



IAFL Introduction to European Family Law 'Virtual Kyiv' Webinar

Divorce and financial splits: an essential outline

Friday 19th March 2021

Supporting Documents



Chaired by: [William Healing](#) (England)

Panel: [Marie Berger](#) (Switzerland), [Agne Limante](#) (Lithuania), [Sam Longworth](#) (England), [Iryna Moroz](#) (Ukraine) and [Séverine Tamburini-Kender](#) (France)

Page 1: Marie Berger paper

Page 2: Agne Limante presentation

Page 6: Sam Longworth presentation

Page 12: Iryna Moroz presentation

Page 19: Séverine Tamburini-Kender presentation

Divorce and financial splits: an essential outline – Switzerland

1. Preliminary remarks

2. Swiss international private law

- Jurisdiction
- Applicable law
- Recognition

3. Property regimes in Switzerland

- Separation of property
- Participation in acquired property
- Community of property

4. Marriage contract

- International rules
- Domestic law

5. Occupational pension assets (2nd pillar)

- Principles
- International rules
- Domestic law

Party autonomy to choose jurisdiction and applicable law for matrimonial property in Europe

IAFL Introduction to European Family Law 'Virtual Kyiv' Webinar

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Issues to be covered

- Why party autonomy is an important tool of EU private international family law?
- Right of the parties to agree on jurisdiction under the Matrimonial Property Regulation
- Possibility of the choice of applicable law for matrimonial property
- Final thoughts

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Why party autonomy?



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Why party autonomy is an important tool of EU private international family law?

Greater legal certainty

Stability and Predictability

Optimal choice

Concentration of jurisdiction and law

Saving time and costs of additional litigation

Flexibility

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Party autonomy in the Matrimonial Property Regulation

POSSIBILITY TO CHOOSE FORUM

POSSIBILITY TO CHOOSE LAW

Limited as concentration of jurisdiction is seen as priority

Parties choice is the main connecting factor

Main jurisdictional rule: jurisdiction for divorce + jurisdiction for matrimonial property regime

→ Brussels II a regulation (automatic extension of jurisdiction // consent of the parties)

(also jurisdiction for succession + jurisdiction for matrimonial property regime)

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Right to choose forum under the MPR

◦ Priority: concentration of jurisdiction

◦ If this fails →

◦ Article 6 cascade of connecting factors **OR** Article 7 and choice of court

◦ Article 7 allows to choose:

◦ courts of the country whose law applies (parallelism of *forum* and *ius*)

◦ courts of the state where the marriage was concluded

+ jurisdiction based on the appearance of the defendant (Article 8)

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Choice of applicable law for matrimonial property



- Article 22: MPR makes parties choice of law the main connecting factor
- Only if the parties' choice was not made, the Regulation foresees the rules on applicable law

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Possible options

Article 22, parties can opt for:

- the law of the state where **both or one of them is habitually resident**, or
- the law of the **nationality of either party** at the time the agreement is concluded

No *lex fori* / No *lex rei sitae*



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No choice of law – Article 26

An Italian woman and a Swedish man got married in Italy on 1 March 2019.

Due to husband's work, the spouses moved to live in Azerbaijan for 3 years then move to Ukraine. They want to start divorce proceedings in Europe

If no choice of law → law of the couple's *first* habitual residence after the marriage. Azerbaijani law?

If choice is made → Swedish or Italian law can be chosen for matrimonial property regime



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Final thoughts

- Interplay of related instruments should be taken into account: matrimonial property questions mostly come together with divorce, maintenance, parental responsibilities
- Choice-of-court agreement might not come to life due to superior concentration of jurisdiction rule
- Choosing applicable law might be particularly important for mixed couples living in several jurisdictions during their marriage time
- Balancing measures: overriding mandatory provisions, public policy, protection of the weaker party

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Thank you!

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Interested in trainings on EU
matrimonial property?

Upcoming:

**EU co-funded project "E-training
on EU Family Property Regimes"
(EU-FamPro)**

University of Camerino, Italy // Law Institute of Lithuania,
Lithuania // University of Almeria, Spain // University of
Ljubljana, Slovenia // Rijeka University, Croatia
<https://www.euro-family.eu>

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Divorce and Financial Splits in
England – An Essential Outline

Sam Longworth
March 2020

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Divorce and Financial Splits – An Essential Outline

2

AGENDA

> The Legal Framework

> Divorce in England & Wales

> The Family Court and Finances on Divorce

> English Nuptial Agreements

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THE LEGAL FRAMEWORK

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The Legal Framework for Divorce (and Financial Claims) in
England & Wales

> Matrimonial Causes Act **1973** (almost 50 years ago...)

