International Academy of Family Lawyers

European Chapter

Newsletter, Summer 2023

Contents

Message from IAFL European Chapter President *by Sandra Verburgt* 1
Welcome from the Editor *by Soma Kölcsényi* 3
Werner Martens Tribute *by Miles Preston* 5
The Response of the Legal Profession to the War in Ukraine *by Sandra Verburgt and Annie Dunster* 10
Filling the Gaps when Financial Disclosure is Incomplete *by Lucy Loizou* 13
The "Celerity" of the Romanian Authorities *by Eniko Fulop* 19
Private Divorce in Europe *by Amparo Ambáizar* 22
EU Proposals for Increased Cross-Border Protection for Adults *by Alex Ruck Keene KC* 27
IAFL European Chapter Young Lawyers' Award 2023 *by Michael Allum* 29

Intro by President

by Sandra Verburgt

Sawadee ka!

I took over in February from Alberto Perez Cedillo, who did an excellent job in leading us out of COVID times. It was a pleasure to meet so many fellows in Athens and Venice, after two years of IAFL ZOOM meetings, which can in no way beat a real life meeting.

On 7 June I returned from the first stand-alone meeting from the IAFL Asia Pacific Chapter in Bangkok. It was a fabulous meeting in every way. Outstanding (and entertaining!) education, great social events in good company and excellent food, which the Thai are renowned for. This meeting was taken hostage by COVID. Originally scheduled for February 2020, it finally took off in May 2023. Congratulations to the three successive Asia Pacific Chapter Presidents who put so much work in the past three years and made this all happen: Nigel Nicholls, Corinne Remedios and Geoff Wilson. They put the bar for future meetings very high!

Meanwhile the AGM in Santiago de Chile will come up in September. Have you already registered? If you intend to go, please make sure you register before 31 July 2023, when the early bird registration ends. I warmly encourage you to take advantage of it. The benefits of attending these meetings are clear from the feedback we receive from each meeting, and replicated in the responses we receive from the meeting surveys. By virtue of its admission criteria, the IAFL community comprises experts, and there can be no better learning than peer to peer exchanges, whether those are in the education program or during one of the IAFL's networking events. Reason enough to embark on a trip to South America, I would say!

I appreciate that the timing of this meeting may not be good for some of you and therefore also understand that this may result in you making other choices. In that

case it may be worth attending one of our European Chapter Chats, held bi-monthly on Zoom from 4 pm - 5 pm GMT /5 pm - 6 pm CET. European Chapter Vice President William Healing is hosting these chats and a variety of topics will be discussed, chosen by our new fellows. It is a delight to see so much effort and passion put in their contributions and similar to our real life meetings this is an excellent manner to identify experts and their niches in International Family Law. The next European Chapter Chat will be on Tuesday 12 September. Mark your diaries!

From this autumn the European Chapter will also be organising webinars on one specific topic during lunchtime (12 noon – 1 pm GMT / 1 pm – 2 pm CET) alternating with the European Chats. The European Public Policy Committee will be hosting the first one in October and another one in January 2024. Dates and topics to be announced soon.

Last but not least a message about an event in Bucharest. This event, unlike the past few years, will focus on expansion in Eastern Europe and therefore we will be investing time in connecting with mainly Eastern European family lawyers, who are not yet fellows, but might become fellows in the near future. Therefore, there will be no open registration this year for the event. Some of you will be invited to attend the conference to welcome our Eastern European friends, tell them all they want to know about the IAFL and exchange experiences during an education program, which will be chaired by our Slovakian fellow Daniela Ježová. I appreciate that this may be disappointing for some of you, but in 2024 we hope to organise another European Young Lawyers Conference, which will be open to all young lawyers.

I wish you a good summer with hopefully some time to relax a bit.

Sandra Verburgt

IAFL European Chapter President

Intro by Editor

by Soma Kölcsényi

Warmest Greetings!

We hope this edition of the IAFL European Chapter Newsletter finds you well and thriving in your professional endeavors. As we enter the vibrant summer season, we would like to take a moment to reflect on the remarkable achievements and inspiring collaboration within our esteemed community.

The past few months have seen IAFL flourish with engaging events, insightful discussions, and the nurturing of valuable connections. Our collective dedication to promoting excellence in family law across borders continues to strengthen the IAFL European Chapter as a dynamic platform for knowledge exchange and professional growth.

We are proud to highlight the exceptional contributions of our members who have made significant strides in international family law practice. Their expertise and unwavering commitment to ethical standards continue to shape the field, ensuring the best possible outcomes for families navigating complex legal challenges.

Looking ahead, we have an exciting lineup of events and initiatives planned for the upcoming months.

Here is the European Chapter Schedule.

Highlights are as follows:

Somerset House Drinks on 21 September at 6.30pm BST. To register click here: https://www.iafl.com/events/forthcoming-events/iafl-european-chapter-fellows-drinks/

Upcoming webinars:
EPPC on 19 October at 12pm GMT
European Chapter Chat on 12 Sept and 5 Dec
EPPC webinar 18 January at 12pm GMT (tentative)

Future IAFL meetings:
Santiago, 6 – 10 September 2023
Introduction to Family Law – Bucharest, 15 – 17 November 2023
Brisbane, 21 - 25 February 2024
Boston, 5 - 9 June 2024
Seattle, 11 - 15 Sept 2024
Paris, 4 – 8 December 2024
Charleston, 5 - 8 February 2025
Istanbul, 21 - 25 May 2025
Link to all upcoming events: https://www.iafl.com/events/forthcoming-events/

From thought-provoking webinars to collaborative networking opportunities, we aim to provide valuable resources and foster meaningful connections that will further enrich your professional journey.

We encourage you to actively engage with our vibrant community, share your expertise, and take advantage of the wealth of knowledge that resides within our chapter. Your participation and contributions play a pivotal role in shaping the future of international family law.

In closing, we extend our gratitude to each and every member of the IAFL European Chapter for your unwavering support and dedication to our shared mission. Together, we will continue to raise the bar, champion best practices, and make a positive impact on the lives of families around the world.

Wishing you a joyful summer season filled with both personal and professional successes.

With warm regards,

Soma Kölcsényi
Editor
IAFL European Chapter

Werner Martens Tribute

by Miles Preston

First, let me provide some background information about Werner, who died on 3rd April 2023.

Werner was born on 18th September 1944 in Munich. He was raised and lived there for the whole of his life apart from a couple of years when he worked and studied in the United States. His English was excellent with a very slight hint of an American accent, acquired, I imagine, while he was living in the States.

He went to school in Munich until he was sixteen when he went to a boarding school in Berchtesgaden for two years. After leaving school, he went to legal college in Munich and Freiburg before doing a legal clerkship in Madison, Wisconsin and, while there, he attended courses at the University of Wisconsin-Madison.

