Southern Family Law Conference
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Hot Topics and Future Trends in International Family Law:
(1) Jurisdiction (2) Part III and (3) International Marital Agreements

A) Jurisdiction

1. When the UK joined Brussels II (March 2001), two of the jurisdictional grounds for divorce were:

    a. the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; and

    b. the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and was (in the case of E&W) domiciled there.

2. There was some uncertainty regarding this wording, specifically whether the requirement to have spent six months (if domiciled here) or 12 months (if not domiciled here) in E&W prior to the date of issue needed to be habitual residence or just ordinary/simple residence.

3. In *Marinos v Marinos* [2007] EWHC 2047 (Fam) (September 2007) Munby J favoured the lower threshold, i.e. habitual residence only required on the date of issue with simple/ordinary residence sufficient for the relevant period prior to issue.

4. By contrast, in *Munro v Munro* [2007] EWHC 3315 (Fam) (December 2007) Bennett J adopted the higher threshold, i.e. habitual residence required both on the date of issue and throughout the relevant period beforehand.

5. Although the position was uncertain, the general perception seemed to favour *Marinos* and the lower threshold until *Pierburg v Pierburg* [2019] EWFC 24 (April 2019) where Moor J – placing weight on, among other things, foreign language versions of Brussels II – favoured *Munro* and the higher threshold.

6. When the UK left the EU the MOJ said they intended to replicate the EU position but – despite most of the foreign language versions containing the higher threshold adopted in *Munro* – the wording chosen was the lower threshold favoured by *Marinos* namely:

    a. the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made; and

    b. the applicant is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately before the application was made.

7. Any uncertainty that may have existed regarding the EU interpretation was clarified in *BM v LO* (Case C462/22) (July 2023) when the ECJ confirmed that the relevant clauses must be interpreted as requiring the applicant to have been habitually resident for the entire period.

8. E&W is therefore currently in an unsatisfactory position with the wording which was chosen by the MOJ contradicting not only the EU position but also what the MOJ intended to achieve namely alignment with the EU.

9. This issue was recently considered by Recorder Allen KC in *TI v LI* [2024] EWFC 163 (B) (21 June 2024). Although the judgment is not binding (though it is citeable) and the comment is obiter, it contains a helpful analysis of the current state of the law.

10. After considering the background the judge adopted a purposive approach and took the view that habitual residence was required throughout the whole period rather than just on the day of issue. The judge was influenced not only by the EU position – which the MOJ had intended to follow – but also the analysis in *Pierburg*, and held as follows:

> [86] As divorce jurisdiction for all cases was only found in EU law it had to be replaced by national legislation. In drafting the new legislation the Ministry of Justice indicated they intended to follow EU law for continuity and comity. However DMPA 1973 s5(2) (as amended) departs from the EU wording. Rather than repeating Article 3 verbatim and stating habitual residence *if*, the statute states habitual residence *and*. In other words the *Marinos* interpretation was adopted. So the current English legislation requires the applicant to be habitually resident only on the day of issue provided he/she has had ordinary or simple residence for the previous six or 12 months, possibly in parallel with ordinary or simple residence in one or more other countries.
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> [87] In *BM v LO* (Case C462/22) the German court referred the *Marinos*/*Munro* debate to the CJEU. In its judgment of 6th July 2023 the CJEU was clear that the fifth and sixth indents require habitual residence throughout the relevant period and not just on the day of issue. There was no need to draw a distinction between the concepts of residence and habitual residence.
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> [88] The present position under English law is therefore uncertain. The new post Brexit divorce jurisdiction legislation followed *Marinos* as being the perceived correct interpretation but also purported to follow EU law. However this is now not the EU position (if indeed if ever it was).
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> [89] There is to date no reported decision on the interpretation of the amended English provisions. On a literal approach the legislation is clearly the *Marinos* interpretation. However on a purposive approach the UK government intended to replicate EU law which probably was at the time, and certainly is now, the *Munro* interpretation. Post-Brexit, the courts of England and Wales may still take account of CJEU decisions (European Union (Withdrawal) Act 2018 (as amended) s6(2)).
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> [90] In my view, the purposive interpretation is to be preferred because (i) the Ministry of Justice indicated they intended to follow EU law for continuity and comity; and (ii) the position in the EU is now clear and the English courts may still take account of such decisions. In addition, the *Pierburg* analysis – which prefers the *Munro* interpretation - is to my mind wholly persuasive. I therefore take the view the present position under English law is that habitual residence is required throughout the relevant period and not just on the day of issue.

11. It remains to be seen how other judges will approach this issue, but it is hoped this could be the start of a move towards aligning the position in E&W with the EU as was intended when the legislation associated with the UK's departure from the EU was being drafted.

12. In the meantime, practitioners need to be aware of the uncertainty in the law and advise clients (both applicants and respondents) accordingly when instructed in relation to jurisdiction disputes.

B) Financial provision after overseas divorce (Part III)

13. On 31 January 2024 the Supreme Court handed down judgment in *Potanina v Potanin* [2024] UKSC 3. These proceedings relate to financial claims which can be brought in England for financial provision after an overseas divorce. Although the parties in this case have been described as 'massively rich' with assets estimated at $20 billion, the judgment will have a significant impact on the way all Part III claims are determined – both in terms of procedure and outcome – going forwards in England.

14. This was only the second time the Supreme Court has had an opportunity to give a substantive judgment on the way in which Part III proceedings should be conducted (the other case being *Agbaje v Agbaje* [2010] UKSC 13). This judgment is of particular importance given the announcement that despite calls for the Law Commission to review the law on Part III applications, they are not going to be included in their review of financial provision on divorce.

Part III: a brief introduction

15. Part III Matrimonial and Family Proceedings Act 1984 (Part III) gives the English Family Court the power to make financial orders after a marriage has been dissolved or annulled in an overseas country if there has been inadequate financial provision on the overseas divorce and the parties have a sufficient connection with England.

