EDUCATION PROGRAMME: the overview

EUROPEAN FOG LIFTING?

The IAML website declares that the Salzburg Education Programme will be as “inclusively European and continental as possible” - and so it is! We have about 20 contributors, from 10 different jurisdictions East to West: see the biogs at pages 4-21 and hand-outs which follow.

Following the tune set by “Helen and the Swedes” (Helen Ward, Johan Sarvik and Fredric Renström) in Crete 13 months ago, this year’s EdPro concentrates on context, continuity and actuality. The Education Programme hopes to steer an inclusive course between money and children, and looking at what is most topical for all of us now and in the immediate future.

To set the scene: just last month, on 23 April 2013, the French legislature made its historic commitment to same-sex marriage. And this month, on 1 May 2013 the Franco-German agreement for a common optional matrimonial property regime finally entered into force: see page 49 below (English version). Article 21 invites other member states to join. Meanwhile, the EU draft Regulations on Matrimonial and Registered Partnership Property Regimes work their tortuous way up the Brussels agenda, in the wake of Rome III enhanced co-operation - which affects all of us who have any cases with the participant-states, not just the participants themselves. And England has settled into a system of matrimonial finance which, at least in big money cases, in its result mirrors surprisingly closely the effects of the Franco-German property regime. Plus ça change …? Actually quite a profound change.

Our programme starts on Thursday morning (only) at 09.00, recalling last year’s spirited floor-debates in Crete, especially those on the EU Maintenance Regulation - now updated with a presentation from the perspective of the Austrian Ministry of Justice by Dr. Robert Fucik. We then move seamlessly through the recent French legislative upheaval with a presentation by my QEB-colleague Stewart Leech QC on “Marriage: A Universal Right?” Next we have a pan-European panel session-debate, devised by Maggie Rae and Roger Bamber, on the impact of the financial crisis on family services and alternatives to court-based remedies, under the heading “Where to now? European Family Law in the Recession”. And then on Friday 09.00 - as a follow-on from previous presentations on surrogacy – Mitochondrial DNA parentage: the medical facts and legal implications. Finally we conclude with a double-debate on Matrimonial and Registered Partnership Property Regimes (Friday 11.00 and Saturday 09.00). This is in order to see just how similar/different we all actually are; and what the way forward may be, particularly given the Franco-German initiative. The full EdPro timetable and index will be found at page 3.
In the context of the medico-legal presentation we are particularly pleased to welcome Dr. Valentine Akande MBBS PhD MRCOG, Lead Clinician and Speciality Director of Fertility Services at the **BCRM (Bristol Centre for Reproductive Medicine)**. Valentine will be speaking back-to-back with another of my QEB colleagues, Charles Hyde QC, on the implications of 3-parent-children. The medical science is already here; the lawyers (in all jurisdictions) will need to catch up. We are very grateful to Dr. Akande for this opportunity.

All of the presentations will be interactive, in that they positively invite/encourage participation from the floor. Some will be even more interactive in that they start with panel-presentations and debate from across our Chapter. This applies particularly to the session on alternative family law in the financial crisis which affects us all (Thursday 11.15); and to the 9-jurisdiction presentations and debate on property regimes (Friday and Saturday mornings). Here particularly we all are faced with this overarching question: do Matrimonial Property Regimes (“MPRs”) represent a/the way forward towards a harmonised substantive law of matrimonial finance? Or are they an immoveable conceptual divide and obstacle? Given that the two main (but very separate) British jurisdictions, Scotland and England, have no MPR at all, they might appear to have little to contribute to this debate. Therefore the Education Pack includes, by way of English background and provocation, a short paper on the subject which I gave at the Anglophone-Germanophone Judicial Conference in Thun, Switzerland in September 2012: p.39 (with the German version at p. 43, for those who may prefer it).

In the first of the property-regime sessions (Friday morning), the focus will be on the overall situation from the perspective of the “edge states” – ie. those on the edge of Europe, whether geographically or politically. In the second property-regime session (Saturday morning), the panel will be joined by Peter Junggeburth. He will share with us his particular experience of the new Franco-German Optional Matrimonial Property Regime – pushed through to coincide with the golden anniversary of that other grand Franco-German initiative: the Elysée Treaty of 1963. The starting-point for debate will be the seven property regime questions which you will find at p.38 below.

We will, of course, try rigorously to keep to the celebrated IAML priority of good time-keeping, at least as regards the all-important conclusion of the education sessions. This is so as to enable a punctual (although usually in fact surprisingly leisurely) commencement to the social programme. “Interactivity” may mean that some internal timings shift a little. But have no fear: the social programme will be free to start at 12.30 on Thursday and Friday; and nothing will be allowed to delay the AGM on Saturday! Therefore the (approximate) **timetable will be as set out overleaf**.

I have obviously had a lot of help putting this programme together. I am very grateful especially to my QEB colleagues, Charlie Hyde and Stewart Leech, and also to all the other fellows who have helped – particularly Jane Keir and Isabelle Rein-Lescastereyres for inspirational ideas – and to Mike Lancaster for co-ordinating the Education Packs and AVs.

I hope you enjoy the Salzburg EdPro. I look forward to your interactive participation!

Tim Amos QC, QEB, London; May 2013  
**www.qeb.co.uk; tamos@qeb.co.uk**
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Tim AMOS QC

Tim has practised at QEB as a barrister since 1988 and as QC since 2008. He is also a mediator and sits judicially as a Family Recorder (part-time deputy judge) and conducting private FDRs (Financial Dispute Resolution hearings). His practice spans all aspects of family law but he is predominantly known as an expert in "big money" family finance, married or unmarried, alive or dead, and especially international. Tim is ranked in Band One of Chambers UK Bar Directory for Matrimonial Finance (2013) where he is described as "one of London's 'go-to silks on jurisdiction and complex international issues'" and "rated extremely highly by the market for his abilities in international family law and international family finance".

Tim is fluent in German (including legal German) and has undertaken work experience in German courts and law firms. He also has professional French.

Tim is a qualified Collaborative Lawyer and was the first Collaborative Family Law QC at the English Bar.

Tim’s recent reported decisions include the landmark family/company law case of Petrodel v Prest, which was heard in the UK Supreme Court before seven Justices in March 2013 (judgment awaited). In that case Tim represented companies of which the husband in divorce proceedings is the controller.

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Dr. Robert Fucik, Austrian Federal Ministry of Justice

Robert Fucik was born 1959 in Vienna. After graduation at Vienna Law Faculty in 1982 he was appointed as a trainee judge. In 1987 he was appointed as a judge (Regional Court Korneuburg). From 1999 to 2005 he was sitting judge at the Vienna High Court of Appeal. Since 2006 he is head of the department for international family Law in the Federal Ministry of Justice, in particular dealing with Child Abduction, Adoption, Maintenance and Taking of Evidence.

He is Austrian Delegate at the Hague Conference on International Private Law and gives Lectures at the University of Vienna (Procedural Law). He is board member of two leading Austrian legal newspapers (Österreichische Juristenzeitung, and interdisziplinäre Zeitschrift für Familienrecht). Academically, he is committed to Procedural Law, Family Law and the Law of Torts.
Stewart Leech QC

Stewart studied French and German at Oxford University and spent the next four years teaching both languages to university entrance level at two of the UK’s leading schools, Shrewsbury and Eton. He qualified as a barrister in 1992 joining QEB, one of the country’s pre-eminent family law sets. Since then he has specialised in financial cases involving married and unmarried couples. He was appointed Queen’s Counsel in April 2011. His cases generally involve significant wealth and complex financial arrangements, often with an international dimension and/or involving jurisdictional disputes. He has a particular interest in cross-channel cases. He is bilingual in French and fluent in German and is happy to be instructed to act as an expert in proceedings taking place in other jurisdictions. He also routinely drafts nuptial agreements, again often involving multiple jurisdictions.

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Maggie Rae

Maggie Rae was admitted to the Bar in 1973. She qualified as a solicitor in 1978 and became a partner in Hodge Jones & Allen in 1979. In 1992 she joined Mishcon de Reya and remained there until 1998 when she left to join Clintons, where she is a consultant.

She has written extensively and her publications include “Women in the Law and Children in the Law” published by Longmans. She was the editor of Tolley’s Childcare Law and is the joint author of “Pensions on Divorce” with David Salter and Robin Ellison.

She is a member of the International Academy of Matrimonial Lawyers. She was a special advisor to the House of Commons Social Security Select Committee on Pension Sharing and Divorce. She was a member of the Department of Work and Pensions Consultative Committee on Pension Sharing.

Maggie has a strong interest in Alternative Dispute Resolution and co-founded with James Stewart Collaborative Family Law (see www.collaborativefamilylaw.org.uk)
Roger Bamber - Mills & Reeve LLP

Roger Bamber is a Partner in the national Family Law team at Mills & Reeve LLP.

He is regularly instructed in complex financial cases involving businesses, trusts and offshore assets.

Roger was one of the first lawyer mediators to be trained in England and has practised regularly, using both the family law model of mediation and the commercial model of mediation. He was one of the first collaborative lawyers to be trained, and was part of the steering group which helped to set up collaborative law in the UK.

He was trained as an Arbitrator in 2012, and is a member of the Chartered Institute of Arbitrators.

Roger is an established author and commentator on family law. His recent article “Prest: An open road and a fast car?” (Family Law February 2013) contributed to the debate around how businesses are treated on divorce in England, following the Court of Appeal decision in Petrodel Resources Limited etc v Prest [2012] EWCA Civ 1395. Roger also contributed a Twitter feed and blogs during the Supreme Court appeal of this case. His books include The Family through Divorce, written with psychiatrist Dr Jeannette Josse and psychologist Dr Janet Reibstein and Pensions and Insurance on Family Breakdown.

As the author of www.divorce.co.uk and the Divorce UK app, Roger has been given the Family Law Innovation Award in 2011 and has been shortlisted for the same Award in 2013. He is the Editor and instigator of the Family Law Hub, an online training and education resource published by Class Publishing. The Divorce UK app was voted one of the best 500 apps in the world by The Sunday Times in 2012, and was commended by the FT European Legal Awards in 2013. Roger’s design for the Divorce Calculator hosted by www.moneyadvice.org.uk was highlighted in the Interim Government Report by Sir David Norgrove.