> Some later modifications...

> SUPPLEMENTED WITH

> Family Procedure Rules 2010 (and accompanying Practice Directions) AND

> Judicial decisions to ensure a 'modern' (!) approach is adopted in line with public thinking...in theory.

> Divorces are 99.9% of the time paperwork exercises dealt with at the County Court level.

> Financial cases are primarily dealt with at County Court level, with provision for elevation to the High Court for cases with significant assets (in practice more than £15m - £20m) or very complex issues.

> Tightly managed appeal process, running up to the Supreme Court on rare occasions.

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Divorce - Overview

- > No divorce in first year of marriage
- > **Jurisdiction** based primarily on 'habitual residence' but also on 'domicile' (English definition)
- > Only 1 ground for divorce:
 - "That a marriage has broken down irretrievably"
- > Demonstrated by one of the following 5 facts:
 - The other parties' **unreasonable behaviour**
 - The other parties' **adultery**
 - **2 years separation** (with consent)
 - **5 years separation**
 - **Desertion**
- > The Divorce, Dissolution and Separation Act 2020 – all change (soon!)

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Divorce - Process

- > Reconciliation?
- > Divorce petition
 - Who is the petitioner?
 - Jurisdiction
 - Defending a petition
 - Acknowledgment of service
- > Decree Nisi
 - Confidentiality considerations
 - Commence financial proceedings
- > Decree Absolute
 - Legally divorced



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Finances on Divorce

- > No 'applicable law'
- > All assets and "resources" considered on a worldwide basis (disclosure obligation and consequences of dissipating assets ie: 'add-back')
- > Discretionary
- > Equitable distribution (does not depend on legal ownership)
- > Same sex marriage/civil partnership (same/opposite sex)

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Forum (and format)

> Number of ways for a couple to address the financial aspects of their separation:

- Direct discussions;
- Mediation;
- Collaborative Law;
- Solicitor based negotiations;
- Arbitration;
- Court

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Court's Duty & Powers

> Matrimonial Causes Act 1973

"It shall be the duty of the court in deciding whether to exercise its powers...and, if so, in what manner, to have regard to all the circumstances of the case.."

> Court powers:

- Capital
- Sale/transfer property
- Maintenance (spousal and child)
- Pension share
- Settlement variation

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Factors the court will take into account

> "...the court shall in particular have regard to the following matters:

- (a) the income, earning capacity, property and other financial resources...;
- (b) the financial needs...;
- (c) the standard of living enjoyed by the family...;
- (d) the age of each party... and the duration of the marriage;
- (e) any physical or mental disability...;
- (f) the contributions which each of the parties has made or is likely to make...to the welfare of the family...;
- (g) the conduct of each of the parties..."

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Additional factors (and often seen arguments)

- › Pre-marital wealth
- › Marital acquiescence
- › "Matrimonialisation"
- › Three key principles
 - **Sharing**
 - › Presumed 50/50
 - › Special Contribution
 - **Needs**
 - › Elastic and can be very significant!
 - **Compensation**
 - › For relationship generated disadvantage, but very rarely awarded.



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Income - the clean break vs ongoing maintenance claims

- › **Clean Break**
 - Duty of the court to consider and make where possible
 - Clean break = financial closure between separating couple, financial claims regarding children remain available (and are linked to the needs of the children).
- › **Maintenance**
 - Only where 'need' requires it
 - Duration
 - › None – clean break
 - › Term – fixed or extendable
 - › Indefinite – 'joint lives' orders

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Nuptial agreements - Overview

- › Pre-nups + Post-nups + Pre-Clips + Post-Clips
- › Not contractually binding
- › Court ultimately has discretion
- › Factors taken into consideration include "the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it".
- › Pre-2000 – rare and given little weight

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Validity - The Checklist

- › *K v K* – 2003 – the checklist
 - Both understand it
 - Properly advised
 - Lack of pressure
 - Full disclosure
 - Not unjust to hold to the terms
- › *Radmacher v Granatino*
 - “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”
 - “predicament of real need”

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Content

- › Examples of what they can include:
 - Vacating properties
 - Confidentiality clauses - separate, prior agreement?
 - Jurisdiction
 - Freedom to deal with separate property, undertake tax planning etc
 - Costs
- › Example of what they won't include:
 - Financial provision or arrangements for children on separation
 - How the couple run their lives during the marriage

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Any questions?



