

THOMAS · MORE · CHAMBERS

**THE FINAL FRONTIER:  
INTERNATIONAL  
ASPECTS OF  
ANCILLARY RELIEF**

**Wednesday 24th October  
2007**

**6.30pm to 7.30pm**

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## A. AN OVERVIEW

### JURISDICTION OF ENGLISH COURT IN ANCILLARY RELIEF

See Dicey 14<sup>th</sup> edition Rule 91 and generally.

#### After English Divorce

1. English courts have jurisdiction to make an ancillary relief order for financial provision on or after the granting a decree of divorce, nullity of marriage or judicial separation whenever they have jurisdiction in the main suit.

2. As for factors to be considered as to jurisdiction on main suit, see Brussels II Convention concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. See also European commission Practice Guide to Council Regulation 2201/2003:

(a) Regulation State ie all EC except Denmark- Article 3 sets out general jurisdiction, principal factor being habitual residence – FIRST SEISED

(b) Non-regulation State – Article 7 (1) of Regulation provides that where no court of a regulation state has jurisdiction that jurisdiction is to be determined by the laws of that State ie in the case of England, the **Domestic and Matrimonial Proceedings Act 1973 Schedule 1 paragraph 9**. DMPA embodies “balance of fairness” test. See **de Dampierre v de Dampierre** [1988] AC 92 – House of Lords affirmed that considerations same in DMPA as in leading common law cases of **Spiliada** [1987] AC 460 and **Connelly v RTZ Corporation** [1998] AC 854 – ie FORUM CONVENIENS TEST including:

- (i) proceedings first in time
- (ii) closest connection
- (iii) witnesses, delay and expense
- (iv) juridical advantage and comity
- (v) pre-nuptial agreements

#### After Foreign Divorce

3. English courts have jurisdiction to make an order for financial provision after the grant in a country outside the UK, the Channel Islands and the Isle of Mann of a divorce, annulment of marriage, or legal separation which is entitled to be recognised as valid in England– NB not intended to give spouse second bit of cherry **Matrimonial and Family Proceedings Act 1984**

4. Four conditions:

- (a) Foreign Decree must be entitled to recognition in England – see **Family Law Act 1986** and Brussels II [for EU countries – judgment recognised without any special procedure – Article 21]
- (b) A must seek leave of court – s13 MFPA 1984 – this will involve showing substantial grounds for court to exercise its powers under s12 MFPA 1984;

- (c) Parties must have a genuine connection - jurisdiction not available to “birds of passage” - either or both parties habitually resident in England for minimum of 1 year before application made or decree of divorce; or either or both parties had interest in a dwelling house used as a FMH (NB in the final case any order for AR is restricted to an order affecting an interest in the FMH)
- (d) Forum Conveniens – is England appropriate forum – burden of proof on A.  
Court must consider at s16 MFPA
  - (i) connection of parties to England and to other countries
  - (ii) financial benefits likely to be received under foreign law whether by operation of the law, order or agreement
  - (iii) any right to apply for financial relief under foreign law
  - (iv) availability of property in England in respect of which an order could be made
  - (v) extent to which order is enforceable
  - (vi) length of time elapsed since foreign decree

5. MFPA s 14 provides for interim maintenance

6. MFPA s24 provides for order to prevent transaction intended to defeat prospective application for AR cf s37 MCA 1973

### **Failure to provide reasonable maintenance**

7. English courts also have jurisdiction to make an order for financial provision in cases where there has been failure to provide reasonable maintenance – see **Maintenance Orders (Facilities for Enforcement) Act 1920, Maintenance Orders (Reciprocal Enforcement) Act 1972, Domestic and Matrimonial Proceedings Act 1973**

### **General Considerations**

8. A foreign decree of divorce recognised in England does not necessarily put an end to maintenance ordered by an English court – **Bragg v Bragg** [1925] P20. In such case there is of course another option of seeking AR after the foreign decree pursuant to MFPA 1984 as above

9. A court can make an order for pps in a case where H is domiciled and resident abroad and has no assets in England – **Cammell v Cammell** [1965] P 467

See also **Nunneley v Nunneley** (1890) 15PD 186, **Forsyth v Forsyth** [1891] P363, **Goff v Goff** [1934] P107,111

10. However, a court will decline to exercise its powers where any order it might make would be wholly ineffective – **Tallack v Tallack** [1927] P 211 and **Wylter v Lyons** [1963] P274 although note that these decisions predate Conventions.

