function under maintenance law. Doubts were, however, arising if the agreement of separation of property was connected with additional agreements which endangered the situation regarding old age provision of the spouse who, according to the planned or lived organization of conditions, was in particular need of a social safeguarding „due to the marriage". Even without such cumulation, an agreement regulating the matrimonial property regime could be questionable, if under such agreement not alone the future allocation of property was regulated, but established legal positions were waived. The adjustment of pension rights, although it did not recur to states of

need, was closer to maintenance than to the equalization of the surplus; nevertheless, it had to be assumed that, within the statutory limits – which were narrower in this case – the adjustment of pension rights was subject to the freedom to arrange marriage contracts (Schwab DNotZ 2001, 9, 15 fol.).

According to a third opinion, the responsibility of spouses for each other (sec. 1353 para. 1 sentence 2, second half-page *[Civil Code]*) was mandatory law, which, though it was open to the self-understanding of the parties, did not permit any interpretation in a marriage contract.

On the German Meeting of Family Courts *(Deutscher Familiengerichtstag)* of 2003, the working group of „Agreements on Maintenance" held, on principle, a waiver of maintenance to be admissible, not, however, a full waiver of maintenance for child care. According to the opinion of the working group „Agreements on the Adjustment of Pension Rights", a „global waiver" of maintenance, equalization of the surplus and adjustment of pension rights should be possible on principle, but should only be held to be unproblematic if there was a sufficient safeguarding against old age and invalidity (disablement) risks.

b) The importance attached to an imbalance between the contractual parties is also assessed differently. One part of the experts conclude that the question of whether a wife is discriminated by a marriage contract had at any rate to be denied in cases in which the latter had been instructed by a notary public on the contents of the respective contract and had concluded such contract without any pressure of time (Langenfeld DNotZ 2001, 272, 279). According to another opinion, a situation of inferiority of a spouse could actually be presumed in the case of a particularly pronounced objective discrimination of one spouse by the marriage contract (Schwab DNotZ loc. cit. 15; similarly, the working group of „Agreements Regarding the Adjustment of Pension Rights" of the German Meeting of Family Courts of 2003 *[Deutscher Familiengerichtstag 2003]*: „refutable presumption"). A third opinion

recommends „ to free oneself from the tensed-up search for situations of imbalance" and to „teleologically reduce" the freedom to arrange marriage contracts quite generally with respect to a potential one-breadwinner marriage in matters concerning the central issues of the system of legal consequences of divorce (Dauner-Lieb AcP loc. cit. 323; followed also by Goebel loc. cit. 1518).

c) The Federal Constitutional Court *(Bundesverfassungsgericht)* expressly left the question unanswered with which instruments the specialized courts should carry through the review of contents assigned to them. In this connection, a sanctioning is considered in specialized literature which differentiates between sec. 138 para. 1 and sec. 242 Civil Code *(BGB)* in accordance with the measure of discrimination (Schwab FamRZ 2001, 349, 350; idem DNotZ loc. cit. 17 fol; Bergschneider FamRZ 2001, 1338, 1340; in the same direction, also the abovementioned working groups of the German Meeting of Family Courts of 2003 *(Deutscher Familiengerichtstag 2003)*. In this connection, the narrow limits are underlined which are drawn for the corrective effect of sec. 138 Civil Code *(BGB)*; at the same time, attention is drawn to the lack of structural suitability of a review of effectiveness which was laid out for general regulations worded in advance (Dauner-Lieb loc. cit. 328). Neither did Sec. 138 Civil Code *(BGB)*, with its consequence of nullity, fulfill the requirement of the least possible interference with the freedom to arrange marriage contracts (Goebel loc. cit. 1519). As far as the principles of the clausula rebus sic stantibus (e.g. Bergschneider FamRZ 2003, 376, 378) and the supplementary interpretation of the contract were taken into consideration, there is unanimity that these instruments – in spite of their differentiation in detail – will fail if the contractual parties held the later development merely to be possible and nevertheless agreed on an intentionally final regulation; just that would be frequently the case in waivers stipulated in marriage contract (Dauner-Lieb loc. cit. 326 fol.). For this reason, an control of the exercise of rights is recommended which the Federal Court of Justice *(Bundesgerichtshof)* – as stated – has made use of before, invoking sec. 242 Civil Code *(BGB)*, for softening the hard consequences of a principally „full freedom to arrange marriage contracts" (Goebel

loc. cit. 1519 fol., Grziwotz FF 201, 41, 44; Schervier MittBayNot 2001, 213, 214). In this connection, an extension of the institute of the control of the exercise of rights is demanded: Such control should also be extended to constellations of cases in which the marriage contract did not effect any burdening of third parties – such as joint children – but discriminated only one of the spouses themselves in a one-sided and unjustified manner. In addition, the control of the exercise of rights should also cover discriminations of a spouse which were created by circumstances which could already be foreseen at the time of the conclusion of the contract and which – because they had been protected by the original intent of the parties – did not easily let the reliance on the contractual stipulation appear to be a misuse of rights (Dauner-Lieb loc. cit. 328 fol.).

III.

In the opinion of the Division, the question under which conditions an agreement by which spouses regulate their relations with regard to maintenance or property for the case of divorce, in derogation from the statutory provisions, will be ineffective (sec. 138 Civil Code *[BGB]*), or renders reliance on all or individual contractual regulations inadmissible (sec. 242 *[BGB]*) cannot be answered in a general sense nor conclusively for all cases conceivable. Rather, a overall view of the agreements concluded, the reasons and circumstances of their being brought about, and of the intended and realized organization of conjugal life was necessary. In this connection, considerations have to be based on the following principles:

1. The statutory regulations on post-nuptial maintenance, equalization of the surplus and adjustment of pension rights are on principle subject to the contractual disposition of the spouses; applicable law does not know of any unrenounceable minimum content of the legal consequences of divorce in favour of the benefitting spouse.

a) The legislator, on the one hand, has confronted the principle laid down in sec. 1569 Civil Code *(BGB),* viz., that each spouse, after the marriage, is responsible for himself/herself with respect to maintenance, with a nearly complete system of claims for maintenance which were to secure the protection of the socially weaker spouse after the divorce and are to compensate him/her in particular for disadvantages caused by the marriage which he/she had suffered, for the sake of the marriage or the education of children, in his/her own professional/occupational career and the building up of a corresponding old age provision. Under secs. 1353, 1356 Civil Code *(BGB),* on the other hand, the legislator guaranteed the right of the spouses protected by the Basic Constitutional Law to organize their matrimonial community of life, in their own responsibility and free from statutory regulations, in accordance with their individual ideals and needs. In this respect, the contractual freedom relating to the legal consequences of divorce is a necessary supplementation of the guaranteed right and originates from the legitimate need to agree on deviations from the legal consequences of divorce regulated by law which better fit the individual idea of marriage of the spouses. The risks of life of a partner, for example, which are inherent in in a sickness apparent already before the marriage, or in a training which clearly does not promise to become any basis for income, may be excluded from the mutual responsibility of the spouses from the beginning. The conception of conjugal solidarity, too, which is not restricted to the duration of the marriage – also in the merely programmatic form, indistinct in its contours, of sec. 1353 para. 1 sentence 2 half-page 2 Civil Code *(BGB)* introduced in 1998 together with the right to conclude a marriage which demands a mutual responsibility of the spouses for each other (cp. Wagenitz, Publication in Honour of Rolland 1999, 379, 381 fol.) - is neither intended nor suited to establish duties to pay

permits modifications in a marriage contract with regard to the adjustment of pension rights up to its total exclusion, too, which, however, will be ineffective if one spouse files a petition for divorce within one year's time. Also in connection with an intended divorce the spouses may conclude, pursuant to sec. 1587 o Civil Code *(BGB),* agreements regarding the adjustment of pension rights. Such agreements, however, will require the permission of the family court in accordance with sec. 1587 o para. 2 Civil Code *(BGB),* and a judicial review of the contents, which has to consider the regulation of maintenance and the apportionment of assets and liabilities and has to give thought to a settlement between the spouses which is reasonable in manner and amount.

2. The principal disponibility of the legal consequences of divorce, however, must not produce the result that the protective purpose of the statutory regulations can be arbitrarily avoided by contractual agreements. This would be the case if a clearly one-sided distribution of burdens would be created which was not justified by the individual arrangement of the matrimonial standard of living, the acceptance of which – with due consideration of the interest of the other spouse and his reliance in the effectiveness of the agreement made - could not be expected from the burdened spouse in a reasonable understanding of the character of marriage. The burdens of one spouse will be considered to be the heavier, and the examination required for the interests of the other spouse will be the more exacting, the more directly the exclusion of statutory regulations by the marriage contract interferes with the central issues of the law regulating the legal consequences of divorce.

a) These central issues include, in the first line, the maintenance for child care (sec. 1570 Civil Code *[BGB]*) which, for the reason of its orientation to the best interests of children alone, is not subject to the free disposition of the spouses. However, the maintenance for child care is not exempted from any modification, either. Nevertheless, cases can be imagined in which the type of the profession/

maintenance in which a post-nuptial solidarity is concretized as mandatory law withdrawn from the disposition of the parties (as, however, confirmed by Goebel, loc. cit. p. 1516). Accordingly, Sec. 1585 c Civil Code *(BGB)* contains no limitation in the direction of an unrenounceable minimum content of rights.

b) The equalization of the surplus is less the result of post-nuptial solidarity than the expression of a justice of participation which, in the individual case, may compensate for disadvantages due to the marriage, but in its character by far exceeds this aim and, for this reason, is subjected, by sec. 1408 para. 1 Civil Code, *(BGB),* to the disposition of the spouses. In fact, the Federal Constitutional Court *Bundesverfassungsgericht)* has made it clear in another context that services rendered by the spouses in their joint efforts to support the conjugal community were of equal importance irrespective of their economic valuation, and that, for this reason, both spouses on principle had a claim to equal participation in the jointly earned assets (BVerfG FamRZ 2002, 527, 529). This fictitious equal valuation, however, does not exclude the possibility for spouses to take reasonable account of their distribution of work individually agreed upon or a clearly different economic valuation of their contributions in the marriage by a concerted regulation deviating from the law.They are also at liberty to counter, in the individual case, results of the statutory property regime which are felt to be unfair – for instance with respect to increases of value of the initial assets – by the choice allowed to them by law of the separation of property.

c) These considerations are also applicable to the adjustment of pension rights – at any rate on principle – which, in its aim, may be understood as an anticipated old age maintenance, on the other hand, however, imitates the mechanism of the equalization of the surplus. Sec. 1408 para. 2 Civil Code *(BGB)*, therefore, expressly

occupation of the mother permits her to reconcile child care and gainful activity/employment with each other without the child suffering damage to its education. Neither does a full-time care by the mother seem to be an indispensable precondition for a good educational success so that spouses may also come to an understanding about calling in a third party for child care, from a certain age of the child, in order to enable the mother to re-enter working life as early as possible.

When orienting oneself to the central issues of the legal consequences of divorce, it will be possible to set an order of priorities for the latters' disponibility which is measured in the first line by the importance of the individual regulations for the legal consequences of divorce for the person entitled to such benefits in his/her actual situation. Thus, for example, the satisfaction of the current need for maintenance is more important, as a rule, for the beneficiary than the equalization of the surplus or the later adjustment of pension rights. Among the elements of maintenance, maintenance in the case of sickness (sec. 1572 Civil Code *(BGB)*) and old age maintenance (sec. 1571 Civil Code *(BGB)*) will have priority – after maintenance for child care (sec. 1570 Civil Code *(BGB)*). Admittedly, the latter elements of maintenance are not connected with disadvantages due to marriage. This does not mean, however, that they do not belong to the central issues of the statutory regulation of the legal consequences of divorce and are subject to the unlimited disposition of the spouses. By the very fact that the law restricts itself to a merely chronological connection with marriage it attaches special importance to these duties to be responsible for each other as an expression of post-nuptial solidarity – a fact which, it is true, does not generally exclude a waiver, for instance, if the marriage was concluded only after the breakout of a sickness or in old age. The duty to pay maintenance because of unemployment (sec. 1573 Civil Code *(BGB)*) appears to have lower priority compared to the foregoing, since the law anyway transfers the risk of a loss of employment to the beneficiary as soon as the latter has found a permanently safe job (sec. 1573 para. 4; cp. also sec. 1573 para. 5 Civil Code *(BGB)*. The duty to pay maintenance because of unemployment is followed

by maintenance in case of sickness and maintenance for old age provision (sec. 1578 para. 2.1, variant, para. 3 Civil Code *[BGB]*). The claims that can most easily be waived appear to be claims for increased maintenance and claims for maintenance for educational purposes (sec. 1573 para. 2 sec 1575 Civil Code *[BGB]*), since the latter types of maintenance duties were least defined by law and can not only be limited in the amount (cp. sec. 1578 para. 1 sentence 2 Civil Code *[BGB]*) but basically also in time (sec. 1573 para. 5, sec. 1575 para. 1 sentence 2 Civil Code *[BGB]*).

b) The adjustment of pension rights is placed in the same rank as old age maintenance. As an anticipated old age maintenance, it is open for contractual disposition only to a limited extent. Therefore, agreements on the adjustment of pension rights have to be examined in accordance with the same criteria as a complete or partial waiver of maintenance. As participation in the pension rights assets acquired in the marriage, the adjustment of pension rights, on the other hand, is similar to the equalization of the surplus; this fact may justify a more extensive right of disposition, at least in the case of pensions that are noticeably higher than the average.

c) The equalization of the surplus proves to be the element that is most open to contractual disposition. As Schwab has rightly pointed out (loc.cit. p. 16), the understanding of marriage requires no definite allocation of earned assets in marriage. The conjugal community of life – also a a partnership of husband and wife based on equal rights – has not necessarily been a community of property, too. Also the equality of importance of gainful activity and family work which has been emphasized by the Federal Constitutional Court *(Bundesverfassungsgericht) (to be the basis)* for the right of post-nuptial maintenance does not result in a definite structuring of the area of matrimonial property. As illustrated by sec. 1360 sentence 2 Civil Code *(BGB)* (cp. also sec. 1606 para. 3 sentence 2 Civil Code *[BGB]*), it is not the earned income of one spouse and the management of the household by the other spouse that are of equal value. For the fulfilment of the claim to family maintenance, only such contributions to maintenance are of equal weight as are

made by the spouses from their earned income or as family work (Federal Constitutional Court *[BVerfG]* FamRZ 2002 loc. cit; likewise also Gernhuber/Coester-Waltjen, Textbook of Family Law *(Lehrbuch des Familienrechts],* 4th edition sec. 34 I 5 p. 495, especially footnote 4). Admittedly, the statutory property regime provides for an equal participation of the spouses in the jointly gained assets. This regulation is based on the standardized conception that the spouses contribute to the formation of property in a manner of equal economic value. This – only fictitious – equivalence, however, does not prevent the spouses from adapting, in mutual agreement, their internal regulation of property, by modification or deselection of the standard matrimonial property regime, to the individual conditions of the form of marriage envisaged or lived by them, and thereby replacing the statutory standard by economic valuations of their own. After all, the principle of conjugal solidarity does not demand any mutual participation of property by the spouses: Their responsibility for each other (sec. 1353 para. 1 sentence 2 2nd half-page, Civil Code *[BGB]*) appears in cases of concrete and present need for provision; as shown, the applicable law of maintenance takes account of such need. Applicable matrimonial property law, on the other hand, is not connected with situations of need; the participation in the gained assets intended by the standard statutory property regime has no functions regarding maintenance rights (Schwab loc. cit.). It is true that, in an overall view, the situation with respect to provision of the spouse who is not working, or not working full-time, is also influenced by matrimonial property law in the individual case. Grossly unfair deficits of provision which result from the agreements concluded by the spouses for the case of divorce have to be compensated, in the first line, by the law of maintenance – since it is oriented to need – and, at the most, by an alternative correction of the regulation of property chosen by the spouses.

3. Whether a clearly one-sided distribution of burdens is created by an agreement deviating from the statutory the legal consequences of divorce, the acceptance of which appears to be untolerable for the burdened spouse, is a question which has to be decided by the fact-finding judge. This task does not become obsolet by the fact that the burdened spouse had been sufficiently instructed

on the contents and consequences of the contract (other opinion: Langenfeld loc.cit.) since anyhow such examination and instruction will take place only in the case of agreements in notarial form such as provided for under sec. 1408 para. 1 in connection with sec. 1410, sec. 1587 o para. 2 sentence 1 Civil Code *(BGB)*, not, however, in the case of agreements on maintenance which may be concluded by private document or informally – as permitted under sec. 1585 c Civil Code *(BGB)*.

a) In this connection, the fact-finding judge first has to examine, within the scope of an effectiveness control, whether the agreement, already at the time of its making, clearly leads to such a one-sided distribution of burdens for the case of divorce that, irrespective of the future development of the spouses and their standard of living, recognition by the legal order has to be wholly or partially denied to such agreement because it violates public policy. Such denial of recognition will have the consequence that the agreement will be replaced by the statutory regulations (sec. 138 para. 1 Civil Code *[BGB]*). In this connection, an overall evalution will be required which refers to the individual conditions at the time of the conclusion of the contract, thus especially to the income and property situation, the planned or already realized pattern of the marriage and to the effects on the spouses and the children. Subjectively, the purposes pursued by the spouses by means of the agreement and the other motives have to be taken into consideration which caused the benefitting spouse to demand that particular arrangement of the marriage contract, and which induced the discriminated spouse to fulfill his wish. As a rule, the verdict of violation of bonos mores will only be possible if, by the contract, regulations belonging to the central issues of the law on the statutory legal consequences of divorce are excluded wholly or to a large extent, without this disadvantage for the other spouse being

mitigated by other advantages or being justified by the special situation of the spouses, the type of marriage envisaged or lived by them, or by other important interests of the benefitting spouse.

b) If, after such examination, a contract is considered to be legally valid, the judge has to examine – within the scope of the effectiveness control – whether, and to which extent, a spouse misuses the legal power granted to him under the contract if, in the case of divorce and with respect to a legal consequence of divorce desired by the other spouse, he relies on the fact that such legal consequence had been effectively excluded by by the contract (sec. 242 Civil Code *[BGB]*). For such examination, not only the conditions at the time of the conclusion of the contract are decisive. Rather, the essential criteron will be whether at present - at the time of the breakdown of the conjugal community - a clearly one-sided distribution of burdens results from the exclusion of the legal consequence the acceptance of which cannot be expected from the burdened spouse, even if the interests of the other spouse and his confidence in the effectiveness of the stipulation agreed upon, as well as a true assessment of the essence of marriage are reasonably considered. That will be the case, in particular, if the actual organization of the matrimonial living conditions mutually agreed upon is basically different from the original planning of life on which the contract was based. At this point, a spouse will not be able to demand post-nuptial solidarity if he/she has violated matrimonial solidarity on his/her part; if a reasonable adjustment of disadvantages caused by the marriage is under consideration, points of fault will be of lesser importance. Altogether, the required weighing will have to be oriented to the order of priority of the legal consequences of divorce: The higher the priority of the legal consequence of divorce which was excluded by contract and nevertheless is asserted now, the weightier the reasons must be that speak for their exclusion, due consideration being paid to the pattern of marriage actually realized in mutual agreement.

If the reliance of a spouse on the contractual exclusion of the respective legal consequence of divorce does not stand the test of the judicial review of the exercise of rights, this failure alone does not lead, under sec. 242 Civil Code *(BGB),* to an ineffectiveness of the contractually agreed exclusion. Neither will the legal consequence of divorce provided by law, but excluded by contract, be put into effect.

Rather, the judge will have to decree that legal consequence to be carried through which takes account, in a well-balanced manner, of the justified interests of both parties in the situation that has now arisen. In this connection, he will have to orient himself all the more to the legal consequence provided for by law the more such legal consequence belongs to the central issues of the law governing the legal consequences of divorce.