16. Part III was introduced at a time when international movement was on the rise and many countries made little, if any, financial provision for women on divorce. The problem became apparent in a series of cases in the 1970s where there had been a foreign divorce which resulted in no financial provision having been made for the wife.

17. For public policy reasons the English Family Court has a liberal approach to the recognition of overseas divorces. This did however give rise to difficulties when parties with close connections to England divorced abroad and received inadequate financial provision. If England recognised the overseas divorce (which it usually does), the English Family Court had no power to make orders for financial relief.

18. The Law Commission were asked to review the law in this area and make recommendations. This resulted in a Working Paper in 1980[1] followed by their final Report in 1982[2]. The Law Commission recommended the introduction of legislation to give the English court the power to make financial orders after an overseas divorce where there had been inadequate financial provision abroad and thus Part III was born.

19. To avoid claims without any merit from proceeding the Law Commission recommended a filter mechanism. Therefore, before an application can be brought for financial relief under Part III the applicant must first apply for and obtain 'leave' under s 13 MFPA 1984. The legislation provides that leave should not be granted unless there is a 'substantial ground' although case law has established that the threshold is not high.

20. As with any claim it is necessary to have a sufficient connection, jurisdiction, to bring make an application under Part III. The jurisdictional grounds are set out in s 15 MFPA 1984 and require, in summary, either party to be domiciled in England or to have been habitually resident in England for 12 months on the date of the overseas divorce or Part III leave application[3].

21. The English court has the power to make a wide range of orders that are very similar to the financial orders which can be made on divorce in England. The range of orders is contained within s 17 MFPA 1984 and includes lump sum orders, property transfer orders, periodical payments orders and pension sharing orders.

22. When considering whether to make an order the English court is under a duty to consider both a list of factors in s 16 MFPA 1984 when deciding whether England is an appropriate venue and a list of factors in s 18 MFPA 1984 in deciding whether, and if so in what manner, to make an order under Part III.

Part III: the leave process

23. The procedure to be adopted when applying for leave under Part III has a complicated history. Although the Law Commission recommended that the leave application should be ex parte, the legislation made no reference to whether the leave hearing should be inter partes or ex parte and the procedural rules (which have changed over time) have not always been clear.

24. As a result, a practice developed where applicants would often give respondents informal notice of the leave application. This invariably led to the leave application being determined on notice. Alternatively, when the leave application was determined ex parte, respondents would often apply for the grant of leave to be set aside. Both approaches lead to increased time and cost being spent on what was supposed to be a summary process to prevent wholly unmeritorious claims being pursued.

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[1] *Financial Relief After Foreign Divorce* (180) (Working Paper No 77)

[2] *Financial Relief After Foreign Divorce* (1982) (Law Com No 117).

[3] Jurisdiction can also be founded on the basis either party has a beneficial interest in a property in England which has been used as a family home, although financial claims are limited.

25. These practices were perceived to have been disapproved in *Traversa v Freddie* [2011] EWCA Civ 81 and *Agbaje v Agbaje* [2010] UKSC 13. In the former the Court of Appeal held that the leave application should be made without notice albeit the court should have the power to direct that the leave application be heard inter partes[4]. The procedural rules were amended to reflect this in August 2017 (FPR 8.25). In *Agbaje* the Supreme Court held that unless the respondent can deliver a 'knock-out blow', any set aside application should be heard with the substantive application[5].

26. The more recent practice has therefore been for applicants to make the leave application without notice although there has been an increasing recognition – particularly following the difficulties which arose in the *Potanin* litigation – that in complex or borderline cases the court may consider that the leave application should be heard on notice[6].

27. Although respondents still have the ability to apply for Part III leave to be set aside if made at an ex parte hearing, the threshold the Supreme Court introduced in *Agbaje* (a knock-out blow) is so high that in practice it is very unusual for leave to be set aside once it has been granted. The court will more often direct that any set aside application should be determined at the conclusion of the proceedings once all the evidence has been heard.

28. This approach has been perceived by some as unfair on respondents. Although there is a high duty of candour on applicants at an ex parte hearing, that is not the same as the respondent being able to make their own submissions on the merits. This perceived unfairness has arguably become more acute following the Court of Appeal's comments in *Potanin* that where leave is obtained based on misleading information it should only be set aside if the misrepresentation was material[7].

29. This combination of (1) leave often being granted ex parte and (2) the very high threshold to succeed on a set aside application, led to concerns that respondents are unable to be heard on the issue of whether leave should be granted. They are often not present at the leave hearing and, unless they can show a knock-out blow, they are unable to be heard after leave has been granted too.

30. It was against this background that the *Potanin* litigation started in England in late 2018 when the wife applied ex parte for leave to make a financial claim in England following her Russian divorce.

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[4] *Traversa v Freddie* [2011] EWCA Civ 81 at [57].

[5] *Agbaje v Agbaje* [2010] UKSC 13 at [33].

[6] See, for example, the President's Guidance on the Jurisdiction of the Family Court dated 24 May 2021, para 25(d).

[7] *Potanina v Potanin* [2021] EWCA Civ 702 at [87].

Potanin: brief background

31. The parties were both born in Russia in 1961. They married in Russia in 1983 and divorced in Russia in February 2014. They had three children who are all now adults. The parties spent all their married life living in Russia.

32. The parties came from modest backgrounds but during the marriage the husband accumulated wealth estimated (by the wife) to be in the region of approximately $20 billion. The majority of the husband's wealth was not held in the husband's name but through various trusts and corporate vehicles.

33. There was a dispute between the parties as to the date of separation (2007 per the husband; 2013 per the wife) although the Russian courts found the date of separation to be 2007. In 2007 the husband transferred the sum of approximately $71 million to the wife followed by a further $5.1 million.