11. The Australian court in **Moss** has held that if H changes his domicile after decree of divorce, court still has power to order him to pay maintenance – likely that English courts would follow rule of “once competent, always competent” established in **Leon v Leon** [1967] P 275. See also **Moss v Moss** [1937] St R Qd 1

## Civil Partnership

12. Moot point as to whether Brussels II R applies of its own force to same sex unions. Separate Regulations – Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 SI 2005/3334

## JURISDICTIONAL CONFLICT

13. English court has jurisdiction to restrain foreign and English proceedings until English [or possibly foreign] court can determine substantive issue of jurisdiction. Such injunctions can be permanent or interim.

### Permanent injunction

14. Permanent injunction is a stay on proceedings – ie anti-suit injunction – must show that England is natural forum and that pursuit of foreign proceedings vexatious or oppressive

### Interim Injunction

15. **Hemain v Hemain** [1988] 2 FLR 388 – injunction granted in respect of French proceedings [NB prior to Brussels II R] as an interim measure. Sought for a limited time and a limited purpose ie preserving the status quo whilst an application for a stay is made ie neither party entitled to litigate the substantive issues in either court until preliminary issues as to jurisdiction disposed of. Do not need to show that England natural forum, merely that dispute as to forum is giving one party an advantage

### Stays on English proceedings:

16. Three possibilities:

- (i) related jurisdiction – Isle of Mann, Scotland, Guernsey, Jersey, Northern Ireland – obligatory stay on second seised
- (ii) Brussels II R ie EU save Denmark – obligatory stay on second seised – NB parties cannot agree to oust Brussels II [cf proposals in Rome III]
- (iii) everywhere else – **DMPA 1973 Schedule I paragraph 9(1)** – discretionary stay ie issues of forum conveniens rather than lis alibi pendens

### Stays on Foreign proceedings

17. English court will exercise power to restrain foreign proceedings very sparingly. Any order made is against the party ie in personam – it is not an order against a foreign court.

18. If there is a risk that the other party will not refrain from pursuing proceedings abroad despite the injunction, an alternative is for the English Court to dismiss the stay application and then make alternative orders eg abridgment of time, and/or to expedite the administrative process to achieve a swift decree nisi to ensure that the English divorce proceedings are not frustrated by the other party.

19. **Hemain** injunctions and undertakings do not in fact exist in many other jurisdictions so it is important to use them quickly in England.

20. Whatever interim provision the English court may make, the interim order will cease to have effect on the expiration of the period of 3 months beginning from the date on which the stay was initially imposed DMPA s11(2)(b)

21. Judge can also stay proceedings of own motion in family proceedings with an international dimension - there is a responsibility to investigate possible proceedings in other jurisdiction whether or not an application is made by one of the parties **Abbassi v Abbassi** [2006] 2 FLR 415

22. Where there are complicated issues on jurisdiction, judicial case management must ensure highest priority for dispatch of preliminary issues – **Moses-Taiga v Moses-Taiga** [2005] EWCA Civ 1013

### **CHOICE OF LAW**

23. In general in proceedings in England for divorce, courts apply English law ie MCA 1973 cf position in other jurisdictions eg Spain – if UK nationals, will apply English law. NB in relation to proceedings for nullity, English courts sometimes apply foreign law.

24. Consideration is being given to the harmonization of applicable law as well as jurisdiction in the EU – Rome III

25. See though case of **Otobo v Otobo** [2003] 1 FLR 192 in which the English Courts took into account in deciding the ancillary relief the likely awards which the parties would have received had they not litigated in England – weight should be attached to the foreign cultural factors.

*“English law chooses no substantive law other than its own for the despatch of applications for ancillary relief following divorce, even though belatedly it is beginning to recognise the need, in a case with foreign connections for a sideways look at foreign law as part of the discretionary analysis required”* **C v C** [2004] 2 FLR 1

26. See also **A v T (ancillary relief:cultural factors)** [2004] EWHC 471 in which the same approach was followed re Iran and **Sabbagh v Sabbagh** [1985] FLR 29 in which account was taken of Brazilian proceedings.

27. However two earlier Court of Appeal decisions would seem to suggest otherwise – **Dart v Dart** [1996] 2 FLR 286 – no consideration to USA divorce law in Michigan, **Thyssen-Bornemiswza v Thyssen-Bornemiswza** [1985] FLR 1069 – no consideration to Swiss divorce law.