IV.

The decision under appeal does not meet the described requirements of judicial control of the effectiveness and exercise of rights in agreements on maintenance rights and in marriage contracts.

1. The Higher Regional Court *(Oberlandesgericht)* held the contract as a whole to be ineffective because the Respondent had waived the claims for maintenance under secs. 1571 to 1576 Civil Code *(BGB),* and therefore an inadequate regulation had been concluded to the one-sided disadvantage of the Respondent. The fact that the Parties had let maintenance for child care continue did not make any difference for this judgment since the said maintenance was only a minimum maintenance which, in accordance with the jurisdiction of the Federal Court

of Justice *(Bundesgerichtshof)*, had to be allowed to an educating parent in the interest of the children in need of care, anyway.

This opinion of the Higher Regional Court *(Oberlandesgericht)* is not supported by the actual fact-findings of the judgment under appeal. As stated, such ineffectiveness could only arise from sec. 138 para. 1 Civil Code *(BGB)* in connection with an overall viewing of the regulations agreed upon (effectiveness control). The preconditions for a violation of bonos mores, however, are neither explained nor otherwise evident.

a) It cannot be seen which reasons caused the Parties to conclude their agreement. In particular, it was not found what motives caused the Respondent to contractually waive part of the rights due to her in the case of divorce, if any. The Higher Regional Court *(Oberlandesgericht)* assumes an inferiority of the Respondent at the time of the conclusion of the contract which was misused by the Appelant. In view of the restriction of sec. 138 para. 1 Civil Code *(BGB)* to serious violations of moral standards, such an evaluation even lacks the factual basis. At the time of the conclusion of the contract, the Respondent had been married for more than two years to the Appellant and was not again pregnant. She had an academic training which she had already used professionally with success; the interruption in the exercise of her profession which had been caused by the birth of her (first) child took place little more than two years ago. A complete financial dependence of the Respondent on the Appelant, as assumed by the Higher Regional Court *(Oberlandesgericht)* in its evaluation has not yet been established by these facts. The circumstance underlined by the Higher Regional Court *(Oberlandesgericht)* that the Respondent, in connection with her pregnancy and upon the wish of the Appellant, had not pursued the acquisition of a doctor's degree is of no importance for the question whether her waiver of the statutory legal consequences of divorce constituted a violation of bonos mores. The same applies to the good income and

property situation of the Appellant to which the Higher Regional Court *(Oberlandesgericht)* refers, without, however, ascertaining it for the time of the conclusion of the contract. From the favourable financial situation of the Appelant, in particular, no position of constraint of the Respondent may be deduced which might have caused her to consent to a partial waiver of rights granted to her by law for the case of divorce, which rights, with an income situation exceeding the average, were particularly „valuable", as stated by the Higher Regional Court *(Oberlandesgericht)*.

b) According to the foregoing findings, the objective contents of the notarial agreement concluded by the Parties cannot substantiate the reproach of a violation of bonos mores, either.

This is due to the fact that the immediate central issues of the statutory legal consequences of divorce were not affected. Rather, the Parties did not exclude maintenance to the extent a „claim for maintenance of the wife for child care" was under consideration. In accordance with the interpretation of the agreement which was omitted by the Higher Regional Court *(Oberlandesgericht)* and, for this reason, had to be carried through by the Division instead, this regulation was not only intended to include the claim arising automatically under sec. 1570 Civil Code in the case of a required full-time child care. Rather, according to correct understanding, also the claim for an increased maintenance in accordance with sec. 1573 para. 2 Civil Code *(BGB)* was included which arises in addition to the partial claim under sec. 1570 Civil Code *(BGB)* if a spouse, due to the advancing age of the children, works in a part-time employment/self-employment. According to the jurisdiction of the Division (judgment by the Division dated December 13, 1989 – IVb ZR 79/89 – FamRZ 1990, 492, 493 fol.), the claim for maintenance under sec. 1570 Civil Code *(BGB)* , in this case, only extends to the point where the child care prevents a spouse from exercising his/her profession. If the maintenance due to him/her under sec. 1570 Civil Code *(BGB)* together with the income from a part-time employment/self-employment is not sufficient to cover his/her full maintenance in accordance with the

matrimonial standard of living (sec. 1578 Civil Code *[BGB])*, an additional increased maintenance in accordance with sec. 1573 para. 2 Civil Code *(BGB)* is eligible. At this point, it cannot be assumed that the Parties intended to leave to the Respondent only such claim for maintenance as can be directly derived from sec. 1570 Civil Code *(BGB)*, all the less so as this differentiation was only developed by the Division after the conclusion of the contract. Rather, according to the wording, aim and object of the agreement, the waiver of maintenance by the Respondent was to be restricted to the time after the cessation of any kind of child care. For the time of full or partial need of the children for care, she was to be entitled to demand maintenance in accordance with the statutory provisions, irrespective of whether such maintenance was directly based only on sect. 1579 Civil Code *(BGB)*, or partly also on sec. 1573 para. 2 Civil Code *(BGB)*. Also with respect to the amount, no limitation ensues from the contract, as for instance limitation to the minimum maintenance. Both partial claims were to be defined in accordance with the conjugal standard of living, and were to guarantee to the Respondent the continuance of the previous standard of living.

With the maintenance for sickness and old age, the Parties, indeed, excluded important legal consequences of divorce. In connection with the other regulations, such exclusion could only justify the reproach of violation of bonos mores if the Parties, in their planning of life, had in mutual agreement assumed at the time of the conclusion of the contract that the Respondent would permanently or for a long time withdraw altogether from working life, and would dedicate herself to family work, since only in that case the Respondent would have been permanently prevented from building up a safeguarding of her own against the risks of old age or sickness and a lasting dependence of the Respondent on the Appelant would have been established. Such planning of life in mutual agreement, however, was not found to exist.

Admittedly, the effect of the agreed waiver of maintenance for age which discriminates the Respondent was increased by the fact that the parties also excluded the adjustment of pension rights. This exclusion, however, is mitigated by the contractual obligation of the Appellant to effect, and to maintain, a capital sum life insurance for the wife. The circumstance that, according to the findings of the Higher Regional Court *(Oberlandesgericht),* pension rights of the statutory social security pension insurance in the amount of approx. DM 590 would have had to be transferred to the Respondent if the adjustment of pension rights had been carried through, for the constitution of which a lump-sum payment of approx. DM 128,000 would have had to be paid in, possibly reduces, in retrospect, the importance of this life insurance in the nominal amount of DM 80,000 as compensation for the exclusion of the adjustment of pension rights. A violation of bonos mores, however, may not be deduced from this fact, since it is not evident that, at the time of the conclusion of the contract, it could have been foreseen that the Appellant would acquire pension expectations in the future from which he would have to transfer approx. DM 590 to the Respondent. In addition, the insurance sum of a capital sum life insurance is not identical with a payment from this insurance to be expected upon expiry (in this case, according to information by the insurance: DM 172,294); in addition, both amounts are not comparable, from their mere function, with the non-recurring contribution to the statutory social security pension insurance. Although the Higher Regional Court *(Oberlandesgericht)* correctly points out that the capital sum life insurance did not procure any protection against invalidity for the Respondent, the statutory social security pension insurance did not provide any absolute protection against invalidity to a spouse entitled to the adjustment of pension rights, either, but only subject to the condition of a three-years' payment of compulsory contributions within the last five years before the earning capacity of the spouse concerned is reduced (sec. 43 para. 1 sentence 2, para. 2 sentence 1 No. 2 Code of Social Law *(SGB)* VI; cp. also sec. 1587 o para. 2 sentence 4 Civil Code *(BGB)* which, in its amendment applicable

since January 1, 2000, no more demands the qualification of alternative safeguarding measures also „for the case of incapacity for work".

The exclusion of the duty to pay maintenance agreed upon by the Parties for the case of unemployment and the waiver of increased maintenance (for the time after child care) and of maintenance for equitable reasons do not justify the verdict of violation of bonos more – also because of their importance within the system of legal consequences of divorce. The same applies to the exclusion of the statutory property regime.

2. If it turns out that the agreements concluded by the Parties stand the test, also subjectively, of a judicial control of effectiveness in accordance with sec. 138 para. 1 Civil Code *(BGB),* it remains to be examined whether, and to which extent, the Appellant is prevented by sec. 242 Civil Code *(BGB)* to rely on the agreed exclusion of individual legal consequences of divorce (control of exercise of rights).

a) For the time in which the children will need care, the Appellant, as stated, is obliged to pay maintenance, if merely because of the fact that the Parties have not excluded his respective maintenance duty; therefore, the Higher Regional Court *(Oberlandesgericht)* has rightly ordered the Appellant to pay maintenance on the merits.

For the time after child care, a duty of the Appellant to pay maintenance might arise in particular from sec. 1573 para. 2 Civil Code *(BGB).* If the waiver of such maintenance contractually declared by the Respondent should not prove to be ineffective in accordance with sec. 138 para. 1 Civil Code *(BGB)* alone, and if such follow-up maintenance should have to be decided, the court in question will have to examine to which extent the Appellant will be entitled to rely on this waiver in accordance with sec. 242 Civil Code *(BGB).* The fact-finding judge will have to take account of the fact – within the scope of his control of the exercise of rights – that the Respondent, in connection with the birth of the first child, had stopped her

professional activity and had dedicated herself to family work, and later to self-employed work which although it was not in keeping with her qualification acquired by professional training but apparently can be reconciled with the management of the household and the care for the – in the meantime two – children. By giving up her professional activity, the Respondent has assumed a risk which, with the breakdown of the marriage, will become a disadvantage when the children's need for care will end and it will turn out that a „re-entry" into her profession will not be possible for the Respondent, or only under clearly less favourable conditions. If it was a joint decision of the Parties that the Respondent, in the interest of the family, should permanently abandon any further activity in the profession she was trained for, it could appear to be unfair if the Appellant, relying on the notarial agreement, would burden the Respondent alone with the unfavourable consequences of such agreement. Admittedly, it could be admissible to deny to the Respondent an increased maintenance in accordance with the matrimonial standard of living (sec. 1573, para. 2, sec. 1578 para. 1 Civil Code *[BGB]*) on the basis of her waiver of maintenance assumed to be effective in this connection. Within the scope of a judicial control of the exercise of rights, however, the Respondant may nevertheless be granted a claim for maintenance compensating her, at any rate, for her disadvantage in earning capacity which is due to the marriage. The amount of such maintenance could be assessed in accordance with the difference between the income which the Appellant could gain on the basis of a permanently exercised professional activity in keeping with her training (sec. 287 Code of Civil Procedure *[ZPO]*) and the earnings she gained, or could gain, from a full-time professional/occupational activity which after the abandonment of her profession was still possible for her and could be expected from her; such claim will, at any rate, not exceed the full maintenance assessed in accordance with the matrimonial standard of living.

b) Unless the marriage contract proves to be ineffective pursuant to sec. 138 para. 1 Civil Code *(BGB), t*he duty of the Appelant to disclose his surplus achieved in

in the marriage which was pronounced by the Higher Regional Court *(Oberlandesgericht)* can only continue if the Appellant is prevented by sec. 242 Civil Code *(BGB)* to rely on the separation of property agreed upon by the Parties. This is not the case – at least not on the basis of the findings of the Higher Regional Court *(Oberlandesgericht)* made so far.

The equalization of the surplus does not belong to the central issues of the law on the legal consequences of divorce; as shown, it is open, to a large extent, to contractual disposition. For this reason, reliance on an effectively contracted separation of property will only prove to be a misuse of rights under very narrow conditions, such as in a case where spouses based their agreement on a professional activity of both parties with economically comparable incomes but where this planning later on could not be realized. In such cases of exception and in similar circumstances, special conditions may let it appear unfair, irrespective of agreements made, if the spouse who had not been gainfully employed/self-employed afterwards lost the profit of his/her cooperation in the marriage. In this case, however, matters are different. In particular, the circumstance stressed by the Higher Regional Court *(Oberlandesgericht)*, viz., that the Respondent, in the marriage, had dedicated herself to the management of the household and the education of the children, does not prevent the Appellant, according to the principle of good faith, to rely on a separation of property agreed upon effectively by the Parties. In view of the fact that the Respondent had at least temporarily given up a gainful employment/self-employment of her own in favour of the family and in view of the duration of her marriage, it is true that she can no more be expected to put up with with a standard of living, after the divorce, which corresponds to her own chances of gainful employment/self-employment which possibly are noticeably reduced by her having not worked in the meantime. Such cases, however, cannot be remedied by a participation in property which is contrary to the agreements in the marriage contract; rather, a need exceeding the own earnings of the spouse who was not gainfully

employed/self-employed in the marriage can only be satisfied in accordance with legal principles by instruments of the law on maintenance. This also applies if the statutory claims for maintenance were effectively excluded; in this case – as shown – a periodical maintenance to be granted by way of judicial control of the exercise of rights can compensate for disadvantages which were caused by the marriage in a manner meeting the requirements of the individual case.

Also the other points of view set forth by the Higher Regional Court *(Oberlandesgericht)* are not capable of supporting the reproach of misuse of rights. A particularly high income – at least in the last few years – of the Appellant does not compel a participation of the Respondent, which is inconsistent with the concluded agreement on the matrimonial property regime; the same applies to the assumption for which no detailed proof was furnished that is was the Respondent - who worked full-time in her shop – who had made it possible for the Appellant, by her management of the household and care for the children, to fully dedicate himself to his professional activity. The interests of the joint children are not affected by the allocation of the parental property. Other circumstances which are of importance for sec. 242 Civil Code *(BGB)* are not evident.

V.

After all the facts stated, the decision under appeal cannot remain effective. The Division is unable to finally decide on the merits of the case on the basis of the findings of the Higher Regional Court *(Oberlandesgericht)*. For this reason, the matter had to be remanded to the Higher Regional Court *(Oberlandesgericht)* so that it may subsequently undertake the findings required for the control of effectiveness and the control of the exercise of rights.

For the further proceedings, the Division draws attention to the following:

1. As stated, the Respondent is entitled to claim maintenance from the Appellant in acordance with the matrimonial standard of living for the time in which the joint children need to be cared for. In assessing such maintenance, the Higher Regional Court *(Oberlandesgericht)* correctly applied an objective standard and held such standard of living to be decisive which seems to be adequate from the point of view of a reasonable observer taking due consideration of the concrete income and property conditions. It is only within these limits that the actual consumption pattern of the spouses during conjugal cohabitation can find consideration (cp. for instance, judgment by the Division dated January 25, 1984 – IVb ZR 43/82 – FamRz 1984, 358, 360 fol.). For this reason, a standard of living of the Parties which is too needy from this point of view has to be left out of account for the assessment of the Respondent's requirements. Nevertheless, the actual net income of the Appellant which, with an amount of DM 27,000, is extraordinarily high, cannot be taken as a basis for the assessment of the conjugal standard of living as such. Such consideration fails to understand the factual uncertainties to which the keeping up of such a level of income is subject in economic life and especially in the Appellant's profession. Even if an objective standard is applied, such uncertainties do not let it appear to be advisable to adjust the standard of living of a family which is mindful of constancy in its standard of living to the respective actual income conditions. In addition, it is often overlooked that an income in the amount stated by the Higher Regional Court *(Oberlandesgericht)* – also, and especially, from the point of view of a reasonable observer – usually is not employed for purposes of consumption alone, but serves for capital formation to a not inconsiderable extent (cp. judgments by the Divisi++on dated October 1, 1986 – IVb ZR 68/85 – Fam RZ 1987, 36, 39 and dated Dezember 18, 1991 – XII ZR 2/91 – FamRZ 1992, 423, 424). To which extent

such income will then be available for purposes of consumption is a question for fact-finding evaluation which has to be looked into by the Higher Regional Court *(Oberlandesgericht)*.

The Higher Regional Court *(Oberlandesgericht)* has concretely assessed the Respondent's need for maintenance to be satisfied by the Appellant and has determined her maintenance on the basis of a list of required items. There should not be any objection to such procedure. However, the Higher Regional Court has not considered the fact that the Respondent receives from the Appellant maintenance for the two joint children in accordance with the highest rate of the Düsseldorf Table *(Düsseldorfer Tabelle)*. These maintenance rates required amounts – in particular for housing and incidental housing costs - are included which are also contained in the list of required amounts for the Respondent and which accrue only once for her and the children. For this reason, payments which are already partially effected by the Appellant in connection with child maintenance have to be considered by way of reduction of the Respondent's claim. As far as can be seen, the Regional Court *(Oberlandesgericht)* has failed to do so.

Hahne Sprick Weber-Monecke

Wagenitz Ahlt

End of Translation

In my capacity as a public interpreter and translator for English, duly commissioned and sworn in Bavaria I certify:
The foregoing is a correct and complete translation of a German document into the English language. It has been taken from a photocopy.

Munich, February 21, 2006

(Karin Klaus)

Hungary

- Children and Finance

The Vassallo case (Vassallo v Varga, Vassallo v Hungary)[1]

The case concerns the alleged failure of the Hungarian authorities to conduct a swift examination in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").

In 2009 the applicant (Argentinian-Italian dual national) met Ms B., a Hungarian national. They lived together for several years in Ibiza, Spain, where they were married in 2015. From this union two children were born, in 2013 in Hungary and in 2015 in Spain. In January 2017, after a family holiday with the children in a third country, the applicant returned to their home in Ibiza alone. B. went to Hungary with the children and announced to the applicant her intention to settle there permanently.

On 15 February 2017 the applicant filed an application for the return of the children to Spain based on the Hague Convention. On 13 July 2017, concluding that the children's habitual residence was in Spain, the Pest Central District Court ordered their return. In 2017 and 2018 the Budapest High Court and subsequently the *Kúria* confirmed this decision.

On 31 January 2018, in a separate set of proceedings initiated by the applicant, the Court of First Instance of Ibiza granted him provisional custody of the children.

On 13 February 2018 the Hungarian Constitutional Court suspended the enforcement of the return orders and on 27 November 2018 cancelled the previous decisions on the grounds that the children's interests had not been duly taken into account, in violation of B.'s right to a fair trial.[2]

On 23 February 2018, after a decision related to the lack of jurisdiction of the Hungarian courts, the applicant filed for divorce before the Court of First Instance of Ibiza, which pronounced the divorce on 21 January 2019. The Court established the children's habitual residence with their father in Spain and ordered their return, as well as indicating the modalities of custody, parental visits and B.'s contribution to alimony and putting a ban on her departure from Spanish territory with the children.

On 25 March 2019, having obtained a report on the psychological evaluation of the children, the Pest Central District Court once again ordered their return to Spain. The decision was upheld in the subsequent procedure by the High Court and the *Kúria*.

All of these instances relied on evidence such as the common apartment of the family until the separation, the financial contribution of the parties to the family and the registration of the children in local communities, nurseries and health care services.

On 21 October 2019 the Hungarian Constitutional Court suspended anew the execution of the return proceedings and, on 25 February 2020, abolished the last return order on the grounds that the psychological impact of the return to Spain on the children had been insufficiently evaluated and the mother had not had the opportunity to put questions to the expert[3].

On 30 October 2019 the certificate required by Article 42 of the Brussels II *bis* Regulation was transmitted to the Hungarian authorities for executing a decision ordering the return of the children to Spain.

On 22 June 2020, having examined a private psychological expertise presented by the mother, the Pest Central District Court again (third time) ordered the children's return to Spain.

[1] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-228385%22]}

[2] https://public.mkab.hu/dev/dontesek.nsf/0/0fa27150169a525bc125835c0035053c/$FILE/3375_2018%20AB%20hat%C3%A1rozat.pdf

[3] https://public.mkab.hu/dev/dontesek.nsf/0/9812614faaca2c49c125843a005b84de/$FILE/3068_2020%20AB%20hat%C3%A1rozat.pdf

Meanwhile, on 10 December 2019 the Debrecen District Court in Hungary recognised a Spanish judgment related to divorce and custodial rights in favour of the applicant and the return of the children as enforceable under EU Regulation 2201/2003.