As well as being a Fellow of the International Academy of Matrimonial Lawyers, Roger is a member of The Times Law Panel, is rated a Leader in the City Wealth lists and has been one of The Lawyer Hot 100.
Partner in CBBC law firm in Paris with Véronique CHAUVEAU and Charlotte BUTRUILLE-CARDEW. Doctor in Law from the University of Toulouse, thesis in Private international law, Lawyer at the Paris Bar

Accredited specialist in Family law and international law by the Paris Bar.

Redactor to a French family law review called “Actualité juridique famille”, published monthly.

Practises in all the areas of international family law: prenuptial agreements, marriage, divorce, children issues, abduction, maintenance, succession, jurisdiction cases, enforcement of foreign orders.
HAROULA CONSTANDINIDOU

Attorney at Law at the Supreme Court of Greece. Member: Athens Bar Association (Family Law Committee), International Society of Family Law, Honorary Member of the Association of Private International Law, Reunite (International Child Abduction Center), International Social Service; Fellow: International Academy of Matrimonial Lawyers (IAML): Member of the IAML ARTS Committee (2013), President of the European Chapter (2004-2006), President Elect of the European Chapter (2003-2004); Lecturer and Author of publications and articles on Matrimonial Law, Correspondent of the “International Family Law” in Greece.
Rachael KELSEY, Solicitor

Rachael is a solicitor and one of the founding directors of Sheehan Kelsey Oswald Family Law Specialists, the largest niche family practice in Scotland.

Rachael is based in Edinburgh, practising throughout Scotland. The majority of her work in latter years has had cross-border or international elements. She is in ‘Band 1’ of matrimonial lawyers in Scotland in Chambers and Partners, where her firm is top ranked, as it is in the Legal 500. Rachael has been accredited by the Law Society of Scotland as a Specialist in Family Law since 2004 and is also accredited as a Family Mediator. She is a Fellow of the IAML. Rachael trained as a collaborative lawyer in 2004. She was a founding member of the group set up to institute a bespoke Family Arbitration scheme- FLAGS- and currently is the only person in Scotland to have acted as an Arbitrator under that scheme.

Rachael was a member of the Scottish Government Civil Sub-Group working on the implementation of vulnerable witness legislation and also on the Lord Advocate’s working group on child witnesses; she was previously Chair of the Family Law Association (2005-2006); is currently Chair, and a trustee, of Family Mediation Lothian and is Treasurer of CALM (the organisation of solicitor mediators in Scotland). Rachael is a published author on family law issues: she writes regularly for legal journals and the press and is often called upon for comment by the broadcast media.

When Rachael is not working she shouts at her children, argues about work-life balance with her husband, eats, drinks good wine and boxes. Preferably not all at once.

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Fredric Renström graduated with an LL.B. from Stockholm University in 1988, and has been professionally active since then. He became a member of the Swedish Bar Association in 1993.

His main practice areas are; Swedish and International Family and Private Law; Divorce; Estate administration and distribution; Custody.

He is a member of the International Academy of Matrimonial Lawyers. He is a frequent lecturer for professionals (also for judges) and for private entities. He has also given lectures internationally, for instance for the CCBE and the IBA. Fredric Renström was appointed as expert in the implementation of “the Maintenance Regulation” and “the 2007 Hague Protocol”.

Fredric Renström joined the Lindskog Malmström law firm as a Partner 1st of January 2008.
Dr Valentine Akande MBBS PhD MRCOG
Consultant Gynaecologist & Reproductive Medicine Specialist

Valentine qualified as a doctor in 1989, became a member of the Royal College of Obstetricians and Gynaecologists in 1995 and in 2004 was appointed as a Consultant Obstetrician and Gynaecologist at Southmead Hospital in Bristol, and Honorary Senior Lecturer at the University of Bristol.

He heads the Bristol Centre for Reproductive Medicine (BCRM), which is one of the largest Fertility Centres in the UK with consistently excellent outcomes.

He was a clinical research fellow to the late Prof Michael Hull and later clinical lecturer in Reproductive Medicine at the University of Bristol & St. Michael's Hospital, where he gained expertise in assisted conception techniques.

His research interests have led to a PHD and numerous international publications. He is often invited to speak at meetings & courses. He is also an elected member of the British Fertility Society’s executive committee and a medical performance assessor for the General Medical Council.
Charles Hyde QC

Charles practised as a barrister in Bristol from 1988 until moving to QEB in 2009. He became a QC in 2006. He sits as a Family and Criminal Recorder (part-time judge) and as Deputy High Court Judge.

Described in the legal directories as brilliant, inclusive and charming (Legal 500) Charles practices as a smooth operator in high value money cases (Chambers and Partners 2013). Moreover, his expertise is recognised in Children law, he is one of a few London silks ranked in both financial and children work.

He is a regular lecturer and has contributed to a number of legal publications.

In 2010 he attended and presented at a workshop at the European Parliament, to consider the extent to which there is scope for a unified European approach to Matrimonial Law.

Charles has been a member of the Family Procedure Rules Committee since 2004 which is now heavily involved in the modernisation of the family justice system in England and Wales and the creation of a unified Family Court.

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CURRICULUM VITAE

Name: João Paulo de Almeida Rainha Perry da Câmara

Civil Status: Married

Place of Birth: S. Jorge de Arroios, Lisbon

Date of Birth: 27 December 1961

Profession: Lawyer registered in the Bar Association since 1986

Academic Qualifications:

- Degree in Law (1984) from the Universidade Católica Portuguesa
- Corporate Management Program (P.D.E.) from the IESE-Company’s Superior Studies Institute (University of Navarra) 1992
- Attended Masters Course (specialization level) in Commercial Law in the Universidade Católica Portuguesa (1996)
- Studied specialization in corporate law in the Universidade Católica (2000)

Professional Career

- Litigation Assistant in Nestlé Portugal, S.A.
- Advisor to the Secretary of State for Youth (1987)
- Partner of the firm “PMBGR – Sociedade de Advogados”-1999

Amongst his other professional experience, the undersigned has practised his activity as a lawyer in diverse areas, namely in family law, commercial and civil litigation, commercial law with special focus on a wide range of commercial companies, in the real estate area related with property transactions and setting up real estate investment operations involving the banking sector, urban rentals, real estate development, pharmaceutical law, etc.
Positions held in the Bar Association

- Vice-President of the General Council of the Portuguese Bar Association - 2004/2007
- Vice-President of the Lisbon District Board of the Portuguese Bar Association - 2001/2004

Positions held in Professional Associations

- Member of the IAML-International Academy of Matrimonial Lawyers

- Chairman of the Board of the General Meeting of the Lisbon Association of Urban Landlords

Languages

English, French and Spanish spoken and written fluently
Isabelle REIN LESCASTEREYRES

Paris Bar Lawyer

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Date of birth: 12/12/1971

Married / three children

PROFESSIONAL RECORD

- Taking the oath: 1997
- 1997: Litigation department of WILLKIE FARR & GALLAGHER law firm
- 1997 to 2000: Associate of DANET law firm
  General practitioner with an emphasis on civil and family law
- 2000 to 2005: Associate and co-founder of the family law firm BWG Associes:
  Divorce, Estate, Filiations, Family assets, International cases…
- From 2005: Partner of BWG Associes (3 other partners and 12 associates)
  With an emphasis on international family law cases

ACADEMIC RECORD

- 1995: Graduated from HEC Business school (Major in business law)
  Law degree (PARISXI)
- 1996: Master in Law (PARISXI)

OTHERS

- Member of the « Institut du Droit de la Famille et du patrimoine »
- Fellow of the IAML
- Member of the IBA, the UIA, and Resolution
- Member of the Paris Bar “Commission for Family law”
- Member of « HEC Groupement Droit et Affaires »
- Collaborative Lawyer (trained in London in 2007) and founding member of the association des praticiens du droit collaborative (AFPDC).
- Speaker in numerous trainings to Family Lawyers in France and abroad (among which for the "Etats généraux du droit de la famille", a conference organized every year by the Conseil National des Barreaux, the CCBE and ERA European family law conference…)
- Many Articles on Family law in various professional magazines
- Bilingual English
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Maryla Wróblewski is one of this country’s greatest authorities within family and inheritance law. In her daily work she combines her extensive specialist knowledge and her strong counselling competencies with her ability to meet people at eye level and maintain her focus on practical solutions.

Maryla is an experienced negotiator both in and out of court, and she provides legal counsel in cases on estate planning, administration of the estates of deceased persons and divorces. Maryla is authorised by the District Court in Lyngby to help spouses with the division of property in case of divorce. Furthermore, she is authorised by the Danish Ministry of Justice as particularly qualified to provide legal counsel in cases on child abduction.

As a particular speciality within family and inheritance law Maryla has insight in the issues which face international families when planning their relationship with separate property and wills, or in case of divorce. Within this area Maryla conducts cases on a continuous basis involving many different countries in both Europe, Africa, USA, Asia and the Middle East. If you would like to see some examples of international cases where Maryla has acted as legal counsel, follow this link.

Maryla has a strong professional and personal network in IAML (International Academy of Matrimonial Lawyers, www.iaml.org). The Academy is a worldwide association of legal practitioners who are acknowledged as the best and most experienced in their respective countries. Accession in IAML takes place upon recommendation. IAML has four Danish members.

Maryla has been appointed by the Danish Bar and Law Society as their representative in the Council of Bars and Law Societies in Europe, CCBE, and is in CCBE’s task force on family and inheritance law. Furthermore, Maryla is the head of JUC’s network on inheritance and matrimonial property law.

Sharing her knowledge is part of Maryla’s everyday life, and she teaches both colleague attorneys and private individuals, e.g. private banking clients.

Memberships and honorary offices

International Academy of Matrimonial Lawyers
CCBE’s working group within Family and Inheritance Law
Special Committee for Family Law set up by the Danish Association of Law Firms
Danish Family Lawyers
S.L.A. (SANDRA) VERBURGT

family lawyer

Called to the bar : 2000
Fields of Expertise : (International) Family Law
Specialist Association : Dutch Association of Family Law Lawyers and Divorce Mediators (vFAS)

Practice

With more than 12 years experience in all kind of family law matters Sandra is a senior lawyer in the Family and Mediation Team of Delissen Martens. She is also a member of the International Desk, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes mainly divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 Sandra also deals with cross border disputes. She works closely with accredited family law specialists in Europe and the United States of America.