28. Query whether a party would be justified in calling expert evidence of likely order in foreign jurisdiction? Costs?

29. To extent that there is an issue on AR eg as to ownership of a particular asset - issue of fact for trial judge – **Parkasho v Singh** [1968] P 233

## **B. BRUSSELS II JURISDICTION – WHERE ARE WE NOW AND WHERE ARE WE GOING?**

30. The European Union has turned its sights to family law. Brussels now tells us where we can raise proceedings in family cases. Council Regulation (EC) No 1347/2000 of 29 May 2000 (known as "Brussels II") applied to matrimonial matters and some children's cases. It came into force on 1 March 2001. That Regulation has in turn been superseded by Council Regulation (EC) No 2201/2003 of 27 November 2003 ("Brussels II bis"). The Regulation is directly applicable in the United Kingdom. It also applies in Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Austria, Poland, Portugal, Slovak Republic, Slovenia, Finland and Sweden, but not Denmark.

### **Conflicts of jurisdiction in divorce proceedings - Europe and the world**

#### **Jurisdiction in divorce**

31. The rules are now found in Article 3 of Brussels II bis. The same rules apply to actions relating to "legal separation" and "marriage annulment". A court in a member state has jurisdiction to entertain an action for divorce, separation, or nullity where:

- Both spouses are habitually resident there;
- Both spouses were last habitually resident, and one still resides there;
- The petitioner is habitually resident there;
- The respondent is habitually resident, and either has resided there for at least a year preceding the application or is domiciled (or a national) there and has resided there for at least six months preceding the application;
- Both spouses are domiciled (or nationals).

32. Article 19 of Brussels II bis provides:

"1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different member states, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court..."

Brussels II bis applies the principle of *lis pendens*, or 'first come, first served' to actions raised in two different member states. This provision does not relate to actions brought in different parts of the same state. It is relevant only to actions in different member states. There is no discretion. The rule is absolute. The courts in the place second seised must decline jurisdiction.

### **When is a court seized?**

33. The time of seizure depends on whether the first step in an action is to lodge a document instituting proceedings in court, or to serve the document. If the document requires to be lodged first, then the time of lodging is the moment the court is seized, provided the document is then served. If service comes first, then service represents the seizure of the court, provided the document is then lodged (article 16). The effect of Brussels II has not been altogether helpful. It means that in EU cases, there may be a rush to commence proceedings, in order to secure the application of what are perceived to be the most helpful rules on divorce or ancillary matters.

34. Article 20 allows a court to take provisional, including protective, measures in respect of persons or assets, even where the courts of another member state have jurisdiction as to the substance. This may not be broadly construed. In **Wermuth v Wermuth** [2003] 1 WLR 942 a divorce action was commenced in Germany. Before the German court had considered whether it was first seized, the wife applied to the English court for maintenance pending suit, and was awarded £150,000 pa. The German court did in fact assume jurisdiction and the husband appealed the English order. His appeal was allowed. The Court of Appeal held that the order to pay a sum for an indefinite period was an unwarranted invasion of the proper function of the German judge, who was the judge first seized.

35. The seizure of a court means that the court will apply its own rules to the divorce, and to any 'ancillary' matters.

### **When Brussels II does not apply to the application for ancillary relief**

36. Where there are competing actions in this jurisdiction and one of the places to which Brussels II bis does not apply, then the court may be invited to determine which court has jurisdiction.

37. Another example of when Brussels II does not apply to the application for ancillary relief is where there is no claim for maintenance (see **Moore v Moore** [2007] EWCA Civ 361).

38. See also **Prazic v Prazic** [2006] 2FLR 1128 – properties in France and England, H's petition first in France, W issued TOLATA proceedings re two English properties. Court of Appeal decided that TOLATA action was superfluous to French ancillary relief proceedings and stayed proceedings under Brussels I ie risk of irreconcilable judgments and multiplicity of proceedings.

39. Where there is a discretion to be exercised as Brussels II does not apply, the test for the exercise of the discretion is "the balance of fairness (including convenience) as between the parties to the marriage". The court is obliged to have regard to all the factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result.