On 26 July 2020, during a parental visit, the applicant took the children to Spain where they have remained with him since, according to the elements in the case file.

On 26 October 2023 the European Court of Human Rights hold that there has been a violation of Article 8 of the ECHR. The Hungarian Constitutional Court has not intervened in a Hague 1980 convention matter ever. In this case, twice. The children ever since their return are still living in Ibiza with the applicant.

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Monaco

- Children and Finance

MONACO - Anthony Decroocq
Succession. Application of the CDIP over time :

Court of Revision, March 21, 2022, Michaux (Jurisprudential interest: Strong): In this case, the question arises of the applicability of Law No. 1,448 of June 28, 2017 relating to the Code of Private International Law to a disputed succession opened in Belgium in 1963.

In the absence of any applicable transitional provisions concerning pending proceedings, Law No. 1,448 of 28 June 2017 on private international law applies immediately to pending cases. According to Article 56 of this law, succession is governed by the law of the State where the deceased was domiciled at the time of his death. Article 24 of this law excludes the system of renvoi, so the Belgian succession rules apply to the entire succession.

European Court of Human Rights, 18 January 2024, Michaux v. Monaco (Jurisprudential interest: Strong):

The applicant argued that by retroactively applying the Code of Private International Law to the succession opened in 1963, the Monegasque courts had violated the principle of "legal certainty".
The judgment of 21 March 2022 received very clear support from the European Court of Human Rights in its judgment of 18 January 2024 which, by referring only to Article 6 § 1 of the European Convention on Human Rights (Article 1 of Protocol No. 1 being irrelevant due to its lack of ratification by Monaco), declared the application before it inadmissible on the explicit grounds that the judgment does not contravene the "concept of legal certainty [which] refers to the idea of a stable, complete and predictable legal framework, which excludes any arbitrariness".

Court of Revision, March 18, 2024 (Jurisprudential interest: Average): In this case, the question arises of the applicability of Law No. 1,448 of June 28, 2017 relating to the Code of Private International Law to a disputed succession opened in Monaco in 2015.

In this judgment of March 18, 2024, the Court of Revision held that Article 7-1 of Law No. 1,448 of June 28, 2017, inserted by Law 1,529 of July 29, 2022 after Article 7 of Law No. 1,448 of June 28, 2017, and under the terms of which the provisions of Chapter V of Title II of said Code apply to successions opened after its entry into force, i.e. August 12, 2022 , leaves out of its provisions Article 24 of the Law of June 28, 2017, by including in Chapter IV "Conflicts of laws" of Title I "General provisions" and by limiting the application of foreign law to its substantive rules only, to the exclusion of its own conflict rules and any referral mechanism; that the said Article 24 therefore remains immediately applicable, including to successions opened prior to the entry into force of the law of June 28, 2017.

The Court of Revision relies on Article 24 of the Code of Private International Law, which provides that " *the law of a State means the substantive rules of the law of that State, to the exclusion of its rules of private international law* " and considers that the Court of Appeal violates Article 24 of the Code of Private International Law, together with Article 7-1 of Law No. 1,448 of 28 June 2017, by submitting the rights and obligations of the disputed succession to Monegasque substantive law, in application of the former Monegasque conflict of laws rule in matters of succession including the referral mechanism.

This judgment can be compared with the decision of the European Court of Human Rights, 18 January 2024, Michaux v. Monaco. A new judgment of the Court of Revision ruling on the merits should clarify the scope of this judgment by the end of 2024.

Grandparents' visitation rights :

Order of the Guardianship Judge of March 30, 2022; CACHN of July 26, 2022; Court of Revision of January 16, 2023 :

Paragraph 4 of Article 300 of the Civil Code provides that: "No obstacle may be placed, without serious reasons, on the child's personal relations with his or her ascendants. In the event of difficulty, the terms of these relations shall be regulated by the guardianship judge. The guardianship judge may, in the interest of the child, also grant a right of correspondence or visitation to other persons."

This is how the Guardianship Judge granted broad visitation and accommodation rights to grandparents with regard to their grandchildren by Order of March 30, 2022. To define the frequency and importance of visitation and accommodation rights, the Judge refers to different criteria such as the age of the children, the history of their relationship with the ascendants, the family environment but also the cultural roots, which can be decisive in the case where the grandparents are culturally very involved in the education of their grandchildren.

It was also considered that disagreement between parents and grandparents does not constitute a serious reason preventing the maintenance of the relationship with the grandchildren.

This decision was confirmed by the Court of Appeal on July 26, 2022 and by the Court of Revision on January 16, 2023.

Divorce agreement. Autonomy of the will of the spouses :

Court of Revision May 15, 2023 :
It was by a sovereign interpretation of the agreement established by the parties and without incurring the grievances of the plea that the Court of Appeal recalled that the agreement drawn up by the spouses including a compensatory payment set in particular in the form of a life annuity had been approved by the Court after ensuring their free and informed consent and the conformity of such a measure with the interest of each of the spouses. It thus considered that the Court had ruled in compliance with the autonomy of the spouses' will and that the reading of the agreement regulating the consequences of the divorce confirmed unequivocally that the agreed payment was made as a compensatory payment, the express mention of the derogation from the provisions of Article 204-5 of the Civil Code further confirming the parties' desire to free themselves from the legal framework of the compensatory payment. From which it follows that the plea is unfounded.

On the one hand, after noting that in the absence of a conventional revision clause and in the absence of recourse to the judicial benefit revision mechanism, the modification of the agreement required a new agreement between the spouses, subject to approval, the Court of Appeal made an exact application of the provisions of Articles 989 and 1015 of the Civil Code. On the other hand, it was without violating Article 204-5 of the Civil Code that it stated that the provisions of this text only concerned the terms of payment of the compensatory benefit. From which it follows that the argument must be rejected.

Without calling into question the unavailability of the compensatory benefit, the Court of Revision confirms that spouses may expressly deviate from the terms of payment of the compensatory benefit as provided for in Article 204-5 of the Civil Code, within the framework of a divorce agreement to which they have given their free and informed consent.

Netherlands

- Children and Finance

European family law landmark cases

Category 1: Finance

Case: Italian inheritance case, Supreme Court 17 February 2017, ECLI:NL:HR:2017:276

Background:

In the "Italian inheritance case" the husband is Dutch and the wife is Italian. Under the private international law governing matrimonial property at that time, Dutch law applied to their matrimonial property regime. To marriages concluded before January 1st 2018, the general community of property applied: all property acquired before or during the marriage automatically became communally owned by both spouses. Only gifts or inheritances that were acquired under an exclusion clause, will not be part of the general community of property.

Before the marriage, the wife had inherited real estate in Italy without an exclusion clause. The Supreme Court ruled that the Italian inheritance was part of the marital community of property and thus had to be divided. To assess whether or not foreign property acquired under inheritance or gift without an exclusion clause is part of the community of property, it is relevant:

- Whether the foreign testator could have been aware the applicability of Dutch matrimonial property law and the consequences thereof;
- Whether it must reasonably be assumed that the testator did not intend for the property to fall into a community of property through marriage, and;
- Whether the spouse who acquired property under foreign law prior to the marriage was reasonably able to exclude that inherited property of the marital community of property by creating a pre-nuptial agreement, in accordance with the presumed wishes of the testator.

The court noted that the spouse who relies on the restrictive effect of reasonableness and fairness has the burden of proof of the facts and circumstances justifying this. The Supreme Court argued that the mere fact that the foreign law applicable to the inheritance does not recognize or assume a general community of property as a matrimonial property regime is not sufficient in this regard.

Significance:

1. **Internationally a major exception:** the general community of property is almost non-existent in other legal regimes the world. From this follows that there is a possibility that many outside of the Netherlands do not know the consequences of gifting or foreign inheritances. The "Italian inheritance case" highlights the importance of pre-nuptial agreements in managing international inheritances and gifts within the context of Dutch matrimonial property law for couples married in the Netherlands before January 2018.
2. **Duty to take action according to the wishes of the testator:** not only the intentions and expectations of the testator are involved, but also the question of whether the person who acquired the property was able to act in accordance with the presumed wishes of the testator, by drawing up a pre-nuptial agreement.

Category 2 Children

Case: Supreme Court 15 October 2021, ECLI:NL:HR:2021:1513

Background:

In this case, a mother who had the sole custody of a child, moved to another country with an unknown destination. The question in this case was whether a parent with sole custody who moved with unknown destination can be ordered to move back?

The Supreme Court remarked that the fundamental principle is that both a child and a parent have the right to maintain contact with each other. This right is guaranteed for the non-custodial parent by Article 8 of the European Convention on Human Rights (ECHR) and Article 1:377a(1) of the Dutch Civil Code (BW), and for the child by Article 9(3) of the United Nations Convention on the Rights of the Child (UNCRC) and Article 24(3) of the EU Charter of Fundamental Rights. Article 1:247(3) BW stipulates that parental authority includes the obligation to foster the child's relationship with the other parent. This applies to parents exercising joint custody as well as to the parent with sole custody.

In cases of joint custody, Article 1:253a BW allows the court to prohibit the parent with whom the child primarily resides from moving far from the other parent or to order the relocating parent to move back or to a location that allows for the continuation of contact between the child and the other parent.

Even though the mother had sole custody at the time of her move and was thus initially free to choose her and her daughter's place of residence, the father was granted joint custody by the time of the court's decision. It is noteworthy that even in cases of sole custody, the law allows for restrictions on the custodial parent's choice of residence if they fail to promote contact between the child and the other parent (Article 1:247(3) BW). According to Article 8 ECHR, the court must take all appropriate measures to ensure that the custodial parent complies with this obligation. A relocation prohibition or an order to move back can be an appropriate measure.

Significance:

1. **Parental obligations to foster child-parent relationships**: the Dutch Supreme Court ruled that from Article 8 EHCR follows that the court can be bound to take appropriate measures to induce the parent with custody to cooperate in facilitating contact between the child and the other parent.
2. **International context**: the case has significant implications for international family law cases, particularly concerning the relocation of children to other countries. This case can also internationally cause issues as to when something can be qualified as child abduction.
3. **Balance of interests**: the decision underscores the need for a balance between the custodial parent's right to freedom of movement and the child's right to maintain regular contact with both parents.

Northern Ireland

- Children

Northern Ireland landmark decision
Judgement on what constitutes 'coercive control'

1. In G v G [2024] NI Master 5, Master Bell considered 'coercive control' ('**CC**') and how it may be relevant to financial proceedings connected with divorce .

2. Master Bell considered, firstly, how CC could be cited as evidence of 'litigation conduct'; this could be relevant to the division of assets:

   "[25] In certain circumstances, conduct may have an impact on the implementation of the needs-based approach. In TT v CDS [2020] EWCA Civ 1215 Moylan LJ, giving the decision of the Court of Appeal for England and Wales, approved Moor J's statement in R v B and Others [2017] EWFC 33 that, where the court was satisfied that one party had committed litigation conduct, the financial effect of that litigation conduct could impact on a needs-based award because, in attempting to achieve a fair outcome, the court must be entitled to prioritise the needs of the party who has not been guilty of litigation conduct. Indeed, Moylan LJ went so far as to say that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it was fair that the innocent party was awarded all the matrimonial assets."[1]

3. Or, Master Bell considered, CC may be relevant to assessing the 'needs' of a party, if it has affected their capacity to engage in work:

   "[25] …. In addition, as I will indicate later, coercive control may have a very significant impact upon the needs of a party if their capacity to engage in financially remunerative employment has been damaged by it."[2]

4. Master Bell acknowledged that the concept of CC was not widely recognised in UK law (even by family practitioners) and - possibly - even the victim.[3]

5. The judgment gave some other examples of CC e.g. 'monetary control' where one party controlled the spending of the other, or restricts access to joint funds (etc.,). However, he also recognised there was a wider definition (which he took from 'The Equal Treatment Bench Book').[4] This defined CC thus:

   "Controlling or coercive behaviour does not relate to a single incident. It is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another through a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. It can be a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim".[5]

[1] Emphasis added.
[2] Again, emphasis added. I suspect this covers 'damage' to both past and future employment?
[3] [**81**] – [**82**] and [**84**] – [**85**]
[4] A key reference work published by the Judicial College for the judiciary in England and Wales.
[5] [**86**]

6. It is the amorphous nature of CC which led Master Bell to describe it as 'covert domestic abuse'.[6] As such, a finding of CC may be punishable by criminal proceedings.

7. Master Bell then considered how any party could prove CC[7]: for example, by using guidelines now available in police prosecutions, or, hearing detailed evidence relating to the alleged conduct. In Master Bell's opinion, a Judge could find evidence of CC "… *even if counsel has not argued that this is a 'conduct case'."*[8]

8. If a Court finds sufficient evidence of CC it may be relevant to financial proceedings, but **only** if some causal link can be established:

> *"[93] The fact that the financial impact of the behaviour may be unquantifiable does not mean that it should not be taken into account in ancillary relief proceedings. In Tsvetkov v Khayrova [2023] EWFC 130 Peel J said that a party asserting conduct must prove:*
>
> *"… that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation."*

9. Lastly, Master Bell warned that allegations of CC should not be made lightly (because such allegations could result in a criminal prosecution).

10. Therefore, allegations of this type are akin to 'fraud' claims: i.e. any allegation can only be made on the basis of **clear** evidence, with the threat of a referral to the Bar Council if there was never any sufficient basis to plead such a claim.[9]

[6] **[83]**

[7] **[90]** – **[93]**

[8] **[95]**. Master Bell cited Mostyn J's judgment in Clarke v Clarke [2022] EWHC 2698 as support for this conclusion. However, Mostyn J's comments were made in the context of a litigant-in-person i.e. that a Court should not follow the rules slavishly "… *because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts*."

[9] This is similar to the Bar Rules relating to fraud pleadings.

Portugal

- Children

IAFL EUROPEAN CHAPTER'S 35TH ANNIVERSARY

European family law landmark cases - Portugal

Finance

The October 16th 2012 Supreme Court's decision was rendered on a division of marital property case, in which the marital assets included two properties located in Virginia, USA.

The Court of First Instance understood that the assets situated in the USA should be excluded from the asset division proceedings in Portugal, as there were no guarantees that the Portuguese decision would be recognized by the courts of Virginia. This decision, however, was overturned by the Lisbon's Court of Appeal.

Called to decide, the Supreme Court of Justice upheld the Court of Appeal's decision, considering that the division of all the marital assets, regardless of their location, by the same Court and in the same procedure was a corollary of the principles of unity and universality, which rule asset division. The Supreme Court also added that the mere possibility of a conflict of jurisdictions or of a lack of recognition of the Portuguese decision isn't sufficient to exclude assets located abroad from the assets' division proceedings and/or to exclude the Portuguese court's jurisdiction.

The Supreme Court further affirmed that the absence of an international treaty between two countries pertaining the international recognition of legal orders does not necessarily imply that the Portuguese decision wouldn't be recognised by the Virginia Courts, as most countries (including Portugal) have special procedures for the recognition and revision of foreign judgements.

This decision represents a shift in case law, which until then affirmed the exclusion of the universality principle with regard to assets located abroad, when the effectiveness of the Portuguese decision was not guaranteed by convention or treaty.

Children

The May 4th 2021 Supreme Court's decision was rendered on a EU cross-border parental children abduction case, concerning two Icelandic children who objected to being returned to their home country.

Although the children's objection related to the parental conflict (the girls were hurt with their mother for initiating a romantic relationship with a third party) and there was evidence of manipulation of the children by the father, the Supreme Court upheld the Oporto's Court of Appeal's decision, which refused to order the children's return to Iceland.

According to the rulings' grounds, the Supreme Court of Justice can only rule on questions of strict legality. Thus, the control exerted by the Supreme Court over the Court of Appeal's decision would be

limited to the verification of the legal requirements established under Article 13(2) of the Hague Convention of 25 October 2980 on the Civil Aspects of International Child Abduction, namely whether the children had indeed objected to their return and whether they had attained an age and degree of maturity at which it is appropriate to take account of their views.

Since those requirements had been met, the Supreme Court could not assess whether the order of non return is compatible with the children's best interests, as such ruling was made according to criteria of convenience and opportunity and therefore excluded from the scope of jurisdictional control exerted by the Supreme Court.

This case law has been followed in later decisions of the Supreme Court concerning the exception established in article 13(2) of the 1980 Hague Convention, and includes a reasoning that may be applicable in relation to the other exceptions provided for in the Convention, thus embodying a tendency to limit the scope of the appeals in return proceedings under the Hague Convention.

Romania

- Children

My landmark decision in the Romanian case law, the Dumitrache case

Romania is a country where equality between parents in raising the child is it is supported at all levels, court, social workers, police and all authorities involved are in favor of the principle that a child must be raised by both parents to receive the stability necessary for growth, development, and only in this way is considered that is met the principle of

Moreover, Romania being the first European country that recently regulated parental alienation, it proves even more seriously that, as far as possible, the minor must be raised by both parents, and exclusive custody is not granted than in extreme cases where the parent consumes drugs or uses violence against the other parent or minor.

So, when in 2015 the mother Monika Dumitrache woke up that his child was abducted by the maternal grandmother from a Romanian private kindergarten, put to a private airplane and transported to Moscow, she knew that it will be hard to get the child abduction trial win, and the sole custody.

In January she parallelly started the trial of child abduction in Russia, and the sole custody rights in Romania.

Meanwhile she informed the Ministry of Foreign affairs about the abduction, who alerted the Interpol.

The Interpol localized the child in Russia, but the next day he was again transported in Italy, to unknown place, and with false documents where the mother would have given her written consent.

In early 2016 the abduction trial started before the Moscow tribunal, but the father did not present to the court and case was postponed.

In March 2016 in Romania, at the Bucharest 1st district Court, the court ruled down the abduction case, mentioning if all is true must be proven by a criminal case, rejected the claim, with all proves on the table and mentioned that joint custody is still necessary, the parents must find an agreement about how to co-parent in raising the child.

In Moscow the father, with the help of his employer company found various reasons to not appear before the court, and the hearings were continuously postponed.

We entered in the case at this stage, when the child was nowhere to be found by Interpol, the abduction case stagnated and in Romania we had to do the appal for the sole custody.

We went to the prosecutor to discover the stage of the criminal case which has been introduced for false testimonies in an official document, and falsifying the mother signature. The prosecutor mentioned that the father is not cooperating and cannot reach him, cannot take his declaration and receive any type of information from Russia.

In April 2016 was scheduled the hearing for the sole custody case and somehow everything depended on this.

The judge was one of the most famous family law judges in Romania, Andreea M. who wrote several books regarding family law.

We presented the case mentioning that we have no drug, alcohol consume, but a father who since the abduction completely alienated the child from the mother , is using his power to evade the authorities and justice, to delay the cases of international abduction and the criminal case, and is in the power of the judge to bring back the child with the mother, and to relocate him to his native country and last official and habitual residence.

The plea was convincing, within 3 days of the hearing the judge granted exclusive custody to the mother.

The custody decision was immediately sent to the Moscow Court, which ruled on the minor's resettlement in his native country, and Interpol was able to intervene, took the child from the father, handing him over to the mother at the Moscow airport.

The criminal case was resolved in less than two month, the child got back to the mother, lives a happy life with the mother and his step father and occasionally receives his father’s visit in Romania.