After completing his time in the U.S. he returned to Munich where he joined the Kanzlei (law firm) of Dr. Goetz Pollzien. He married his first wife, Christa (with whom they had their two sons, Florian and Sebastian) in 1975 and was called to the Munich Bar on 3rd April the same year. He remained with this Kanzlei for over forty years, specialising in family law, first as an assistant, then as a partner and ultimately as the senior partner. For forty of his years with the firm he had the same secretary, Mrs. Conrad. In 2018, at the age of 74, he wound up his practise

and became a consultant to the firm of SSW, which subsequently evolved into Witzel Erb Backu & Partner in 2020.

I first came across Werner in 1985 when we worked together on an international child case. From that encounter, I immediately realised that I was working with someone who was competent, intelligent, considerate and had complete integrity. He enjoyed a good laugh and the odd glass of lager, the best of which, Augustiner, he introduced me to in Munich. He was also a great supporter of his local football team, Bayern Munich.

The timing of this first meeting was highly fortuitous as it transpired, as it was at only a few months later that Peter Grose-Hodge, a partner with Speechley Bircham, and I met two US attorneys who had come to an IBA conference in London and wanted to discuss our increasingly international workload and the possible merits of creating an international association of family lawyers.

That four party meeting led to the calling of a meeting of twenty-eight English divorce practitioners, thirteen U.S. attorneys, and five lawyers from other countries (two from Ireland, one from France, one from Sweden and one from Germany). We included Werner, the sole German lawyer, because of the chance encounter that I and one or two others had had with him in the recent past.

That first, inaugural as it turned out, meeting was held in October 1986 in the Parliament Chamber of the Inner Temple, one of the Inns of Court in London.

At that meeting, as well as setting up the main International Academy of Family (initially known as Matrimonial) Lawyers, it was agreed to create a US Chapter and an English Chapter. The first President of the English Chapter was Robert Johnson QC and I was asked to be the Chapter's President-Elect. When Robert became a High Court Judge at the end of 1988, I took on the Presidency of the Chapter.

On assuming the role in January 1989, I thought it would be much more fun if we became a European Chapter, thereby embracing all the other European countries and jurisdictions. I called a meeting of the English Chapter fellows a month or so later at the Law Society in Chancery Lane, London. There was unanimous approval of the concept of converting the Chapter into a European Chapter.

In the April, I convened a meeting in Paris of the English Chapter fellows and the few other European fellows, including, of course, Werner. Everyone favoured the conversion of the English Chapter into a European Chapter. The European Chapter was now up and running.

Werner and I immediately jelled and in no time made plans for the first annual European Chapter meeting to take place the following April. The choice of venue, Munich, shows the extent to which Werner had already immersed himself in the Chapter's affairs.

Werner was the key organiser of this meeting and the next one, in Interlaken, in the Spring of 1991.

To get the Chapter established, I served as President for three years so I was still in office for our third annual meeting which took place in Lyon in the spring of 1992. This meeting was organised principally by Audrey Ducroux, another rapidly rising star in the Chapter, but Werner was a huge help with this meeting as well. Very tragically, Audrey died fairly soon thereafter. She was a great loss to the Chapter.

When I stood down at the end of my term as President, it was obvious that my successor should be Werner. He, therefore, took on the Presidency for what by then had been decided should be the standard duration of two years. The Chapter went from strength to strength under his leadership.

Werner went on, as one would have expected, to become President of the Academy in 1997/8. This in itself was quite a saga. At the Paris main Academy annual meeting in the autumn of 1994, when Arthur Berman was due to complete his two years as President, there was a contested election between Werner and another fellow, Philip Schwartz. The election went in favour of Werner, which meant that he would become President-Elect for the two years that I was President of the Academy, and then become President for the following two years, 1996/7 and 1997/8.

Philip Schwartz was unhappy about the result of the election. He believed that there had been an irregularity in the election procedure. So strongly did he feel about this that he instituted court proceedings against the Academy, me in my role as the new President and Werner as the newly elected President-Elect. I spent most of the first year of my term as President resolving these proceedings. It had quickly become apparent that the proceedings could result in both the Academy's insolvency and its complete breakdown and disintegration. Fortunately, the matter was resolved by Werner agreeing to Philip becoming President for a year and he being President for one year instead of two. This was a good old-fashioned compromise but one which saved the Academy from the real possibility of terminal decline and a very sad end after such an amazing take off.

To round off our professional relationship and our friendship, Werner and I were each delighted and honoured to be awarded the Academy's President's Medal by IAFL President Mia Reich-Sjogren at the European Chapter meeting, very appropriately, in Stuttgart in September 2018. This meeting was hosted by former European Chapter President Daniela Kreidler-Pleus, who was one of Werner's very close friends and was brought to the Academy by Werner.

Werner, Mia and me immediately following Mia presenting the President's Medal to Werner and to me

I have just found out that he was also made an Honorary Citizen of the State of Tennessee.

Although the European Chapter and the Academy have grown hugely over the last thirty years, I know that Werner, like me, would believe that they have retained the fundamental ethos which the early leaders of the Academy held so dear namely that of the importance of camaraderie between the fellows and making new fellows feel very welcomed into the family which is the IAFL.

As well as putting endless effort into helping the Chapter and the Academy as a whole to continue to develop, Werner ran his professional practise really well for over forty years before becoming a consultant to SSW in 2018, and he also brought up his two delightful sons Florian and Sebastian, both of whom are a great credit to him. Werner is survived by his beautiful and kind second wife, to whom he got married on 17th September 2004, also called Christa. This was the day before his sixtieth birthday - he felt it would be inappropriate to get married

after he was sixty! Many fellows will remember Christa, and in the early days the boys accompanying Werner to numerous Chapter and Academy meetings.

Werner's death comes as a huge sadness and loss to the Academy. He will always be remembered as one of the founding fellows and someone who put his heart and soul into everything he did.

May he rest in peace.

Miles Preston

Founding Fellow and former President of the European Chapter and the IAFL


The Response of the Legal Profession to the War in Ukraine

by Sandra Verburgt and Annie Dunster

An overview of a webinar held on Wednesday 21 June organised by the IAFL Relief for Ukraine Committee

Sandra Verburgt, Chair of the IAFL Relief for Ukraine Committee welcomed all attendees. The webinar started with a moving account of daily life in Ukraine from **IAFL Fellow Oksana Voinarovska**. There is no longer talk of a work-life balance; in Oksana's office they talk of war-life balance. Everyday life is complicated by missile attacks, blackouts, drone attacks and curfews. An underground parking lot serves as shelter and is now set up as a working facility so that work can carry on regardless of the disruption and devastation that is going on outside. The courts are functioning, adapting and making the most of digital platforms. Much progress has been made in e-governance and e-judiciary. Colleagues are working mainly from the office as there is water and heating which wasn't always the case at home, particularly during blackouts and the winter months. Daily life is complicated and interrupted by missile attacks, drone strikes, blackouts and curfews. People in Kyiv have learnt to differentiate between the different sounds of the strikes. A missile shot from the sea means you have around 40 minutes to get to the shelter, by contrast a ballistic missile means you have just 4 minutes to get to safer ground. An underground parking lot is now set up as a working facility and doubles up as office space and shelter so that work can continues regardless of the impending strikes. Life goes on "we have to resist [the aggressors] and demonstrate our resilience".