34. After what was described as a 'blizzard of litigation' between 2014 and 2018 the Russian courts awarded the wife at least $41.5 million (there is a dispute as to the exact amount received owing to disagreement as to the appropriate exchange rate to be used when converting roubles into dollars).

35. In terms of connections with England, in June 2014 (four months after the Russian divorce was finalised) the wife obtained a UK investor visa. Later that year the wife bought a property in London. The wife's case was that since the beginning of 2017 London had been her permanent home.

Potanin: the leave application

36. In October 2018 the wife made a without notice application for leave to bring a claim under Part III MFPA 1984. On 25 January 2019 Cohen J granted the wife leave to apply for financial relief pursuant to Part III. Although the judge expressed a strong inclination during the without notice leave hearing to determine the application on notice, the judge determined the leave application ex parte.

Potanin: the set aside application

37. The husband applied to set aside the grant of leave on the basis the judge had been misled as to (1) the facts of the case (2) issues of Russian law and (3) the applicable principles of English law. The set aside hearing took place inter partes over 2 days in October 2019 with judgment given on 8 November 2019[8].

[8] *Potanin v Potanina* [2019] EWHC 2956 (Fam)

38. When deciding to set aside the grant of leave Cohen J found three categories of misrepresentation:

    a. Factual misrepresentation which the judge said included being given incorrect information about the level of child maintenance and misleading information as to the strength of the connections with England;

    b. Misrepresentation as to the Russian litigation which the judge said included not being given copies of the Russian law or judgments and not being told the wife had not made a needs-based claim in the Russian proceedings; and

    c. Misrepresentation as to English law which the judge said included not being sufficiently referred to key paragraphs of the Supreme Court's decision in *Agbaje*.

Potanin: the Court of Appeal judgment

39. The wife applied for permission to appeal the judge's decision to set aside the grant of leave. The appeal hearing took place over 2 days in January 2021 with judgment handed down on 13 May 2021[9]. The Court of Appeal (King LJ delivering the judgment with which David Richards LJ and Moylan LJ agreed) allowed the wife's appeal and allowed the wife's Part III application to proceed.

40. The Court of Appeal found that the judge had applied the wrong test and adopted the wrong procedure when setting aside the grant of leave. The test the judge adopted was whether – if he had had the full picture at the leave application – he would have granted the wife leave to bring her application. The Court of Appeal said that the judge should have instead listed a short hearing to determine whether there was a knock-out blow.

41. The Court of Appeal held that the judge's view had been tainted by the procedure adopted at the set aside hearing (which on the one hand was too lengthy, but on the other hand led to the making of findings against the wife without oral or expert evidence) and that the alleged deficits identified by the judge, even if they were to be established, were not sufficiently material to justify setting aside the grant of permission.

42. The Court of Appeal's order therefore reinstated the grant of leave and the matter was remitted to Francis J for directions to be made to progress the wife's claim under Part III.

Potanin: The Supreme Court judgment

43. The husband appealed to the Supreme Court. The hearing took place over 1.5 days on 31 October and 1 November 2023. The judgment was handed down on 31 January 2024[10]. By a majority of 3:2 the Supreme Court allowed the husband's appeal.

[9] *Potanina v Potanin* [2021] EWCA Civ 702
[10] *Potanina v Potanin* [2024] UKSC 3

44. Practitioners should be aware of the following two areas covered by Lord Leggatt (with whom Lord Lloyd-James and Lady Rose agreed) in his judgment on behalf of the majority: (1) the threshold adopted on the Part III leave application; and (2) the threshold adopted on an application to set aside the grant of Part III leave.

Threshold on the leave application

45. In a thorough and detailed judgment, Lord Leggatt examined the inconsistency in the threshold test adopted by the Supreme Court in *Agbaje* on the leave application which was as follows:

> [33] 'The principal object of the filter mechanism [in section 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid".

46. In a passage which should be read by all practitioners Lord Leggatt then gives the following guidance on the threshold to be adopted on leave applications (emphasis added):

> [89] 'I would not wish to cast any doubt on the primary guidance given in *Agbaje* that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. **It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive**. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, **the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily**. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. **In each of these contexts the test applied is whether the claim has a "real prospect of success"**. That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.'

47. Lord Leggatt also commented that leave hearings listed for as little as between 20 and 60 minutes are not realistic and that it would not be reasonable to expect such hearings to be measured in minutes rather than hours[11].

48. Going forwards, practitioners should be aware that the test adopted on Part III leave applications is now likely to be higher. This element was endorsed by Lord Briggs and Lord Stephens in the dissenting judgment[12]. Applicants applying for leave under Part III will need to show more than that their claim is not totally without merit or an abuse of process. The test to be adopted going forwards is whether the claim has a real prospect of success. Practitioners should also be aware when making their application that a longer time estimate may be required (particularly given, as explained in more detail below, it is possible that Part III leave applications will more often be heard on notice going forwards).

[11] Para 93
[12] Para 110

Threshold on an application to set-aside leave

49. In the opening paragraph of his judgment Lord Leggatt held as follows (emphasis added):

> [1] 'Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is – if you make the order sought – to give the other party an opportunity to argue that the order should be set aside or varied. **What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made**.'

50. Lord Leggatt went on to give three reasons why the approach which has been adopted to the Part III leave process was unfair:

    a. To deny a party adversely affected by an order any opportunity to say why the order should not be made is unfair[13];

    b. As well as being unfair, such a procedure is also foolish: judges make better decisions if they hear argument from both sides rather than from one side only[14]; and

    c. A procedure which, while otherwise preventing a party from objecting to an order, allows that party to do so if he can show that the court was materially misled at a hearing held in his absence, is likely to raise the temperature, increase court time and waste costs[15].