Contributing lawyer

Eniko Fulop, Romania

Russian Federation

- Children and family

SUPREME COURT OF THE RUSSIAN FEDERATION

DECISION

dated July 7, 2015 N 5-KG15-34

The Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation, consisting of:

Presiding judge Klikushin A.A.,

Judges Vavilycheva T.Y. and Yuryev I.M.

considered in open court a civil case based on the application of Ms. Sergeeva A.A. (hereinafter – **S.**) against Mr. Dubin M.L. (hereinafter – **D.**), Mr. Astrakhan I.M., Meadus Holdings Limited company, Lemorg Investments Limited company, Drongo International Limited company, Milord International Limited company, Degord Limited company, Fliburg Holdings Limitedcompany, Tripleton International Limited company, LLC "IHC" on the division of property, invalidation of the transaction, on the counterclaim of D. against S. on the division of property,

on the cassation appeal complaint of the counsel of S.- Korolev S.A. on the Judgement of the Khamovnichesky District Court of Moscow dated June 28, 2013 and the Appeal decision of the Moscow City Court dated June 5, 2014.

Having heard the report of the Judge of the Supreme Court of the Russian Federation T.Y. Vavilycheva, having listened to the explanations of Korolev S.A., who supported the arguments of the cassation appeal complaint, and on the other side to the counsel of D., Mr. Astrakhan I.M., the counsel of the Tripleton International Limited company – Mr. Trofimov M.V., the counsel of Mr. Astrakhan I.M. – Ms. Sidenko E.V., the counsel of the Tripleton International Limited company – Mr. Aleshcheva I.A., who objected,

ruled:

S. filed an application against D., Mr. Astrakhan I.M., Midus Holdings Limited company, Lemorg Investments Limited company, Drongo International Limited company, Milord International Limited company, Degord Limited company, Fleeburgh Holdings Limited company, Tripleton International Limited company, LLC "IHC" on the division of property and invalidation of the transaction.

In support of her claim S. indicated that since March 15, 1996 she had been married to D. By Decree of the Cheryomushkinsky District Court of Moscow dated December 22, 2011, the marriage was dissolved. During their marriage, the assets which constitute the common marital property were registered in the name of D., asked the court to invalidate the shares' sale transaction carried out by D. of his participation in the authorized capital of LLC "IHC" in the amount of 50% in favor of Flyburg Holdings Limited company, to apply the consequences of the invalidity of that transaction and to divide the specified share in the authorized capital of LLC "IHC" between the ex- spouses.

In addition, S. asked for a division of the assets acquired jointly during the course of their marriage with D. which included the apartments <...>, <...> and <...> parking spaces located at the address: city <...>; 50,000 shares of Meadus Holdings Limited company; 50,000 shares in Milord International Limited company; 50,000 shares of Drongo International Limited company; 50,000 shares of Degord Limited company; 50,000 shares of Bogalto Investments Limited company; 5,000 shares of Tripleton International Limited company; 5,000 shares in Manford International Limited company; 1,000 shares in Fleeburgh Holdings Limited company; 1,000 shares of Lemorg Investments Limited company; participation shares in Kinginvest LLC; participation shares in Land Raft LLC; participation shares in LLC "IHS"; 100% shares of Target Hospitality CJSC; trademarks; funds held in the bank accounts in the authorized bank "<...>" (Geneva) of Milord International Limited company, Degord Limited company; funds held in the bank accounts in bank JSC "<...>" (Latvia), in bank "<...>" USA (New York), in an account of a financial company <...> (USA) and other bank accounts of Tripleton

International Limited company; rights of claim under the loan agreement dated January 22, 2007, concluded by Milord International Limited company with D., in the amount of <...> US dollars; registered in the name of D., securities of the company Tripleton International Limited company and others registered in the name of the offshore companies owned by D.

S. asked the court to recognize her right in their communal marital property acquired jointly in the course of their marriage with D., to allocate her spousal share in this property with the assigning to D. the duty for transferring the named property to S.

D. filed a counterclaim against S. on the division of the common marital property, where he asked to divide the apartment located at the address: city <...>, recognizing his right to 1/2 share in the ownership for the apartment, and also asked the court to recognize his ownership of 50,000 shares of the Degord Limited company with payment to S. a compensation for the value of her spousal share in the shares of this company in the amount of <...> US dollars.

By the Judgment of the Khamovnichesky District Court of Moscow dated June 28, 2013, upheld by the appeal decision of the Moscow City Court dated June 5, 2014:

were declared invalid the alienation transactions performed by D. of the 50% shares in the authorized capital of the LLC "IHC" with a nominal value of <...> rubles in favor of the LLC "IHC" and of the LLC "IHC" of the 50% share in the authorized capital of the LLC "IHC" with a nominal value of <...> rubles in favor of Fleeburg Holdings Limited company.

The consequences of invalidity of the transactions were applied – the share of 50% participation in the authorized capital of LLC "IHC" was transferred to D.

The spousal share of S. was determined in the amount of 1/2 in the common property of the spouses and her ownership of:

The 25% share in the authorized capital of LLC "IHC" (<...>);

25,000 shares with a par value of <...> US dollar each (50% of the total) of Meadus Holdings Limitedcompany;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Milord International Limited company;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Degord Limitedcompany;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Drongo International Limitedcompany;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Bogalto Investments Limitedcompany.

The share of D. was determined. in the amount of 1/2 in the common property of the spouses and the right of ownership to:

participation share of 25% in the authorized capital of LLC "IHC" (<...>);

25,000 shares with a par value <...> US dollar each (50% of the total number) of Midus Holding Limited company;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Milord International Limited company;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Degord Limited;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Drongo International Limitedcompany;

25,000 shares with a par value of <...> US dollar each (50% of the total) of Bogalto Investments Limitedcompany.

The rest of the initial claims were denied.

It was denied as well in the granting of the counterclaims of D. to S. on recognition of the right of the 1/2 share in the ownership of an apartment at the address: <...>, and the recognition of the right to 50,000 shares of Degord Limited company with payment to S. a compensation for the value of her share in the shares of this company.

By the decision of the judge of the Supreme Court of the Russian Federation dated January 29, 2015, it was refused to S. to transfer the cassation appeal complaint for consideration in a court session of the

Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation.

By the determination of the Deputy Chairman of the Supreme Court of the Russian Federation V.I. dated June 4, 2015, the decision of the judge of the Supreme Court of the Russian Federation dated January 29, 2015 and the cassation appeal complaint of the counsel of S. – Mr. Korolev S.A. were set aside and the case was transferred for consideration in a court hearing of the Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation.

Having checked the case materials and discussed the arguments of the cassation appeal complaint, the Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation have found that there are grounds for overturning the Judgment and the appeal decision regarding the refusal to grant the claims of S. on recognition of the shares of the Tripleton International Limited and Manford International Limited companies as the common property of the spouses, imposing obligations on D. to transfer to S. shares of the companies: Meadus Holdings Limited, Milord International Limited, Degord Limited, Drongo International Limited, Bogalto Investments Limited and transferring the case in the part where it was set aside for a new trial at the court of the first instance.

In accordance with Art. 387 of the Civil Procedure Code of the Russian Federation, the grounds for setting aside or amending of the court decisions/judgments at the cassation stage are the following:

significant violations of substantive Law or procedural Law that influenced the outcome of the case to such extent that it became impossible to restore and protect the violated rights, freedoms and legitimate interests of one of the parties, as well as to protect the public interests protected by Law.

Such violations of substantive and procedural Law were committed by the courts of first and appellate instances.

The court found that on March 15, 1996, between S. and D. the marriage was registered.

By the Decree of the Cheryomushkinsky District Court of Moscow dated December 22, 2011, which entered into its legal force on May 18, 2012, the marriage between S. and D. was terminated.

By the Judgement of the Cheremushkinsky District Court of Moscow dated May 18, 2012, some part of the common marital property of S. and D. was divided. At the same time, the shares of the ex-spouses in the common property acquired jointly during their marriage are recognized as equal (vol. 20, pp. 130 - 136).

The other part of the common property acquired jointly by the ex-spouses during their marriage, listed by S. and D. in their specified statements of claims (vol. 7, pp. 117, vol. 19, pp. 200 - 209), was not divided.

Refusing to grant the claims of S. on recognition of her right to shares and property of the Tripleton International Limited company, Manford International Limited company, the court of first instance (and the court of appeal agreed with it) came to the conclusion that S. had not proven the fact that D. is a beneficial owner of the named companies and that he had acquired his right to the property owned by those and other specified companies.

These conclusions of the courts cannot be considered legal and correct due to significant violations of substantive and procedural Law.

According to Art.34 of the Family Code of the Russian Federation, the property acquired by the spouses during their marriage is their joint/common property.

The property acquired by the spouses during their marriage (common property of spouses) includes the income of each spouse from any working activity, entrepreneurial activity and the results of their intellectual activity, pensions, benefits received by them, as well as other monetary payments that do not have a special purpose (amounts of material assistance, amounts paid in compensation for damage due to loss of ability to work due to injury or other damage to health, and others).

The common property of the spouses also includes movable and immovable things acquired at the expense of the spouses' common income, securities, shares, deposits, shares in capital contributed to credit

institutions or other commercial organizations and any other property acquired by the spouses during the marriage, regardless of whether in the name of which of the spouses it was registered or in the name of which of the spouses the funds were contributed.

Filing an application for division of the common marital property, S. claimed that D. was the beneficial owner of the foreign companies Tripleton International Limited and Manford International Limited, registered and located in the Commonwealth of the Bahamas and exercised actual ownership of the property of those companies and by virtue of Art. 34 of the Family Code of the Russian Federation, this property is subject to the regime of community of property.

Thus, the identification of a beneficial owner shall be legally significant circumstances that must be established by evidence that meets the requirements of relevance and admissibility (Articles 56, 60 of the Civil Procedure Code of the Russian Federation).

In accordance with Art. 56 of the Civil Procedure Code of the Russian Federation, the content of which should be considered in the context of the provisions of Part 3 of Art. 123 of the Constitution of the Russian Federation and Art. 12 of the Civil Procedure Code of the Russian Federation, which establishes the principle of adversarial civil proceedings and the principle of equality of parties, each party must prove the circumstances to which they refer as the basis for its claims and objections, unless otherwise provided by Federal Law.

By virtue of Part 1 of Art. 57 of the Civil Procedure Code of the Russian Federation, evidence is presented by the parties and other persons participating in the case, the court also has the right to invite them to provide additional evidence. If it is complicated for these persons to present the necessary evidence, the court, at their request, provides assistance in collecting and requesting evidence.

According to paragraphs 7 and 8 of the Resolution of the Plenum of the Supreme Court of the Russian Federation on June 24, 2008 No. 11 “On preparation of the cases for trial,” the judge is obliged, already at the stage of preparing the case for the trial, to create conditions for a comprehensive and complete study of the circumstances of the case that are important for

the correct consideration. Evidence is presented by the parties and other persons participating in the case, but taking into account the nature of the legal relations of the parties and the substantive Law governing the disputed legal relations. The judge explains which party is responsible to prove certain circumstances, as well as the consequences of failure to provide evidence. In such situation, the judge must find out which evidence of the parties can support their statements, which difficulties if any they have to present the required evidence, explain that, at the request of the parties and other persons participating in the case, the court could provide assistance in collecting and requesting evidence (Part 1 of Article 57 of the Civil Procedure Code of the Russian Federation).

The evidences presented by the parties and other persons participating in the case are verified by the judge for their relevance (Article 59 of the Civil Procedure Code of the Russian Federation) and admissibility (Article 60 of the Civil Procedure Code of the Russian Federation).

The courts in this case failed to comply with these procedural rules and requirements.

The List of the states and territories approved by the Order of the Ministry of Finance of the Russian Federation dated November 13, 2007 N 108 provides preferential tax regimes and (or) does not provide for the disclosure and provision of information when conducting financial transactions (offshore zones).

Such states include the Commonwealth of the Bahamas, which is the place where the named foreign companies such as Tripleton International Limited company and Manford International Limited company (clause 5 of the appendix to the Order of the Ministry of Finance of the Russian Federation dated November 13, 2007 N 108) were located.

Due to the special legal regime of companies registered in offshore zones and the non-public structure of ownership of shares of these companies, independent presentation of evidence about the beneficial owner of the companies Tripleton International Limited company and Manford International Limited company was difficult for S., and therefore in accordance with Art. 57 of the Civil Procedure Code of the Russian

Federation it was addressed to the court with a request on collecting the evidence, which was granted.

However, by the time the decision was made and verified on appeal proceedings, the information on the request had not been received by the court. The reasons for the non-execution of the request and information about the progress of its execution were not established by the courts.

Under such circumstances, the refusal to grant the claims of S. for lack of proof of the fact of belonging to D. of the above companies indicates a violation of the right to a fair trial, guaranteed by paragraph 1 of Art. 6 of the Convention for the Protection of Fundamental Human Rights and Fundamental Freedoms, as well as Art. 123 of the Constitution of the Russian Federation.

In addition, the courts violated the rules for evaluating evidence established by Art. 67 of the Civil Procedure Code of the Russian Federation, according to which the court evaluates evidence according to its internal conviction, based on a comprehensive, complete, objective and direct examination of the evidence available in the case (Part 1).

No evidence has pre-established force for the court (Part 2).

The court evaluates the relevance, admissibility, reliability of each evidence separately, as well as the sufficiency and interconnection of the evidence in its entirety (Part 3).

The court is obliged to reflect the results of the assessment of evidence in a decision, which provides the reasons why some evidence was accepted as a substantiation of the court's conclusions, other evidence was refuted by the court, as well as the reasons why some evidence was given preference over others (Part 4).

In support of the conclusion that D. is not the beneficial owner of Tripleton International Limited company, the court referred to a letter from the registered agent of this company, MMG Bahamas Limited company, on Morgan & Morgan letterhead, dated December 7, 2012, according to which the sole beneficial owner of Threepleton International Limited company from the date of establishment was <...> K. (vol. 23, pp. 38 - 43).

At the same time, presented by S. evidence to refute the arguments of D. and the above letter were not the subject of research and assessment by the courts of the first and appellate instances.

So, in refutation of the arguments of D., S. introduced the following documents:

- response of the Latvian bank JSC <...> dated July 27, 2012 to the request of the Khamovnichesky District Court, according to which D. was registered as the sole beneficial owner of Tripleton International Limited company (vol. 13, pp. 144 - 145);

- letter from the registration agent of Triden Trust dated May 21, 2012, which states that D. is the owner of Tripleton International Limited company (vol. 6, pp. 228 - 230);

- protocol of interrogation of an employee of the Triden Trust registration agent <...> P. dated December 20, 2013, according to which D. from the beginning of the 2000s, he was the owner of Tripleton International Limited company (vol. 28, pp. 253 - 273);

- instructions from D. 2006 - 2008, addressed to the registered agent Triden Trust (vol. 28, pp. 286 - 296).

In violation of Articles 67, 198 of the Civil Procedure Code of the Russian Federation, the specified evidence was not reviewed and assessed.

Lack of assessment of a number of evidence in the case presented by the parties to the dispute and relevant for its correct resolution and making a lawful and informed decision, as well as the entire, absence of many of the evidences in the decision and appeal determination of the motives for which some evidence was accepted to substantiate the court's conclusions, and others were rejected by the court, violates the principle of equality and competition between the parties to the dispute (Article 123 of the Constitution of the Russian Federation, Article 12 of the Civil Procedure Code of the Russian Federation).

Refusing S. in granting her claim to recognize the companies Tripleton International Limited company and Manford International Limited company and their property as the common property of the spouses, the court proceeded from the provisions of Art. 48 of the Civil Code of the

Russian Federation, indicating that the legal entities whose rights to property are claimed in the application are not state and municipal unitary enterprises or institutions, and therefore the participants of these legal entities do not have any proprietary rights to their property.

This conclusion of the court cannot be considered lawful, since when resolving the issue of the rights and obligations of company shareholders, rights to company property, of the rights and obligations of the person who is the custodian of documents revealing the identity of the beneficial owner, the court should have taken into account the norms of foreign Law of those countries where these companies are registered and where they operate.

In accordance with Art. 400 of the Civil Procedure Code of the Russian Federation, the personal Law of a foreign organization is considered to be the Law of the country in which the organization is established.

By virtue of Art. 1202 of the Civil Code of the Russian Federation, the personal Law of a legal entity, on the basis of which the content of the legal capacity of a legal entity, the procedure for acquiring civil rights and assuming civil responsibilities by a legal entity, internal relations, including relations of a legal entity with its participants, is determined, is considered Law the country where the legal entity is established, unless otherwise provided by the Federal Law "On Amendments to the Federal Law "On the Entry into Force of Part One of the Civil Code of the Russian Federation" and Article 1202 of Part Three of the Civil Code of the Russian Federation."

Meanwhile, in violation of the above provisions of the rules of substantive and procedural Law, the court actually left these circumstances, which are essential for the correct resolution of the dispute, without investigation and legal assessment.

As the applicant of the cassation appeal points out, the MMG Bahamas Limited company became the registered agent of Tripleton International Limited company only on October 16, 2012 (vol. 23, pp. 37), that is, after the divorce of S. and D. During the marriage of the parties in the case, the registered agent of Tripleton International Limited company was another

company - Trident Corporate Services (Bahamas) Limited (vol. 23, pp. 21 - 25).

According to the party who filed the cassation complaint, under Bahamian Law, the new registered agent of Tripleton International Limited company (MMG Bahamas Limited) could not have been in possession of documents and information regarding the beneficial owner of Tripleton International Limited company until October 16, 2012 (period preceding the change of registration agent). Such documents are available only to the former registered agent of Tripleton International Limited company - Trident Corporate Services (Bahamas) Limited company.

According to Art. 1191 of the Civil Code of the Russian Federation, when applying foreign Law, the court establishes the content of its provisions in accordance with their official interpretation, the case law of its application and doctrine in the relevant foreign state (clause 1).

In order to establish the content of the foreign Law, the court may, in accordance with the established procedure, seek assistance and clarification from the Ministry of Justice of the Russian Federation and other competent bodies or organizations in the Russian Federation and abroad, or involve experts.

The participants in the case may submit documents confirming the content of the norms of the foreign Law to which they refer to substantiate their claims or objections, and otherwise assist the court in establishing the content of these norms.

For requirements related to the parties' implementation of entrepreneurial activities, the obligation to provide information on the content of foreign Law norms may be imposed by the court on the parties (clause 2).

At the same time, the provisions of the rules of Law of foreign states in whose territory the companies whose shares S. requested to be divided, including Tripleton International Limited company, are registered, were not studied by the court and were not taken into account when resolving the dispute.

According to paragraph 3 of Art. 38 of the Family Code of the Russian Federation, when dividing the common property of spouses, the court, at

the request of the spouses, determines what property is to be transferred to each of the spouses.

As follows from the case materials, S. made a petition to impose on D. obligations to transfer to her the spousal part of the property acquired jointly during their marriage, namely shares owned by D. companies located in offshore zones of the foreign countries.

However, the court, refusing to satisfy this requirement, did not consider it on its merits and did not reflect its judgment on this issue in the decision, thereby violating the provisions of articles 195 - 198 of the Civil Procedure Code of the Russian Federation.

Under such circumstances, the court decision and the appeal decision regarding the refusal to grant the claims of S. on recognition of the shares of the companies Tripleton International Limited and Manford International Limited as the common property of the spouses, imposing obligations on D. transfer of shares of the companies: Midus Holding Limited, Milord International Limited, Degord Limited, Drongo International Limited, Bogalto Investments Limited, Tripleton International Limited and Manford International Limited are subject to reversal of the decision of the lower courts.The case is partly referred for a new consideration by the court of first instance.

Regarding the refusal of S. in granting her claims for recognition of joint property such as apartments and parking spaces located at the address: <...>, there are no grounds for canceling court decisions, since the courts have established and confirmed by evidence that the owner of the apartment <...>, apartment <...>, parking spaces at the indicated address is Mr. Astrakhan I.M. (vol. 2, pp. 218 - 219).

These apartments were purchased by the respondent Mr. Astrakhan I.M. on the basis of purchase and sale agreements dated September 1, 2009 (vol. 8, pp. 46 - 47, 82 - 83).

Funds for the purchase of apartments and parking spaces were received by Mr. Astrakhan I.M. under the loan agreements that were concluded with Tripleton International Limited company.