Our next speaker was **Florence Darques-Lane** who is currently providing assistance and expertise to the Office of the General Prosecutor (OGP) in Ukraine notably with regard to conflict-sexual related violence (CSRV). Florence noted that the main challenge with CSRV is the multiple agencies involved in the investigations who all need to have access to files and evidence which requires trust and collaboration. Digital tools help accessibility. There are now 4 prosecutors in Kyiv focussing on CSRV crime. Further, there are challenges on linking events on the ground up to the chain in command. Understandably, Ukrainians were keen on getting results in court and therefore initially focusing

on prosecuting the men on ground. It takes perseverance and strength to pursue these investigations, linking the events on the ground to the authorities While people may think that the ICC should be playing a key role, crimes must be investigated under Ukrainian law which in turn needs to incorporate international law. Currently crimes against humanity is not part of Ukrainian law which provides another obstacle.

Dr Mark Ellis, Executive Director of the International Bar Association (IBA) provided an overview of the IBA's assistance in addition to having actively spoken out against the war, the IBA's focus extended beyond financial assistance to the two Bar Associations in Ukraine. As a result of engagement with the OGP, the IBA had signed a Memorandum of Understanding with the OGP, the National School of Judges, the Ministry of Defence and the Ministry of Justice all focussing on accountability and justice. One digital aid founded by the IBA is the Eye Witness to Atrocities mobile camera app which allows the user to take photos and videos that are embedded and cannot be tampered with so can be used as evidence in a court of law. There are now over 50,000 pieces of evidence that are held securely in a chain of custody which demonstrates that the information is original and has not been tampered with in any way. Ukraine is technologically sophisticated which has helped the conflict to be one of the most documented conflicts in history. Mark noted that the vast amount of trials arising from the war in Ukraine will be domestic and not international. With this in mind, the IBA was providing a training course for defence lawyers as well as a course for conducting war crimes tribunals. A great part of Ukraine's legacy Mark surmised will be its ability to ensure trials are impartial and fair to international standards.

Bas Martens, immediate past President of the Federation des Barreaux d'Europe (FBE) spoke about the work that the FBE had undertaken in connecting lawyers on the ground, and the role that the FBE's human rights commission had played in work with un-accompanied minors to ensure that they received appropriate legal representation. The work had not focussed solely on Ukraine but also with surrounding countries particularly Poland. The FBE is a federation of bar associations and connected in this crisis with the Kyiv Bar and the Ukrainian National Bar Association. **IAFL Fellow Joanna Wsolek** commented on the work of the Krakow Bar Association in identifying lawyers in Ukraine who needed assistance; she thanked in particular the IAFL Fellows in France who had been instrumental in providing some medical supplies.

Oksana concluded the webinar by providing assurance that life in Ukraine continued. Long may that be the case.

Sandra Verburgt
President
European Chapter and Chair, Relief Committee for Ukraine

Annie Dunster
IAFL Executive Director

Practising Family Law in Times of Uncertainty

By Lucy Loizou

Filling the gaps when financial disclosure is incomplete The English Court's power to draw adverse inferences

Many countries across the globe adopt a sharing principle when dividing assets on divorce meaning that the starting point shall be the equal division of any assets generated during a marriage. A marriage in England is regarded as a partnership of equals and therefore the fruits should also be shared 50/50. In some cases, it may be appropriate to award a greater share to one party to meet needs.

It is of crucial importance that there is confidence in the totality of assets in a case. This is achieved through the exchange of financial disclosure between the parties. The English Court has wide powers in this regard. Numerous and far-reaching orders can be made against the persistent non discloser. Cost sanctions can also be imposed. Questions do, however, arise as to how long and how much should be spent on searching for assets where the chances of discovery are slim. This is especially pertinent for international spouses where assets are located in several jurisdictions. Different countries have different approaches to this issue. Over the decades, England has adopted a device of making adverse inferences to overcome this problem. A Court can infer that the non-disclosing spouse has assets and can make orders accordingly.

The Court's Approach

The approach adopted was considered in the case of NG v SG [1] When the English Court is satisfied that there has been material non -disclosure then:

[1] NG v SG (Appeal: Non- Disclosure) 2011 EWHC 3270 (Fam)

- *"The Court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.*
- *But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the Court is satisfied he has not got.*
- *If the Court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms.*
- *In making its judgment as to quantification the Court will first look to direct evidence such as documentation and observations made by the other party.*
- *The Court will then look to the scale of business activities and at lifestyle.*
- *Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise.*
- *The Al-Khatib v Masry [2] technique of concluding that the non-discloser must have assets of at least twice what the Claimant is seeking should not be used as the sole metric of quantification.*
- *The Court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that than that the Court should be drawn into making an order that is unfair to the Claimant" [3]*

Case studies

Over the years there have been various reported cases on this topic. The Courts have not feared making robust findings. The cases listed below are only a small selection of the awards made.

Al-Khatib v Masry[4]

The parties separated after 15 years of marriage. The Husband was a Saudi businessman. The Wife sought financial relief from the Husband. For many years, the Husband refused to provide disclosure or any other formal evidence and would not answer questions. He also refused to attend Court.

[2] (2004) EWCA 1353
[3] Mostyn J- Paragraph 16
[4] (2002) EWHC 108 (Fam)

In the absence of a clear breakdown of the Husband's income and assets, the Wife asserted that he was worth in the region of $200 million and sought £24 million. At an interim hearing, a judge gave the Husband a warning that, in the absence of full, complete and frank disclosure the Court would most likely draw the inference that the Husband's total assets were such as to justify the award that the Wife sought. The Husband did eventually produce some evidence, but the Wife was able to identify a number of specific instances of non-disclosure and inconsistency.

In the end, the Court awarded the Wife assets worth over £23 million.

The Court drew the inference that the Husband had sufficient assets to satisfy the Wife's claim. The Court was only entitled to draw inferences from the evidence before the Court which was limited. However, it did include evidence from the Husband's friends and business acquaintances, documentary evidence as to the scale of commissions earned by the Husband, evidence as to the value of certain properties and investments held by the Husband and the scale and determination of the Husband's attempts to remove the assets from the reach of the court. While the evidence before the Court did not justify an inference that the Husband was worth more than $200 million, it did justify a finding that the full extent of the family assets was comfortably in excess of £50 million.