40. When determining the question of which court should have jurisdiction the Court must look at **Schedule I of the Domicile and Matrimonial Proceedings Act 1973** in which, paragraph 9 reads as follows:

*"Where before the beginning of the trial or first trial in any matrimonial proceedings other than proceedings governed by the Council Regulation which are continuing in the court it appears to the court –*

*(a) that any proceedings in respect of the marriage in question are capable of effecting its validity or subsistence are continuing in another jurisdiction; and*

*(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings,*

*"the court may then if it thinks fit order that the proceedings in the court be stayed or as the case may be that those proceedings be stayed so far as they consist of proceedings of that kind.*

*"In considering the balance of fairness and convenience for the purposes of sub-paragraph 1(b) above the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed."*

41. In **Moore v Moore** [2007] EWCA Civ 361 (handed down on 20 April 2007) it was held that the court has a discretion to stay proceedings on the grounds of forum non conveniens. Whilst this case was dealing with an application for leave to apply for maintenance under section 13 of the Matrimonial and Family Proceedings Act 1984 it confirms the position that where the court is not dealing with an application for maintenance neither Brussels I or Brussels II applies to the application for ancillary relief. It also considers what factors the court will look at when considering which forum is the most appropriate for the resolution of issues re finances. The connection in this case to England was found to be overwhelming.

42. A former husband's application to the Spanish court was an application for the division of the wealth or assets to which the former married couple had a claim and was not related to maintenance within the meaning of Regulation 44/2001 Art.5(2).

43. The appellant husband (H) appealed against a decision giving his former wife (W) leave to apply for orders for financial relief pursuant to the **Matrimonial and Family Proceedings Act 1984** Part III. H and W had separated after being married for the last five years of a relationship lasting over 15 years. They had three children. They had emigrated to Spain for tax reasons. H had filed for divorce in Spain. He had offered to pay W £6 million in addition to such properties as were registered in her name. W issued a divorce petition in England, which was stayed in accordance with the provisions of **Council Regulation 1347/2000**. H then applied for the Spanish court to deal with the financial aspects of the divorce but on the basis that English law applied.

44. The Spanish court declined to deal with the financial claims and H appealed against that decision. Meanwhile W had obtained leave under s.13 of the 1984 Act to apply for financial relief after an overseas divorce. H applied to set aside that leave. The judge confirmed the leave obtained by W, holding that H's application in respect of finances in Spain was not a claim for maintenance within Regulation 44/2001 Art.5(2) and that there was a close connection with England, which made England the appropriate venue. H submitted that (1) the judge had been wrong to hold that his application to the Spanish court was not to be characterised as relating to maintenance within Regulation 44/2001 Art.5(2); (2) the judge should have stayed the English proceedings as related proceedings under Regulation 44/2001 Art.27 or Art.28 on the basis that H's Spanish proceedings remained on foot; (3) leave should not have been granted under s.13 of the Act.

45. The Court of Appeal (Thorpe LJ, Lawrence Collins LJ, Munby J) held that:

- Whether an application was to be regarded as a matter relating to maintenance depended not on Spanish law, nor on English law, but on the autonomous concept of Community law derived from the judgments of the European Court of Justice, De Cavel v De Cavel (143/78) (1979) ECR 1055, De Cavel v De Cavel (120/79) (1980) ECR 731 and Van den Boogaard v Laumen (C220/95) (1997) QB 759 applied. On that basis H's application was plainly not related to maintenance, but was an application for the division of the wealth or assets to which the couple had a claim. The essential object of H's application was to achieve sharing of the property on his terms rather than an order based on financial needs, Miller v Miller (2006) UKHL 24, (2006) 2 AC 618 considered. Consequently the application was not a matter relating to maintenance for the purposes of Regulation 44/2001 Art.5(2).
- Since H's application was not a matter relating to maintenance within Regulation 44/2001 Art.5(2), there was no basis for the application of Art.27 or 28 even if those proceedings were still pending, and it was not necessary to decide whether Art.27 applied where the court first seised had declared that it was without jurisdiction but an appeal was pending.
- The judge had been entitled to find that the connection with England was overwhelming for the purposes of s.13 and s.16 of the 1984 Act and that W had established a substantial ground for making her application under DMPA. There was no error in the judge's approach or conclusion.

Source: *Lawtel*

46. In Ella v Ella [2007] EWCA Civ 99, a prenuptial agreement provided that the law of Israel should apply on issues between the spouses at any place and any time. The wife had not been independently advised. However, it was common ground that the agreement was enforceable in Israel. The wife issued a petition in England, whereupon the husband applied for a stay of the English petition and issued a petition in Israel. The wife did not apply to stay the proceedings in Israel. The wife then participated in an agreement lodged at the Rabbinical Court. The husband's lawyer stole a march by obtaining an order without notice in the Rabbinical court whereby the Rabbinical court was to have exclusive jurisdiction provided certain conditions were fulfilled. Macur J granted a stay of the wife's petition on the ground of forum conveniens, finding the prenuptial agreement an important element. The wife appealed. Her appeal was dismissed on the ground that the existence of the enforceable prenuptial agreement was properly regarded as an important element in the exercise of discretion. At the first stage of the de Dampierre exercise, when the court was

considering whether Israel was plainly the more appropriate forum, the defects (to English eyes) in the prenuptial agreement were not relevant; the agreement in that context had to be considered by local standards.