The cash under the loan agreements was returned by Mr. Astrakhan I.M. The fact of repayment of loans and interest on them was confirmed by a letter from the Chairman of the Management Board of OJSC AKB "<...>" (vol. 20 case file 143), as well as a response to the court's request (vol. 21 case file 216), from which it is seen that from the account of Mr. Astrakhan I.M. On October 5, 2012, an outgoing transfer of funds was made to repay loans and accrued interest under loan agreements with Tripleton International Limited company.

By virtue of articles 387, 390 of the Civil Procedure Code of the Russian Federation, the cassation court is not vested with the right to evaluate evidence differently.

The Arguments of the cassation appeal complaint filed by S. about incorrect calculation of the limitation period cannot serve as a basis for canceling court decisions in this part, since the court rejected the claim on the merits to recognize the apartment as the joint marital property of S. and D.

At the same time, judicial acts regarding the refusal of S. in granting the claims for recognition of the above-mentioned real estate objects as the joint property of the spouses S. and D. are supposed to become a subject to change by excluding from the reasoning part of the court decisions the conclusion that D. is not the beneficial owner of Tripleton International Limited company, since this conclusion was made by the court in violation of substantive and procedural Law.

Resolving the dispute regarding the claims of S. to recognize her right to the corresponding share in the authorized capital of Kinginvest LLC and Land Plot LLC, the court correctly refused to grant these claims, since these companies were liquidated, as the appropriate entries were made in the Unified State Register of Legal Entities to confirm its liquidation.

Provisions of Part 3 of Art. 196 of the Civil Procedure Code of the Russian Federation in this part were not violated by the courts.

Taking into account the subject of the stated requirements, the court’s refusal to grant the claims of S. is also justified on the recognition of her ownership of trademarks, since in accordance with the provisions of Art. 1478 of the Civil Code of the Russian Federation, the owner of the

exclusive right to a trademark may be a legal entity or an individual entrepreneur, which is not applicable for S. at all.

The Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation finds that the violations of substantive and procedural Law committed by the courts of the first and appellate instances are significant, they influenced the outcome of the case and without their correction it is impossible to restore and protect the violated rights and legitimate interests of the applicant, due to that the appealed court decisions are subject to partly setting aside with the direction of the case in that part for a new consideration.

Guided by articles 387, 388, 390 of the Civil Procedure Code of the Russian Federation, Judicial Panel for Civil Cases of the Supreme Court of the Russian Federation

ordered:

the Judgment of the Khamovnichesky District Court of Moscow dated June 28, 2013 and the appeal decision of the Moscow City Court dated June 5, 2014 must be set aside in terms of the refusal to grant the claims of S. on assigning duties to D. to transfer to S. the following properties:

25,000 shares with a par value of <...> US dollar each (50% of the total) of Meadus Holdings Limited company,

25,000 shares with a par value of <...> US dollar each (50% of the total) of Milord International Limited company,

25,000 shares with a par value of <...> US dollar each (50% of the total) of Degord Limited company,

25,000 shares with a par value of <...> US dollar each (50% of the total) of Drongo International Limited company,

25,000 shares with a par value of <...> US dollar each (50% of the total) of Bogalto Investments Limited company,

on recognition as common property of spouses, recognition for S. rights to the following property and obligations of D. to convey to S. the following:

- 5,000 shares with a par value of <...> US dollar each (100% of the total) of Tripleton International Limited company,

- 5,000 shares with a par value of <...> US dollar each (100% of the total) of Manford International Limited company

and in this part, this case must be sent for a new trial proceeding to the relevant court of the first instance.

The Judgment of the Khamovnichesky District Court of Moscow dated June 28, 2013 and the appeal decision of the Moscow City Court dated June 5, 2014 regarding the refusal of S. in granting the claims for recognition of the apartment and parking spaces at the address: <...>, as the common property of the spouses and the division of this property, amend it by excluding from the reasoning part of the court decision and the appeal decision the court's conclusion that D. was never the beneficial owner of Tripleton International Limited company.

In the remaining part, the Judgment of the Khamovnichesky District Court of Moscow dated June 28, 2013 and the appeal decision of the Moscow City Court dated June 5, 2014 must be left without any amendments.

Scotland

- Finance and Children

IAFL European Chapter 35th Anniversary – Scotland

Thank you to the IAFL for encouraging us to discuss interesting cases in our jurisdiction. A cohort of Scottish IAFL Fellows met to discuss the most relevant Scottish cases. We were unable to reach consensus on one for each of the categories, so I have chosen them at random based on the cases which formed part of our discussion.

There are a few statistics worth noting from a Scottish perspective: -

- We are a small jurisdiction and population – population of c. 5.4m with c. 2.67m dwellings (2021)
- 91% of Scotland's population live in 2.3% of its land area – a large proportion of Scotland is uninhabited (2022).

Of the two categories of cases: -

1. **Finance**

Some preliminary notes: -

- Our jurisdictional basis for divorce is the domicile of either party or habitual residence of either party for a period of one year. A dispute on jurisdiction would be considered based on a forum non-conveniens argument or based on specific rules if intra-UK.
- We do not have a matrimonial property regime. Our main family law provisions regulating financial provision on divorce has been in place since 1985 - we have a clear framework for financial provision on divorce which is practical and is approved by most family lawyers, focussing on the principle of a "clean break".
- Discretion is available if so required, but most issues are resolvable through negotiation and agreement. Our most complex cases are where assets are largely pre-marital and the standard of living during the marriage is high.
- Litigated cases (of which there are few) are decided at first instance in a local Sheriff Court or the Court of Session (which sits in Edinburgh). Cases can be appealed to a three Judge Court and then to the Supreme Court (which sits in London, UK).

I have chosen a case which highlights the evolution of the Scottish Court, and which paves the way for remote evidence in our jurisdiction (and therefore a consideration for Scots living abroad, but who have retained their domicile here). This case also highlights the expediency of the Scottish Court. The case was initially heard to determine the merits of divorce (of which, it is unusual for the merits of divorce to be contested). It is assumed financial matters were later solved by agreement, further highlighting that a judicial determination of financial matters in Scotland is not often necessary: -

YI v AAW [2020] CSOH 76

This was a case heard and decided upon by Lady Wise (Judicial Fellow of the IAFL). This couple had a relatively short marriage. They married in 2011 in Dubai and separated in 2018. The wife was Russian. The husband was Scot domiciled. They had a child together. The husband raised divorce proceedings in the local Court in Inverness. To raise in a local Court in Scotland, there is residency

requirement of 40 days. This action was dismissed as the Court did not have jurisdiction. The husband commenced divorce proceedings in Dubai. The wife raised divorce proceedings seeking financial provision in the Court of Session in Scotland based on her husband's domicile. She raised the divorce proceedings based on the marriage having broken down irretrievably because of the husband's behaviour (which he disputed). This case was heard in July 2020. The case was heard remotely. Because of the disputed basis for divorce, the court required to assess the credibility and reliability of each witness. Whether the Court was able to do this because of the remote nature of the hearing was disputed. This was rejected. As with most family cases in Scotland, the primary evidence of witnesses was provided by sworn affidavits. The disputed evidence focussed on the relationship of the couple and the reasons for the breakdown of their relationship.

A submission was made for the husband that it would be difficult to assess credibility of the parties and their witnesses in this case because the proof was conducted remotely on video screens. Lady Wise addressed this directly in her decision [para 44]: "*my vision and ability to hear the witnesses was clear and unimpeded. The pursuer came across as emotional and a little fraught, speaking as she was in her second language…linguistic nuance was as easy to pick up on screen as it would have been in the courtroom. So far as the defender is concerned…on one occasion in cross examination…he leant forward towards the camera to state his denial in…an aggressive manner. He rolled his eyes more than once…he folded and unfolded his arms. He became noticeably red in the face…My observations of his behaviour were noted just as I would have done had the been appearing in a physical court. The connectivity and sound difficulties had no bearing on that assessment, or on my ability to assess the credibility and reliability*."

Financial matters relating to this case were deferred for a period to allow disclosure of the defender's financial circumstances, with the expectation that a hearing to determine those issues would take place in less than a year (or resolved by agreement). This case made a significant change to the way that litigated cases are now conducted in Scotland.

2. **Children**

Some preliminary notes: -

- Generally, the Scottish Court's approach to child cases is to only intervene where necessary and, where an order is mad,e will focus on the best interests and welfare of the child.
- An Order made outside the UK in respect of a child shall be recognised in Scotland if it was made in a country where the child was habitually resident (Family Law Act 1986 section 26) – most of our contested child cases are either domestic cases regulating care, relocation or cases under the 1980 Hague Convention.

The child case I have chosen involves an application under the 1980 Hague Convention which was appealed to the UK Supreme Court and in which the IAFL was an Intervener. Several IAFL Fellows from Scotland and England and Wales acted in this case in some capacity.

R Petitioner [2015] UKSC 35 (on appeal from [2014] CSIH 95**)**

As an appeal to the UKSC, this case was heard before five Judges, all of whom agreed. The issue in this case was whether the court should order the return to France of two little girls who had been living

in Scotland with their mother. The issue arose under article 3 of the 1980 HC, incorporated in the UK within the Child Abduction and Custody Act 1985.

The children were born in France in 2010 and 2013. Their father is French. Their mother is a British and Canadian citizen. She was born in Canada with a Scottish mother. Until July 2013, they lived together in France. They would visit the mother's family in Scotland. In July 2013, the mother and the children came to live in Scotland with agreement of the father. The father stated that this was on the basis that they would do so for a period of 12 months while the mother was on maternity leave and would then live elsewhere. A decision would then be made on where the family would live (not necessarily in France). The marriage broke down. The mother served divorce proceedings in Scotland on the father in November 2013. She sought residence of the children and to stop the father removing the children from Scotland. The father raised proceedings seeking an order for return of the children to France and maintaining the mother's raising of the proceedings in Scotland seeking residence of the children was wrongful retention of the children under the 1980 HC. This was predicated on the children being habitually resident in France immediately before the raising of the proceedings in November 2013.

At first instance, the Court determined the children had not lost their habitual residence in France before November 2013. The Court granted the father's application that the children be returned to France.

This decision was reversed on Appeal to the Inner House (appeal Court in Scotland). The Court considered that the Court at first instance had erred in law in treating a shared parental intention to move permanently to Scotland as an essential element in any alteration of the children's habitual residence from France to Scotland. The Court of Appeal considered in the whole circumstances, the children were habitually resident in Scotland at the material time, four months being sufficient time to become habitually resident.

The case was then appealed to the UK Supreme Court. The decision of the UKSC was to uphold the decision of the Inner House. Lord Reed stating in terms that there was no requirement that there should be an intention on the part of one or both parents to reside in a country permanently or indefinitely before habitual residence could be acquired there by a child or children.

This case has subsequently been referenced in the case of *F v M* [2021] CSOH 90, specifically, the impact, if any, of a formal agreement between two parents on a decision about habitual residence. A stated joint intention of parents that their children will not acquire a new habitual residence cannot prevent that occurring [23]: -

"...It accords with the policy of the Convention that children are not parcels of property whose future can be determined solely by the contracts or actions of adults. An agreement that a child's habitual residence will not change cannot be enforced if, as a matter of fact, that child's residence is found to have changed…Such agreements remain relevant as a factor, but will not be adhered to where, as here, the necessary social and family integration of the children in the "new" country is shown to be of a well settled character. It may be that different views exist in other Hague Convention jurisdictions about the relative significance of a formal agreement entered into with the benefit of legal advice such as that entered into by these parties. In this jurisdiction, however, it is clear that, no matter how formal the agreement, the analysis of the circumstances of the children at the material time must be the primary focus of the discussion."

Slovakia

- Children

35th Anniversary – landmark cases – Slovakia

Category 2. Children:

Slovakia – Austria abduction case and custody case

Main issue: habitual residency of minor children

Daniela Jezova law office was involved for Slovakia part.

The case was listed as one of the landmark cases of Court of Justice of the European Union for the year 2023 in the annual selection of cases.

Case Numbers: Bratislava court 2P/47/2020, Austrian court: 20R 380/21d, Court of Justice EU: C-87/22 TT v. AK

Years: 2020 - 2024

Case is mainly about the habitual residency of minor children, where all parties were Slovak citizens, living in the border area in Austria, but having their daily lives in Slovakia – kids visiting schools, out of school activities, parents having daily jobs. Nobody was speaking German; they all speak Slovak.

In Slovakia it was an abduction case where the mother moved to Slovakia with children after the beak up between spouses. The first instance court in Slovakia rejected the return application having legal opinion that the children had habitual residency in Slovakia due to spending most of their active time and daily life in Slovakia for many years before they came to live in Slovakia with their mother. Appeal court cancelled the decision and returned the case to the first instance to elaborate and execute more evidence regarding habitual residency of minors. In that second procedure first instance court, where a different judge was appointed to the case, returned the children to Austria having opinion that children have habitual residency in Austria. Appeal court approved that decision.

There was also a jurisdiction fight about the divorce case and custody case. Both parties filled their applications one in Austrian court and one in Slovakian court. Austrian court filling was first – difference one day. The first instance Austrian court rejected the case due to not having jurisdiction about the minor children stating the children have habitual residency in Slovakia. Appeal Austrian court had a different legal opinion – stating Austria shall have the jurisdiction over the minor children and continue dealing with the custody and divorce case. Slovakian court issued several emergency orders based on the presence of the children in the country. Custody case was interrupted in Slovakia to wait for Austrian courts to decide about their jurisdiction. Austrian court continued to deal with the custody case and filled preliminary questions to the Court of Justice. After the legal opinion of Austrian appeal court, Austrian first instance court intended to transfer the jurisdiction to Slovakian court for custody case due to the fact children are closer to Slovakian court – Slovakian court can easier ask the school for report, talk to children to hear their voice in their native language, etc.

Austrian court filled preliminary question to Court of Justice of EU asking about the Interpretation of the Regulation Brusel IIbis (before Recast) article 15.

On those grounds, the Court (Fourth Chamber) hereby ruled:

1. Article 15 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as

meaning that the court of a Member State, which has jurisdiction to rule on the substance of a case on the matter of parental responsibility under Article 10 of that regulation, may exceptionally request the transfer of that case, provided for by Article 15(1)(b) of the regulation, to a court of the Member State to which the child has been wrongfully removed by one of his or her parents.

2. Article 15(1) of Regulation No 2201/2003

must be interpreted as meaning that the only conditions to which the possibility for the court of a Member State with jurisdiction as to the substance of a case in matters of parental responsibility to request that that case be transferred to a court of another Member State is subject are those expressly set out in that provision. When examining those conditions in respect of, first, the existence in the latter Member State of a court better placed to hear the case and, second, the best interests of the child, the court of the first Member State must take into consideration the existence of proceedings for the return of that child which have been instituted pursuant to the first paragraph and point (f) of the third paragraph of Article 8 of the Convention on the Civil Aspects of International Child Abduction, concluded in The Hague on 25 October 1980 and in which a final decision has not yet been delivered in the Member State to which that child was wrongfully removed by one of his or her parents.

Importance:

The case was unique in regard to jurisdiction and habitual residence of minor children. Many different legal opinions were presented and the questions about the interpretation of Art. 15 Regulation Brussel IIbis raised which were not interpreted before by the Court of Justice of the EU.

Finances – no nominations

Spain

- Children and finance

Landmark decision financial

Spanish Supreme Court Judgment 315/2018 dated 30th May 2018 confirms that the clause whereby the future spouses waive their rights to spousal maintenance in a pre-nuptial agreement is valid. This judgment recognises the validity of the waiver in a prenuptial agreement signed by the Wife to Be (a Russian national) in Spanish before a Spanish Notary Public, and the judgment declares as a fact that she *knew what she had signed and the significance of what she had declared, because of her knowledge of the language, her experience of a previous marital breakdown, and the possibility of obtaining explanations from the notary*.

This judgment holds significant relevance as it addresses the potential validity of waiver clauses in relation to Spousal maintenance, which has been confirmed by subsequent judgments of the Spanish Supreme Court, contributing to the harmonisation of the interpretation and enforceability of waiver clauses related to spousal maintenance in prenuptial agreements and marriage contracts. The validity of the waiver would only be declared null, and void as long as is not against the law, the moral or the public order.

Landmark decision children

The Spanish Supreme Court Judgment 89/2021 dated 17th February 2021 which accepts the jurisdiction of the Spanish Courts and the applicability of Catalonian law in a divorce case involving two French nationals who had their last common habitual residence in Catalonia (Spain) and where the Husband continued to have his habitual residence after the divorce.

This decision confirms the *modus operandum* of applying the following Regulations and conventions:

(i) Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

(ii) Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

(iii) 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 matrimonial property regimes.

(iv) Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,

(v) Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,

(vi) Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

This decision also reinforces the concept of maintenance and its autonomous interpretation in accordance with the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, including compensatory or indemnity payments between "ex-spouses" as long as those payments are not related to the division of property or liquidation of property under the matrimonial property regime in accordance with the judgments of the European Court of Justice (ECJ) dated 6 March 1980, case number 120/1979, De Cavel II and dated 27 February 1997, case number C-220/1995, Boogaard/Laumen.

The judgment also makes clear that even though the habitual residence of the children changed during the divorce proceedings, as their residence was located in Catalonia (Spain) at the time of filing the divorce application, the Spanish Courts had jurisdiction regarding the attribution and exercise of parental responsibility, especially for dealing with rights of custody and rights of access, in accordance with Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The judgment also specified that the law applicable was Catalonian Law in accordance with the Spanish Civil Code and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

This Spanish Supreme Court Judgment is of paramount significance as it brings clarity to the application of international Conventions and European Regulations in family law cases with a Spanish element.

Contributions:

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Elena Zarraluqui

Switzerland

- Children and finance

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

return

Chapeau

145 III 109

16 Extract from the judgement of the Second Civil Division in the case of A.A. v. B.A. (complaint in civil matters)
5A_841/2017 of 18 December 2018

Regeste

Art. 64 al. 1bis LDIP; compétence internationale pour connaître du partage de prétentions de prévoyance professionnelle envers une institution suisse de prévoyance professionnelle; champ d'application temporel du nouveau droit.
Interprétation de l'**art. 64 al. 1bis LDIP**; possibilité de reconnaître un jugement de divorce étranger entré en force prior to the entry into force of the new law, which porte sur le partage de prétentions de prévoyance professionnelle envers une institution suisse de prévoyance professionnelle (consid. 4 et 5).

Faits à partir de page 110

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A. By judgment of 19 January 2015, the Tribunal de Grande Instance de Mulhouse dissolved the marriage of A.A. and B.A., both French nationals and resident in France. This judgement became final.

B. On 2 June 2015, A.A. filed a petition with the Basel-Landschaft East Civil District Court. She requested that the French divorce decree be amended to the effect that the termination benefits accrued by B.A. during the marriage with his pension fund in Switzerland from his employment in Switzerland were to be divided, recognising the decree of 19 January 2015. The Civil District Court dismissed the claim in its ruling of 10 January 2017. The appeal lodged by A.A. against this was also dismissed by the Cantonal Court of Basel-Landschaft in a ruling dated 5 September 2017.

C. In an appeal in civil matters dated 23 October 2017, A.A. (appellant) appealed to the Federal Supreme Court. As before the lower courts, she requests that the termination benefits accumulated by B.A. (respondent) with his pension fund during the marriage pursuant to **Art. 122 ZGB** be divided - in recognition of the divorce decree of the Tribunal de Grande Instance de Mulhouse of 19 January 2015 - and that the respondent's pension fund be ordered to transfer the difference calculated pursuant to **Art. 22 para. 2 FZG** to the vested benefits institution designated by the appellant.
The Federal Supreme Court dismisses the case on the merits.
(Summary) From the recitals:

Considérants

4.