51. Lord Leggatt concluded it would be difficult to devise a worse system than this for dealing with leave applications[16]. Lord Leggatt went on, however, to state that the law as it presently stands (not how it had been misinterpreted) does not lead to those untoward results[17]. The right to apply for the grant of leave to be set aside is unconditional and the rules do not require a knock-out blow[18]. Lord Leggatt went on to explain that the creation of the 'knock-out blow' test was owing to a misunderstanding as to concerns Thorpe LJ and Munby J expressed in *Jordan* and *Agbaje* (in the Court of Appeal) respectively. According to Lord Leggatt, those judges had been criticising as inefficient the requirement to hear the leave application initially ex parte instead of being able to move at once to an inter partes hearing to decide whether to grant leave[19]. Their criticisms had been misinterpreted as being directed at applications to set aside leave once granted.

[13] Para 31
[14] Para 32
[15] Para 33
[16] Para 33
[17] Para 34
[18] Para 35
[19] Para 56

52. Lord Leggatt went on to conclude that 'whatever the reason for it, however, it would be quite wrong and unfair if a judge's initial case management decision were to deprive the respondent of the right to present an argument to the court that leave should not be granted[20]' and that 'the end result of this history is that there is a mismatch between, on the one hand, the fundamental principle of procedural fairness reflected in [the rules] which entitles a respondent to apply to set aside an order made without notice and, on the other hand, the practice presently adopted in dealing with section 13 applications[21].'

53. Lord Leggatt then considered, and dismissed, three reasons which were advanced for retaining the knock-out blow:

    a. Restricting the right to apply to set aside leave granted without notice is justified by the desirability of saving costs and court time. Lord Leggatt's response was that although court time could be saved if courts were to adopt a practice of hearing from applicants alone without allowing respondents to participate in the process unless they can demonstrate by a 'knock-out blow', fairness is not a value which can properly be sacrificed in the interests of efficiency[22];

    b. Denying a respondent a right to object to an application for leave under s 13 is not unfair because granting leave does not decide any issue of substance. In response, Lord Leggatt commented that although a requirement to obtain leave of the court to bring a claim is unusual, that does not mean it is unimportant and the fact a grant of leave does not finally decide any issue of substance between the parties is not an acceptable reason to deny a respondent the right to be heard[23]; and

    c. The approach generally taken by the Supreme Court is that matters of practice and procedure are best left to the Court of Appeal or the Rules Committee to address. In response Lord Leggatt responded that although that is the general approach, there are three reasons why it is not applicable in this case: (a) the practice of denying respondents the right to oppose applications for leave under s 13 originates in observations in a judgment of the Supreme Court (and it is therefore for the Supreme Court to correct the position); (b) no question of procedure is raised which it is suitable to leave for consideration by the Rules Committee (as in their current form the rules of court governing the setting aside of leave granted without notice are clear and unambiguous); and (c) as the practice currently being followed in dealing with applications to set aside leave granted without notice is unlawful the Supreme Court should intervene to end the practice[24].

[20] Para 67
[21] Para 68
[22] Para 77-78
[23] Para 79-81
[24] Para 82-85

54. This represents a significant change of practice when dealing with Part III leave applications. Since 2010 practitioners have been slow to advise respondents to apply to set aside a grant of leave owing to the very high threshold and costs risks. Sometimes a tactical decision was taken to issue a set aside application for presentation purposes on the basis it would be listed for determination at the final hearing. But, apart from that, set aside applications have been rare over the last decade or so.

55. Going forwards the test to be adopted on set aside applications is now lower. The obvious concern is that we will see a return to the practice before *Agbaje* and *Traversa v Freddie* of respondents routinely applying to set aside the grant of Part III leave. To counter this it is likely the courts will increasingly utilise their case management powers (see FPR 8.25(3)) to hear Part III leave applications on notice with a time estimate of two hours or half a day or more. Where the application is determined ex parte, applicants will need to be careful to comply with the duty of candour which exists on all ex parte applications.

Potanin: the future

56. That is not, however, the end of the *Potanin* litigation. There are two other grounds which had been raised by the wife in the Court of Appeal (but were not dealt at the time as the wife had been successful on the primary issue in that appeal) which have been remitted to the Court of Appeal. They are as follows:

    a. Even if Cohen J was entitled to set aside the leave granted without notice, he should not have done so because after hearing argument from both sides he should have concluded that the test for granting leave was satisfied; and

    b. The wife's application should not in any event have been dismissed insofar as the court has jurisdiction in relation to it by virtue of the EU Maintenance Regulation.

57. The first ground brings to a head what is likely to be the main issue in these proceedings. On the one hand, the parties had no connections with England before the marriage was dissolved. Anyone who watched the proceedings in the Supreme Court will know how strongly Lord Leggatt expressed his views about whether it was appropriate for leave to be granted in these circumstances. On the other hand, the wife has been awarded a tiny fraction (estimated at 0.5%) of the husband's wealth as the majority of his assets held in trusts and corporate vehicles were excluded from consideration under Russian law. How the court balances these competing arguments may to a large extent determine the outcome.

58. The second ground relates to a provision contained in s 16 MFPA 1984 at the time the wife's application was issued (before the UK's departure from the EU) which stated that the court may not dismiss an application for financial relief under Part III on the ground that England is not an appropriate venue if to do so would be inconsistent with the EU Maintenance Regulation. This provision continues to apply in these proceedings under the transitional arrangements governing the UK's departure from the EU but is unlikely to impact many, if any, other cases in the future.