Munby J:

> *[95] 'the husband has never purported to give anything that can properly be described as a connected or narrative account of his business dealings or any real details of either the nature or scale of his commercial activities. In the circumstances, as I have found them to be the inferences properly to be drawn are, in my judgement, first, that the husband's business activities have been, and continue to be, on the kind of grandiose scale indicated by the evidence of his business associates'... 'and secondly that the extent of his earnings and wealth derived from his business activities is, has been, and continues to be, vastly greater than he has ever been prepared to admit'*

Moher v Moher [5]

The Husband (52) and Wife (45) had been married for 21 years with three dependent children. The Husband was a successful businessman during the

[5] (2020) 1 FLR 225

marriage and owned and ran a company importing goods. The Wife cared for the children.

At first instance, the trial judge had found the Husband guilty of significant non-disclosure. The Husband was ordered to pay the Wife a lump sum of £1.4 million of the parties' £1.7 million visible assets in addition to pay periodical payments. His Honour Judge Wallcock had said that the case had become far more complex than it need have been, due largely to the failures of the Husband to provide adequate disclosure and his lack of adherence to court orders.

The Husband's argument on appeal was that the Court should not have made that award because it had failed to first quantify the scale of the undisclosed assets.

The Court of Appeal dismissed the Husband's appeal and found that the Court is not obliged to quantify the assets before drawing adverse inferences. While quantification is desirable, it is not always possible or proportionate.

Lord Justice Moylan:

> *[87] – [89]*
>
> *(i) 'It is clearly appropriate that generally, as required by section 25, the court should seek to determine the extent of the financial resources of the non-disclosing party.'*
>
> *(ii) 'When undertaking this task, the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry…*
>
> *(iii) 'This does not mean…., that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because, the manner in which a party has failed to comply with their disclosure obligations, means that the court is unable to quantify the extent of his undisclosed resources…*
>
> *(iv) 'When faced with uncertainty consequent on one party's non-disclosure……. the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome.'*

Young v Young [6]

The case involved 7 years of litigation following a 17-year marriage. The Wife's costs were in the region of £6.4 million which were increased by the complex nature of the case but also fundamentally by the Husband's failure to provide full and frank disclosure.

The issue that the Court had to determine was simple. The Wife sought half of the marital assets on divorce and ongoing maintenance from her Husband. The sole question for the Court to decide was what there was to divide/the true level of the couple's wealth.

The Wife's case throughout was that the Husband was worth hundreds of millions of pounds and that she was entitled to half. The Husband on the other hand, claimed that he had suffered a financial crisis and had lost the lion's share of his assets. He claimed to only be able to provide for his Wife (and children) through lending from friends and gifts from family. He declared himself bankrupt. Numerous disclosure orders were made against him that he failed to comply with. It is noteworthy that within the proceedings, the Husband had received a prison sentence owing to his conduct. The Court tried to get to the bottom of how he had lost all his wealth but struggled.

Ultimately, the Court found it impossible to make findings as to the Husband's specific assets and beneficial interests in properties and corporate assets, however on the evidence available from a forensic accountant in the case and on the balance of probabilities, his net assets were found to be £40 million. The Husband was ordered to pay the Wife £20 million within 28 days.

This case was played out in the media and was therefore curious and unusual in many ways. It ultimately ended in tragedy however with the Husband falling to his death off the fourth-floor window of his flat in London.

A Word of Warning

Whilst the Court can and will adopt a tough stance in this area, care is needed. There are risks associated with this approach. If adverse inferences are made in a case, there can be uncertainty as to whether an order can be enforced. Sometimes, a party won't know the assets against which it can execute. In these

[6] (2013) EWHC 3637 (Fam)

cases, and where possible, it is far safer to seek an order against the known assets in a case and if they are onshore, then the risk element is reduced.

Lucy Loizou
lucy.loizou@iflg.uk.com
The International Family Law Group LLP
https://www.iflg.uk.com
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'The clue is in the name – 'the' go to place for international family law. 'The International Family Law Group is above and beyond in strength of expertise and its customer service' **Legal 500 2023**

.The "Celerity" of the Romanian Authorities in the Application of International Child Abduction Legislation

by Eniko Fulop

Romania strictly applies the Hague Convention, the law implementing the Convention on the Civil Aspects of International Child Abduction and details all the application procedure in a special legislation procedure, with very strict deadlines, for both authorities and for the judicial system.

Let's analyze the approach of Romanian authorities, the central authority and then the judicial system, on complying with imperative provisions on established deadlines.

a. **In this sense, The Ministry of Justice is the central authority in Romania for carrying out the obligations established by the Hague Convention.**

   As the Romanian central authority, the Ministry of Justice cooperates with the central authorities of the other states party to the Convention and collaborates with the Romanian institutions and authorities with powers in the scope of the Convention.

In theory this works, every time their involvement is requested by the authorities abroad, but is not the same celerity when they have to request the foreign collaboration although, the law has very strict deadlines and when the authority must bring the action.

According to the Law, *if the Romanian central authority has indications that the minor whose return is requested is on the territory of another state party to the Convention, it will forward the request directly and without delay to the central authority of that state, informing the requesting central authority or, as the case may be, the applicant.*

When it is necessary for them to start the action, they return through addresses with questions about the merits of the dispute until we get out of the period in which it could be applied.

This is what happened in a recent case law, we represented, when an action came from Turkey, Great Britain, they automatically notified the Bucharest bars, sent the action to the Bucharest Tribunal, the only authority in the country that can judge abduction trials.

When they had to notify the authorities abroad regarding the abduction and requesting the return, they start requesting all kinds of evidence at intervals of weeks, and when we finally had the file prepared, is too late, we have exceeded the deadline of 1 year or in exceptional cases of two years, and the minor has turned 16.

Not to mention it was included a graphoscopic report made by a forensic expert regarding the forgery of the client's signature at the school in Romania, made by the mother for the withdrawal of the minor, it was still not enough for the authority to carry out the "immediate" activity, established by law.

This self-sabotage is very interesting for its own citizens, even if it must be appreciated that speed is at least applied when the notification comes from abroad.

b. the law sets very strict deadlines for judges to resolve quickly the abduction cases

- Court terms cannot be longer than two weeks

- The pronouncement of the decision of the first instance can be postponed by no more than 24 hours, and the drafting of the decision is done in no more than 7 days after the pronouncement.

- The decision will be communicated to the parties and the central authority, within 48 hours of drafting.