4.1 The complainant demanded that, in recognition of the divorce decree of the Tribunal de Grande Instance de Mulhouse of 19 January 2015 (see facts of the case), the termination benefits of the

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occupational pension scheme of the respondent and to instruct his pension fund to transfer the difference to a vested benefits institution yet to be specified in accordance with **Art. 22 para. 2 FZG** (SR 831.42). The lower court dealt with this solely under the heading of whether the French judgement was incomplete. It came to the conclusion that a supplement was not justified (for the reasons, see the unpublished E. 6.1).

4.2 The disputed French divorce decree was dated 19 January 2015 and became final without being contested (see facts). The proceedings for recognition and supplementation subsequently initiated by the complainant in Switzerland were still pending on 1 January 2017 (see facts).
On 1 January 2017, the new provisions of the Swiss Civil Code adopted by Parliament on 19 June 2015 on pension equalisation in the event of divorce came into force (AS 2016 2313; see also Dispatch of 29 May 2013 on the amendment to the Swiss Civil Code [Pension Equalisation in the Event of Divorce], BBl 2013 4887 [hereinafter: Dispatch on Pension Equalisation]). Together with the Civil Code, the legislator revised the provisions of the Federal Act of 18 December 1987 on Private International Law (IPRG; SR 291) relevant to pension equalisation. The applicable law for actions or requests that are pending in the first instance when this Act comes into force shall be determined in accordance with this Act (**Art. 198 IPRG**). For requests for the recognition or enforcement of foreign judgements that are pending when this Act comes into force, the conditions for recognition or enforcement are governed by this Act (**Art. 199 IPRG**).

4.3 The amendment or modification of a foreign decision is governed **by Art. 64 IPRG**. According to the new **Art. 64 para. 1bis IPRG**, the Swiss courts have exclusive jurisdiction for the settlement of pension claims against a Swiss occupational benefits institution**.**
The local jurisdiction is determined in accordance with Art. 64 para. 1 in conjunction with Art. 59 or Art. 60 IPRG. **Art. 59 or Art. 60 IPRG** or subsidiarily according to the registered office of the pension fund (direct jurisdiction).
Due to the exclusive and mandatory jurisdiction of Swiss courts in accordance with **Art. 64 para. 1bis of the IPRG**, the courts in the

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judgments handed down abroad on the equalisation of Swiss pension claims are no longer recognised (indirect jurisdiction; see Dispatch on Pension Equalisation, BBl 2013 4887, 4927 on Art. 63 para. 1bis and 4930 on Art. 64 para. 1bis; see also CORINNE WIDMER LÜCHINGER, in: Zürcher Kommentar zum IPRG, 3rd ed. 2018, N. 4 on **Art. 64 IPRG**; GIAN PAOLO ROMANO, Aspects de droit international privé de la réforme de la prévoyance professionelle, FamPra.ch 2017 p. 57 ff., 67 and 74 f.; JUNGO/GRÜTTER, in: Scheidung, Bd. I: ZGB, 3rd ed. 2017, N. 47 f. zu Vorbemerkungen zu **Art. 122-124e ZGB**; THOMAS GEISER, Scheidung und das Recht der beruflichen Vorsorge, AJP 2015 p. 1371, 1385). The foreign divorce decree is always incomplete with regard to pension equalisation, regardless of whether the Swiss pension assets were taken into account by the divorce court or not (WIDMER LÜCHINGER, loc. cit., N. 12 f. to **Art. 64 IPRG**; JAMETTI/WEBER, in: Scheidung, Bd. II: Anhänge, 3rd ed. 2017, N. 87 to Annex IPR).

4.4 In connection with the new jurisdiction provisions, the PILA does not provide for a transitional period or an exception in favour of decisions that were already final and binding before the revision came into force. The application of **Art. 64 para. 1bis PILA** without a corresponding transitional solution would mean that recognition is excluded even if the foreign decision was already final at the time of entry into force on 1 January 2017 (WIDMER LÜCHINGER, loc. cit, n. 4 to **Art. 64 IPRG**; in this sense, probably also JAMETTI/WEBER, loc. cit., n. 89 to Annex IPR; a.A. BASILE CARDINAUX, Le partage des prétentions de prévoyance en cas
de "divorce international", in: Symposium en droit de la famille, Patrimoine de la famille, 2017, p. 107, the with reference to **Art. 1 SchlT ZGB**, proposes that a judgement that pronounces on occupational benefits can only no longer be recognised if it has not yet become legally binding when the new law comes into force). As far as can be seen, most authors do not explicitly comment on the issue discussed here.

4.5 A comparison of the new and old IPR rules illustrates the effects of an immediate (retroactive) application of the new law.

4.5.1 At the time of the judgement, the French divorce judge had jurisdiction in the case to be judged.

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also had to decide on the settlement of the spouses' pension entitlements with Swiss institutions, especially since neither of the parties was domiciled in Switzerland and neither had Swiss citizenship (**Art. 59 and Art. 60 IPRG** in the version valid until 31 December 2016; see an application case in judgment 5A_874/2012 of 19 March 2013 E. 2 and 4, in: FamPra.ch 2013 S.
752). The division of the termination benefit of the occupational pension plan was in principle subject to the law applicable to the divorce, i.e. the law applicable to the divorce (in this case French law; cf.

aArt. 63 IPRG; **BGE 134 III 661** E. 3.1 S. 663). Exceptions were reserved in accordance with **Art. 15 IPRG**, in which the pension statute, i.e. Swiss law, was applied (**BGE 131 III 289** E. 2.7 p. 293), which is not the case in the present case, as will be discussed later. If the equalisation payment to be made to the wife under foreign law was determined in accordance with Swiss law, taking into account the termination benefit of the husband's occupational pension scheme, the divorce decree was not incomplete in this respect and did not require any supplementation (**BGE 134 III 661** E. 3.3 p. 664). It was also possible to recognise a foreign divorce decree that awarded the wife less than half of the termination benefit of the husband's occupational pension plan (as this is not obviously incompatible with Swiss substantive public policy; see **BGE 134 III 661** E. 4.2 p. 666 and E. 5.5 below).

4.5.2 Under the new IPR rules, as explained above, only the Swiss judge can rule on assets held in Swiss pension schemes in accordance with Swiss law. The French divorce decree could not (or no longer) be recognised with regard to the pension scheme, even if the French divorce judge had carried out the pension equalisation in accordance with the law applicable at the time or had otherwise taken it into account and even though the French divorce decree was already final before the revision came into force. In any case, the competent Swiss court would have to decide anew (i.e. once again) on the pension equalisation.

4.6 The question arises as to whether the legislator intended such a retroactive effect of the new rules on international jurisdiction on judgements that had already become final before the revision came into force.

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5.

5.1 The law must first and foremost be interpreted on its own merits, i.e. according to its wording, meaning and purpose and the underlying judgements on the basis of a teleological method of understanding. The interpretation of the law must be guided by the idea that it is not the wording alone that constitutes the norm, but only the law understood and concretised in terms of facts. What is required is the factually correct decision in the normative structure, orientated towards a satisfactory result of the ratio legis. In doing so, the Federal Supreme Court adheres to a pragmatic pluralism of methods and specifically rejects subjecting the individual elements of interpretation to a hierarchical order (**BGE 144 III 29** E. 4.4.1 p. 34 f.; **BGE 140 I 305** E. 6.1 p. 310 f.; **BGE 121 III 219** E. 1 d/aa; each with further references). Particularly in the case of more recent laws, the legislative materials must also be taken into account if they provide a clear answer to the question at issue and thus help the court (**BGE 144 III 29** E. 4.4.1 p. 34 f.; **BGE 143 I 109** E. 6 p. 118; **BGE 140 V 8** E. 2.2.1 p. 11 with references).

A lege artis interpretation of the law may show that an (apparently) clear wording is too broad and does not apply to a situation that is covered by it (teleological reduction, see **BGE 143 II 268** E. 4.3.1 p. 273 f.; **BGE 141 V 191** E. 3 p. 194 f.; **BGE 140 I 305** E. 6.2 p. 311; **BGE 131 V 242** E. 5.2 S. 247). According to a contemporary understanding of methods, this is a permissible act of judicial creation of law and not an impermissible interference in the legal policy competence of the legislator (EMMENEGGER/TSCHENTSCHER, Berner Kommentar, 2012, N. 378 to **Art. 1 ZGB**; TUOR/SCHNYDER/SCHMID/JUNGO, Das schweizerische Zivilgesetzbuch, 14th ed. 2015, § 5 N. 35; **BGE 131 III 61** E. 2.2 p. 65; **BGE 128 I 34** E. 3b p. 41; **BGE 121 III 219** E. 1d p. 224 et seq. notes).

5.2 The materials indicate that the preliminary draft of December 2009 did not yet provide for exclusive jurisdiction. At that time, it was proposed that only **Art. 61 IPRG** be amended (proposed wording: "Divorce and separation are subject to Swiss law.") and that a new Art. 64 para. ^{1bis} be inserted (proposed wording: "If no court has jurisdiction under paragraph 1, the Swiss courts at the registered office of an occupational benefits institution shall have jurisdiction for actions to supplement or amend decisions on the division of claims against that institution. A supplement is permissible,

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insofar as the foreign decision has not taken into account pension assets."). The dispatch does not explain why the draft dispatch differs from the preliminary draft.

With regard to the objective of the changes finally introduced, the dispatch states that pension equalisation and divorce itself should "in future" be subject exclusively to Swiss law (dispatch on pension equalisation, BBl 2013 4887, 4902 para. 1.5.4). It can also be inferred from the dispatch that the legislator wanted to draw a line under the debate as to the conditions under which foreign judgements regarding claims against a Swiss pension fund are to be supplemented (cf. dispatch on pension equalisation, BBl 2013 4887, 4930 on Art. 64 Para. ^{1bis} : "The fact that foreign decisions on the equalisation of Swiss

pension assets are no longer recognised, the frequent question in practice as to whether a foreign decision is incomplete with regard to such assets and therefore requires supplementation becomes superfluous.").
The dispatch does not comment on a possible retroactive effect on judgements made before the revision came into force. The word "in future" (see above on the message on pension equalisation, BBl 2013 4887, 4902 para. 1.5.4) can at least be considered an indication that speaks in favour of a future, but not retroactive, application.

5.3 In the parliamentary deliberations in the Council of States as the first chamber, the Federal Council's proposal on **Art. 61-64 IPRG** was only narrowly adopted (22:21), whereby the preliminary consultation committee had requested rejection in this regard and submitted a counter-proposal. In a newly proposed **Art. 65 para. 3 and 4 IPRG**, this provided for the recognisability of foreign decisions on the settlement of pension claims against a Swiss occupational pension scheme under certain conditions. In the event that a recognisable decision did not comply with the principles of Swiss law on pension equalisation, the counter-proposal provided for the possibility of an action for modification within one year of this decision becoming final (see Official Bulletin, meeting of the Council of States of 12 June 2014 [13.049], AB 2014 S 527 ff.). There was no debate on the issue of the retroactive effect of the Federal Council's proposal, which was ultimately adopted.

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What is interesting in this context is the statement made by Federal Councillor Sommaruga at the meeting of the Council of States on 12 June 2014 (AB 2014 p 528). The bill under discussion offers a differentiated and fair solution for pension equalisation. The Federal Council is "of the opinion that we must now prevent this solution from being undermined by a procedure abroad." Regulations can only be undermined if applicable law is to be circumvented, but not in a case such as this, where the French judge has not yet been able to apply the new law that is to be prevented from being circumvented. Furthermore, Federal Councillor Sommaruga, without going into transitional law issues, pointed out the problems surrounding the interpretation and exequatur of foreign judgements under the old law and the need for second proceedings in Switzerland under the Federal Council's proposal, but ultimately declared both proposals (that of the Federal Council and that of the Commission) to be acceptable (AB 2014 p 528).
In the debate of the National Council as a second chamber on 1 June 2015, National Councillor Feri suggested in the form of an individual motion that a decision should be made in line with the previous proposal of the Committee of the Council of States. Here too, Federal Councillor Sommaruga argued primarily that the Swiss pension solution should be prevented from being undermined by a procedure abroad (AB 2015 N 771). National Councillor Fischer, spokesperson for the committee, stated that the issue of international jurisdiction had not been discussed in the committee, which is why he was unable to take a position on this. The National Council ultimately followed the Federal Council's proposal and the majority of the Council of States. The problem of a possible retroactive effect of the IPR rules was not discussed here either. Consequently, it cannot be said that the National Council or the Council of States deliberately sought retroactive application.

5.4 If the legislator does not specifically regulate the temporal scope of application of a legislative revision, **Art. 1-4 SchIT ZGB** are authoritative. The starting point here is the basic rule contained in **Art. 1 SchIT ZGB** of the non-retroactive effect of a legislative amendment, which applies to the entire area of civil law (**BGE 141 III 1** E. 4 p. 4; see also MARKUS VISCHER, in: Basler Kommentar, Civil Code, Vol. II, 5th ed. 2015, N. 2 to **Art. 1 SchIT ZGB**; **BGE 133 III 105** E. 2.1 P. 108; **BGE 138 III 659** E. 3.3 P. 622).

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An exception pursuant to **Art. 2 SchIT ZGB**, which provides for a genuine retroactive effect, can only be affirmed under restrictive conditions. It is not sufficient for the new norm to be imperative in nature; public policy and morality only permit retroactive application if the norm is one of the fundamental principles of the current legal system, i.e. if it embodies fundamental socio-political and ethical views (**BGE 141 III 1** E. 4 P. 4; **BGE 133 III 105** E. 2.1.3 p. 109; VISCHER, loc. cit., n. 4 to **Art. 2 SchIT ZGB**; HÜRLIMANN-KAUP/SCHMID, Einleitungsartikel des ZGB und Personenrecht, 3rd ed. 2016, n. 525).

5.5 As explained, the temporal scope of application with regard to retroactivity was not explicitly regulated. Furthermore, an exception based on public policy is out of the question from the outset, as the division of termination benefits is not a matter of public policy (**BGE 134 III 661**, confirmed in **BGE 136 V 57** E. 5.4 p. 63). The dispatch also does not declare pension equalisation to be a matter of public policy. Nor does it cite any other fundamental principle of the legal system that would justify retroactive application. On the other hand, legal certainty is at stake.

5.6 The general transitional provisions of the IPRG adopt the general principle of non-retroactivity, as it already results from **Art. 1 SchIT ZGB** and as such expresses the view of the federal legislator on intertemporal law not only in the area of the ZGB (**BGE 116 II 211** E. 2b p. 211; **BGE 112 Ib 39** E. 1c p. 42 f.; **BGE 84 II 179** E. 2b p. 182; cf. also GEISER/JAMETTI, in: Basler Kommentar, Internationales Privatrecht, 3rd ed. 2013, N. 4 to **Art. 196 IPRG**). In this respect, the principles outlined above for **Art. 1 et seq. SchIT ZGB** when interpreting **Art. 196 ff. IPRG** must be taken into account.

Since the problem of subsequent loss of recognisability is the main issue in the present case, the scope of **Art. 199 PILA** is decisive. According to **Art. 199 IPRG**, the requirements for requests for recognition or enforcement of foreign judgements that are pending when the IPRG comes into force are governed by this Act. The provision leaves open how to decide if recognition was possible under previous law but not under the new law (DIRK TRÜTEN, in: Zürcher Kommentar zum IPRG, 3rd ed. 2018, N. 5 to **Art. 199 IPRG**; GEISER/JAMETTI, loc. cit., N. 7 to **Art. 199**

IPRG). In the doctrine, it is proposed to fill this gap in the sense of **Art. 197 IPRG** (GEISER/JAMETTI, loc. cit., N. 7 to **Art. 199 IPRG**). If a request for recognition was pending at the time of the change of law and this would have to be rejected under the new law, the foreign judgment must nevertheless be recognised if this would have been possible under the old law (GEISER/JAMETTI, loc. cit., n. 7 to **Art. 199 IPRG**; TRÜTEN, loc. cit., n. 5 to **Art. 199 IPRG**). TRÜTEN (loc. cit., n. 1 to **Art. 199 IPRG**) explicitly states that **Art. 199 IPRG** must also apply with regard to subsequent revisions.

KNOEPFLER/SCHWEIZER/OTHENIN-GIRARD (Droit international privé suisse, 3rd ed. 2004, p. 113 para. 207) come to the same conclusion. They refer to the principle of "favour recognitionis", which is the basis of **Art. 199 IPRG**. According to this principle, the law to be applied is that of the disputed rights which allows the foreign judgement to be recognised or enforced. In the rare cases in which the new law is stricter (recognition possible under the old law, but not under the new law), **Art. 199 PILA** should be abandoned and the general rule of **Art. 196 PILA** should be applied, which makes it possible to ensure the recognition or enforcement of the judgement in question.

The interpretation of the general transitional provisions of the IPRG thus leads to the following consequences in the case at hand context to the same conclusion as the preceding considerations, namely that a retroactive effect on judgements that became final before the revision came into force is not appropriate.

5.7 Finally, it should be noted that the principle of non-retroactivity was also reflected in the substantive (national) transitional law on the revision of pension law. According to **Art. 7a SchIT** In accordance with Art. 7d **of the Swiss Civil Code**, which is to be used to determine the content of the transitional law on the revision of occupational benefits insurance in accordance with the amendment to the Swiss Civil Code of 29 May 2013 (see Dispatch on Pension Equalisation, BBl 2013 4887, 4923 on Art. 7d), divorces that became legally binding under the previous law remain recognised.

5.8 To summarise, it cannot be assumed that the legislator intended to deviate from the principle of non-retroactivity. This means that legitimate expectations must be protected insofar as the rules of jurisdiction that applied prior to the revision do not apply.

can be revoked retroactively by no longer recognising the judgement that was made lawfully and on the basis of jurisdiction, because the foreign judge in question can no longer rule on the provision under the new law.

5.9 Against this backdrop, a teleological reduction of the new IPR rules that came into force on 1 January 2017 regarding the settlement of pension claims against a Swiss occupational pension scheme should be noted that it was not the legislator's intention to apply the new rules retroactively to foreign divorce judgments that had already become final before the revision came into force. If such a judgement is brought before a Swiss judge, the latter must examine the matter in accordance with the provisions applicable until the end of 2016. In principle, the new IPR standards on pension equalisation do not prevent recognition of the judgment of the Tribunal de Grande Instance de Mulhouse of 19 January 2015.

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61 Extract from the judgment of the Second Civil Division in the case of A. v. B. (complaint in civil matters) 5A_450/2015 of 11 March 2016

Regeste

Art. 301a para. 2 lit. a and para. 5 CC; removal of the child abroad.
Regulatory competence of the national legislator (E. 2.3). Draft of the Federal Council and parliamentary deliberation (E. 2.4). Respect for the parents' freedom of establishment and freedom of movement (E. 2.5). Examination of the appropriate place of residence of the child on the basis of the best interests of the child based on the departure of one parent (E. 2.6). Criteria for this assessment; care concept as a starting point (E. 2.7). Mandatory examination of an adjustment of the care, visitation and maintenance arrangements (E. 2.8).

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A. A. (born 1966, French national) and B. (born 1973, Austrian national) married in 2011. They have two children together, C. (born 2010) and D. (born 2011). The spouses separated at the beginning of 2012.

B. By judgment of 7 July 2014, the District Court of St. Gallen dissolved the marriage between the parties. It granted the parents joint custody, but awarded the children to the mother, placing them in her sole care and stipulating that they live with her. The father was granted visitation rights for every second weekend from Saturday, 9 a.m. to Sunday, 6 p.m., as well as holiday rights for a fortnight per year. The court also granted the mother permission to move the children's place of residence to Graz. For the period after the move, the father was granted the right to visit the children in Graz every first weekend of the month from Friday, 8.00 am to Sunday, 6.00 pm; the mother was obliged to bring the children to U. every three months (February, May, August, November) on the third weekend of the month, so that the father could spend the time with the children from Friday, 9.30 am to Sunday, 2.00 pm. The holiday entitlement was set at two weeks per year for the period after the move to Graz. Furthermore, the district court ordered guardianship in accordance with **Art. 308 para. 1 and 2 ZGB**. It also ordered maintenance for the wife and children, separately for the period in Switzerland and for the period after the move to Graz. A. lodged an appeal against this. In a decision dated 29 April 2015, the Cantonal Court of St. Gallen confirmed the first instance ruling, in particular the allocation of children and the permission to move the children's place of residence to Graz.