59. Lord Leggatt expressed a view (in passing and without hearing argument) that on the face of it that provision did not apply because the former wife was seeking to bring (rather than enforce) a claim for maintenance and would not be a 'maintenance creditor' within the meaning of the Regulation[25]. I very respectfully suggest that cannot be right. The Regulation governs not only recognition and enforcement of maintenance decisions but also jurisdiction to apply for them. Article 3 of the Regulation provides that jurisdiction shall lie with *inter alia* the court for the place where the maintenance creditor is habitually resident. If the term 'maintenance creditor' was intended only to refer to persons seeking to enforce an existing maintenance decision it would not feature as a ground of jurisdiction to apply for a maintenance decision. A similar view was expressed by Coleridge J in *M v W* [2014] EWHC 925 (Fam) when he held that although the term 'creditor' is generally found where a debt is in existence, on a proper reading of Regulation it includes a potential creditor[26].

60. What is of interest is whether the wife's claim will be treated as concerned with maintenance (in which case the EU Maintenance Regulation may apply) or solely concerned with dividing property (in which case the EU Maintenance Regulation would not apply). The following passages is in *van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-01147 will be relevant:

> [21] '... The court from which leave to enforce is sought must **distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance**, having regard in each particular case to the specific aim of the decision rendered.
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> [22] **It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship** and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.
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> [23] **It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.**' (emphasis added)

61. It will also be interesting to see whether s 16(3) MFPA 1984 will be interpreted as applying to leave applications or restrained to substantive application. S 16(1) MFPA 1984 provides that before making an order for financial relief the court shall consider whether it is appropriate for an order to be made in England and, if not satisfied, shall dismiss the application. S 16(3) provided that if the court had jurisdiction under the EU Maintenance Regulation (which it did), the court may not dismiss the application on the ground mentioned in s 16(1) if to do so would be inconsistent with the EU Maintenance Regulation. On the surface it therefore appears as though the application, if and to the extent that it is maintenance in character, cannot be dismissed on this basis as it would be inconsistent with the EU Maintenance Regulation.

[25] Para 101
[26] Para 39

62. On the other hand, s 13 MFPA 1984 provides that no 'application' for financial relief under Part III can be made unless leave of the court has been obtained. Might it therefore be argued that the provisions in s 16(3) (which are not repeated in s 13) do not apply to the leave process which takes place before an 'application' has been made? Or will the court interpret that the requirement not to contravene the EU Maintenance Regulation should be applied to the leave process too? Given the wording of s 16(3) 'the court may not dismiss the application *or that part of it* …' (emphasis added), might this lead to only a needs-based element of the wife's claim being permitted to pass beyond the leave stage, with the sharing element being effectively debarred by a partial refusal of leave? What would that look like in practice: leave granted to bring an application restricted to be assessed by reference to the needs principle? Would that not place a fetter on the court's discretion when conducting the exercise required by s 16 and s 18?

Post-*Potanin* case law

63. On 24 April 2024 Moor J handed down judgment in *TY v XA* [2024] EWFC 96. It is the first reported Part III decision since the Supreme Court judgment in *Potanin*. The judgment concerns the former husband's second attempt to set aside the grant of Part III leave in the case, the judge having given the former husband permission to bring that application again if the Supreme Court changed the law on set aside applications (which, as above, they did).

64. On the facts of the case Moor J refused the former husband's second set aside application, but the judgment contains some helpful clarifications regarding Part III applications including:

    a. Applications for leave will now only be refused if the court concludes the claim would be bound to fail even if the applicant proved all disputed facts in their favour or if the factual basis for the claim is fanciful (para 36);

    b. The test to be performed on a set-aside application is exactly the same as on an initial application (para 37); and

    c. In the absence of consent all future leave applications will be heard on notice to the respondent (also para 37).

65. There is also a controversial suggestion in the judgment that the English family court may be prevented from making a maintenance order under Part III if there is a post-Brexit maintenance agreement or order from another 2007 Hague Convention signatory (para 47). The judgment suggests that the argument put forward on the respondent husband's behalf in *TY v XA* focuses on Article 28 of the 2007 Hague Convention which provides that there can be no review of the merits of a maintenance decision or arrangement.

66. One potential counter argument could be that the 2007 Hague Convention has a chapter related to restrictions on when maintenance proceedings can be brought in a contracting state and is drafted very narrowly (see Art 18). It could therefore be argued that if the intention was to prevent maintenance claims being brought where there is a prior maintenance decision in another contracting state in other circumstances, that would have been provided for in the relevant Chapter (Chapter IV) in the 2007 Convention.

67. On the other hand, one can see that were there to be a case involving an overseas order which is not only entitled to recognition and enforcement in England but also cannot be reviewed as to substance, when exercising its discretion to determine whether an order should be made under Part III (whether for leave or a substantive order) the court may more cautious about making further orders in England.

68. More recently, on 7 June 2024 HHJ Vincent handed down judgment in the case of *WXT v HMT* [2024] EWFC 136 (B). It is a rare example of a Part III leave judgment being reported. It follows a divorce in Algeria where the wife had not made any attempt to obtain financial provision in the country where the divorce took place. The learned judge held as follows:

> '[62] The husband says that the wife's application should be struck out because the wife is refusing to engage with the Algerian court, which is now seized of their divorce application. The documents he has submitted show that the court is awaiting an application from her, and if she were only to engage, he says she would obtain the financial remedies she seeks within those proceedings.
>
> [63] However, given that the parties are habitually resident here, the legislation gives the wife a choice. She is not compelled to make an application for financial remedies in Algeria.
>
> [64] I reject the husband's submission that the wife is required to see the Algerian proceedings through to their conclusion before applying to this court.
>
> [65] He submits that this court can only grant permission to the wife to issue her financial remedy application here, if satisfied that the Algerian court either has or is likely to make inadequate financial provision for her. This is an incorrect statement of the law. Permission may be granted, having regard to the particular circumstances of the case, and the factors on the section 16(2) checklist, if there is substantial ground to make an application.'