Publications

- “Marital Agreements: International lawyers neglect jurisdictional developments at their peril”, September 2011, International Family Law (Jordans)

Sandra is also editor of “SDU Relatierecht”, an explanatory commentary on Family Law of Dutch Legal Publisher SDU en member of the Editorial Board of the IAML Online News.
Events
Furthermore Sandra is the creator of the Experts4Expats lectures, which Delissen Martens organises on various practice areas on a regular basis. The purpose of the Experts4Expats events is to inform both international clients and professionals working for international clients about the legal challenges they may face in an international environment, but always also considering Dutch elements.

- Experts4Expats Family law 4 February 2011, “The Effectiveness of pre-nuptial agreements in England & Wales and The Netherlands” with English solicitor Simon Bruce
- Speaker during the IAML European Chapter Meeting 2012 (15 April 2012 - 22 April 2012) in Elounda, Crete (Greece): lectures "EU Maintenance Regulation: Minotaur or Magnifique?” and "Marge and the Maintenance Regulation” with English Family Law barrister Tim Amos QC

Memberships
- Accredited family lawyer and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS)
- Fellow of the International Academy of Matrimonial Lawyers (IAML)
- Chair of the UNICEF Regional Committee for The Hague and surrounding municipalities

www.delissenmartens.nl
Peter Junggeburth

Rectsanwalt, Junggeburth & Becker, Berlin

Studied German law at the law faculties of Bonn and Freiburg, conflict and comparative law in Lausanne; graduated in Germany and post-graduated with a French Master of Advanced Studies in the Law of the European Community (Paris-Assas); admitted to Berlin bar in 1994; started career as German lawyer in a Parisian law firm specialised in international (Franco-German) relationships; former lecturer and research assistant at the Institute of Comparative Law in Paris; publications in the field of family law dealing maintenance obligations, appeals in family proceedings, European and international sources of law and comparative family law (French family law).

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Maintenance Recovery abroad – Update from an Austrian perspective

Salzburg May 23rd 2013

Robert Fucik

A dozen of thoughts

1. The problems arising from recovery of maintenance abroad
2. How to ask the proper questions
3. How to find the right legal basis for the answers
4. Where to lodge an Application
5. Which law will be applied – remarks to lex fori, lex causae, choice of law and public policy
6. Is there any room for forum shopping?
7. Recognition and enforcement of foreign decisions: two instruments and four avenues
8. Review and due process of law
9. Cooperation: Two grades of intensity and (at least) two bypasses
10. May I introduce: The Austrian system
11. Technical matters: Application and request, documents and evidence, translation and legal aid
12. Practical experiences or: Communicate or fail
Marriage: A Universal Right?

Salzburg May 23rd 2013

Stewart Leech QC

See separate PowerPoint hand-out
WHERE TO NOW? EUROPEAN FAMILY LAW IN THE RECESSION

Maggie Rae, Clintons

Roger Bamber, Mills & Reeve LLP

Governments are cutting back expenditure on court services and the funding of family law. Clients seem to be changing their spending habits, when it comes to buying legal services. To what extent are these new economic forces affecting how we carry out our legal work, and how we manage our businesses in providing family law services. Is ADR on the rise?

The aim of this session is to discuss whether – and how - the Recession has had an impact on how family law is practised.

In some jurisdictions, certainly in England and Wales, governments have savagely cut back on the expenditure for the administration of justice. Courts are being closed and the numbers of court staff are being reduced. Judicial numbers are also being cut back. However efficient our own service to clients, this inevitably impacts upon the quality of legal provision in the broadest sense. To what extent is this a universal problem, and has this affected the way in which we help clients to resolve their problems.

To what extent has the inefficiency and expense of court services helped to promote ADR – such as mediation or collaborative law? There is evidence from around Europe that mediation has increased, sometimes heavily promoted by government, and sometimes not.

If there is an increase in ADR, to what extent has this impacted upon the practices of Fellows of the IAML? Is this demand for ADR being promoted actively by lawyers, or is it the clients themselves who are choosing it to court proceedings? And if there are different types of mediation, which is the most commercial?

Inevitably, there has been public debate about how lawyers charge for their family law (and other) services. Hourly rates have been the norm for many years, but there is increasing pressure for lawyers to offer fixed fees – for all aspects of family law. Is this made easier by providing ADR services, and if so what is the experience around Europe? Will it ever possible to do fixed fees for litigation?

Within this discussion, there is also the impact of the internet. Whether wealthy or not, are clients changing the way in which they instruct family lawyers, and are their expectations different? It is sometimes said that the legal profession is much less efficient than, say, the financial services sector – certainly in the electronic/reporting and transmission of information. These expectations may well have been raised several years ago, but lawyers comment that these expectations have increased dramatically because of the recession.

Within Europe, what has been the impact, if anything, of the EU Directive 2008/52/EC? Is there any way of resolving the conflict between Brussels II and this EU Directive – is there a lobbying role for the IAML, if mediation is set to grow?
Recession Q&A: Maggie Rae on England and Wales

1 What cuts have there been in the funding of legal services for families in your jurisdiction

In England and Wales there have been very substantial cuts in the funding of legal services. These have taken a variety of different forms. In the first place the availability of public funds to help pay the legal costs of those getting divorced has been more or less extinguished. Public funding or assistance with legal costs is now really only available where there has been domestic violence for mediation and for children cases. This has been accompanied by serious cuts in the numbers of Court staff and Judges.

2 How has this affected the delivery of your legal services?

The reduction in the number of Judges and Court staff has led to administrative chaos in many Courts. This has happened at a time when more and more people are representing themselves because there is no legal funding assistance available. They need more help not less, from Judges and the Court administrative staff. This has put an intolerable burden on many Courts and affected the delivery of services. This has a knock-on effect when parties are represented by lawyers since in those cases too we are working within the context of a very poorly performing Court service which affects the results and the quality of service we can provide for our clients.

3 Has the poor economic climate had an effect on client's attitudes to buying legal services and if so in what way?

There are clear signs that not only are more people choosing to represent themselves or being forced to represent themselves without the assistance of lawyers but that they are also buying divorce services online instead of consulting lawyers. Where clients do want to use lawyers they increasingly want to use them in different ways. They want to dip in and dip out of reliance on legal advisors so rather than asking them to take on a case and sort it out from beginning to end, they will ask their lawyers to undertake only certain parts of it. This has led to the development of what we in England and Wales often call partial retainers. The difficulty for lawyers is that if you are only acting in relation to some aspects of a case it is much more difficult to avoid being held to be negligent if something goes wrong.
4 What alternative dispute resolution services are offered or available in your country?

England and Wales have developed a wide range of alternative dispute resolution services from mediation through collaborative law and now arbitration. Additionally English divorce procedure focuses on achieving negotiated outcomes and negotiation is the way most cases are resolved.

The government has promoted mediation and indeed funded it to some extent and there has been a notable increase in the take up for mediation services. On the other hand the use of collaborative law has diminished and it seems likely that lawyers simply do not feel able to sell it to their clients in a way that they could before the economic downturn. Arbitration has recently been introduced in England and Wales as a means of resolving family disputes. There is speculation that if the Courts continue to be so dysfunctional that in a few years time arbitration will become the normal way of resolving financial disputes between separated couples. It will in fact become a privatised system. The Courts will increasingly be used to resolve children disputes.

5 Is there any other point on this topic you feel is relevant?

The English Family Court system is currently undergoing a dramatic reorganisation. Amongst the changes that the government is introducing is an internet hub for family work which will be available to separating couples and will help them through the minefield that is English matrimonial and family law. Additionally the Judge who is in charge of the Family Justice System in England and Wales is now engaged in a project for simplifying the drafting of orders that the Court can make and putting these on the centralised computer system being rolled out by the government.
Recession Q&A: Alexandre Boiché on France

1 What cuts have there been in the funding of legal services for families in your jurisdiction?

The level of the legal aid is very low in France compared to England. The budget of the legal aid is in debt constantly to try to finance it. The former government has created a tax paid through a 35 € stamp that have to be paid anytime you file a petition before a French court, this stamp could be purchased physically or online. But we have recently discover that when it is purchased online 5% of its value is for the banks.

A person who has less than 929 € income per month could benefit of the full legal aid, this amount could be increased if the person has children on her or his liability (167 € per child for the 2 first ones then 106 € each other). Then the part of the legal aid will decrease with the level of income the last stage is 15% legal aid for income between 1289 and 1393 €.

For a contentious divorce a full legal aid will represent an amount between 822,24 € and 1187,62 € the difference depends of the case if expertise are ordered by the judge, the number of pleadings...There is no increase for international cases.

For a mutual consent divorce the amount is 685 € if each spouses has his or her lawyer and 1142 € if the 2 spouses benefit of the legal aid take the same lawyer

For a custody and child maintenance proceeding the amount of the legal aid is between 365,44 € and 730,88 €.

This amount are very very low and do not take into consideration the time you have to spend on such cases.

2 How has this affected the delivery of your legal services?

We are taking less and less cases at the legal aid only cases with some legal interest or the client.

3 Has the poor economic climate had an effect on clients’ attitudes to buying legal services and if so in what ways?
The client are more and more careful on the costs and fees are very difficult to get paid. The clients always try to obtain a fixed price which is something very difficult to give in our practice.

4 Has the economic situation led to more interest in alternatives to court proceedings as a way of resolving family disputes?

In mediation eventually for the judge and the parties. But, this is not the case for collaborative process especially because in France you could not receive legal aid for legal advice and negotiation. Therefore in a collaborative process if the parties do not reach an agreement the lawyer will not be paid.

5 What alternative dispute resolution services are offered or available in your country?

Mediation and collaborative law.

6 Is there any other point on this topic you feel is relevant?

No
Recession Q&A: Haroula Constantinidou-Stavropoulou on Greece

1. **What cuts have there been in the funding of legal services for families in your jurisdiction?**

According to the information provided by the competent Department of the Ministry of Justice, Transparency and Human Rights, there are no cuts in the funding of legal services (legal aid). The annual budget for legal aid amounts to 4 million euros approximately. It should be noted however, that the cases (criminal and civil) funded by the Greek State are increasing due to the poor economic climate.