47. LORD JUSTICE Thorpe held that the statutory provision confers on the judge a very wide discretion. The manner in which the discretion is to be exercised in matrimonial proceedings was considered and determined by the House of Lords in the case of **de Dampierre v de Dampierre** [1988] App Cases 92.

48. In **de Dampierre v de Dampierre** [1988] App Cases 92 the Court held that France was the most natural forum for the resolution of the dispute between the parties.

49. **de Dampierre v de Dampierre** was followed in the case of **Krengel v Krengel** [1999] 1 FLR 969 where Holman J held that it was appropriate to stay the English proceedings in circumstances where Germany was clearly the most appropriate forum for resolution of the financial issues. In that case the parties had always lived in Germany and all the assets were in Germany. The only injustice in that case was that the wife would have to travel to Germany and would not be eligible for legal aid.

50. In **D v P (Forum Conveniens)** [1998] 2 FLR 25 in this case it was held that Italy was the most appropriate forum for the court to determine financial issues. Connell J stayed the English proceedings. It did not matter that there were no proceedings underway in Italy at the time that the husband applied for a stay of the English proceedings. The court further held that the divorce proceedings and the proceedings for financial provision were not inextricably linked. In that case the only link with the English jurisdiction was one bank account here. The key issue was a separation agreement which the Italian court would be better placed to deal with.

51. When arguing forum conveniens the question of delay is also relevant. **Mansour v Mansour** [1989] 1 FLR 418 is authority for the proposition that where a party seeks to raise an issue as to jurisdiction they must do so at the very start of the proceedings prior to any significant steps being taken and prior to costs being incurred. In the **Mansour** case proceedings had advanced to the stage where both parties had filed a claim against each other and a Mareva injunction had already been granted. It was in respect of alleged breaches of the injunction and committal proceedings that the wife sought to challenge jurisdiction. In this case the court held that the wife made the application as a tactical move and dismissed her application.

### **THE FUTURE – ROME III**

52. Not all EU countries apply domestic law on divorce. Some have rules of private international law, which require application of the law of the parties' nationality, or may allow parties to specify the applicable law. The Commission has now turned its attention to the question of applicable law. From Brussels II bis, we are advancing to "Rome III", which involves proposals for harmonisation of applicable law rules. This would mean that member states of the EU would be bound by Regulation to apply a particular law to the divorce, and possibly ancillary matters. It might, but need not, be the local law. It could be a law of the parties' choice, or the law of closest connection to the parties or the marriage.

53. In March 2005 the European Commission launched a public consultation on applicable law and jurisdiction in divorce matters in the form of a Green Paper which relates to a future regulation, Rome III. This Regulation is intended to simplify divorce procedure for EU Nationals who live in other Member States by dealing with the choice of applicable law and setting out clear rules relating to them. The Commission's last move towards the simplification and standardisation of EU divorce law.

### **Foreign law in English courts**

54. Brussels II does not include rules which specify which system of national law should be applied to determine the rights and obligations of parties to a case, "applicable law". At present, a number of Member States have rules which allow foreign law to apply to family proceedings, for example, Spanish and German courts will routinely apply English law to cases involving English nationals divorcing in those particular jurisdictions. Conversely, a number of jurisdictions, including England, apply their own national law (*lex fori*) to all cases where they have jurisdiction regardless of the nationality or origins of the parties.

55. Rome III was intended to improve legal certainty. To quote Vice President Franco Frattini, Commissioner for Justice, Liberty and Security, "These initiatives will simplify life for couples in the EU .... they will increase legal certainty and enable couples to know which law will apply to their matrimonial property regime and their divorce". The architects of the draft Regulation, whilst appreciating the inadequacies of Brussels II, may have underestimated the huge difficulties in implementing applicable law in the UK, where we have no tradition of applying foreign law in ancillary relief cases. Accordingly, in October 2006, the UK, along with Ireland and Malta, decided not to opt into Rome III.

56. The UK's decision to exercise its opt out in relation to Rome III highlights the inevitable difficulties our domestic family law is experiencing in adjusting to the increasing mobility of Europe's families. That said, it was clear to the government that the implementation of applicable law in this jurisdiction would have been exceptionally difficult to effect as it would certainly have given rise to severe practical as well as procedural difficulties.