69. This approach may come as a surprise to some practitioners bearing in mind the purpose of Part III is to allow the English court to make financial orders where there has been inadequate financial provision abroad. How can it be said there has been inadequate financial provision abroad if the applicant has not even tried to obtain financial orders there? It remains to be seen whether other judges will adopt the same approach and allow Part III leave applications to proceed where the applicant has not made any attempt to obtain financial provision in the country where the divorce took place.

Conclusion

70. It has been a long time since there was such uncertainty in relation to Part III claims. The Part III leave process has been overhauled with the almost inevitable result that leave applications will now be determined on notice. There are arguments that the 2007 Hague Convention might prevent Part III claims being brought in England after divorces from various countries including EU member states and the US. And there is a suggestion that it is permissible to apply for Part III without attempting to obtain financial orders in the country where the divorce took place.

71. It remains to be seen how these issues will play out but, in light of the Law Commission's decision to exclude Part III claims from their upcoming scoping report (which is due in November 2024) in respect of their review of financial provision on divorce, these important issues will need to continue to be interpreted and developed by our courts.

C) Treatment of foreign marital agreements

72. In July 2024, Cusworth J handed down judgment in the (brilliantly named) case of *BI v EN* [2024] EWFC 200. The primary issue in the case was whether the "Contrat de Marriage" the parties signed in Hong Kong before their wedding in France should impact the wife's application for financial remedies on divorce in England.

73. The wife (age 51) and husband (age 50) were both French nationals who met in France in 1997 whilst studying. They married in Fance in May 2021 and separated in September 2022. They moved to live in England a year after their wedding when the wife was pregnant with their first child. The parties had three children together who were aged 21, 19 and 17.

74. At the time of their marriage the wife was in a financially stronger position than the husband. Her family were wealthier than the husband's family and the wife was in secure employment. By contrast, the husband's company was in financial difficulties and was in the process of being closed down.

75. In 2008 the husband founded an investment company which enjoyed substantial success and amounted a substantial fortune. By the time of the divorce the assets were worth between £87m and £115m. The parties agreed that aside from the impact of the contract, all of the assets held by them would be accounted as matrimonial and so subject to the sharing principle which would have entitled the wife to between £43.5m and £57.5m.

76. When deciding what weight to attach to the *Contrat de Marriage* Cusworth J went through the following circumstances.

Motivation

77. In the wife's first statement she said she "struggled to recall anything much at all" about the parties' discussions prior to its signing. She said she did not believe they talked about it "other than in the most brief and insignificant way" because she did not remember any discussion. She went on to say that she was "almost certain" it was the husband who first suggested that they sign it. In the same statement the wife described her parents as being comfortably off, but not wealthy. She drew no distinction between the social status of her parents and the husband's parents.

78. The wife went into more detail in her second statement. She accepted that when she met the husband her parents had a home in the Paris suburbs, a summer holiday home and two studios in the mountains. She described how her paternal grandparents were not wealthy after her paternal grandfather, also an entrepreneur, had become bankrupt in the late 1960s. She accepted that her mother's parents had more than those of her father such that although she was one of six children, her mother had still received an inheritance of £1m in 2013.

79. In a short statement the wife's father confirmed he and her mother had a similar *separation de biens* contract because that is what his father-in-law had wanted. Both the wife's parents denied having any discussions with the parties ahead of their marriage about the terms of any contract. The wife's mother said that whilst it is probable that she booked the parties' civil wedding, she could not recall doing so. She also said that whilst she was at the civil ceremony where the fact of the parties' chosen regime was confirmed, she never discussed this with her daughter at the time.

80. By 2003 the wife's parents' own marriage was in difficulties. The wife's mother recounted three lengthy telephone conversations with her daughter expressing concerns about the wife's father placing joint funds into accounts in his sole name, to deprive her of her share under the terms of their contract. She also recalled the wife telling her of a conversation she had had with the husband triggered by her concerns about her father's behaviour.

81. The husband's evidence was that his parents were of modest means and did not have a marriage contract. He drew a contrast with the relative affluence of the wife's family and said that he found this initially intimidating. The husband said he did not recall who first raised the subject of a marriage contract after the parties' engagement, but said that he did recall a conversation with the wife's father from which he got the impression that there was an expectation that they would choose *separation de biens*.

82. Cusworth J commented that:

> '[16] The overall impression which the evidence gives is that the wife's family are far more used not only to having money, but also to protecting it and to the risks of losing it over the course of generations.'

83. Cusworth J also said:

> [17] '**In circumstances where the wife's own parents had such a contract, where her own paternal grandfather had suffered bankruptcy as an entrepreneur, and where her maternal grandfather had required her father to sign their contract, it is clear that the risks and benefits of the arrangement were well known to the family**. Whilst the opportunity to transfer assets to the wife or into joint names for their protection in the event that the husband's future businesses proved unsuccessful may have been the primary motivation for the family, I cannot accept that they did not also understand in 2001 that any such contract would also have consequences in the event of a subsequent divorce, at least under French law.'

84. On this issue Cusworth J went on to conclude as follows:

> [18] Thus whilst I cannot know from the evidence that I have exactly who first broached the subject, **I am satisfied that the wife would have understood what a marriage contract is, and its various purposes**, and that her family's instincts in the spring of 2001 would have been to have provided for her the sort of protection that her mother had had when she married her father, in light perhaps of the bankruptcy that had befallen her paternal grandfather in the past. **This is therefore not a case where the contract has been foisted onto an unwilling and ill-informed ingenue, who signed and then married without any understanding of the consequences**.

[19] I cannot therefore accept the wife's account that she 'never considered that the contract would be important on divorce'. I do accept that at that stage in her life she would not have considered that a divorce was in any way a likely prospect. When she says that she recalls feeling like she 'had no choice', she was not suggesting that that was in any way due to any inappropriate pressure from the husband. I accept that the main motivation may have been to protect assets (or the wife's share in them) from the vicissitudes of the husband's business career, which did not then look promising. That would at that time have appeared to the wife and her parents to be significant consideration for entering into the agreement.