2. **How has this affected the delivery of your legal services?**

The delivery of our legal services has not been affected by the above as our law firm does not work on legal aid cases or in any way on cases funded by the Greek State.

3. **Has the poor economic climate had an effect on clients’ attitudes to buying legal services and if so in what ways?**

Certainly the economic crisis in Greece had an effect on clients’ attitudes to buying legal services. More precisely:

- People avoid court proceedings when possible, or try to limit them as much as possible.
- They started using the recently introduced ways of alternative dispute resolutions, which are cost-effective and time-effective. I expect that these possibilities will be used on a wider scale in the future as they will become more known to the people.
- People make appointments for consultation less frequently and for more serious reasons.
- Some clients ask to be facilitated and pay in installments or on credit. My understanding is that this is more frequent in commercial legal services.
4 Has the economic situation led to more interest in alternatives to court proceedings as a way of resolving family disputes?

The economic situation has started leading to more interest in alternatives to court proceedings as a way of resolving private and thus and family disputes. As such alternatives are quite new there are no statistics available.

5 What alternative dispute resolution services are offered or available in your country?

Arbitration, compromise, out of court dispute resolution, mediation and judicial mediation are the ways of alternative dispute resolution available in Greece. With the notions of arbitration and compromise Greek lawyers are quite familiar. Mediation and judicial mediation are quite new in Greece.

I will refer very briefly to them:

Mediation was introduced by L. 3898/2010 under the title “Mediation in Civil and Commercial Matters”. This law on mediation aims on the one hand to the harmonization of the Greek legislation with the provisions of the EU Directive 2008/52/EC “on certain aspects of mediation in civil and commercial Matters in cross-border disputes” of the European Parliament and the Council and on the other hand to the establishment of national procedures of mediation. This law entered into force in Greece on 16 December 2010.

Its scope covers all civil and commercial cases in cross-border disputes within the EU except from rights and obligations which cannot be disposed by the parties. The relevant mediation agreement is required to have been signed by the parties. At the end of the mediation procedure a Minute is drafted by the Mediator and is signed by the mediator, the parties and the lawyers. The original is filed with the court and from its filing it consists an enforceable title if it includes an agreement of the parties for the existence of a claim that can be enforced. The parties, their lawyers and the Mediator work together. Mediations in domestic disputes can be conducted only by lawyers who have been accredited as mediators by the competent authority of the Ministry of Justice, Transparency and Human Rights. Mediation as in cross-border disputes can be conducted by accredited mediators who may not be lawyers. The mediator’s fees are calculated on an hourly basis and for 24 hours maximum. The parties however can agree a different way of fees payment. The hourly fee is fixed and readjusted by virtue of a decision of the Ministry of Justice, Transparency and Human Right.

Judicial Mediation was introduced by L. 4055/2012 adding article 214B in the Greek Code of Civil Procedure.
This new institution, gives the possibility to the parties to resolve their disputes by recourse to the judicial mediation. The recourse can be made before the establishment of proceedings or for so long as lis pendens exists. To this effect one or more judges who are either Chairmen at the Court of First Instance or senior judges at the same court can serve as full or part time mediators. The mediator may propose non binding resolutions of the dispute. If the parties reach an agreement, a minute of mediation is drawn which is signed by the mediator, the parties and their lawyers and is filed with the Court Secretariat where the mediation took place. From its filing the Minute of mediation consists an enforceable title.

6  Is there any other point on this topic you feel is relevant?

It is probably worth mentioning that the alternative justice in Greece is not an invention of the recent years. In ancient Athens it was the arbitrators that had jurisdiction in private law cases and tried to find a way for the parties to reach a compromise. If they could not succeed in reaching a compromise they gave a judgment in spirit of leniency. If the parties did not accept that, they could seek a judgment at the Iliaia Court.
Recession Q&A: Rachael Kelsey on Scotland

1. **What cuts have there been in the funding of legal services for families in your jurisdiction?**

Scotland continues to provide assistance when it comes to obtaining legal advice for the economically vulnerable. The Scottish Government have confirmed that they do not intend to restrict the provision of Legal Aid as has recently happened in England and Wales. The approach in Scotland can probably be characterised as death by a thousand cuts rather than decapitation! There has been no increase in the Legal Aid rate for well over a decade and changes in the system in recent years have moved to payment in most cases being by way of a “block fee” rather than on a “time and line” basis. The provision of public funding extends to “advice and assistance” which it is advice outwith a litigation. This is available for advice in relation to any matter of Scots Law and, in real terms, is restricted to those on the lowest incomes. Legal Aid proper is available for litigation, again in relation to any matter of Scots Law. One has to satisfy the Scottish Legal Aid Board (“SLAB”) that there is a reasonable basis for public funding and the financial eligibility criteria. It is fair to say that the Board are taking a harder and harder line and are expecting parties to use the Court as a forum of last resort.

Full automatic Legal Aid (irrespective of financial resources) continues to be available for Hague applications.

2. **How has this affected the delivery of your legal services?**

In urban areas very few solicitors continue to offer Legal Aid. The hourly rate granted by the Board is just over £50 per hour and with the introduction of the block fee the vast majority of firms have taken the view that it is simply not economic for them to be able to offer legal advice under Legal Aid. It is certainly the case that solicitors who continue to offer Legal Aid have to be extremely disciplined about the work that they do which impacts on service delivery for clients and, indeed, can markedly increase costs for a private funding client who is on the other side of a legally aided opponent. If you are acting for a client under Legal Aid you cannot unilaterally take the steps that you regard as being necessary to properly manage your case and need advance approval from the Board for significant steps like the instruction of experts etc. This certainly leads to delays and often leads to cases being run,
in my view, with inadequate preparation (or, more commonly, adequate preparation with inadequate remuneration) and inadequate third party (expert) support.

3 Has the poor economic climate had an effect on clients’ attitudes to buying legal services and if so in what ways?

Undoubtedly. Six or seven years ago solicitors routinely deferred fees until the conclusion of a case and it was very common for clients to pay fees from equity release (at a time when house prices were rising significantly annually and lending was widely available). Very few solicitors will now agree to deferred fee arrangements and because clients have to fund advice as they go they are undoubtedly more cost conscious. There has been a significant increase in the number of solicitors who offer fixed fee arrangements for initial advice. Very few solicitors in Scotland have (yet) started to offer fixed fees generally. Clients are undoubtedly more cost conscious.

4 Has the economic situation lead to more interest in alternatives to court proceedings as a way of resolving family disputes?

Yes. I and three of my colleagues are mediators and we have seen an exponential increase in the instructions coming to us as mediators. It is clear that a significant part of the enthusiasm for mediation is because it is (generally correctly) perceived as being significantly less expensive than litigation.

It is fair to say that there has also been an interest in alternatives to court proceedings on the part of the Scottish Legal Aid Board. I was one of a six strong group of individuals which started looking at arbitration for family cases in 2004 and which ultimately lead to the creation of a bespoke set of family law arbitration rules and a group of trained family law arbitrators – FLAGS. We have been in discussion with SLAB about funding arbitration in family law disputes and it is fair to say that they are extremely interested in exploring how public funding could be made available for arbitration in family law cases, particularly in contentious child cases.

5 What alternative dispute resolution services are offered or available in your country?
The main alternative dispute resolution method in Scotland is mediation. One can apply to be accredited by the Law Society of Scotland as a family mediator. Extensive initial and annual training is required. There are around 60 family mediators who are all members of CALM (Comprehensive Accredited Lawyer Mediators). CALM mediators offer both child and "all issues" (financial and child) mediation. Virtually all CALM mediators will mediate both on a private funding and legally aided basis.

There is also a very experienced and wide ranging network across Scotland of non-lawyer mediators who operate under charitable status. The various mediation organisations (which extend to around 15 across the country) come under the umbrella organisation of Relationships Scotland. The Lothian’s charity is Family Mediation Lothian, of which I am Chair and a Trustee. FML has a team of 15 family mediators. In 2012 there were 452 mediation appointments attended. At present, due to funding shortfall FML can only offer mediation in pure child cases. Mediation through FML is paid for on a voluntary donation basis with a sliding scale according to client’s self declared income.

Collaborative family law is also available in Scotland. The first solicitors were trained in 2004. It is fair to say that take up of collaborative family law has been patchy. There is one particular area in Scotland – Aberdeen – where it has taken off and is fairly common. In most other places in Scotland there has been much more limited uptake. I am unaware of anybody who has been able to undertake collaborative family law with the assistance of public funding. It has perhaps been less widely embraced because there is more of a culture of joint meetings anyway in Scotland ("collaborative lite"). This has meant that it is often difficult to “sell” to clients the benefits of CFL and is perhaps part of the reason why the take up has been fairly limited. My experience has also been that, despite what we were told when we trained, that CFL is no less expensive than conventional negotiation.

The new kid on the block is family law arbitration. The first family law arbitrators (29 in total – Counsel and Solicitors) were trained in 2011. We have a bespoke set of rules for family cases which are based upon the Arbitration Act 2010. We are still very much at the stage of educating solicitors and clients about arbitration and its benefits but we are starting to see cases being dealt with by way of arbitration. The Scottish Rules allow arbitration in both child and financial cases and given the Scottish tradition of party autonomy and the ability to oust the jurisdiction of the court contractually, arbitration is well placed to take off here. As cuts to the court service start to bite those of us who are trained arbitrators are expecting this form of alternative dispute resolution to really take off.
Recession Q&A: Fredric Renström on Sweden

1. What cuts have there been in the funding of legal services for families in your jurisdiction?

There is very little change because of the recession. Legal aid is very limited, largely because there is an obligation to have insurance which has to be used first. Insurance is not applicable in all cases however.

Although Judges complain about increases in administration, the Court services have been unaffected by the recession. Delays tend to be caused more because of procedural changes than because of economic cut backs.

2. How has this affected the delivery of your legal services?

The Court services – for better or worse – have been running much as they were before.

3. Has the poor economic climate had an effect on client’s attitudes to buying legal services and if so in what way?

Clients are certainly shopping around more – either to conflict people out of cases, or to find out where the best price is.