C. On 1 June 2015, A. lodged an appeal in civil matters against the decision of the cantonal court. He is demanding that the request for permission to move the children's place of residence and extended visiting rights (every second weekend from Friday evening instead of Saturday morning and alternating between Easter, Ascension Day, Whitsun and Christmas) be rejected.
The Federal Supreme Court grants the father additional visiting rights on alternating public holidays, but otherwise dismisses the appeal.
(Summary)

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Considerations

From the recitals:

2. The main point of contention is whether the mother should be authorised to move the children's place of residence to Graz. This is governed **by Art. 301a para. 2 lit. a ZGB**, which came into force on 1 July 2014.

2.1 The cantonal courts have assumed that the children are mainly cared for by the mother and have considered that in this case the transfer of residence should only be refused in exceptional cases. Admittedly, the father's visiting rights could be exercised less frequently due to the long journeys and spontaneous visits would become impossible. On the other hand, the mother had given good reasons for her wish to move. She wanted to return to her roots and her home country after the separation, especially as she did not feel integrated in Switzerland. It was understandable that she saw better prospects in Graz in terms of working conditions (hospitality industry), subjective well-being and childcare. Moreover, similar living conditions could be expected there and no dangers were apparent for the children, especially as they were Austrian citizens and the language environment was the same. As far as the father was concerned, the latest submissions did not show a particularly close and familiar relationship with the children. The current care situation would not change if he moved away; he is still "merely" demanding normal visiting rights and does not want to take on any significant share of the care. It would therefore be inappropriate to prohibit the mother from moving away; rather, the father's visiting rights should be adapted to the intended new situation.

2.2 The father complains that the children have the right to be cared for by both parents and that contact should not be de facto thwarted by a move. The mother had not carefully planned and considered the move; in particular, she could not provide evidence of either a job or a flat for Graz. It was completely arbitrary for the cantonal court to hold that she could not do so because of the appeals lodged. Moreover, it is cynical to say that Graz offers good working, social and living conditions; the child's welfare is already in question if the working, living and care situation in the new location is not completely clear, especially as the mother in U.

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It has been proven that he has a job and a flat. It was also incomprehensible why she did not feel integrated despite her many years of residence in Switzerland, as he himself was also a foreigner, even with a different mother tongue, and had been able to integrate without any problems. The mother no longer had many social contacts in Graz and it was questionable whether she would be able to build up a network there. Furthermore, she did not have the necessary bonding tolerance; the findings to the contrary were based on an arbitrary assessment of the evidence. Furthermore, his visiting rights would be inadmissibly curtailed by authorising the move. The fact of a binational marriage also does not make the move permissible. The cantonal court disregarded the best interests of the child by authorising the move, especially as it had to be established beyond doubt that the move was well-considered and not an abuse of rights.
The mother argued in the hearing that the move to her home country had been carefully considered. However, she could
She should not sign an employment and rental contract or enrol the children in school as long as it is not certain when she will be able to leave the country due to the appeals lodged by her father. The father is therefore demanding evidence that cannot objectively be provided. It is not a matter of a remote, exotic or dangerous country, which is why the father's fears are unfounded; the children would be just as well looked after, schooled and cared for in Graz. Moreover, the working conditions in Graz were better for her; she would lose her job in Switzerland and would become a welfare recipient from 2016 unless she found something new.

2.3 The Federal Act of 21 June 2013, which came into force on 1 July 2014 (AS 2014 357), revised parental custody and, in this context, the right to determine the place of residence of children. The new law establishes joint parental custody as a general principle, even for divorced or unmarried parents (for the exceptions, see **BGE 141 III 472**). Whereas under the old law the right to determine the place of residence was to be understood as part of the right of custody (see **BGE 136 III 353**), the amended law stipulates that parental custody includes the right to determine the child's place of residence (**Art. 301a para. 1 ZGB**). If the parents exercise parental custody jointly and one parent wishes to change the child's place of residence, this requires the consent of the other parent or the decision of the court or the child protection authority if the new place of residence is abroad.

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or the change of residence has a significant impact on the exercise of parental care and personal contact by the other parent (**Art. 301a para. 2 ZGB**).

The basic idea behind this norm is that the relationship with the parents depends on the child's place of residence and therefore neither parent alone should be able to relocate if this significantly affects the exercise of the other's parental rights (see dispatch of 16 November 2011, BBl 2011 9107 f. on Art. 301a). For the transnational transfer of the place of residence, it was also essential to consider that this involves a change of jurisdiction with regard to children's interests (see Art. 5 of the Hague Convention on the Protection of Children of 19 October 1996 [HCCH; SR 0.211.231.011] and Art. 5 para. 2 lit. a and c of the Lugano Convention of 30 October 2007 [Lugano Convention; SR 0.211.231.011]). October 2007 [Lugano Convention; SR 0.275.12]), which is why the consent of the other parent or the court or the child protection authority should be required regardless of the distance of the new place of residence and the specific influence on the exercise of parental custody (Dispatch, BBl 2011 9108 on Art. 301a).

The substantive regulatory responsibility for questions of parental care, custody and support, of personal traffic and the right to determine residence has so far been the exclusive responsibility of national legislators. Although there are various international agreements in this area, these only concern jurisdiction, applicable law and the recognition and enforcement of judgements. There are also mutual legal assistance agreements in cases of international child abduction, namely the Hague Abduction Convention of 25 October 1980 (HCCA; SR 0.211.230.02). This regulates the consequences of a violation of the other parent's exclusive or joint custody rights (Art. 3 Hague Convention) or the right to determine the child's place of residence (Art. 5 Hague Convention). However, the Convention does not necessarily specify who is materially entitled to the right to determine the child's place of residence, so that a wrongful interference within the meaning of Art. 3 and 5 HCCA and thus an abduction within the meaning of the HCCA can occur; rather, this is determined by the law applicable under private international law in the state of the child's habitual residence prior to the wrongful removal (see judgment 5A_764/2009 of 11 January 2010 E. 3.1).

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As far as the material aspects are concerned, various efforts have been made at international level in connection with the right to determine the place of residence and the removal of children (so-called relocation) for a possible future standardisation, which, however, are not yet binding for national legislators in any respect. One example is the so-called Washington Declaration on International Family Relocation, which was adopted by the International Judicial Conference in March 2010. This lists a catalogue of decision criteria if the parents cannot agree on the child's place of residence in the event of removal. Possible criteria include the possibility of maintaining a relationship with both parents, the child's wishes, the parents' proposals, the reasons for moving away, continuity of upbringing, pre-existing custody and contact arrangements, the enforceability of the agreement and the mobility of family members, although there is expressly no hierarchy between these criteria. Mention should also be made of the Council of Europe Recommendation on the Rights and Legal Status of Children and Parental Responsibilities of May 2011, whose "Principle 31" is dedicated to "Residence and Relocation". The recommendations contained therein are that states should promote appropriate mechanisms such as mediation and that, in the event of a dispute, the competent authority should decide, unless national law provides otherwise; the best interests of the child should be the primary consideration, but all other relevant factors should also be duly taken into account. Finally, work is underway at Hague level to create a basis in the area of relocation. In January 2012, the Permanent Bureau of the Hague Conference published a preliminary report (Preliminary Note on International Family Relocation) in which it recommended that the Special Commission conduct further research on the topic (Preliminary Note, para. 83). In January 2012, the Special Commission stated that the Washington Declaration formed a suitable basis for future work and that further groundwork should be carried out (Conclusions and Recommendations, para. 83 f.). The above-mentioned preliminary report of the Permanent Bureau emphasises that recent socio-psychological research is by no means unanimous as to whether the best interests of the child are served by extensive contact with both parents (which tends to mean allowing the child to move away).

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The Preliminary Note also states that only a few states have established concrete rules on relocation (Preliminary Note, para. 32). The preliminary report also states that only a few states have concretely regulated relocation and established specific procedural standards (Preliminary Note, para. 44 f.). A number of states approached the problem from the perspective of custody and its modification (Preliminary Note, para. 46). The Preliminary Note also points out that the outcome of removal proceedings may depend on whether certain presumptions or rules on the burden of proof apply or whether the evidence is to be freely assessed or even whether the official maxim applies (Preliminary Note, para. 48 et seq.).

It follows from the above that the national legislator is called upon, but is free in terms of content, to regulate the right of residence with regard to the children, in particular in connection with the question of moving away. The standardisation introduced by the amendment of 21 June 2013 is described below.

2.4 In the Federal Council's draft, **Art. 301a para. 2 of the Swiss Civil Code** was formulated to the effect that the relocation of the other parent and the child would require consent ("If the parents exercise parental custody jointly and one parent wishes to change their place of residence or that of the child, this shall require consent ..."). The Federal Council's dispatch of 16 November 2011 emphasised in this regard that a change of location of only one parent (in particular also a change of location of the parent who is not the main carer) also requires parental consent (BBl 2011 9107 on Art. 301a).

The fact that the relocation of an adult person should be dependent on the consent of another person due to the fact that they have a child together was criticised in the consultation process and led to controversy in the parliamentary debate (see the National Council debate, AB 2012 N 1652 et seq, and the debate in the Council of States, AB 2013 p 12 et seq.) because this would have impaired a number of constitutional rights (in particular the freedom of establishment, **Art. 24 BV**, but also personal freedom and freedom of trade, see TUOR/SCHNYDER/JUNGO, Das schweizerische Zivilgesetzbuch, 14th ed. 2015, p. 514).

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The preliminary advisory committee of the Council of States and the Council of States took the criticism expressed into account (see AB 2013 p 13 ff.) by limiting the requirement for consent in para. 2 to a change in the child's place of residence and otherwise supplementing **Art. 301a ZGB** with paras. 3-5 (duty to inform in the case of sole custody; duty to inform in relation to the child's own change of residence; notification or decision on the adjustment of care, custody, personal contact and maintenance). The National Council approved this version of **Art. 301a ZGB** (AB 2013 N 704). In the Council of States, Federal Councillor Sommaruga commented on the criticism of the original version of the draft as follows: The purpose of the standard is not in fact to prevent the relocation of one parent, but to encourage parents to examine the impact of a relocation on the exercise of joint parental care and, if necessary, to adapt the existing rules on children's interests. The committee of the Council of States had really endeavoured to find a solution that better reflected this concern, and she [Federal Councillor Sommaruga] could say today that the committee had succeeded very well (AB 2013 p 14).

2.5 As far as the interpretation of **Art. 301a ZGB** is concerned, and in particular the criteria relevant to the question of moving away, the starting point is the legislator's conscious decision in the adopted version of para. 2 that the parents' freedom of establishment and freedom of movement must be respected.

This legislative judgement must be read not only in the context of the constitutional rights of parents (freedom of establishment, personal freedom, freedom of trade), but also in the context of the principle of family autonomy, which characterises the Civil Code. There is a general social consensus that the state should not intervene in parents' life planning. This also applies to the issue of children's residence. Families can move around or emigrate at will; there are no authorisation requirements, and the state refrains from intervening even if the associated relocation of the child is detrimental to its welfare or against its express will. The state's respect for the autonomous decision of the parents is ultimately based on the assumption that the parents fulfil their responsibility and are best placed to make the child's decision.

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maxim of the best interests of the child (cf. analogously COESTER-WALTJEN, Relocation - from Theory to Practice, Interdisziplinäre Zeitschrift für Familienrecht [iFamZ] 2012 p. 312). It would be difficult to understand why parental autonomy should be cancelled in the event of parental dissent with regard to the relocation of the child (COESTER-WALTJEN, loc. cit, p. 313) and there should be a discussion about the motives for moving away and thus a state "snooping" (see FASSBIND, Inhalt des gemeinsamen Sorgerechts, der Obhut und des Aufenthaltsbestimmungsrechts im Lichte des neuen gemeinsamen Sorgerechts als Regelfall, AJP 2014 p. 699) by the judge or the child protection authority.

Finally, in connection with the exercise of fundamental rights, it should be noted that it is by no means only about freedom of establishment, but just as much about personal freedom or the freedom to organise one's life as such. Of course, caring responsibilities can lead to a restriction of these rights, but in particular also to factual difficulties in exercising these freedoms; this is no different for cohabiting couples than for single parents. However, the fact that there are joint children is no reason to restrict the exercise of civil liberties beyond the legislator's concept. This results in particular from a parallel assessment with other family law institutions that are based on the exercise of fundamental freedoms and concern life planning. For example, the legislator has not restricted the freedom to divorce simply because the marriage has produced joint children; the divorce petition of one parent must be granted even if the other parent is unwilling to divorce or it would be the children's greatest wish for the parents to remain together. In other words, the fact of divorce resulting from the unilateral exercise of will is assumed and, as a consequence, the children's interests are reorganised, with the best interests of the child being the guiding principle (**Art. 133 Para. 2 ZGB**).

Similarly, a parent is not prevented from exercising his or her freedom of marriage by entering into a (new) marriage, even if the former partner does not agree to this or the children from the previous relationship oppose it and there is a question of the welfare of the child being impaired. Here too, the fact of the (new) marriage resulting from the will of one of the parents to marry is taken as a basis and the children's welfare is at stake.

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as a result, the interests of the children from the previous relationship may need to be adjusted, again with the best interests of the child as the paramount consideration.

Based on the same value judgement, the legislator has taken into account the concerns expressed about the draft law with regard to the parents' freedom of establishment by deliberately modifying **Art. 301a para. 2 ZGB** and ensured that Switzerland does not become a "mothers' prison" due to a "de facto residency obligation" (see **BGE 136 III 353** E. 3.3 p. 359) (see decision of the High Court of the Canton of Bern of 26 May 2014, in: FamPra.ch 2015 p. 252). This means that the motives of the parent who moves away - which are hardly justiciable anyway - cannot be up for debate. Instead, it must be assumed that one of the parents is moving away (see also COESTER-WALTJEN, loc. cit., p. 314), and the parent-child relationship must be adjusted as necessary as a result (**Art. 301a para. 5 ZGB**). In this respect, the version of the law adopted by the legislator corresponds to what the German Federal Supreme Court (BGH) has established for international relocation by judicial determination of the law:

In Germany, the law does not contain any standards that directly regulate the issue of removal. Section 1631 para. 1 of the German Civil Code (BGB) applies, according to which personal custody includes the right to determine the child's place of residence, in conjunction with section 1671 para. 1 BGB, according to which the separated parent can apply for the family court to transfer parental custody or part of it to them alone. In its ruling XII ZB 81/09 of 28 April 2010 - concerning a move to Mexico - the Federal Court of Justice stated that the best interests of the child are the yardstick (para. 17). The general freedom of action of the parent wishing to emigrate, which is guaranteed under constitutional law in Article 2 of the Basic Law, determines the actual starting position, because for the assessment of the best interests of the child, it should not be assumed that the parent primarily caring for the child will remain in Germany with the child, even if this would be most compatible with the best interests of the child, but that he will realise his wish to emigrate (para. 22). The motives for the decision to emigrate are not subject to review by the court; in this respect, it does not matter whether the parent can cite valid reasons (para. 23). The court's powers should focus on how the emigration would affect the child's welfare; if the parent is pursuing

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If the purpose of the relocation is to thwart contact with the other parent, the parent's bonding tolerance and thus their suitability to raise the child is in question; if the emigration has a detrimental effect on the child, the suitability to raise the child must be called into question and custody may even be withdrawn; in the case of an obviously unreasonable plan, there would be detrimental consequences for the continuity and quality of the bond with the custodial parent and custody may have to be transferred to the other parent if there is suitability to raise the child (para. 24). Emigration is not automatically precluded by the fact that contact with both parents is generally part of the child's welfare; even if contact with the other parent is made considerably more difficult by the emigration, this alone does not result in either a general or a presumed detriment to the welfare of the child (para. 25). The court's decision is not restricted by factual or legal presumptions; the question is whether emigration with the main caring parent or the child remaining with the parent who is still resident in Germany is the better solution for the child's welfare (para. 28). Analogous to the above considerations, the Federal Supreme Court also argued in its decision XII ZB 407/10 of 16 March 2011.

2.6 As will be shown below, similar considerations must apply to the interpretation and application of **Art. 301a CC.** As already mentioned, the premise must be that one parent wishes to move away in the exercise of his or her liberty rights. It is therefore not a previous situation that is to be perpetuated, but a new situation that is to be regulated (see FASSBIND, loc. cit., p. 697). The question that arises here as to where the child's place of residence should be in the context of the new circumstances must be answered in the best interests of the child (see **Art. 301a para. 5 CC**; Message, BBl 2011 9108 on Art. 301a). This principle enjoys constitutional status (**Art. 11 BV**) and is the supreme guideline for all child matters (**BGE 129 III 250** E. 3.4.2 P. 255; **BGE 141 III 312** E. 4.2.4 P. 319, **BGE 141 III 328** E. 5.4 P. 340). Accordingly, case law in relation to the relocation of a child was already guided by the principle of the best interests of the child under the old law (see **BGE 136 III 353** E. 3.3 p. 358 in connection with an intended move to the Czech Republic). It also forms the guiding principle for the organisation of the parent-child relationship in the neighbouring countries and the question of the place of residence, the relocation of which must be considered in the event of a child's removal.

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disagreement between the parents requires a judicial decision (Germany: see case law cited in E. 2.5; France: Art. 373-2 para. 3 CCfr, decision of the Cour de cassation no. 06-17869 of 13 March 2007; Italy: regulation in Art. 337ter and 337sexies CCit, in particular Art. 337ter para. 2 CCit; Austria: regulation in § 162 ABGB, in particular § 162 para. 3 ABGB).

The question to be answered by the court or the child protection authority is therefore not whether it would be more favourable for the child if both parents remained in the country. Rather, the decisive question is whether the child's best interests are better served if it moves away with the parent who wishes to emigrate or if it stays with the parent who stays behind (see COESTER-WALTJEN, loc. cit., p. 314), whereby this question must be answered taking into account the adaptation of the child's interests (care, personal contact, maintenance) to the forthcoming situation based on **Art. 301a para. 5 CC.** There is a close interdependence between the adaptation of the children's interests and the question to be answered from the point of view of the child's welfare as to whether the relocation should be authorised (see E. 2.8).

2.7 The following section examines the criteria to be used to assess the question of the best interests of the child. Under the old law, the Federal Supreme Court referred to the case law regarding the allocation criteria in the event of separation or divorce and - in connection with the mother's intended move to the Philippines and the father's announced start of employment in Singapore - considered that the interests of the parents should take a back seat in the reorganisation of the parent-child relationship; The personal relationships between parents and children, their educational abilities and their willingness to have the children in their own care and to look after and care for them personally to a large extent, as well as the children's need for the stability of relationships necessary for harmonious development in physical, mental and spiritual terms, which is of particular importance in the case of equal ability to raise and care for children (judgement 5A_375/2008 of 11 August 2008 E. 2). August 2008 E. 2).

These criteria can be transferred to the application of **Art. 301a ZGB**. Because it is generally a question of adjusting the

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existing arrangement to the new situation (see **Art. 301a para. 5 ZGB**), the previous care model will in fact form the starting point for the considerations. If the children have so far been cared for by both parents in largely equal shares (shared or alternating custody) and both parents are still willing and able to look after the children personally or as part of a care concept that is in the best interests of the child, the starting point is to a certain extent neutral. In this case, further criteria (such as family and economic environment, stability of circumstances, language and schooling, health needs, opinions of older children) must be used to determine which solution is in the best interests of the child.