[20] Whether the suggestion came first from the husband, or from the wife, or from the wife's parents, **everyone on the wife's side of the family would have understood what the arrangement would connote and how it would operate**. In May 2001, the husband's finances were precarious. He had a business venture in the process of failing, whilst the wife was in reliable employment. Neither then had any inherited wealth to protect, but the wife's prospects would have been rather stronger than the husband's. Thus, the contract would offer her a measure of protection and security going forward, in the hope perhaps that the husband would do the decent thing and put property into joint names. Indeed, if anything, **the wife's initial lack of recollection about what happened would suggest that she really had few concerns at the time about what was being arranged, rather than she did not have any understanding of what the contract meant**.

The signing process

85. The contract was signed in Hong Kong seven days before the wedding. The wife said she remembered very little about making the arrangements. She said she remembered only a short meeting without specifics. She describes it as a tick in the box for the contract to be signed. She did not recall reading the document either before or at the meeting nor who provided the information for its contents. She said she did not believe she have received any advice as if she had had it explained she would never have signed it.

86. The husband said it would have been the wife who contacted the consulate, given his travails at the time with the struggling start-up. He recalled at least two meetings, at the first of which the consequences and effect of signing were explained to them. He also said they could have asked questions if they had any doubts, although he did not recall any. The husband said that at the second meeting (at which the document was signed) the consular notary read out the entire contract and again there was a facility to ask questions. He describes the feel of the two different rooms in which he says that the two meetings took place.

87. Cusworth J said:

[22] 'On the basis of his clearer recollection of these events, and the wife's 'faint memory' of these important events, I prefer the husband's account and do find on the balance of probabilities that there were two meetings as the husband says, at the first of which the information which has been typed into the contract ahead of the second meeting would have been provided.'

88. The contract was in fairly conventional terms and recorded that the parties would adopt the regime of separation of property as the basis of their union. Cusworth J commented that:

[25] 'Whilst protection from future creditors probably was a primary motivating factor for both parties in entering into the contract, and neither may have had divorce at the forefront of their mind at the outset of their relationship, **it was nevertheless very clear from the document that they each signed that under French Law, the law that they were electing, the contract would have the consequences on divorce which it explained**.

[28] The document in this case was said to be signed before the Vice-Consul and Head of Chancery in the Consulate, and was then 'read over' or '*Lecture faite*' in the French, to the parties before signing. This accords with the husband's recollection that the entire document was read to the parties at the second meeting, contrary to the wife's suggestion that she did not read it. Orally, she suggested that it was not read to her either, but I find that this was something which if not remembered she has forgotten.

[29] That French consular officials no longer carry out the duties of notaries for these purposes does not, in my judgement, in any way undermine or impugn the process which the parties went through in 2001, which is one that the SJE on French Law, Laurence Mayer, has opined would be recognised and accepted by a French Court. I accept the husband's evidence that one of the motivations for the parties in entering into the contract was to ensure that, even though they were then living, and intended to continue to live, abroad, they nevertheless as French citizens wished to submit their marriage to the principles of French Law. That a consular official may not have been competent to give property advice, as Ms Mayer suggests, does not in my view undermine the weight which this agreement should carry.

[30] **In those circumstances, I am clear that this agreement is of sufficient formality that the court can potentially give it effect, if it is fair to do so, although it can never be more than one of the circumstances of the case that the court must consider in undertaking the statutory exercise mandated by the MCA 1973**. I will set out my conclusions as to the parties' intentions, understanding and awareness below.'

Conclusion on the Contract

89. Cusworth J concluded as follows:

[45] 'Consequently, after carefully considering all of the evidence that I have heard and read in relation to the contract during the course of the hearing, **I am entirely satisfied that at the outset of their marriage, and thereafter throughout its length, both of these parties have both understood and acknowledged by their actions and attitudes that they had elected the *separation de biens* regime to apply to their marriage, and that its consequences in the event of their divorce would be that, subject to the question of what in French law is termed *prestation compensatoire*, and in this jurisdiction is referred to as the meeting of needs, their capital entitlement would be defined by how they held their various properties and other assets. They had all of the information that was material to their respective decisions; were fully aware of the implications of the agreement; and understood and so intended that the agreement should govern the financial consequences of the marriage coming to an end**.'

90. In those circumstances the judge then had to decide what weight should be given to the contract the parties signed before they married. The judge referred to the well-known passage at paragraph 178 of *Versteegh v Versteegh* [2018] EWCA Civ as well as paragraphs 69 to 74 of *Granatino v Radmacher* [2010] UKSC 42.

91. When considering the extent to which the wife could be sad to be fully aware of the implications of the contract the judge referred to the following passage from *Versteegh*:

'[59] **The desirability of legal advice forms part of the miscellany of factors which a judge considers before concluding that a party did (or did not) have a full appreciation of the implications of the PMA**. Doubtless in some cases its presence or absence will be critical. In the present case, the judge was fully aware that the wife had not received legal advice but, having seen her give evidence, made the clear finding that the wife knew 'full well' the effect of the agreement. The judge said that he was able to 'reach a firm and clear conclusion' and to 'find as a fact that throughout the marriage the wife has known and understood the impact of the PMA' (J1, at para [183]). On the judge's findings there can be no doubt but that the wife clearly felt herself to be bound by the PMA in England and acted to ameliorate its effect.