### **Rising number of international divorces**

57. There are around 2.2 million marriages in the EU every year. The Commission estimates that around 350,000 of these involve an international couple. The EU has a comparatively high divorce rate. Of the 875,000 divorces in Member States, it is estimated that 16% are international. If the proportion is similar in England and Wales, around 24,000 of our 150,000 divorces annually involve international couples who need to be aware of the difficulties they may face navigating the wide variation in divorce law across European jurisdictions.

58. Research has shown that, before they relocate, couples tend to focus on the externals of the move, such as where they will live. They are unprepared for the feelings of disorientation and isolation which often accompany an international move and many fail to realise that an international move may prove fatal to a marriage.

### **Countries which apply the laws of other states (applicable law):**

59. Austria, Estonia, France, Germany, the Netherlands, Greece, Italy, Portugal, Poland and Spain apply the divorce laws of other states in some circumstances.

### **Availability of divorce:**

60. In Spain and Scotland, there is no requirement to be married for a year before divorce. By contrast, in Northern Ireland there is a requirement to be married for two years before divorce. In Sweden no ground for divorce is needed but a six month consideration period applies where one spouse is opposed or there is a child aged under 16. However, in the Republic of Ireland a divorce can only be granted after four years separation when it is shown that there is no prospect of reconciliation and adequate arrangements have been made for the spouse and any children. There is no principle of a clean break. At the most extreme, in Malta there is no provision for divorce at all.

### **The significance of blame for the break-up:**

61. In Austria and Poland, fault can be taken into account in financial orders.

### **Pre-nuptial agreements:**

62. While they are merely a factor to be taken into account in England and Wales, they are binding in France, Sweden, Portugal, Poland, Spain and the Czech Republic and in Germany in certain circumstances. They are enforceable in Latvia only on the division of capital. They are also enforceable in Scotland where the courts are very reluctant to interfere with properly drafted agreements.

### **Maintenance for spouses:**

63. Most EU countries (including Scotland) take a more restrictive approach to maintenance for spouses than we do in England and Wales. If maintenance is available it is usually short-term and specifically targeted at situations where it is difficult for a spouse to support herself because of her age and lack of recent, or indeed any, work experience, or because she is caring for young children. Examples of countries taking this approach include Greece, Cyprus, Estonia, France (maintenance during pregnancy and until a child reaches 3 years old), and Germany (spouses are expected to work fulltime by the time a child is fifteen years old). In Denmark maintenance is uncommon and usually does not last longer than ten years. In Sweden there is no general maintenance but it may be awarded to provide support during a “transitional period” to find employment or undertake training. In Scotland, maintenance tends not to last beyond three years. In Italy a spouse who is able but unwilling to support herself can be denied maintenance. Unusually, in Belgium maintenance does not stop automatically on re-marriage.

### **Marital property:**

64. A large number of countries allow inherited wealth or assets acquired before the marriage to be excluded from the pool of marital property to be shared on divorce. This is the case in Belgium, Germany, Scotland, the Czech Republic, Estonia, France, Latvia, Poland, Slovakia.

65. The Rome III Regulation which is intended to come into force on 1st March 2008 elsewhere in the EU aims to harmonise these disparate rules and:

- create a clear, comprehensive legal framework in matrimonial matters in the EU;
- bring legal certainty, predictability, flexibility and ensure access to court;
- prevent the “rush to court”;
- increase flexibility and party autonomy.

66. The Regulation will establish a consistent set of rules for deciding which country’s law would apply in a given case. The rules will set out a scale of factors for the court to consider, starting with the country in which the spouses last had their home together to ensure that the divorce is governed by the law with which the marriage has the closest connection.

67. There would also be a mechanism for the spouses to designate by agreement which laws would apply to allow flexibility for them to make an autonomous choice which could be made in a pre-marital agreement or by agreement in writing at the time of the divorce application.

### **Where does that leave international divorce rules in England and Wales?**

68. Since the implementation of the Brussels II regulations in 2001, European couples have needed specialist advice on the advantages and disadvantages of bringing proceedings in each EU state to which they have a connection. Undoubtedly, these considerations have encouraged a rush to divorce to secure a beneficial jurisdiction. Measures to counter this trend would be welcomed by family lawyers

69. The introduction of the proposed new Regulation throughout most of the EU will lead to more couples having their divorces dealt with by courts in other Member States, applying their interpretation of English law. English family lawyers can therefore expect to receive more instructions from foreign lawyers.