- The decision is subject to appeal to the Bucharest Court of Appeal, Section for minors and family, the Appeal suspends the execution of the decision pronounced in the first instance. The file will be submitted to the Bucharest Court of Appeal, within 5 days from the expiration of the appeal period.

- The ruling by the court of appeal can be postponed by no more than 24 hours, and the drafting of the decision of the court of appeal is done in no more than 7 days after the ruling.

According to the theory, we have a system that works at maximum speed, in reality a hearing is held once a month and the deadlines are also delayed a bit.

In the last international abduction case, however, the trial court heard the case on September 9, 2022, and sent the decision at the end of November 2022, and in the meantime the girl turned 16 years old, and the 2-year term was also completed in the same period when could exercise the return action. We are in appeal, also delayed versus the imperative provisions.

Considering that the central authority also remained passive, in the same case there are many questions that still remain unanswered.

Was it just the bad luck of the client, who is practically prevented by the Universe from seeing his child?

How long will it take for the justice system to realize that it is judging people's lives and not just legal cases that we interpret as we feel?

Given that I still haven't found the answer, I'm turning it over to you, in the hope that these intrusions happen less in your jurisdictions.

Eniko Fulop

Private Divorce in Europe

by Amparo Arbáizar

Private divorce in Europe has been endorsed by the Judgment of the European Court (Grand Chamber), dated 15 November 2022, in case C-646/20.

The request for a preliminary ruling had been made in proceedings between the Ministry of the Interior and Sports, as the authority responsible for monitoring civil status in Germany and TB concerning the refusal by that authority to allow the registration, in the German register of marriages, of TB and RD's divorce, which was obtained through extrajudicial means in Italy, in the absence of prior recognition of that divorce by the competent German judicial authority.

TB, who had dual German and Italian nationality, married RD, an Italian national, on 20 September 2013 before the Standesamt Mitte von Berlin (Civil Registry Office). That marriage was entered in the Berlin marriages register.

TB and RD appeared before the civil registrar of Parma, Italy, with a view to initiating divorce proceedings through extrajudicial means under Article 12 of Decree-Law No 132/2014. After having obtained their divorce in Italy, TB applied to the Civil Registry Office of Berlin-Mitte for the divorce to be entered in the Berlin register of marriages.

Private divorce can be granted at the Civil Registry Officer "Ufficiale dello Stato Civile", in Italy. Spouses who want to apply for divorce must have been separated for at least six months.

The spouses must attend the Civil Registry Office of at least one of them habitual residence or where their marriage is inscribed. The assistance of a lawyer is optional. The couple will sign an agreement which will be endorsed in the document finally drafted by the Officer and will be formally confirmed by both partners after at least thirty days. After such confirmation, the agreement has the same effect as the judicial decree in the consensual separation in court. The agreement cannot envisage any transfer of immovables or valuable assets, although it may provide for

spousal maintenance obligation. The proceeding in front of the civil Status office can be addressed only by childless couples, or couples having children over eighteen but financially independent.

The Federal Court of Justice in Germany asked in essence, whether Article 2(4) of the Brussels IIa Regulation must be interpreted, as meaning that a **divorce decree drawn up by a civil registrar of a Member State,** containing a divorce agreement concluded by the spouses and confirmed by them before that registrar in accordance with the conditions laid down by the legislation of that Member State, **constitutes a 'judgment'** within the meaning of Article 2(4) of that regulation.

It follows from the case-law of the European Court that the Brussels IIa Regulation covers only a divorce which is pronounced either by a **national court** or under the **supervision of a public authority**, thereby excluding mere private divorces, such as a divorce resulting from a unilateral declaration of one of the spouses before a religious court (see, judgment of 20 December 2017, Sahyouni, C-372/16, EU:C:2017:988).

According that case-law, any public authority called upon to pronounce a 'judgment', within the meaning of Article 2(4) of the Brussels IIa Regulation, **must retain control over the grant of the divorce**, which means, in the context of divorces by mutual consent, that **it examines the conditions of the divorce in the light of national law and the actual existence and validity of the spouses' consent to divorce.**

In that regard, the civil registrar is, in Italy, a legally established authority which, under the law of that Member State, has jurisdiction to pronounce the divorce in a legally binding manner by recording, in writing, the divorce agreement drawn up by the spouses, after having carried out an examination. Under Article 12 of Decree-Law No 132/2014, a civil registrar must obtain, personally and on two occasions, within at least 30 days, the declarations made by each spouse, as a result of which the civil registrar is satisfied that their consent to divorce is valid, free and informed.

Furthermore, in accordance with that provision, that registrar is to examine the content of the divorce agreement in the light of the legal provisions in force, in that the registrar ensures that that agreement relates only to the dissolution or termination of the civil effects of the marriage, to the exclusion of any transfer of assets, and that the spouses do not have minor children or adult children who do not have legal capacity, have a severe disability or are not financially independent with the result that the agreement does not relate to such children.

In the light of the foregoing considerations, the European Court of Justice answered that **a divorce decree drawn up by a civil registrar of the Member State of origin, containing a divorce agreement concluded by the spouses** and confirmed by them before that registrar in accordance with the conditions laid down by the legislation of that Member State, **constitutes a 'judgment'** within the meaning of Article 2(4) of the Brussels IIa Regulation

Apart from Italy, the European Union jurisdictions that rule private divorce are also: France, Spain, Greece, Latvia, Romania, Estonia, Portugal and Denmark. Other European countries that provide private divorce are Norway, Russia, Ukraine, Moldavia and Armenia.

France: Private divorce is regulated in articles 229-1–229-4 French Civil Code, **with the necessary involvement of the lawyers.** There are not any rules regarding national or international jurisdiction. Any couple could go to France to divorce without any connection to France and without applying French law to their divorce.

The Lawyers must check the spouses' legal capacity and the children´s welfare protection. If the spouses agree on the divorce and on all its consequences, they can only use the new private divorce by mutual consent and cannot apply for divorce before the court. There are however two exceptions:

.- when a minor child of the spouses has been informed about his/her right to be heard by the family judge and wants to make use of this right; or

.- when one of the spouses is placed under a legal protection regime such as guardianship or trusteeship

The spouses shall lay down the content of the agreement in a private document, which they must sign and have countersigned by two "avocats". Each spouse must appoint an "avocat" who will take care of the spouse's interests; the written agreement must be filed in with the records of a notary public to became and enforcement order. The notary must check that the agreement was signed only after termination of the reflection period and verify that all required annexes have been attached to the deed. This is a formal check, which means that the "avocats" will bear the responsibility for the contents of the divorce agreement.

The divorce agreement must include the terms of the comprehensive settlement of all divorce consequences, in particular children and spousal maintenance obligations, information regarding the liquidation of matrimonial property or the statement that no division of property has to be made; and a reference that the minor child has been informed by his/her parents about his/her right to be heard by the family judge but does not want to make use of it.