[60] The parties are Swedish and the wife lived her entire life in Sweden prior to the marriage. PMAs are both commonplace and binding in Sweden. The brief document signed by the wife was in absolutely standard form, written in Swedish and which the wife agreed she understood. The agreement was to be subject to Swedish law. Under this standard agreement the parties elected a regime of separate assets with no delineation as between inherited and other kinds of wealth, all of this in contemplation of their married life being in England not Sweden.

[61] The judge had the benefit of the opinions of three Swedish commentators on family law who confirmed that such formal requirements for a PMA as existed in Sweden at the time were complied with. Further, neither the absence of, nor lack of opportunity to take, independent legal advice (nor the proximity of the signing to the ceremony) would of themselves offend a Swedish court.

[65] In my judgment, **when an English court is presented with a PMA such as the present one, signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to Radmacher to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system**.

[182] **In the case of a globe-trotting couple, it would require the giving of advice about multiple possible matrimonial regimes all over the world. That seems to me to be both impractical and prohibitively expensive. Moreover, if the move from one country to another is not anticipated at the inception of the marriage, why should a couple seek such advice on the off-chance that one day they might move?** It is also, in my judgment, inconsistent with the Supreme Court's discussion of 'the foreign element' in Granatino v Radmacher.'

92. Cusworth J then went on to say as follows:

[70] 'Here, there is agreement that absent the contract all of the assets which the parties now have would be categorised as matrimonial, and so subject to the sharing principle. But that does not mean that their agreement can be classed as one that was unfair from the start. After all, there was plenty of consideration for this wife in her being offered protection from possible entrepreneurial failures that might have bedevilled the husband's future. And I am entirely satisfied that in 2001 this couple saw themselves completely as a French couple, regardless of where they were choosing then to work.

[71] What neither of them could with any accuracy have foreseen is the very significant fortune which the husband has now amassed through his business activities. **There can be no doubt that the wife has been fully contributing to a long marriage, so the question that I must ask myself, in fairness, is whether, in the events that have since happened, the contract which this couple signed in Hong Kong in May 2001 should now have the effect of significantly reducing the value of her claim**. Of course, the fact of the contract of itself has a significant bearing on fairness, as does the fact that, throughout the length of this marriage, there is evidence that the wife has understood the consequences of the regime that this couple adopted, and whilst she has sought to ameliorate its impact in the past, she has never apparently sought to alter it. I have to consider whether in those circumstances it is now fair to the husband to tear the agreement up, as the wife suggests.'

Outcome

93. The judge went on to consider what should be the outcome of the case without applying the sharing principle. The judge said he had to weigh the fairness to the husband of the court upholding the contract which the parties understood and accepted throughout their marriage against the contributions of the wife over that same period. The judge referred to "needs" as a misnomer when parties are debating the division of an asset base valued at up to £100 million which is not need at all but rather the provision of an appropriate lifestyle and capital base to provide for the recipient appropriately for the rest of their life in all the prevailing circumstances. The judge adopted the test applied by Moor J in *CMX v EJX* [2022] EWFC 136 when he said:

> [48] 'Finally, I would have to consider her needs. It is clear to me that this is a case where I do not need to consider issues such as whether she will be reduced to 'a predicament of real need' as referred to in *Radmacher*. There is nothing in this Marriage Contract that prevents an award based on needs. As Eleanor King LJ said in *Brack*, in deciding on her needs, I would have to consider all the s 25 factors. This was a long marriage where the wife made a full and complete contribution in every respect. There are very significant resources available. The standard of living enjoyed during the marriage was high. The husband's income was very high and large capital resources were generated. I am quite clear that any award based on need should be generous and complete.'

94. The judge referred (and effectively held) the husband to an early open proposal (not the proposal adopted at trial) to transfer to the wife the family home in London free of any borrowing (£7.65m net) and the property on the holiday home also free of any borrowing (€8.95m net), and to pay a lump sum of a further £9m which came to £22.5m.

95. Cusworth J then concluded as follows:

> [101] '**Having formed that clear view, I turn to consider whether such an outcome would be fair in all the circumstances of the case, or whether, notwithstanding my findings above in relation to the contract, there should nevertheless be an additional element of sharing to this award. I anticipate that, if ever there were to be a case for such an outcome, it would be in a case with a background such as this where significant assets have been built up during a long marriage, but that by reason of an agreement at the outset the right to a sharing outcome at the dissolution of the marriage has apparently been waived. However, after careful thought, I am satisfied that this is not a case where an element of sharing is required to achieve a fair outcome**.
>
> [102] To now import a sharing element into the award would not in my view be a fair outcome for the husband who has throughout the marriage understood that the *separation de biens* agreement was both understood and operative. I accept that this couple have kept their finances separate during the marriage, other than in the placing of family homes into joint names, which the wife has understandably been anxious to secure, as explained above.
>
> [103] Furthermore, an outcome for the wife which leaves her with liquid assets worth very nearly £23m is on any view a substantial award. As a proportion of the whole pot, which I accept by nature is entirely matrimonial, it is somewhere between 20% and 26% of the assets. Whilst this is certainly less than a sharing outcome would have produced, it nevertheless is an amount that does properly reward the wife's contribution. At that level, I am satisfied that no compensation arguments arise, for she could not have hoped for a more secure financial future by her own efforts if she had not made the significant career sacrifices which I acknowledge that she has, both in following the husband to Hong Kong at the outset of their relationship, and then in giving up her job in London when its continuation would have required a relocation to Germany.

[104] I am satisfied that this award is fair to both parties, in all of the circumstances of the case, applying as I do the principles in the MCA 1973, and considering in particular the matters identified in s.25.'

96. Practitioners need to be aware that the English court will hold parties to the terms of a marital agreement even if was not prepared in England or drafted by English lawyers. If the parties are found to have had all the information material to their decision and intended that the agreement would govern the financial arrangements on divorce then, subject to needs being met, the English court is likely to find that fairness may justify holding the parties to that agreement.

30 August 2024
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