4. Has the economic situation lead to more interest in alternatives to court proceedings as a way of resolving family disputes?

There is no real evidence of ADR Services being more popular than they were before.

5. What alternative dispute resolution services are offered or available in your country?

Mediation can be ordered by the Court, but only in custody matters.
There is no collaborative law.

The most common form of dispute resolution is Arbitration. In Sweden, the Court appoints an arbitrator, and the arbitrator has very flexible powers in dealing with the dispute. An arbitrator will usually try to persuade a couple of the outcome of a case. This may be closed to judicial mediation therefore, in other jurisdictions. Arbitration awards can be appealed.

6 Is there any other point on this topic you feel is relevant?

In previous IAML meetings, the possibility of an international panel of arbitrators was canvassed. This would be a very good solution, if couples were referred to the panel and asked to choose an arbitrator from that panel.
Mitochondrial DNA parentage: medical facts and legal implications

Salzburg May 24th 2013

Dr. Valentine Akande

Charles Hyde QC

See separate PowerPoint hand-outs
**Matrimonial Property Regimes**

**Salzburg May 24th and 25th 2013**

João Perry da Cama (Portugal)
Isabelle Rein-Lescastereyres (France)
Rachael Kelsey (Scotland)
Tim Amos (England)
Maryla Rytter Wroblewski (Denmark)
Sandra Verburgt (Netherlands)
Haroula Constandinidou (Greece)
Peter Junggeburth (Germany)

**The MPR Questions**

1. Does your jurisdiction have Matrimonial Property Regimes (MPRs)?
2. If yes, which regimes and which is the default regime; do you have a Regime Primaire equivalent; and how do you treat jurisdictions with no MPR (especially equitable-distribution jurisdictions)?
3. If no MPR, what system of rules applies to marital property prior to divorce (both as between the spouses - whether their assets are separate or joint - and as regards third parties); and how does your jurisdiction treat foreign MPRs?
4. Does your jurisdiction belong to the Hague Convention on Matrimonial Regimes which provides for automatic change and how does your jurisdiction deal with change of regimes, including any automatic changes of regime?
5. In any event,
   a. how does your jurisdiction deal with foreign property?
   b. What attitude is your jurisdiction likely to take to the EU draft Regulations on MPRs (and same sex regimes)? and
   c. What do you expect the impact of those Regulations to be (in their present form)?
6. Does your jurisdiction deal separately with dissolution of the regime and maintenance; and does it have the ability to split (bifurcate) family finance claims so that: (a) they can be dealt with without a divorce and (b) the capital could be dealt with in one country and the maintenance in another?
7. If your jurisdiction does have MPRs, how are the MPRs administered during the marriage and prior to liquidation of the regime?
An English/Welsh contribution to Panel Session H in Thun:

“Marital Property Regimes and prenuptial agreements
– beware before you move!”

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1. This paper is intended to provoke debate. It is therefore important to stress that its conclusion represents only an individual view. The paper is offered from the jurisdiction of England and Wales, not from the other jurisdictions within the United Kingdom. Given time constraints it is necessarily a sketch only. In what follows references to England include Wales.

2. It is now perhaps well known that the English law of matrimonial finance is discretionary, as to both capital and maintenance. Each individual case, in the absence of agreement, is decided as a combined package of capital and (if required) maintenance, together. The decision is made by the individual judge exercising his/her discretion in accordance with a non-exhaustive list of statutory factors set out in section 25 of the Matrimonial Causes Act 1973. Case law provides a guide as to how the judicial discretion is to be exercised.

3. Equally well known perhaps is that English law has recently undergone a radical development in the area of prenuptial agreements, as a result of the case of Radmacher (formerly Granatino) v Granatino [2010] UKSC 42, [2010] 2FLR 1900 (below).

4. Less well known perhaps, even now, is the fact that England has no matrimonial property regime as such, in the sense in which that term is used in the rest of Europe as “a set of rules concerning the property relationships of spouses, between the spouses and in respect of third parties”\(^1\). It follows that there is no ability in England for spouses to elect between different regimes designed for general application (as opposed to making individual do-it-yourself and tailor-made arrangements).

5. Equally fundamental, in terms of difference of approach, are the following:
a. in matrimonial finance cases, English family courts only ever apply English law, being the lex fori. (Whilst English family law of course understands the concept

\(^1\) Article 2(a) of the draft Council Regulation on applicable law etc. in matters of Matrimonial Property Regimes published by the European Commission in March 2011 (COM (2011) 126)
of “applicable law”, it does not employ it because it regards the proof and application of foreign law as expensive and inherently unreliable). And

b. in English law, marriage itself has no effect on property ownership, either as between the spouses or as against third parties. All marriage does is to give to each of the spouses a bundle of discretionary financial claims against the other spouse in the event of dissolution. Apart from this each retains ownership and control of their sole (or joint) property just as if they were not married.

6. The conceptual absence of a matrimonial property regime in England, combined with the adherence to lex fori, has profound implications both for nuptial agreements (usually pre-nuptial agreements and therefore “pre-nups”) and for the English attitude to the draft Council Regulation on applicable law etc. in matters of Matrimonial Property Regimes published by the European Commission in March 2011 (COM (2011) 126).

7. Since the last meeting of this conference in Berlin in September 2010, the undoubted milestone-development in the matrimonial finance law of England has been the decision of our highest court, the Supreme Court, given in Radmacher above. The decision represents a “seismic shift”2 because it significantly elevates the importance of party-autonomy and in so doing reverses the burden of proof in relation to pre-nups, whether English or foreign. In the past, pre-nups have tended to be viewed by English courts with famous scepticism and in large part ignored. Now, provided that a pre-nup is made properly (see below), and provided that it does not exclude provision for needs or relationship-generated-disadvantage, the agreement is likely to be given effect, especially where there has been independent advice and full financial disclosure, and possibly even without it (as was the case in Radmacher itself).

8. Radmacher concerned a very wealthy German heiress marrying a successful French banker who subsequently became an academic. The couple made their home in England where they brought up their two children. There was a German marriage contract, drawn up by the Wife’s family notary, which provided for separation of property and purported to exclude all claims in the event of divorce. This notwithstanding, on divorce the Husband sought about £7m from the Wife on account of his needs, to provide housing for himself (and the children when they were with him), and to provide him with an income for life.

9. The final English court decision in Radmacher was handed down in October 2010 - although those present at the Vienna meeting of this conference in September 2008 may remember a spirited discussion of the case at first instance led by Nicholas Mostyn QC (now Mr. Justice Mostyn). The first instance decision, in July 2008, went in favour of the husband, awarding him about £5m from the Wife for himself, outright, plus the use of a property in Germany worth about €600,000. Appeals to the Court of Appeal (including Lord Justice Thorpe) and thereafter the Supreme Court (formerly the House of Lords), both reversed the first instance decision and upheld the pre-nup in the sense that the husband received housing and maintenance for himself only in his capacity as father and only until the 22nd birthday of the younger child. The end-result was undoubtedly a victory for party-autonomy.

2 as described by Mr. Justice Moor in Z v Z (No.2) (Financial Remedy: Marriage Contract) [2011] EWHC 2878 (Fam) [2012] 1FLR 1100 at [33] and echoed in V v V (Prenuptial Agreement) [2011] EWHC 3220 (Fam) [2012] 1FLR 1315 per Charles J at [38]
10. The core of the *Radmacher* decision is at paragraph [75] of the majority judgment in the Supreme Court:

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

11. It is important to stress that the judgment in *Radmacher* does not of itself make all (or any) pre-nups binding in England: rather the decision in each individual case remains that of the individual judge, who is still free to ignore a pre-nup where the circumstances justify that conclusion. There is therefore no guarantee of enforcement. But the exercise of the individual judge’s discretion is now subject to the guidance given in *Radmacher*.

12. Equally important to stress is that the implications of the *Radmacher* decision are being worked out on the ground in the shadow of possible/wider statutory reform as a result of the Law Commission’s now-extended Marital Property Agreements project: [http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm](http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm). In the meantime, pending any statutory reform, the most obvious area of likely controversy, in applying the *Radmacher* guidance to less extreme facts, is in relation to the making of the pre-nup itself and the words quoted above: “entered into ... with a full appreciation of its implications”. On the facts in *Radmacher*, the Court gave substantial effect to the pre-nup despite the absence of mutual financial disclosure and individual independent legal advice – as distinct from a notary’s joint explanation of the law (which in this context has in any event never counted for much in English law). Similarly on the facts in *Z v Z* and *V v V* (see footnote 2 above). However both advice and disclosure have traditionally been seen as very important in England, precisely so that the future claimant knows what s/he is giving up by entering the pre-nup: see the comments of Mr. Justice Mostyn in *Kremen v Agrest (No.11) (Financial Remedy: Non-disclosure: Post-Nuptial Agreement)* [2012] EWHC 45 (Fam) at [73] and *B v S (financial remedy: marital property regime)* [2012] EWHC 265 (Fam) at [20].

13. *B v S* above concerned an agreement made in Catalonia ostensibly to adopt a marital regime of separation of property. This was well before the parties later decided to move to England. The English (first instance) court rejected the agreement because the requirement of a “full appreciation of its implications” was not met. Mr. Justice Mostyn held that the requirement “must surely mean that the parties intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution.”

14. Although in *Radmacher* the third (and final) instance decision in the Supreme Court gave little explicit consideration to the European context, the decision of the second instance Court of Appeal emphasised the degree to which English law previously, i.e. before *Radmacher*, was out of step with other jurisdictions, particularly our European neighbours. Lord Justice Thorpe’s reasoning included the following at [29(ii)/(iii)] of the Court of Appeal judgment: “As a society we should be seeking to reduce and not
to maintain rules of law that divide us from the majority of the Member States of Europe. Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts.”

15. The movement by the English courts towards a (more European) presumption in favour of prenuptial agreements also coincides with a more general trend in English matrimonial finance law. This is towards a more structured and predictable approach to the discretionary division of capital on divorce. In particular, and subject always to the question of “needs” (which is one of the specific additions to the work of the Law Commission referred to above), English law now concentrates very much more on dividing the economic “fruits of the marriage”. This in turn brings England now close to the approach of those jurisdictions which apply a system of community of accrued gains, or marriage-profit - subject to the safety net in England of judicial discretion in relation to needs. The chief differences between England and the mainland are therefore in the approach (for the moment) to need and in the approach to maintenance, which is of course itself very largely a matter of need.