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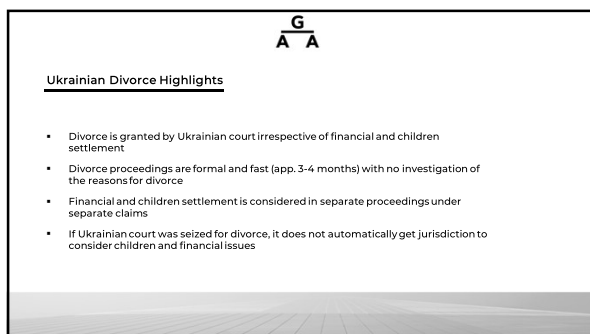
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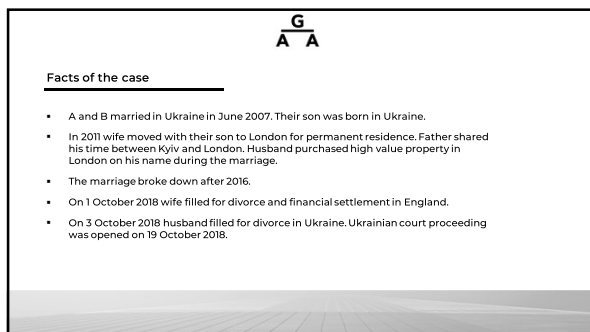
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First instance court

Wife engaged Ukrainian lawyers to suspend divorce proceeding in Ukraine.

Wife's arguments:

- Ukrainian court has no jurisdiction to consider divorce claim, as she and the child hold English citizenship and permanently reside in England.
- There was ongoing divorce proceedings in London that was opened prior to Ukrainian divorce proceeding between the same parties, on the same grounds and for the same reasons. It was the basis for suspension under Art. 75 Law of Ukraine "On International Private Law" and Art 257 of CPC.
- It was crucial for her to have financial settlement in England that was inseparable from English divorce proceeding. She would not have effective financial remedy in Ukraine.

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First instance court (2)

Husband's arguments:

- Wife did not prove with reliable evidence that she commenced divorce proceeding in England. Allegedly husband was not aware about the divorce proceeding commenced in England.
- Allegedly CPC permits to suspend proceeding only if similar proceedings are initiated within the territory of Ukraine.
- Ukrainian judge was not aware about English proceeding at the time of commencement of Ukrainian proceeding, hence there were no grounds to apply Art. 75 of the Law of Ukraine "On International Private Law".
- The parties hold Ukrainian citizenship, have registered place of residence in Ukraine, immovable property in Ukraine, hence Ukrainian court has jurisdiction to hear the case.

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First Instance Decision

- First Instance court favored husband's position and granted divorce decision on 1 February 2019.
- On 20 March 2019 English court granted final divorce – decree Absolute.

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Appeal Court

Wife lodged an appeal against first instance decision

Findings in appeal:

- Arguments about parties' nationality and their registered place of residence are neutral and shall be dismissed.
- Divorce proceeding cannot take place in two jurisdictions, regard should be paid to the jurisdiction that was seized first.
- In England divorce proceeding was commenced on 1 October 2018, that was 18 days earlier than in Ukraine. The first instance court was obliged to close Ukrainian divorce proceeding based on Art. 257 of CPC and Art. 75 of the Law of Ukraine "On International Private Law".
- First instance decision shall be cancelled, the husband's divorce application dismissed.

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Supreme Court

Husband lodged cassation against the appeal decision

Resolution of the Supreme court of 29 July 2019 Case No. 76/37759/18, proceeding No. 61-10439ck19

Supreme Court of Ukraine upheld the decision of the first instance court ordering that the Ukrainian divorce proceeding should be suspended.

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Property that can be divided

It is presumed that each thing acquired during the marriage is the object of joint property of the spouses. Under the general rule the spouses shares in joint property are equal – 50/50.

Joint property, inter alia, includes:

- wages, pensions, scholarships, and other income received by the spouse
- things for professional activity (musical instruments, office equipment, medical equipment, etc.)
- money, other property (royalties, gains, etc.) received under agreements to the benefit of the family

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Property that cannot be divided

Nonetheless, there is some kind of property which is considered to be a private property of the spouses and is not subject to division during divorce.