Private divorce is also possible when minor children are involved. The parents and their lawyers must check the children´s consent to his/her parents´ divorce and that he/she does not want to be heard by the judge. If the child wants to use his/her right to be heard by the judge, the parents cannot have a private divorce and they must apply the dissolution of their marriage at court.

Spain: The **notary** will declare the dissolution of the marriage instead of the judge, but having the same competence by virtue of the Law 12/2015. The notary must check the legal terms and equity of the divorce agreement. If the notary finds the divorce agreement unfair for one of the spouses or their grown-up children, the notary can decide not to ratify it and the spouses must go to court (the notary cannot amend the agreement neither can the spouses go to another notary). The notary of the spouses' last habitual residence or of one of them habitual residence will have jurisdiction.

The spouses must attend personally to sign the deed in front of the notary and be legally assisted by at least one lawyer representing both parties, who will usually write the divorce agreement.

The divorce agreement must deal with the use of the family home, the spousal maintenance and the grown-up children support. Any other agreement regarding the spouses can also be included, such us donations, etc. The liquidation of the matrimonial property regime can be done in the same agreement or afterwards. The notary deed (escritura) will be considered equivalent to a court order.

The spouses cannot divorce from the basis of a private divorce if they have minor or disabled children. They can divorce with children older than 18 years that must appear in front of the notary and sign the divorce deed if they are affected by the divorce agreement.

Portugal: The spouses must file for divorce at the Civil Registry Office and present a set of documents among which are included mandatory agreements regarding: maintenance between former spouses, the allocation of the family home, the exercise of parental responsibilities and the placement of pets. These agreements are subject to the scrutiny of the registrar of the Civil Registry as to their adequacy and the agreement on the exercise of parental responsibilities has to be subject to the control of the Public Prosecutors' Office. Whenever these agreements are not ratified by the competent authorities (because they were not deemed to be fit and the spouses failed to alter them adequately), the proceedings will be transferred to the Court, where the judge will decide the issue that the couple has not been able to solve by agreement.

Greece: The notary can grant divorce by virtue of an agreement concluded by the spouses and recorded **in a notary Deed.** The spouses must agree on the issues of parental responsibility before proceeding with the consent divorce in front of the notary.

Denmark: After six months separation the spouses can complete the divorce application form at the State County Office. It is not necessary to have a lawyer.

Latvia: a Notary can dissolve a marriage. The spouses must consent to the divorce and do not have common minor children or joint property.

Romania and Estonia: recognise consent divorce **at the Civil Register or the Notary.**

Private divorce is also available in **Norway, Russia, Ukraine, Moldavia and Armenia.**

Amparo Arbáizar, L.L.M.

Málaga, Spain

EU Proposals for Increased Cross-Border Protection for Adults

by Alex Ruck Keene KC

On 31 May 2023, the European Commission set out two proposals to seek to secure better cross-border cooperation in relation to adults who are not in a position to protect their own interests. A proposed Regulation[1] would introduce a streamlined set of rules that would apply within the EU. The rules, modelled on those contained in the 2000 Hague Convention on the International Protection of Adults,[2] would govern, which court has jurisdiction, which law is applicable, under what conditions a foreign measure or foreign powers of representation should be given effect and how authorities can cooperate. The proposed regulation, going further than the 2000 Convention, also proposes a set of practical tools, such as:

- facilitating digital communication;
- introducing a European Certificate of Representation, which will make it easier for representatives to prove their powers in another Member State;
- establishing interconnected registers that will provide information on the existence of protection in another Member State;
- and promoting closer cooperation among authorities.

It should be noted that the proposed Regulation – as with the 2000 Convention – will not expressly cover advance decisions / advance choice documents save and to the extent that these contain directions to a specified representative. It is unclear whether this is an oversight or deliberate; either way, it is unfortunate given the increasing recognition of such tools as powerful methods to secure respect for the will and preferences of adults facing a potential loss of decision-making capacity.[3]

[1] To be found at https://commission.europa.eu/document/6ff766ad-aca6-4b27-a3cd-b7a9afe8857d_en.

[2] As to which, see further The International Protection of Adults, edited by Richard Frimston, Alexander Ruck Keene, Claire Van Overdijk and Adrian D Ward (Oxford University Press, Oxford, 2015).

[3] See further the 2021 study by Sonia E. Rolland and Alex Ruck Keene commissioned by the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, "*Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities*."

Alongside the proposed Regulation, a proposed Council Decision [4] provides for a uniform legal framework for protecting adults involving non-EU countries, by obliging all Member States to become or remain parties to the 2000 Convention.

The proposal for a Regulation will still need to be discussed and adopted by the European Parliament and the Council. It would apply 18 months after its adoption and Member States would then have 4 years to make their communication channels electronic, and 5 years to create a register and interconnect it with registers of other Member States.

The proposal for a Council Decision is to be adopted by the Council after consultation with the European Parliament. Member States that are not yet party to the 2000 Convention will have 2 years to comply with the Council Decision and join the Convention.

Whilst the proposed Regulation will not directly affect the United Kingdom, given Brexit, the fact that there is a likelihood that within the medium term the majority of countries with whom there is regular cross-border 'traffic' in relation to adults requiring protection will be signatories to the 2000 Convention will only increase the pressure on the UK to ratify the Convention in respect of England, Wales & Northern Ireland in addition to Scotland.

Alex Ruck Keene KC

[4] To be found at https://commission.europa.eu/document/9f84a9a4-324a-48db-9b71-871c5c04d3c7_en

IAFL European Chapter Young Lawyers' Award 2023 Winning Entry

by Michael Allum, The International Family Law Group LLP

Introduction

The first step when instructed to establish a marital agreement in a common law system[1] is to determine who will be the client[2]. The priority then is to take advice from specialist family lawyers with experience of international cases in every country in which the parties have – or are likely to have – a material connection. This is particularly important when England [3] is involved because it has a significantly different approach to (a) treatment of marital agreements and (b) financial provision on divorce generally. As the UK Supreme Court held in *Radmacher v Granatino*[4]:

> *"The approach of English law to nuptial agreements differs … significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard…*

Several agreements or one master document

Practice internationally varies with national preferences. Some lawyers want separate marital agreements, with similar terms as to outcome, for each jurisdiction

[1] As distinct from many civil law systems where a lawyer/notary may act for both parties
[2] England is developing a practise of one lawyer acting for both parties although this still in infancy and not recommended for international marital agreements
[3] All references in this article to England include Wales which is part of the same jurisdiction
[4] [2010] UKSC 42, para 3

and adapted to national laws. Other practitioners prefer one master agreement, translated as necessary, including the specific words required for each jurisdiction. The latter overcomes minor discrepancies which risk litigation, but this aspect needs early review in each case. If one document is not possible care should be taken, including when dealing with translations, to ensure there is no inconsistency in the documents. In any event it is essential for one lawyer to be responsible for overseeing the document(s).