16. So the advertised provocative conclusion is this: if truly free movement within at least the European Union requires certainty of legal outcome, eventual harmonisation of substantive family finance law must be a serious goal. If so, rather than spend years debating applicable law (which is in any event only half an answer at best), would it not now be better, instead, to deploy the available resources so as, through cross-border negotiation, to reduce further (“and not to maintain”) those rules of law which continue to divide the common approach? It goes without saying that on this point a Swiss answer/comment is the most eagerly awaited!

London, August 2012
ein englischer/walisischer Beitrag zum Panel Session H in Thun:

„Eheliche Güterstände und Eheverträge – vorsicht bevor Sie umziehen!“

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sind (im Gegensatz zu der Möglichkeit, daß man gegebenenfalls individuelle, maßgeschneiderte, Vereinbarungen treffen kann).

5. Gleichwohl grundlegend, hinsichtlich Verschiedenheiten der Angehensweise, sind folgende Punkte zu beachten:
   a. In ehelichen finanziellen Folgesachenfällen wenden englische Familiengerichte nur englisches Recht an, als lex fori. (Obwohl das englische Familienrecht natürlicherweise das Konzept „anwendbares Recht“ erkennt, benutzt es aber das Konzept nicht, weil, aus der Perspektive des englischen Familienrechtes, sowohl die Beweisaufnahme als auch die Anwendung ausländischen Rechtes als teuer und an sich unzuverlässig angesehen wird). Und
   b. Nach englischem Recht hat die Eheschließung an sich keine Eigentumsauswirkungen. In diesem Zusammenhang ist die einzige Folge einer Trauung, daß die beiden neuen Ehegatten jeweils ein Bündel an ermessensbedingten finanziellen Ansprüchen gegeneinander bekommen, die allerdings meist erst nur im Falle einer Auflösung der Ehe geltend gemacht werden können. Abgesehen davon behält jeder Ehegatte sein eigenes (oder gemeinsames) Eigentum als ob er/sie nicht verheiratet wäre.


7. Seit der letzten Tagung dieser Konferenz im September 2010 in Berlin, ist die Meilensteinentwicklung im englischen ehelichen Finanzrecht ohne Zweifel die Entscheidung unseres höchsten Gerichtes, the Supreme Court, im Fall Radmacher (oben). Die Entscheidung stellt eine „richtungsweisende Veränderung“ dar denn sie erhöht erheblich die Wichtigkeit der Parteiautonomie und kippt gleichzeitig die Beweislast hinsichtlich Pre-nups um, egal ob englischer oder ausländischer Provenienz. In der Vergangenheit wurden Pre-nups normalerweise von englischen Gerichten notorisch skeptisch angesehen, und zum Großteil ignoriert. Jetzt, solange daβ ein Pre-nup ordnungsgemäß gemacht worden ist (siehe unten) und solange daβ es nicht die Deckung von „angemessenen Bedürfnissen“ oder den Ausgleich ehe-/beziehungbedingter Nachteile ausschliesst, ist es wahrscheinlich, daß die Vereinbarung in Kraft gelassen wird. Das ist besonders dann der Fall, wenn jede Partei dazu individuelle unabhängige Rechtsberatung und vollständige Vermögensoffenlegung bei Ehevertragsschluss bekommen hat, aber möglicherweise auch ohne (wie im Fall Radmacher sich selbst).

\[5\] wie vom Richter Mr. Justice Moor beschrieben worden in \textit{Z v Z (No.2) (Financial Remedy: Marriage Contract)} [2011] EWHC 2878 (Fam) [2012] 1FLR 1100 Absatz [33] was auch in \textit{V v V (Prenuptial Agreement)} [2011] EWHC 3220 (Fam) [2012] 1FLR 1315 einen Wiederhall findet im Urteilspruch vom Richter Mr. Justice Charles [38]


10. Die entscheidende Passage der *Radmacher*–entscheidung befindet sich in Absatz [75] des (nicht einstimmigen) Urteils des Supreme Court:

„Das Gericht sollte einen Ehevertrag in Kraft treten lassen wenn die Vereinbarung in voller Kenntnis und Würdigung der Folgen abgeschlossen worden ist, es sei denn es nicht fair wäre, den [jetzt] tatsächlichen Umständen nach, die Parteien an ihrer Vereinbarung festzuhalten.“

11. Es ist wichtig zu betonen, daß das Urteil in *Radmacher* nicht dazu führt, daß Eheverträge in England bindend sind: vielmehr bleibt die Entscheidung in jedem einzelnen Fall nach wie vor die des einzelnen Richters, der noch immer einen Ehevertrag ignorieren darf wenn die tatsächlichen Umstände einen solchen Schluß rechtfertigen. Es gibt deshalb keine Garantie für die Durchsetzbarkeit. Aber die richterliche Ermessensausübung unterliegt jetzt der Anleitung in *Radmacher*.


13. B v S oben betraf einen in Katalonien abgeschlossenen Ehevertrag in dem die Parteien angeblich Gütertrennung vereinbart haben sollten. Das war lange bevor sie sich später entschlossen, nach England umzuziehen. Das englische (erstinstanzliche) Gericht wies den Ehevertrag ab weil die Voraussetzung „voller Kenntnis und Würdigung der Folgen“ nicht eingehalten worden war. Laut Urteilstext (Absatz [20]), muß diese Voraussetzung „sicherlich bedeuten, daß die Parteien die Absicht hatten, daß die Vereinbarung eingehalten werden sollte, wo auch immer die sich eventuell scheiden lassen sollten und, ganz besonders, auch dann wenn sie in einem Gerichtstand geschieden werden sollten wo ein System der Vermögensverteilung durch ermessensbedingtes Billigkeitsrecht herrscht.“


16. So ist der am Anfang dieses Referats angekündigte, provozierende Schlußgedanke folgender: wenn echter freier Personenverkehr innerhalb zumindest der Europäischen Union Gewißheit über das rechtliche Ergebnis bedarf, so muß eventuelle Harmonisierung des substantiven finanziellen Familienrechts ein ernsthaftes Ziel sein. Wenn dem so ist, wäre es nicht besser, anstatt sich jahrelang einer Europaweiten Debatte um Anwendbares Recht zu widmen (die sowieso im besten Fall nur eine halbe Antwort darstellt), jetzt die vorhandenen Resourcen zu konzentrieren, um durch grenzüberschreitende Verhandlungen die verbleibenden Rechtsregelungen, die eine gemeinsame Angehensweise noch hindern, zu reduzieren („und nicht zu bewahren“)? Selbstredend wäre dazu eine Schweizerische Antwort/Kommentar am sehnliechsten erwünscht!

London, August 2012
Agreement between the Federal Republic of Germany and the French Republic on the
Optional Matrimonial Property Regime of the Community of Accrued Gains

The Federal Republic of Germany and the French Republic

desiring to align their provisions on matrimonial property regimes,

intending to create with the present Agreement a new, joint, optional matrimonial property
regime alongside the other matrimonial property regimes that exist under the domestic laws
of the contracting States,

have agreed as follows:

Chapter I
Scope of Application and Definition

Article 1
Scope of Application

The optional matrimonial property regime of the community of accrued gains shall be
available to spouses whose property regime is subject to the property law of one of the
contracting States. The contents of this joint optional matrimonial property regime shall be
governed by Articles 2 to 18.

Article 2
Definition

In the optional matrimonial property regime of the community of accrued gains the assets of
the spouses shall remain separate. Accrued gains shall constitute the amount by which the
final assets of a spouse exceed his or her initial assets. Upon termination of the matrimonial
property regime, any debt on the accrued gains shall be determined by comparison of the
accrued gains of the spouses.
Chapter II
Creation of the Matrimonial Property Regime

Article 3
Creation of the Matrimonial Property Regime
(1) By marriage contract the spouses can optionally agree that their matrimonial property regime shall consist in the community of accrued gains.

(2) The contract can be concluded prior to entering into marriage or while the spouses are married. The matrimonial property regime shall become effective upon conclusion of the contract, and any provisions governing the amendment of a matrimonial property regime that existed up until that point shall remain unaffected. The matrimonial property regime shall become effective at the earliest on the date of marriage.

(3) The contract can deviate from Chapter V.

Chapter III
Management, Use and Disposal of Assets

Article 4
General Provisions on the Management, Use and Disposal of Assets
Each spouse shall manage and use his or her assets alone; he or she alone shall dispose of his or her assets. Notwithstanding this, the right to dispose of these assets freely is restricted by Article 5.

Article 5
Restrictions on Disposal
(1) Any legal transactions of a spouse pertaining to household items or rights which guarantee the family home shall be ineffective without the consent of the other spouse. They can however be approved by the other spouse.
(2) A spouse can be authorised by a court to enter alone into a legal transaction to which the other spouse would otherwise be required to consent, in a case where the latter is not in a position to, or refuses to, provide such consent and this refusal of consent is not justified by the interests of the family.

Article 6
Transactions pertaining to the Management of the Household

(1) Each spouse alone can conclude contracts pertaining to the management of the household and for the needs of the children. These contracts shall bind the other spouse jointly and severally.

(2) Notwithstanding paragraph (1), if a spouse enters into payment obligations which are manifestly unreasonable in particular having regard to the lifestyle of the spouses, and the party to the contract was aware of this or ought to have realised this, the other spouse shall not be bound by these obligations.

Chapter IV
Termination of the Matrimonial Property Regime

Article 7
Grounds for Termination of the Matrimonial Property Regime

The matrimonial property regime shall end
1. with the death of, or declaration of death of, one of the spouses,
2. with a change of matrimonial property regime, or
3. when a divorce or another court decision which terminates the matrimonial property regime becomes final and binding.

Chapter V
Establishing the Debt on the Accrued Gains upon Termination of the Matrimonial Property Regime
Part 1

Initial Assets

Article 8

Composition of the Initial Assets

(1) The initial assets shall consist in the assets of each spouse on the date on which the matrimonial property regime became effective. Liabilities shall be included in the initial assets also when they exceed the existing assets.