70. For the time being, the immediate advice for international couples planning a move to another EU State would be to get good advice on their position in the event of marriage breakdown before packing their passport

## **C. PRACTICAL CONSIDERATIONS**

### **WORLDWIDE FREEZING ORDERS “WFO”**

71. Section 25(1) Civil Jurisdiction and Judgments Act 1982 together with the 1997 Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order enables court to grant injunctions over property wherever situated in relation to disputes over maintenance, lump sums and property rights.

NB this Order goes further than the Brussels I and Lugano Conventions which formed the basis for the CJA as it allows injunctions against property in non-contracting states and widens the jurisdiction for the disputes in relation to which orders can be made

### **Section 37 MCA 1973**

72. Injunctions can be sought under s37 MCA 1973 as against foreign property “any property” is unrestricted as to locus – see **Hamlin v Hamlin** [1986] Fam 11  
See also **Bheekhun v Williams** [1999] 2 FLR 229.

73. The injunction is in personam and not in rem ie the court recognises that it has no jurisdiction as against foreign property but will not hesitate to make an order as against a party who is amenable to the court’s coercive powers to enforce orders personally against them

74. Court will refuse to order if shown that foreign court will not enforce ie the injunction would be ineffectual

75. Simpler and fewer requirements – including no undertaking as to damages - but limited to dispositions party about to make and a guilty intention must be shown - see also FPR 2.68

### **Inherent Jurisdiction**

76. Can use both in High Court and also County Court by virtue of County Court Remedies Regulations 1991. See also CPR part 25 setting out the very detailed provisions of draft applications and orders re foreign assets

77. See also the requirements of:

- (i) **Re S (a child) (Family Division without notice orders)** [2001] 1 FLR 308 – general guidance on ex parte applications
- (ii) **Babanaft v International v Bassatne** [1990] Ch 13 – protective provisions in orders to protect third parties as order must not attempt to regulate conduct of third parties abroad who are not joined as parties in respect of property outside the jurisdiction
- (iii) **Derby v Weldon (no. 3 & 4)** [1990] Ch 65
- (iv) **Baltic Shipping Co v Translink Shipping Ltd** [1995] 1 Lloyd’s Rep 673

78. Defendant does not need to have other assets in jurisdiction in order for an order to be made. In relation to undertaking as to damages, remember:

- (a) bank is entitled to take advice as to terms and effects of order and to monitor movements on account – these costs may be passed on to A
- (b) other financial institutions controlling ISAs, PEPs, life assurance policies are in same position as banks above – costs may be considerable
- (c) some foreign banks charge for “policing” the injunction

79. Re service of injunction abroad – specialist legal advice will have to be taken – some lawyers seek contingency fees for this type of work

80. As to enforcement of worldwide freezing order see **Dadourian Group v Simms** [2006] EWCA Civ 399 as to eight guidelines that need to be fulfilled:

- (i) is the grant of permission just and convenient? Would it be oppressive to any party?
- (ii) Should relief be granted on terms? eg as to costs of third parties?
- (iii) What is the proper balance between the interests of all affected?
- (iv) Is this merely the prelude to the applicant seeking more extensive relief abroad?
- (v) What is before the court, including evidence of the law and practice in the foreign jurisdiction?
- (vi) Is there a real prospect that assets will be found?
- (vii) Is there a risk they will be dissipated?
- (viii) Has the respondent been notified of the application?

## **FOREIGN LAND**

81. At common law all courts have exclusive jurisdiction in relation to land situated within that country - see Dicey 14<sup>th</sup> Edition Part 5 – Rules 121 and 122.

82. However, this rule “the Mozambique rule” is subject to various exceptions, some of which are relevant to ancillary relief. In particular the English court has jurisdiction to entertain a claim *in personam* in a civil or commercial matter within the scope of Council Regulation 44/2001

83. See in particular the decision of **Webb v Webb** Case C-294/92 [1994] ECR I-1717 in which the ECJ decided that an action in the English courts for a declaration that a son held land as a trustee as between Father and Son in relation to a flat in France and for an order requiring the son to execute such documents as are required to vest legal ownership to the Father does not involve rights *in rem* within the meaning of Article 16(1) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters.