Junior and Eva

Junior lives in France and Eva in England, so advice is needed in both countries. In addition, Junior is from Brazil and Eva has dual British/American citizenship. We need to know how Eva acquired her American citizenship and with which state(s) she has a connection. Although neither Brazil nor the US seem the most obvious locations for any divorce presently, given their connections at least provisional advice should be taken regarding potential divorce jurisdiction and the treatment of marital agreements. Advice will also be needed from Spain and Germany as Junior may move to live in either country soon.

Some issues to be considered in each jurisdiction are:

1. What are the jurisdiction grounds for any divorce and, if different, financial proceedings and can there be standalone applications;
2. Is it possible to defend the divorce and/or financial proceedings and, if so, on what basis;
3. Is it possible to contest the forum of the divorce and/or financial proceedings and, if so, on what basis;
4. Does lis pendens/"first to issue" apply or carry any weight if there were a jurisdiction dispute;
5. Is there a separation period required before divorce and/or financial proceedings can be issued;
6. What is the court's approach to finances on divorce including (a) treatment of non-marital property (b) treatment of marital property and (c) claims for maintenance;
7. What is the court's approach to marital agreements including (a) any safeguards/procedural requirements and pre-condition and (b) whether they are legally binding;

8. Are jurisdiction and/or applicable law clauses possible and/or binding; and
9. If the parties envisage that they may have children in the future, what is the court's approach to financial provision for children.

England

When the UK was a member of the EU the jurisdictional grounds for divorce were (almost) exactly the same as the rest of the EU[5]. On departure England introduced domestic legislation which largely replicated the position under Brussels II[6].

Since the introduction of no fault divorce in England in April 2022 it is only possible to defend a divorce in limited circumstances. One is on the basis England does not have jurisdiction. It is also possible to apply to stay English proceedings on the basis there is another jurisdiction which is the more appropriate forum. Since leaving the EU lis pendens no longer applies between England and EU Member States. Instead the same test of most appropriate forum applies between England and all other non-UK jurisdictions. There is no separation period (although the marriage must have lasted at least 12 months).

England has a very discretionary approach to finances on divorce. Although there is a statutory list of factors[7], subsequently case law has developed. The court should distinguish between marital and non-marital assets. A marital asset is anything acquired during the marital period. A non-marital asset is typically (a) acquired pre-cohabitation (b) came into the marriage by way of gift or inheritance and (c) sometimes accrued post separation. Marital assets are shared equally unless there is a good reason to depart from equality. The most common good reason is to meet needs. Non-marital assets are not shared unless again there is a good reason to do so, invariably to meet needs.

England also has the power to make orders for periodical payments. There is a statutory requirement to achieve a clean break as soon as possible[8]. Guidance from case law provides that the purpose of a periodical payments order is to allow the receiving party to transition to independence without undue hardship[9]. The court has a very broad discretion and although the pendulum has swung away from the

[5] With the nuance of the UK and Ireland adopting domicile instead of nationality
[6] Sole domicile became a substantive ground (with no maintenance/needs restriction on financial claims) rather than being a residual ground only available if no other member state had jurisdiction
[7] Section 25(2) Matrimonial Causes Act 1973
[8] Section 25(A) Matrimonial Causes Act 1973
[9] *SS v NS* [2014] EWHC 4183 (Fam)

large and lengthy maintenance orders of several years ago, the English court is still more generous than most countries.

For many years marital agreements were seen as contrary to public policy. Then in the late 1990s the English courts started to give them some weight, particularly in second marriage cases where both parties came to the marriage with independent resources. In 2010 the Supreme Court held in a classic exposition of the law:

> *"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*[10]*."*

That left the "*difficult question*[11]" as to the circumstances in which it would not be fair to hold the parties to their agreement. The Supreme Court went on to give some guidance: a marital agreement cannot be allowed to prejudice the reasonable requirements of any children of the family, the court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated, and preserving non-marital property may be a good reason for a marital agreement. The Supreme Court went on to say that it is likely to be unfair to hold the parties to an agreement that does not meet their needs but that (provided needs were met) the court may make an order that contracts out of the sharing principle.

That still leaves the very discretionary and broad assessment of a parties' needs. This will depend on a range of factors including the length of the marriage, the standard of living during the marriage, any sacrifices made during the marriage for the benefit of the relationship, the health of the parties and the presence of children. In appropriate circumstances "needs" can mean a property worth several million pounds or more along with a capital fund to provide a high level of income for the rest of the receiving party's life.

As marital agreements are only persuasively binding in England there are no statutory pre-conditions/safeguards, although the courts and the Law Commission have made recommendations. The Law Commission recommended [12] that Parliament legislate for Qualifying Nuptial Agreements (QNAs) which would need

[10] *Radmacher v Granatino* [2010] UKSC 42, Para 75
[11] *Radmacher v Granatino* [2010] UKSC 42, Para 76
[12] *Matrimonial Property, Needs and Agreements* (Law Com No 343)

to (a) be contractually valid, have been made by deed and contain a statement signed by both parties that they understand it will partially remove the court's jurisdiction (b) not have been made within 28 days of the wedding and (c) require that both parties have received disclosure of material information about the other's financial situation and independent legal advice. Although QNAs have not been introduced it is good practice to comply with these requirements.
Case law has provided that[13]:

- There is no material distinction between pre and post nuptial agreements;
- It is important that each party has the opportunity to obtain all the information that is material to their decision;
- There should be respect for individual autonomy;
- There should be no vitiating factors (duress, fraud or misrepresentation);
- The court should give effect to a marital agreement that is freely entered into by each party with a full appreciation of its implications unless it would be unfair to do so;
- The parties are unlikely to have intended that one of them should be left in a predicament of real need whilst the other enjoys a sufficiency or more; and
- It is the court (not the parties) that ultimately determines the financial outcome on divorce.

Jurisdiction clauses are not binding in England; they may be one of the factors the court takes into account when deciding whether it is the appropriate forum, but no more. Applicable law clauses are not possible in England; the English courts only apply English law.

France, Spain and Germany

As France, Spain and Germany are members of the EU, divorce jurisdiction is within Art 3 Brussels II[14]. The jurisdictional grounds are a mixture of habitual residence, residence and nationality. Lis pendens applies where there is a jurisdiction dispute between two or more EU Member States[15]. If the dispute is between one Member State and a third state (not a member of the EU) their respective domestic laws apply. In these circumstances many EU Member States still often apply the first to issue principle.