(2) Any assets that a spouse acquires at a later date by means of inheritance, transfer as a gift, or damages for pain and suffering shall be included in the initial assets. Any liabilities that affect these assets shall be included in the initial assets also when they exceed the existing assets.

(3) The following shall not be included in the initial assets:

4. the fruits thereof,

   and

5. any items of the initial assets that a spouse has transferred as a gift to lineal relatives throughout the duration of the matrimonial property regime.

(4) Upon conclusion of the marriage contract, the spouses shall compile an inventory of their initial assets. It shall be assumed that this inventory is correct if it is signed by both spouses.

(5) If no inventory has been compiled, it shall be assumed that there are no initial assets.

Article 9

Valuation of the Initial Assets

(1) The initial assets shall be valued as follows:

1. All items in existence on the date on which the matrimonial property regime became effective shall be valued pursuant to their worth at this point in time.

2. Items acquired after the date on which the matrimonial property regime became effective, being items which, pursuant to Article 8 paragraph (2) must be included in the initial assets, shall be valued pursuant to their worth on the date of their acquisition.
(2) All plots of land and equivalent rights included in the initial assets, with the exception of usufruct and dwelling entitlements, shall be valued pursuant to their worth on the date of termination of the matrimonial property regime. If these items are alienated or substituted during the marriage, they shall be valued pursuant to their worth on the date of alienation or substitution. Changes to the condition of these items that are made during the marriage shall not be taken into consideration in the valuation of the initial assets.

(3) If the items are valued at a point in time prior to termination of the matrimonial property regime, their value as determined at this point in time pursuant to paragraphs (1) and (2) shall be adjusted by an amount determined by the average price-change rates for overall consumer prices in the contracting States.

(4) Paragraphs (1) and (3) shall also apply to the valuation of liabilities.

Part 2
Final Assets

Article 10
Composition of the Final Assets

(1) The final assets shall consist in the assets of each spouse on the date of termination of the matrimonial property regime. Liabilities shall be included in the final assets also if they exceed the existing assets.

(2) The final assets shall include the value of any items that a spouse

3. has transferred as a gift, unless
   a) the gift is reasonable having regard to the lifestyle of the spouses, or
   b) an item included in the initial assets has been transferred as a gift to a lineal relative. Any increase in value through improvements to such items that is achieved throughout the duration of the matrimonial property regime using resources that are independent of the initial assets shall however be included in the final assets.

4. has alienated with the intention to disadvantage the other, or

5. has squandered.

This shall not apply if the transfer as a gift, alienation with the intention to disadvantage, or squandering took place more than ten years prior to termination of the matrimonial property regime or if the other spouse had agreed thereto.
Article 11
Valuation of the Final Assets

(1) With regard to both existing assets and liabilities the final assets shall be valued pursuant to their worth upon termination of the matrimonial property regime.

(2) The items pursuant to Article 10 paragraph (2) shall be valued pursuant to their worth at the time of the transfer as a gift, alienation with the intention to disadvantage, or squandering. Any improvement in value pursuant to Article 10 paragraph (2) number 1 letter b shall be determined as that applicable at the point in time when the item was transferred as a donation.

(3) The values pursuant to paragraph (2) shall be adjusted by the amount determined by the average price-change rates for overall consumer prices in the contracting States.

Part 3
Debt on the Accrued Gains

Article 12
Claim to Settlement of the Debt on the Accrued Gains

(1) If the accrued gains of one spouse exceed the accrued gains of the other spouse, the other spouse can claim half of the surplus as debt on the accrued gains.

(2) The debt on the accrued gains shall be a pecuniary claim. However, upon petition of one of the spouses, the court can order items of the debtor to be transferred to the creditor for the purposes of settling the debt if this is equitable.

(3) After termination of the matrimonial property regime, the debt on the accrued gains shall be inheritable and transferable.

Article 13
Date of Calculation in Special Cases
If the marriage is dissolved or the matrimonial property regime terminated by other court decision, the debt on the accrued gains shall be determined pursuant to the composition and value of the assets of the spouses at the time the petition was filed in court.

**Article 14**

**Limitation of the Debt on the Accrued Gains**

The debt on the accrued gains shall be limited to half the value of the assets of the debtor spouse that are available, after deduction of the liabilities, at the point in time determinative for ascertaining the amount of the debt on the accrued gains. The limitation of the debt on the accrued gains shall increase in the cases stipulated in Article 10 paragraph (2), with the exception of number 1 letter b, by half of the amount to be included in the final assets.

**Chapter VI**

**Miscellaneous**

**Article 15**

**Limitation**

The claim to settlement of the debt on the accrued gains shall become statute-barred after three years; this period shall commence on the date on which the spouse learns of the termination of the matrimonial property regime, but at the latest ten years after termination of the matrimonial property regime.

**Article 16**

**Duty of Information, Inventory**

(1) After termination of the matrimonial property regime, each spouse shall have a duty to inform the other spouse of the inventory of his or her final assets. Supporting documents must be submitted on request. Each spouse can demand that a full and correct inventory be submitted. Upon his or her request, he or she shall be consulted in the compilation thereof. He or she can also demand that an inventory be taken by a notary at his or her expense.

(2) Paragraph (1) shall also apply as soon as a spouse has petitioned for dissolution of the marriage or early settlement of debt on the accrued gains.
Article 17

Deferral

(1) Upon petition the court can grant additional time for the debtor to settle the debt on the accrued gains if immediate payment would constitute an inequitable hardship for the debtor, in particular if it would compel him or her to surrender an item constituting the means of his or her subsistence.

(2) Interest must be paid on a deferred debt.

(3) Upon petition of the creditor the court can order the debtor to provide security for a deferred debt; the court shall decide at its equitable discretion on the nature and scope of the security provided.

Article 18

Premature Settlement of Debt on the Accrued Gains

(1) If a spouse manages his or her assets in such a way that he or she adversely affects the rights of the other in the calculation of the debt on the accrued gains, the other spouse can demand premature settlement of the debt on the accrued gains. This shall apply in particular in cases that result in notional inclusion pursuant to Article 10 paragraph (2).

(2) When the decision through which the petition is granted becomes final and binding, the separation of matrimonial property shall apply for the spouses.

Chapter VI

Final Provisions

Article 19

Temporal Application
The present Agreement shall apply to marriage contracts that the spouses have concluded after the entry into force thereof.

Article 20
Ratification and Entry into Force

(1) The present Agreement shall be subject to ratification.

(2) The present Agreement shall enter into force on the first day of the month following the exchange of the ratification instruments.

(3) The present Agreement shall initially remain in force for ten years. After these ten years it shall be renewed tacitly for an indefinite period of time.

(4) The present Agreement can be denounced by a contracting State at the earliest ten years following its entry into force. The present Agreement shall cease to have effect on the first day of the thirteenth month following the date of receipt of notification by the other contracting State.

Article 21
Accession

(1) Following the entry into force of the present Agreement, any Member State of the European Union can accede to the present Agreement. In the case of accession of one or of more States, the Government of the Federal Republic of Germany shall act as depositary for the Agreement. The instruments of accession shall be deposited with the depositary.

(2) The Agreement shall enter into force for the acceding State on the first day of the month following deposit of the instruments of accession. The depositary shall notify the contracting States of every new accession and of the date of entry into force of the Agreement for the acceding States.

(3) As of the date of accession of one or of more States, any denunciation shall be notified to the depositary. Any contracting State can denounce the present Agreement at the earliest ten years following its entry into force for that State. The denunciation shall take effect on the first day of the thirteenth month following the day of receipt of the notification by the
depositary. The depositary shall notify the contracting States of every denunciation and of the date upon which this denunciation takes effect.

Article 22
Languages of the Agreement

Upon accession of a State the contracting States shall decide upon the stipulation of a further binding version in another language.

Article 23
Registration

The present Agreement shall be submitted by the Government of the Federal Republic of Germany for registration with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations immediately following its entry into force.

Done at Paris on February 4, 2010 in duplicate in the German and French languages, both texts being equally authentic.

For the For the
Federal Republic of Germany French Republic
Bekanntmachung
über das Inkrafttreten des deutsch-französischen Abkommens
über den Güterstand der Wahl-Zugewinngemeinschaft

Vom 22. April 2013


Berlin, den 22. April 2013

Auswärtiges Amt
Im Auftrag

Dr. Martin Ney
The optional Franco-German matrimonial regime

Participation in accrued gains

by

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The Franco-German Agreement on an optional matrimonial regime is in force since the 1st of May 2013 as the ratification instruments have been exchanged in April 2013 (Art. 20). It is an optional regime that is available to spouses whose matrimonial property regime is governed by the law of one of the contracting states (Art. 1); in Germany it is also optional for homosexual registered partnerships not pursuant to the Agreement but by referral in virtue to national German law. It is a bi-national agreement but open to accession to any Member State of the European Union (Art. 21).

The Franco-German MPR has been elaborated by a committee set up in 2006 by the two countries’ justice ministries, consisting of senior civil servants and practitioners, lawyers and notaries, and one university professor on the French side. The composition of the delegations was based on the idea that the usefulness of a joint matrimonial regime essentially depend upon its value in practice. The commission held extensive exchanges on each other’s national property regimes. In summer 2007 Germany and France decided to abandon the ambition to elaborate two parallel optional matrimonial regimes, the other based on the French default regime, a community reduced to the acquisitions, as being too complicated. The work achieved on 4 February 2010.

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The Franco-German Participation in accrued gains may be characterized as a “separation of goods” which is amended with an upon-termination-differed-pecuniary-claim on accrued gains (Art. 12 read together with Art. 2), that tends to realize a dividing of the economic fruits of the marriage in equal parts.

For lawyers from equitable-distribution jurisdictions that don’t care about MPRs:

It’s just a claim that realizes a participation in accrued gains, whose idea is to divide the fruits of marriage insofar as they find their expression in assets; and notably insofar as needs (understood as the/a criterion for the determination of maintenance) has no relevance. The claim is amended with provisions (of minor importance) regarding property and the relationship to third parties.
The core area of the provisions lies in the definition of the method to calculate the respective “accrued gains” realized by each spouse while the matrimonial regime was effective and during which the arrangements in respect of property and third parties are very tight.