If, on the other hand, the parent who wishes to move away has been the caregiver for all or most of the time in accordance with the care concept actually practised to date (namely in the classic visiting rights model), it will tend to be in the best interests of the children if they remain with this parent and consequently move away with them. The reallocation to the other parent that is necessary for the children to remain in Switzerland - which in any case presupposes that the other parent is able and willing to take the children in and provide them with appropriate care - requires careful consideration as to whether it is actually in the best interests of the child.

Again, this depends on the circumstances of the individual case. If the children are still small and therefore more person-orientated than environment-orientated, it is not easy to reassign them to the parent who is staying behind, given the principle of continuity of care and upbringing. On the other hand, with older children, the home and school environment as well as the developing circle of friends become increasingly important and they may already have the prospect of an apprenticeship; in this case, remaining in Switzerland, insofar as a reallocation to the other parent is possible, could possibly be in the best interests of the child.

All other facets of the specific situation must also be taken into account. For example, for a child
It is not the same whether the child has already grown up bilingually or whether it is being educated in a foreign language, and it is also not the same in terms of the stability of the situation whether, for example, the parent wishing to emigrate returns to their home country or to their traditional family circle (grandparents, uncles and aunts etc. who are already familiar to the child) or to a new partner.

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in an economically and socially secure environment or whether, for example, it is about gaining distance or a thirst for adventure and a lifestyle with largely open prospects.
Finally, in the case of older children, the wishes and ideas expressed at their hearing must also be taken into account to the extent that these can be reconciled with the specific circumstances (actual reception and care options of the parent concerned).

To summarise, the specific circumstances of the individual case are always decisive for the assessment of the best interests of the child, but the parent who wishes to move away, who has predominantly cared for the children to date and will continue to do so in the future, should be allowed to relocate the children.

abroad will generally have to be authorised, which is also the unanimous assumption of the doctrine (see BUCHER, Elterliche Sorge [...], in: Familien in Zeiten grenzüberschreitender Beziehungen, 2013, p. 63; CANTIENI/BIDERBOST, Reform der elterlichen Sorge aus Sicht der Kindes- und Erwachsenenschutzbehörde [KESB] - erste Erfahrungen und Klippen, FamPra.ch 2015 p. 792; BÜCHLER/MARANTA, Das neue Recht der elterlichen Sorge, Jusletter 11 August 2014 para. 84 f.; FASSBIND, op. cit, p. 697; probably in agreement with SCHWENZER/COTTIER, in: Basler Kommentar, Zivilgesetzbuch, Bd. I, 5th ed. 2014, N. 14 f. on **Art. 301a ZGB**).

In practice, the parent who is left behind will often object that the other parent is not able to cope with the The court also states that the aim of the applicant's wish to emigrate is to deprive him of his children and that, in this respect, there is an abuse of rights which should not be protected. Such cases can occur, but they are likely to be rare (see BUCHER, loc. cit., p. 63 below). It is understandable that this may seem subjectively different to the parent who stays behind, because maintaining contact with the child becomes more difficult and often the planned move away is the result of the parental separation, which in turn is the result of tensions and difficulties at the parental level. However, it is not a widespread reality that a parent moves away to nowhere. Rather, there is usually an economic basis or prospect in the destination country and there are tangible reasons for moving away, such as returning to the home country or one's own family circle, moving in with a new partner or a career-enhancing job offer.

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However, if no plausible reasons are actually apparent and one parent obviously only moves away in order to alienate the child from the other parent, the bonding tolerance and thus the parenting ability of the parent concerned is called into question, with the result that the reallocation of the child must be considered (see **BGE 136 III 353** E. 3.3 p. 359; judgment 5A_923/2014 of 27 August 2015 E. 5.1, not published in: **BGE 141 III 472**; see then **BGE 142 III 1** E. 3.4 a.E. p. 7; see also the Federal Supreme Court decision XII ZB 81/09 of 28 April 2010 cited above). In this respect, the motives for emigration can still play an indirect role, limited to individual cases. Even in such constellations, the reallocation of the children to the other parent presupposes, of course, that the other parent is capable of bringing up the children and can actually take them in and care for them.

2.8 It follows from the legal concept that the court or the child protection authority - with effect from the actual departure of the parent who has left the country - must adjust the care, visiting rights and maintenance arrangements as necessary (see **Art. 301a para. 5 CC**), including in the event of a negative decision, i.e. if the child remains in Switzerland and the parent who has left the country moves away alone. In substantive terms, the arrangement within the meaning of **Art. 301a para. 5 CC** forms a necessary part of the decision to move away because, according to the above, the specific organisation of care and personal contact influences the question of where the child should reside in its best interests. In international relations, these questions are also difficult to separate for procedural reasons, because when the child moves away, the Swiss jurisdiction to decide on the organisation of the parent-child relationship is generally lost (see **Art. 5 para. 2 HC 96** and also **Art. 5 para. 2 lit. a and c Lugano Convention**). In the dispatch, the need for consent for the child to move abroad was justified precisely by the change of jurisdiction (BBl 2011 9108 on Art. 301a). The legislative motives would be undermined if only the question of the child's removal were to be decided and the parent who stays behind were expected to sue for necessary adjustments to the parent-child relationship abroad.

As far as the specific arrangements for childcare and the organisation of personal transport are concerned, it should be noted in advance that

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It will often not be possible to achieve an ideal situation, regardless of whether the child moves away or remains in Switzerland. Shared care models are impossible, especially over longer distances, and it will inevitably not be possible to maintain the same frequency and intensity of visits. In view of the time and financial outlay required for personal transport and taking into account the needs of the children, the new regulation for longer distances will usually result in a smaller cadence of weekend visits being (partially) compensated for by longer individual weekend units and/or longer holiday stays (see **BGE 136 III 353** E. 3.3 p. 359). However, with young children - for whom physical contact cannot be adequately substituted with other communication channels such as Skype - frequent and short intervals between visits without overnight stays would actually be ideal (GLOOR/SIMONI, Wohnortswechsel mit Kindern nach Trennung und Scheidung, in: Siebte Schweizer Familienrecht §Tage, 2014, p. 251).

In this situation, the courts are required to make care and contact arrangements that are adapted to the new situation, are binding and enforceable and comply with the provisions of Art. 9 para. 3 of the UN Convention on the Rights of the Child of 20 November 1989 (CRC, SR 0.107). This stipulates that every contracting state must respect the right of a child separated from one or both parents to maintain regular personal relationships and direct contact with both parents. It is also recognised by child psychology that

Due to the fateful parent-child relationship, the child's relationship with both parents is important and can play a decisive role in establishing the child's identity (**BGE 130 III 585** E. 2.2.2 p. 590; **BGE 131 III 209** E. 4 p. 211 f.). For this reason, both parents have a duty to promote a good relationship with the other parent with a view to the child's welfare; in particular, the main carer must prepare the child positively for visits, Skype contacts etc. with the other parent (**BGE 142 III 1** E. 3.4 p. 7; judgement 5A_505/2013 of 20 August 2013 E. 6.3).

Because the official decision on the transfer of residence and the adjustment of the parent-child relationship form a single unit, it is also clear that it is not an abstract move away from Switzerland,

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but always specifically about a move to a certain area and a certain environment. For the question of the best interests of the child and the reorganisation of personal contact, it is not the same whether a move to a neighbouring or a remote country is planned. But it is also not the same whether a move from Basel to Lörrach or Berlin is under discussion. In the one case, the model of shared care could even be maintained or established, while in the other case completely different solutions are required. It goes without saying that details such as exact home and school addresses etc. cannot be demanded from the parent wishing to emigrate, as they will often be dependent on the authorising decision of the authorities in order to implement their plans. However, the contours of the move must be clear because the consent of the other parent or the official decision to substitute the consent of the other parent must be based on concrete grounds. In this context, it should also be borne in mind that the emigrating parent to whom the relocation of the children is authorised can only be safe from repatriation proceedings if the authorising decision relates to a specific move.

2.9 In the present case, the complainant almost exclusively questions the mother's motives for her intended move. According to what has been said, however, these are not subject to judicial review. In this respect, the contingent request for referral back to the cantonal court for further clarification in this regard is also unsuccessful.

As far as the issue of the best interests of the child is concerned, the analogous argument that the children in Graz

There are no serious dangers in Graz. The quality of life in Graz is comparable to that in U., the children are educated in the same language and they are at an age where they will settle into their new place immediately. They can grow up just as happily in Graz as in Switzerland.

It is true that personal contact will be less frequent and will involve more effort for all parties involved. However, this in itself is not a reason to prohibit the children from moving away. The assertion that moving away would make the right of contact impossible and would lead to an immediate alienation of the children is also incorrect, as the

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The cantonal visiting rights regulation allows monthly contact and thus the maintenance of a sustainable relationship.

In any case, all these elements are of little relevance to the decision in the present case insofar as the father expressly rules out caring for the children himself in the future and confines himself to demanding more extensive visiting rights (not published in detail in E. 3). Thus, the factual assertion that it is completely unproven that he has always left the upbringing and day-to-day care to the mother is just as irrelevant in view of the correct decision as the objection in relation to the assessment of evidence regarding the father-child relationship. In legal terms, the decision as to where the children's habitual residence should be located is imperatively prejudiced if only one parent is prepared to take over the care of the children, as a more detailed discussion of the best interests of the child ultimately comes to nothing in this situation (see E. 2.7).

In view of the fact that only the mother is prepared to take care of the children for the most part and, moreover, the cantonal courts have found a solution appropriate to the situation with regard to the reorganisation of personal contact for the period after the move to Graz (not publ. E. 3), the permission to move the children's place of residence there is in conformity with federal law. (...)

Ukraine

- Children and finance

UKRAINE

Category – Children

We want to highlight and nominate a decision in case No. 2-4237/12 on review under exceptional circumstances of the resolution of the Supreme Court, the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation dated August 29, 2018. The decision was issued in regard with the establishment by the European Court of Human Rights (hereinafter – «***the ECHR***») in the case of Satanovska and Rodgers v. Ukraine, application No. 12354/19 (hereinafter – «***the ECHR judgment***») of a violation by Ukraine of its international obligations under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – «***the Convention***») in the course of the court's decision. The case was brought by Plaintiff against the Defendant with the participation of a third party who did not claim any independent claims regarding the subject matter of the dispute, on behalf of the defendant - the Guardianship and Custodian Authority of the Sviatoshynskyi District State Administration in Kyiv (hereinafter – «***the Third-party***») - to ensure the return of a minor child to the United Kingdom of Great Britain and Northern Ireland (hereinafter – «***the United Kingdom***») based in the provisions of Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The case was repeatedly considered in Ukrainian courts.

Summary of the Supreme Court decision

In December 2012, the Central Department of Justice of Kyiv on behalf of the plaintiff filed a lawsuit, in which they requested: to recognize the defendant's retention on the territory of Ukraine of the minor child (hereinafter – «***the Child***») as illegal; to return the Child to the place of habitual residence at the plaintiff's place of residence in the United Kingdom; to secure the return of the Child, to order the defendant to hand over the Child to the plaintiff, at his place of residence in the United Kingdom.

The Child was born in Sheffield (South Yorkshire, United Kingdom). Since the birth of the Child, the plaintiff and the defendant were residing in Sheffield. Then the defendant (mother) independently changed the Child's place of residence in violation of the plaintiff's (father's) rights, who had given neither oral nor written consent to the change of the Child's place of habitual residence.

In the latest decision of the Supreme Court, which entered into force on August 29, 2018, the claim of the father was fully satisfied. The court motivated its decision by the **fact that the case did not provide sufficient evidence that the Child's return to the state of his or her place of habitual residence**, communication with relatives, and learning the culture and language of the country of origin **would threaten to cause physical or mental harm to the Child**. The Supreme Court stated that the conclusions of the courts of previous instances regarding the existence of a serious risk of creating an intolerant environment for the Child by the plaintiff in the United Kingdom are based on assumptions.

Considering this decision of the Supreme Court, the defendant applied to the ECHR because of the violation by Ukraine of its obligations under Article 8 of the Convention in its procedural aspect.

Summary of the ECHR decision

On the defendant's and the child's application, the ECHR issued a Decision in the case Satanovska and Rodgers v. Ukraine (application No. 12354/19) regarding the violation by Ukraine of its obligations under Article 8 of the Convention in its procedural aspect.

The ECHR made the following conclusions:

Having rejected the objections under paragraph «b» of the first paragraph of Article 13 of the Hague Convention, the Supreme Court did not officially exclude the psychologist's conclusions from the evidence base in the case, which distinguishes the defendant's case from the case of H. v. Latvia, in

which the courts explicitly refused to recognize the conclusion of a psychological examination as admissible evidence (§ 34 of the ECHR judgment).

In its brief reasoning, the Supreme Court did not consider whether the conclusions of the psychological examination and the oral testimony of the psychologist were relevant and reliable and did not give any reasons why it did not take them into account (§ 35 of the ECHR judgment).

The Supreme Court did not analyze the defendant's allegations that she was unable to travel with her son to the United Kingdom. **The reasoning of the Supreme Court regarding the existence of grounds for satisfaction of the claim was so general and formulaic that in the circumstances of the case, it could not be the result of an effective consideration of the defendant's objections to the satisfaction of the return application** (§ 35 of the ECHR judgment).

The applicants suffered a disproportionate interference with their right to respect for family life since the decision-making process under national law did not meet the procedural requirements of Article 8 of the Convention. The Supreme Court did not effectively consider the defendant's objections based on paragraph b) of the first paragraph of Article 13 of the Hague Convention (§ 36 of the ECHR Judgment).

The ECHR stated that there has been a violation of Article 8 of the Convention; and decided that the respondent State is to pay the applicants, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: EUR 1,200 (one thousand two hundred euros), in respect of non-pecuniary damage; EUR 1,500 (one thousand five hundred euros) in respect of legal fees incurred in the proceedings before the Court; EUR 30 (thirty euros) in respect of postal expenses incurred in the proceedings before the Court; from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Summary of the Grand Chamber of the Supreme Court decision

Following the ECHR decision the mother of the Child applied to the Grand Chamber of the Supreme Court of Ukraine to review the previous decision under exceptional circumstances and to dismiss the father’s claim. The Grand Chamber of the Supreme Court satisfied the application. The ECHR Judgment stated that the Supreme Court must assess the defendant's arguments that the Child's return to the United Kingdom would threaten to cause physical or mental harm to the Child or otherwise create an intolerable environment for the Child.

The Grand Chamber of the Supreme Court considered that the courts of first instance and court of appeal made their conclusions having analyzed the testimony of the psychologist who was interrogated in the court of first instance. During the interrogation the psychologist explained that the Child had no problems with adaptation at the new place of residence and in the kindergarten; the Child perceived the place of residence in Ukraine as permanent and comfortable for him and his family; there was a serious risk that returning to the United Kingdom would pose a threat of mental and physical harm to the Child. The participants in the case could ask questions to the psychologist during his interrogation at the trial before the court of first instance. Therefore, the principle of adversarial examination of the above evidence was observed, and the reliability of the psychologist's conclusions was verified during his interrogation.

The Grand Chamber of the Supreme Court considered that the facts established by the courts, as well as the explanations given by the respondent's representative, confirmed her arguments that she would not be able to travel freely to the United Kingdom if the claim was granted and she was separated from her Child. In such a situation, the court had even less reason to question the existence of the risks mentioned in the written conclusions of the psychologist questioned in the court of first instance.

Considering the aforesaid, the content of the ECHR judgment, the facts established by the court of first instance and the court of appeal, the evidence examined by these courts, as well as the explanations

of the parties, the Grand Chamber of the Supreme Court considers that the conclusions of the Supreme Court, which did not take into account the relevant arguments of the defendant, are not properly substantiated. In the context of the exceptions provided for in the Hague Convention, the relevant and admissible evidence examined by the courts in this case was sufficient to support the defendant's objections to the Child's return to the United Kingdom.

Impact on court practice

This decision of the Grand Chamber of the Supreme Court has a significant impact on the court practice in cases of international child abduction in Ukraine. In at least 6 decisions of the Supreme Court since 2022 in similar cases, the court has referred to the described decision of the Grand Chamber of the Supreme Court in case No. 2-4237/12 and, to the ECHR Judgment in justification of its decision.

The full text of the decision is available on the following link: https://reyestr.court.gov.ua/Review/96342875.

Category – Finance

We want to highlight and nominate a decision of the Supreme Court dated 09.05.2024 in case No. 761/22711/19.
In this decision, the Supreme Court has resolved if a foreigner is subject to the right to a compulsory share during the inheritance case in Ukraine.
The case began when the plaintiff filed a lawsuit against the First Kyiv State Notary Office for recognition of ownership by inheritance of a compulsory share in the inherited property and recovery of compensation. The plaintiff's father passed away, leaving a will in favor of his wife. The plaintiff, as an adult disabled child of the deceased, claimed the right to a compulsory share of the inheritance.
The court partially satisfied the plaintiff's claims, recognizing the plaintiff's ownership rights to specific shares of such inheritance as real estate and land.
The Court of Appeal canceled the first instance court's decision because the plaintiff is a **US citizen**.
The court of appeal noted: "*Since the plaintiff is not a citizen of Ukraine, therefore, **he cannot be assigned a disability group under the legislation of Ukraine** (…) the court of the first instance did not fully consider the terms of the Law of Ukraine "On Private International Law", according to which inheritance of immovable property is regulated by the law of the state on the territory of which this property is located, and property subject to state registration in Ukraine is regulated by the law of Ukraine. Thus, for a citizen of another country to be entitled to inherit a compulsory share in the inheritance, they must confirm their disability following the requirements of Ukrainian law*".
The case reached the Supreme Court, which resolved the dispute as follows:
Regarding the claims of the plaintiff for recognition of the right to a compulsory share, the Supreme Court stated that foreigners and stateless persons who are in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine, with the exceptions established by the Constitution, laws or international treaties of Ukraine (Article 26 (1) of the Constitution of Ukraine).
Foreigners and stateless persons have civil legal capacity in Ukraine on an equal basis with citizens of Ukraine, except in cases stipulated by law or international treaties of Ukraine (Article 17 (2) of the Law of Ukraine "On Private International Law").
Inheritance in Ukraine is regulated by the Civil Code of Ukraine. However, if there is a foreign element in such relations, the provisions of the Law of Ukraine "On Private International Law" apply (see the decision of the Supreme Court as part of the Joint Chamber of the Civil Court of Cassation dated March 13, 2023, in case No. 398/1796/20).
Under Article 2(1) of the Civil Code of Ukraine, natural persons and legal entities represent participants in civil relations.
Having considered the above with due regard to the principle of reasonableness, the Supreme Court stated that:
Civil rights and obligations may be granted not only to citizens of Ukraine but also to foreigners. This is evidenced by the use by the legislator of such a legal concept as "natural person".

This approach of the legislator in formulating the provisions of the main act of civil legislation confirms the fact that the absence of Ukrainian citizenship of an individual does not change the scope of possible subjective civil rights and obligations;
there are no provisions in the Civil Code of Ukraine that would indicate restrictions, prohibitions, or other peculiarities of participation in private relations of an individual who is a foreigner;
The Civil Code of Ukraine, as the main regulator of inheritance relations, does not contain any restrictions or prohibitions on the subject of the right to a compulsory share being a foreigner.
At the level of private law, there are no provisions stating that a foreigner's inability to work in order to acquire the right to a compulsory share must be confirmed by disability (incapacity for work) following the requirements of Ukrainian legislation. When determining whether a certain entity belongs to the circle of persons entitled to a compulsory share in the inheritance, it should be borne in mind that the person's disability must be confirmed by relevant documents (**in particular, issued in the country of which he is a citizen**)".
The described decision of the Supreme Court is a landmark since it has established an important precedent for protecting the rights of foreigners to a compulsory share of an inheritance in Ukraine.

The full text of the decision is available on the following link: https://reyestr.court.gov.ua/Review/119134163.