[13] *WC v HC* [2022] EWFC 22, para 22
[14] Council Regulation (EC) No 2201/2003
[15] Brussels II, Art 19

In civil law systems there are two primary matrimonial property regimes: community of property and separation of property. If the spouses have not entered into a matrimonial property regime the regime which applies shall be determined by the court by applying its laws regarding conflict of interests.

On 29 January 2019 Council Regulation (EU) 2016/1103[16] came into force in 15 EU Member States including France, Spain and Germany. The Regulation allows parties to choose the law applicable to their matrimonial property regime provided one of them is habitually resident in or a national of the country where the agreement is concluded[17].

The Regulation provides that (a) the matrimonial property agreement must be expressed in writing, dated and signed by both parties and (b) if only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that state lays down additional formal requirements for matrimonial property agreements, those requirements shall apply[18].

The Regulation also provides that a party may when seeking to dispute the validity of the agreement rely upon the law of the country in which they had their habitual residence at the time the court is seised if it appears from the circumstances that it would not be reasonable to determine the effect in accordance with the law nominated in the agreement[19].

France[20]

France has recently had a major change in its divorce law. The grounds for divorce are (a) mutual consent (b) the acceptance of the principle of marital breakdown (c) fault and (d) breakdown of communal life.

There are various matrimonial property regimes in France including community of assets and separation of property. The default regime is the community of assets which applies where (a) both spouses reside in France at the time of their marriage and have France as their first habitual residence after the marriage and (b) the parties have not entered into a marital agreement electing another matrimonial

[16] *Implementing Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Matters of Matrimonial Property Regimes*, hereinafter referred to as the Matrimonial Property Regimes Regulation
[17] Art 22
[18] Art 25
[19] Art 24
[20] *Family Law: A Global Guide* (5th edition)

property regime. On divorce the parties' assets will be divided in accordance with the relevant matrimonial property regime.

The French Civil Code provides for compensatory benefit (*prestation compensatoire*) which compensates for any disparity caused by the divorce. It is based on the needs of the spouses and can take the form of lump sums, property transfer orders and *usufruct*. The method and amount are discretionary and the judge must take into account a range of factors. Such orders are relatively rare, especially in contrast to England.

Germany[21]

A marriage can be dissolved by divorce in Germany where it has broken down. This is presumed where (a) the parties have lived apart for one year and both parties want to divorce or (b) the parties have lived apart for three years. A divorce can take place sooner if continuing the marriage would cause the applicant unbearable hardship. Fault does not play any role on divorce.

The statutory regime for matrimonial property in Germany is community of accrued gains. This provides that after marriage each spouse remains the sole owner of their own assets and the sole owner of any assets they acquire during the marriage. It is only the increase in the value of assets that will be shared on divorce. Spousal maintenance can also be ordered although these have been curtailed since reforms on 1 January 2008.

Spain[22]

Divorce in Spain is no-fault and allows the Spanish court to make two forms of compensatory order for pensions and household work.

There are two types of matrimonial property regime: separation of assets which is the default in Catalonia and the Balearic Islands and community of assets which is the default in the majority of Spain including Madrid. The Spanish court is bound to apply the applicable matrimonial property regime and does not have discretion to depart from it.

[21] *Family Law: A Global Guide* (5th edition)
[22] *Family Law: A Global Guide* (5th edition)

In addition the Spanish court has the ability to make orders in respect of maintenance if there is a disparity in the economic positions of the parties with the aim of allowing the financially weaker party to address any financial disadvantage they may have suffered as a result of the marriage.

Conclusion

Although we are not told whether we would be acting for Junior or Eva, I am going to proceed on the basis they want the marital agreement to be as binding as possible.

To comply with The Matrimonial Property Regimes Regulation, the law applicable to the matrimonial property regime must be that of a country where either Junior or Eva are habitually resident or a national[23]. As Junior and Eva plan to stay living in Europe that narrows the most appropriate jurisdictions down to France and England. Given England's more discretionary approach to marital agreements, Junior and Eva may decide to elect that French law is applicable. It would be prudent to attach evidence that Junior was habitually resident in France at the time of signing to the agreement[24].

More information is needed about Eva's financial circumstances, but based on the available information a separation of property regime would give Eva protection that any assets acquired by way of inheritance would be kept separate (provided the asset was not acquired in joint names). More information is also needed regarding Junior's financial circumstances. Owing to the nature of his work he is likely to have a high income for a short period of time with perhaps comparatively modest capital. A high earning sports person's financial affairs can be complex with a mixture of remuneration sources so liaison with his advisors will be important. But on divorce, especially towards the end of high earnings, a lump sum may be needed to ensure Junior can meet his future needs.
Although it is not possible to have a binding agreement as to jurisdiction in England, the EU Maintenance Regulation allows Junior and Eva to have an agreement that would be binding in France, Germany and Spain as to where maintenance claims are determined provided there is a sufficient with the nominated country[25]. The

[23] Art 22
[24] Alexandre Boiche, *The conflicts of laws rules applicable to marriage contracts in Europe after the entry into force of Reg 2016/1103 on matrimonial property regimes* [2022] IFL 92
[25] Council Regulation (EC) No 4/2009, Art 4

Matrimonial Property Regimes Regulation also allows Junior and Eva to have a binding agreement in those countries as to which matrimonial property regime would apply provided it is expressed in writing, dated and signed by both parties and one of them is habitually resident in or a national of the nominated state at the time the agreement is concluded[26].

To satisfy The Matrimonial Property Regimes Regulation, the marital agreement must comply with the requirements and formalities in France and England as that is where Junior and Eva are currently habitually resident. For France that would mean both Junior and Eva signing the marriage contract before a French notary in person. The position is less clear for England, but it would be best practice to ensure both Junior and Eva had separate independent legal advice, a full appreciation of the other's financial circumstances and for the agreement to be signed as a deed at least 28 days before the wedding.

As the English court would have the ability to interfere with the marital agreement in the event the divorce proceedings take place in England, steps should also be taken to ensure that the marital agreement meets the recommended safeguards in England. Crucially, to be upheld the agreement must meet both parties' needs. Although it is not possible to oust the jurisdiction of the English court whilst there is a sufficient connection to bring divorce proceedings, in recent years the judicial wind has continued to blow increasingly towards upholding marital agreements as encapsulated in the following comments of Mr Justice Moor in March 2023:

> *"Litigants must realise that it is a significant step to instruct top lawyers to prepare a pre-nuptial agreement prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement. These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide that certainty. Litigants cannot expect to be released from the terms that they signed up to just because they don't now like what they agreed[27]."*

[26] Art 22

[27] *MN v AN* [2023] EWHC 613 (Fam), para 85