1. **Regarding property, third parties and administration**

Logically consistent to the separation of goods (Art. 2), it is (gratuitously) made clear that each spouse shall manage, use and dispose of his or her assets alone (Art. 4).

As a matter of fact there are only two substantial provisions regarding third parties thereof only one that interferes with the applicable general property regime.

a) **Restriction on disposal**

To the disadvantage of third parties, Article 5 establishes restrictions on disposal pertaining to rights which guarantee the family home, and pertaining to household items, without consent of the other spouse; with the consequence of ineffectiveness of the disposition. This rule not only restricts property alienations but also tenancy agreements.

This restriction on disposal of the family home is perceptibly beyond that provided by German law and at the same time unavoidable from the point of view of the French law since a similar restriction is part of the mandatory rules of the French “régime primaire” that apply regardless whatever property regime is chosen (respectively whatever foreign matrimonial regime is applicable), notably in case of a separation of goods. From the point of view of German law, the disposition is desirable.

b) **Limited establishment of conjoined liability**

To the advantage of third parties Article 6 par. 1 phr. 2 establishes a conjoined liability for contracts pertaining to the management of the household and for the needs of the children if they are concluded by only one spouse.

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This leads to the conclusion, that regarding property the ruling is rather characterized by the absence of ruling. Only alienations, not acquisitions, are concerned and this with a limited scope.

2. **The core area**

The core area of the provisions consists in a legally defined calculation, whose ambition is to realize a result that can be understood as a division of the fruits of marriage.

The leading idea of the French community limited to the acquisitions is catchy: The fruits of the marriage should be shared. The leading idea of the division of the sum of accrued gains is the same, but the results are not identical.

The French community limited to the acquisitions seems to be easy, when it comes to termination. As each spouse keeps his / her private property, there is nothing to do in this respect. The community has to be divided in equal parts: easy – isn’t it?
But the reality often doesn’t obey the finality of the established regime and the consequence of that; the clean delimitation of the community on one side and the two private properties (husband and wife) is seldom upheld.

Example: The wife owns a small flat when getting married; later on she sells the flat and the returns are invested in the acquisition of a larger flat (suitable for a family with children). As a consequence of the community limited to the acquisitions, the property of the larger flat is attributed to the community even if it is acquired by the wife only.

This creates a problem as the finality of the regime limited to the acquisitions consists in the realization of a dividing of the economic fruits of the marriage in equal parts.

So does the French regime fail in its main ambition? It doesn’t, but the readjustment is pretty complicated.

The technical term is reimbursement (“récompense”) and it stands for “the community owes to a spouse” – in our example reimbursement for the loss of property of the wife’s side. In other situations “a spouse may owe to the community”. Sometimes numerous transactions of that kind have to be retraced and this creates a considerable mess. Besides, sometimes on top of that, the parties may be confronted with a situation that makes impossible to realize a distribution with equal economic values. Example: 2 flats and 1 house cannot be combined in a way that the division produces equal values. This makes it necessary to proceed to compensation in money, that French law call “solutés”.

The difficulties of the technique of reimbursement consist in the necessity to retrace numerous transactions regarding numerous individual items that all have to be valued in order to reimburse them.

This may be avoided by an overall calculation that distinguishes two assets only and that is indifferent to transactions undertaken by the spouses during the period of marriage as they are balanced “automatically”.

This is the main ambition of the German default-regime and also of the Franco German MPR.

Accrued gains are defined as the amount by which the final assets of a spouse exceed his or her initial assets (Article 2). The spouse whose accrued gains are inferior to those of the other is awarded a compensation claim that equalizes the gains, as the amount is defined as half of the surplus (Article 12). There is no participation in deficits. This requires the compilation of inventories in which appear the items and liabilities with their economic value. Neither the initial assets nor the final assets are real assets but only operands, i.e. numbers, quantities or fictitious values upon which a mathematical operation is performed.

The logic consists in the economic segregation of the legally defined initial assets from the division.
The result of the segregation of private assets from the community in the French default regime is similar but not identical, as the segregation from the community suggests that the other spouse does not participate in gains or losses that are the result of the evolution of market prices (memory hook: “classic cars market boom”). Those variations of economic value of private items realized within the substance are enclosed in the item and therefore segregated from community and division in the French default regime, but not in the Franco-German regime, as in the Franco-German regime all the items have to be valued at two reference dates.

The regime defines strict and detailed requirements referring both to the composition of the assets and to the valuation in order to achieve an equal application in the two countries with predictable results.

The following aspects should be pointed out:

a) Valuation - Inflation

Initial assets generally have to be valuated pursuant to their worth on the date on which the regime became effective (Art. 9 par. 1 n° 1). In order to make the values of the initial assets comparable with the final assets they have to be adjusted by an amount by the average price-change rates (Art. 9, par. 3). (Otherwise the method would produce apparent gains.)

The principal of valuation is inspired by the German model; the exception that applies to plots of land by the French model.

b) Plots of land

All plots of land and equivalent rights included in the initial assets (...) shall be valued pursuant to their worth at the date on termination of the matrimonial property regime (Art. 9 par. 2).

This produces the result that the participation in gains or losses realized within the substance of the plot of land itself is zero.

The provision is based on the consideration that increases in value of plots of land are often the result of coincidences on the real estate markets and therefore independent of any contribution of the spouses. The plot of land takes advantage of the disappearance of an airport for example. The other spouse should not participate in such gains. By contrast the non-owner should participate in changes to the condition of these items for example if a house is constructed on the land while the spouses are married. This is made clear with the last sentence of the paragraph.

Within the French community limited to the acquisitions it would go without saying because an item included in the initial assets remains separated, a situation that produces the consequence that the spouse does not participate in gains “enclosed” in the substance of the item. Constructions on the plots of land are subject of reimbursements.
By contrast, the German calculation method doesn’t provide such an exception for plots of land. So this is derivative of French law.

c) **Inheritances, donations and damages for pain and suffering.**

Any assets that a spouse acquires by means of inheritance, donations or damages for pain shall be included in the initial assets although the spouse acquires them after marriage (Article 8 par. 2):

Within the logic of accrued gains it should go without saying that fruits of capital are matter of accrued gains, but Article 8, par. 3 n° 1 makes it clear.

Within the French community of assets, the result would be similar but not identical because the property is attributed to the private property although it has been acquired after marriage. German law proceeds similar to the mentioned Article 8 par. 2 (but not as far as compensation for pain and suffering is concerned – this aspect is subject of controversial discussions).

d) **Gifts and notably items transferred as gift to lineal relatives (often: “anticipated successions”)**

Gifts decrease the value of the final assets and decrease thereof to the disadvantage of the other the debt on accrued gains.

The Agreement denudes trust-contrary alienations of their effect by mandating that alienated items have to be included in the final assets (Article 10 par. 2 n° 2).

This fictitious addition illustrates that also the final assets have primarily to be understood as an operand – ie. (again) the number, quantity or deemed value upon which a mathematical operation is performed.

But a concession has been made to the widespread practice which may be understood as anticipation of successions by the means of donation. Those donations are not a matter for fictitious addition to the final assets if they concern items of the initial assets (also by means of inheritance) and if the donee is a lineal relative (Article 10 par 2 n° 1 lit b). As a consequence of that, the owner of the alienated item would be advantaged if the item wasn’t eliminated from the initial assets also and this is logically consistent provided by (Article 8 par. 3 n° 2).

The German regime differs.

e) **Capping ceiling and transfer of items on order of the judge**

The agreement provides a capping ceiling. The liability cannot exceed half of the value of the debtor’s property (Art. 14).

This provision is in correlation with the possibility that the initial assets may be negative.
The claim is a pecuniary claim but, if equitable, the judge is empowered to transfer (upon application) items to the creditor in specie for the purposes of settling the liability (Art. 12 par. 2).

f) Flexibility regarding contracted modifications

The regime is flexible as contract can deviate from Chapter V that defines the core rules that define the method to calculate the liability on the accrued gains (Art. 3, par 3).

Examples

The idea of the provision relating to plots of land may be extended to a company, producing the effect that accrued gains realized within the assets of the company will be segregated from participation.

In the opposite direction the privilege referring to plots of land may be eliminated.

etc. etc. etc.

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Usefulness

The creation of a MPR whose provisions are clear and workable, and whose application should therefore produce equivalent results regardless of the country in which it is supposed to be applied, produces an important progress for the concerned couples, third parties and for all lawyers that apply it. Notably this is so regardless of the juridical context in which the lawyers were educated, as it is in substance a legal definition of operands (see above) and valuation only.

As a consequence of this it becomes also more realistic that a lawyer of one country negotiates with a lawyer in another lawyer a custom-made MPR because the impacts are predictable if the lawyers respect the primarily economic logic of the regime.

It is the first harmonization of substantive law on the financial consequences of divorce. It may be criticized as a heartless juridical calculating-machine. But as the reduction of legislation seems to be the only way to avoid interferences with as many laws as there are member states, on a legal field that is generally extensively regulated and highly influenced by traditions that are jealously defended, there is no reason to refrain from doing it.

The choice of this MPR, and thereby the consequential separation of goods, notably avoids interferences with national general property regimes and national succession regimes. Example: a spouse, being the subject of a (for example French) community limited to the acquisitions, acquires a flat in his sole name in a country where actual communities have inconsiderable importance (eg. Germany). He appears as sole owner in Germany, although he isn’t legally the sole owner as a consequence of the community. This MPR also avoids many possible doubts regarding the administration of a good, a question that is pertinent when it comes to alienations and difficult to verify in international relationships. If a good is
obviously not suitable as family home and obviously cannot be considered as household item, the validness of an alienation is not affected by the marriage of the vendor.

The answers to the questionnaire from the German point of view also indicate a high practical usefulness of the Franco German MPR in international family relationship:

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Besides it may help within juridical discussion to better understand the stake of the discussion:

Property? Administration? Liquidation of community? Participation? Interferences with (/intrusions in) general property regimes of whatever national law?

Interferences with (/intrusions in) national old-age pension insurance systems?

(…) and what place the coverage of needs, or relationship-generated disadvantage, occupies in all those considerations?