84. This decision is potentially important in relation to unexecuted transfers etc on ancillary relief orders

85. In relation to WFO on land - enforcement of injunction may mean placing of liens or cautions against land - local advice needs to be taken as to cost of enforcement and how

much removal of caution etc might cost – some jurisdictions land tax is payable which is % of value of land charged

86. Foreign Property Searches – many civil systems eg Spain provide easy and cheap methods of searching national property registers as against NAME without the need for a court order. The search will provide details of “price” although very often this does not actually reflect the actual price paid

87. Three possible ways of dealing with foreign property in English ancillary relief order:

(i) SALE – there may be tax liability both in UK and in foreign country if proceeds are brought back into UK. Expert advice needed from local lawyer as to practical requirements of sale – will parties need to be present or can they provide powers of attorney, how can this be regulated, who will accept proceeds of sale etc. Re tax the UK may exempt CGT if the property is a principal residence even if abroad. However, there is likely to be local CGT as well as other local taxes. It is possible that the UK may effectively allow for a set off of foreign tax but specialist advice needed.

(ii) TRANSFER OF TITLE [eg from sole or joint names into sole name of other party]. Possibility of UK CGT even on principal residence if transfer more than 3 years after separation or in the tax year following separation/divorce. Clearly if property is second home, UK CGT likely. Abroad many jurisdictions impose gift tax on transfers between spouses so may be more appropriate to deal with issue as a sale to avoid local tax. Again there may also be complicated issues as to whether local and UK CGT taxes can be set off against each other

(iii) RETENTION – expert advice should be taken as to local tax consequences of continuing to own property in joint names when no longer married. Further documentation such as power of attorney may be needed to protect parties from liability to tax. If intention is for parties to hold property on trust for themselves jointly, concepts of trust may not be recognised locally. Issues of forced heirship and taxation on death should also be considered as in civil jurisdictions in particular the remaining ex spouse may well find themselves evicted upon the death of the other. All local taxes and services applied to the property should also be considered as they may be in arrears

## **SERVICE OF DOCUMENTS**

88. Under BIIIR it is no longer appropriate to adopt Resolution’s conciliatory approach and to write a letter before action as the first to issue wins the jurisdictional argument so service is all important.

89. Any document required to be served out of the jurisdiction can be served without leave of court – FPR 1991 r10.6. Order for substituted service can be made – FLR 1991 r2.9(9)

90. Re Brussels II R - when proceedings commenced in England and R habitually resident in another Regulation State and does not enter an appearance, court must stay proceedings until shown R has been able to receive document proceedings with sufficient time to arrange defence – Article 18(1)

NB where in fact the documents were served in accordance with the Brussels Service Regulation – Council Regulation (EC) No. 1348/2000 (on the service in the member states of Judicial and Extra Judicial Documents in Civil or Commercial Matters) see instead Article 19 of the Service Regulation.

## **FOREIGN EVIDENCE**

91. A witness outside jurisdiction cannot be compelled to attend substantive hearing – but four ways of obtaining evidence depending upon the particular country and the Conventions entered into. See **Charman v Charman** [2005] EWCA 1606 for a review of orders available:

- (i) appointment of special examiner – by summons to High Court. Consul of requesting country appointed as special examiner to take evidence, can invite witness to produce documents
- (ii) issue of letters of request – by summons to High Court. Foreign judiciary requested [NB not ordered!] to assist and compel attendance of witness for purpose of giving evidence and being cross examined. NB High Court can also issue a letter of request requesting production of documents which could have been subject to a *subpoena duces tecum* if in England. High Court unlikely to issue letter of request unless indication that foreign court would be receptive to such an “invitation” eg **Zakay v Zakay** [1998] 3 FCR 35 letter of request from PRFD to Gibraltar upheld
- (iii) EU member states – evidence can be obtained under Council Regulation on cooperation between the courts of the member states in the taking of evidence in civil and commercial matters – 1206/2001 [NB this Regulation includes family matters]
- (iv) Video link – RCJ Court 38, Law Society and Bar Council have facilities – see also **Practice Direction (Video Conferencing: procedure)** 14<sup>th</sup> January 2002 [2002] 1 FLR 699. NB an order approving such a course must be obtained prior to hearing - see **K v K** [2005] 2 FLR 1137 – Cuba, solicitors responsible for ensuring technical link had been tested and was viable ....!!!!

## **USEFUL SOURCES OF INFORMATION**

- See International Academy of Matrimonial Lawyers – [www.iaml.org](http://www.iaml.org)
- See also Law Society website for list of bilaterals – in particular British Spanish Lawyers Association [www.bsla.org.uk](http://www.bsla.org.uk)
- Conflicts of Law - Dicey & Morris 14<sup>th</sup> Edition
- International Aspects of Family Law - SFLA 2004 Edition
- International Family Law – Barbara Stark
- Rayden & Jackson 18<sup>th</sup> Edition
- Journal of Private International Law

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23<sup>rd</sup> October 2007