Private property of the spouses, inter alia, includes:

- the property acquired before the marriage
- the property acquired as a gift or inheritance
- the property acquired during marriage with private assets
- the housing acquired by the spouse as a result of privatization of public housing
- the land plot acquired for free out of the lands of the state/municipal property, including as a result of privatization

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Resolution of disputes by the Ukrainian court

The Ukrainian court has jurisdiction to consider disputes, including disputes related to division of property during divorce, only under certain conditions, namely:

- the spouses explicitly stated for the jurisdiction of the Ukrainian court in the agreement
- the defendant spouse has residence, immovable or movable property in the territory of Ukraine
- the claimant has his residence in Ukraine in cases that concern the payment of maintenance or the establishment of fatherhood.
- the ground for the claim took place in the territory of Ukraine (for example the spouses married in the territory of Ukraine).
- it is foreseen by international agreements and the laws of Ukraine

The Ukrainian court have exclusive jurisdiction over disputes that concern real estate located in the territory of Ukraine.

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Ukrainian court practise (1)

Resolution of the Supreme Court of March 27, 2019 in case №331 / 8757/14-ts

That is, the status of joint property is determined by the following factors:

- 1) the time of acquisition of property;
- 2) the funds for which such property was acquired (source of acquisition)

The court must establish not only the fact of acquisition of property during marriage, but also the fact that it was acquired for joint funds or joint work of the spouses.

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Ukrainian court practise (2)

Resolution of the Supreme Court of January 9, 2019 in case №643 / 4589/15-ts

If one of the spouses, against the will of the other spouse, disposes or abuses the property that is common joint ownership of the spouses the other spouse has the right to demand compensation of 1/2 of the market value of the disposed property, but not recovery of monetary compensation for the loan, for which the spouses acquired joint property during the marriage.

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Ukrainian court practise (3)

Resolution of the Supreme Court of January 10, 2019 in case №466 / 6554/16-ts

The share in the joint property of the spouse who remains with the child may be enlarged only if the amount of child support is insufficient to ensure its physical and spiritual development.

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Ukrainian court practise (4)

Resolution of the Supreme Court of 13 May 2019 in case №638 / 1962/17

The money received on credit or loan fall within the objects of spouses joint property. The spouses also have an obligation in the form of return credit funds as joint and several debtors.


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Ukrainian court practise (5)

Resolution of the Supreme Court of 15.05.2019 in case №520 / 15882/14-ts

In the presence of a conflict between the parties and the creation by one of the spouses of obstacles in the residence and use of property that is the joint property, the court has the right to establish the order for using such property.




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Advantages

<p>Enforcement and recognition – enforcement and recognition of the decision made by the Ukrainian court is much more easier compare to enforcement and recognition of the decision made by the foreign court.</p>	<p>Privacy issues – information about the parties to the dispute are not available on public record.</p>
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Disadvantages

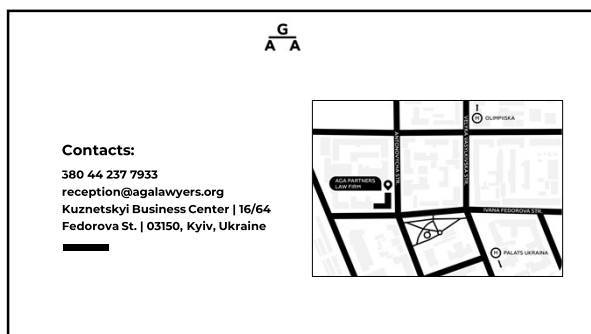
<p>Burden of proof – the burden of proof is on the Claimant. This means that the Claimant is obliged to demonstrate that claims are valid based on the facts and evidence.</p>	<p>Time consuming – the process of filling the claim and getting through the court hearings can be time consuming</p>
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Divorce and Financial Splits in France : an essential outline

KIEV, MARCH 2020

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Introduction

- Financial splits in French divorces : a procedural imbroglio
- Financial splits and financial compensation: what intertwining ?

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I - Financial splits in presence of French prenup

- Particularities of French prenups
- The « separation of assets » regime
- The « participation » regime
- The « universal community of assets » regime

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II - Financial splits in absence of French prenup

The « legal community of assets » regime

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III - Financial splits in an international context : a few key points to keep in mind^[1]_{SEP}

- Non French nationals divorcing in France
- French nationals residing abroad and divorcing in France
- Divorcing abroad and splitting property located in France

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Conclusion

- Financial splits in France: a costly way out
- Financial splits in France: is fairness a possible outcome?

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