

Thomas Geiser - Divorce and the law of pension funds - what the new law brings
(Extract from ASP 10 / 2015, p. 1371 et seq.)

The enacted revision of the law that governs pension compensation in June 2015 offers the possibility for pensions to be splitted. The available assets will decrease, as the pension provisions that had been accumulated in the course of the divorce proceedings can no longer be divided. The freedom of scope is enhanced so that increasingly division becomes obsolete. In the case of a divorce in a foreign country and with retirement assets in Switzerland, it always requires two separate divorce proceedings. The new law brings additional technical improvements. It will likely come into effect on 1 January 2017.

International cases

Present situation

Until now, IPRG (PILA) had governed for the pension compensation neither the jurisdiction nor the applicable law explicitly. Jurisprudence and doctrine assumed that according to Art. 63 para. 1 IPRG (PILA) the courts having jurisdiction for divorce, are also to decide pension settlements. As a result, the principle of unity that applies to the divorce decree in the case of pension compensation also holds relevance in matters with an international character. Also in regard to the applicable law, the precise terminology of Art. 63 para. 2 IPRG (PILA) established the divorce law, which usually saw Swiss law taking effect, unless in some exception referral to foreign-based domestic laws can be found. One difficulty lies in the circumstances that the pension compensations involves not only the spouses, but also the pension funds. The relationship that governs pension scheme relationship cannot routinely form the source for the rules that also govern divorces, as the former follows their own norms. In general, the pension scheme relationship is governed by the laws of the country where the seat of the occupational pension institution is located. In this regard it may concern a legal system, that has little relevance to the divorce law. It is therefore important *to distinguish between the laws that govern the pension compensation* and the laws that govern *the calculation for the entitlement* claims of each spouse towards their pension scheme. For the relationship between the spouses, in other words, the question if and if applicable which requirements and how to divide, the relevant law that had played the decisive role. was the law applicable to divorce. The calculation for the pension entitlements that were to be divided had on the other hand ensued after the applicable laws relating to the individual pension fund were taken into account, that is the laws regarding the pension scheme relationship according to Art. 15 or Art. 19 IPRG (PILA). That view was also taken up by the Swiss Federal Supreme Court.

Situation according to the new law

The IPRG (PILA) has as of now experienced material changes in relation to the Federal Law on Occupational Pensions reforms {BVG}.

In a divorce in Switzerland henceforth finds Swiss law applicable in the instance of both divorce and pension compensation. *The exception in favour of a common domestic law is overturned.* This poses significant relief to the Swiss courts. They now only have to take into consideration Swiss provisions in relation to the issue of pension compensation. The law that refers to the compensation is still determined according to Swiss laws, independently from where the pension assets are. In contrast it remains unchanged to apply the law on the pension scheme assets, which they are governed by. Insofar Swiss courts will still have to deal with foreign pension laws. Furthermore Art. 15 IPRG (PILA) could also lead to the application of foreign law for the purpose of compensation between spouses. So for example it will be useful to apply German law in regard to pension compensation, particularly when in spite that both spouses may reside in Switzerland, but they are both gainfully employed in Germany.

In addition, the legislator has ensured that the *decision over Swiss pension scheme assets* in the instance of divorce as well as in supplementing a *divorce decree find application within Switzerland's jurisdiction.* The legislator even went a step further as it declared the Swiss courts exclusively responsible in this regards. This exclusivity of the jurisdiction entails that a foreign court cannot order the division of a Swiss pension, since these assets cannot be divided up.

It is obvious that discrepancies may occur if a foreign state introduces a similar provision and now like Switzerland divides the Swiss and foreign pension scheme assets in a divorce. This demands *coordination.* In the case that the divorce was completed in Switzerland, such a provision addressing international coordination might stray into material law. Art. 124e Par. 2 CC (Swiss Civil Code) in the version from 2015 stipulates that a Swiss court decision upon request from the (liable) spouse may be altered if existing pension claims that are based abroad may be balanced by an appropriate compensation in accordance with Art. 124e Par. 1 CC (Swiss Civil Code) in the version from 2015 and for these pension claims to be divided thereafter by a binding decision through the foreign pension fund. A deadline for this adjustment is not envisaged. This can be particularly complicated if the division was only ordered once the retirement age was reached and the appropriate compensation according to the Swiss ruling had already long been established.

The reclamation claim is arguably governed by the rules for the unjust enrichment in accordance with CO (Swiss Code of Obligations). It is to consider that such situations may not just fall under the scope of Art. 124e Par. 2 CC (Swiss Civil Code) in the version from 2015. In fact – in the case of splitting of vested benefits and pensions too – you should derogate from the application of the rule of equal splitting for foreign assets of a spouse if in return the splitting over these assets was relinquished. Also in this regard it should be possible to refer back to the legal verdict if the foreign pension was still to be divided up.

If the spouses live abroad and one spouse has pension scheme assets in Switzerland, two proceedings have to be pursued: abroad the divorce proceeding takes place and afterwards (or simultaneously) the decision will have to be amended in Switzerland for the pension scheme assets. In any case it requires a second proceeding within Switzerland. Even a mutually agreed divorce (divorce at joint request) still necessitates two proceedings, as the pension fund can no longer follow suit with the compensation from a foreign divorce settlement, but requires a Swiss divorce decree. In the event that the spouses reach an agreement that the Swiss pensions ought not to be divided, for example because one spouse abroad may receive a considerably higher pension and therefore could be liable to

pay a portion to the other spouse with a Swiss pension, otherwise the other spouse may later demand a supplementary part of the divorce decree in Switzerland and hence the legal decision that was made abroad could be thrown into doubt. How long a supplementary portion of a divorce decree is still possible have yet be answered by doctrine and jurisprudence.

The purpose that is sought with the exclusivity of the Swiss jurisdiction, namely that always when assets are based in Switzerland that these should also always fall under the principles of the Swiss laws that govern their division, will hardly be reached: that spouse who is entitled to the division of pension assets, is abroad then for financial, administrative, or cultural reasons may not even submit a supplementary petition in Switzerland. In this case the assets shall remain undivided with present beneficiary of the pension assets. The foreign court will not help the entitled person as it is outside their jurisdiction. If a division was ordered by that foreign court, the pension fund would not be allowed to follow suit and divide the pension assets in question. Is the foreign connection significant, because for example both spouses have lived abroad and have spent substantial portions of their professional lives abroad, then an evaluation of the appropriate compensation from a Swiss perspective becomes considerably more intricate. In such an instance it is the foreign pension provisions that will have to be considered and ascertained. The 3-pillar principle (according to Swiss pension law; see Art. 111 of the Federal Constitution in which the three pillar principle, and therefore also the occupational pension is anchored) is unlikely to be a pension arrangement that exists abroad. Old-age, survivor's- and disability pensions has to be viewed globally, including the first and if necessary the third pillar as well as maintenance. Our principles governing pension compensation then do not fit to the case. A later "improvement" runs the risk "to take a step forward and two steps back".

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