International Comparative Legal Guides

Family Law 2021

A practical cross-border insight into family law

Fourth Edition

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The Practice of International Family Law


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Introduction

"International Family Law" is not a standalone discipline. It means different things to different people – indeed, even "family law" does not have a single accepted definition: for example, in some parts of the world it would encompass succession law, whereas in others it does not. In some places the word "international" in a family law context has come to be synonymous with "jurisdiction" and so covers family law issues arising within the boundaries of one country. What is clear is that if you work with families who have connections with more than one legal system, then you do need some specialist knowledge – even if that is only to know what you do not know!

In this chapter, we will identify the areas of family law which may involve international elements and what those elements might be. Here we do not seek to tell you about the law in any given part of the world – the chapters will give you some general information on that score – but what we will do is give you an indication of how a practitioner should think and what he or she should do in the event that a set of circumstances with an international element presents itself.

It is important that lawyers do not give advice on foreign law unless they are qualified to do so; it is sometimes tempting. There are, of course, a number of internationally recognised conventions and instruments which certain jurisdictions have signed up to (for example, instruments that bind EU Member States and various Hague conventions and protocols which have international reach) and lawyers need to understand whether any such international instruments have relevance in their legal system, or in other systems that may apply to the family in question. There is often no universal application either and, therefore, you also need to understand how they will be interpreted in the other system(s). Being able to contact a specialist family lawyer in another jurisdiction is invaluable; he or she will be able to provide chapter and verse on whether or not that particular country has jurisdiction, as well as give you advice on what the law is and how it is applied. A lawyer who is experienced in international work will also be able to work with you to maximise the outcomes for your clients across legal boundaries.

After that brief homily, the best thing to do may be to deal with each area of practice under its own heading.

Divorce/Financial Provision and Cohabitation

There are four things that must be thought about when it comes to divorce:

- Which jurisdiction(s) can entertain proceedings?
- What elements would they be capable of dealing with – the divorce, financial provision, children issues?
- What law would they apply?
- What would they do if there were competing proceedings elsewhere?

There are various publications setting out, for the benefit of the family law practitioner, how the substantive divorce and financial matters on divorce are dealt with in different jurisdictions throughout the world. You will need a lawyer who knows the law in their particular jurisdiction, but you will also need a lawyer who is used to dealing with cases with jurisdictional elements. For many practitioners now, this is at the heart of their international practice. This is because we may be confronted with jurisdiction races, or forum shopping, where one party tries to divorce in one jurisdiction and the other wishes to divorce in another jurisdiction.

In the EU, a Regulation known as Brussels IIa (Council Regulation (EC) No 2201/2003) has been with us since 23 November 2003. All members of the European Union (apart from Denmark) are bound by the Regulation, which provides a set of rules to determine jurisdiction to entertain, and then progress, divorce proceedings. The UK, although no longer a Member State, will continue to apply the Regulation until the 31 December 2020 (and the EU Member States will treat the UK as though it was still a Member State until then). There may be multiple places which would have concurrent jurisdiction to deal with divorce, so the Regulation provides rules which are designed to avoid competing proceedings or the risk of irreconcilable judgments. Note though, that the Regulation does not proscribe the grounds for the divorce itself, which remains a matter of national law – the Regulation simply deals with the PIL rules that provide for whether a state would be able to entertain a divorce.

This is not the case in respect of countries outside the EU where we should never assume that we know what is required in order to found jurisdiction to raise divorce proceedings. There are many jurisdictions (both within and outside the EU) where the parties must have been living separately for a period prior to issuing divorce proceedings (such as Italy, Ireland and Australia). Under Brussels IIa, first in time counts for everything; outside Brussels IIa, there is still the possibility for there to be an argument about which is the more "appropriate" forum (*forum non conveniens*), although first in time counts for a great deal as between many jurisdictions. The mechanics for dealing with issues, such as where the divorce should take place, are complex.

It might be considered by many that the venue of the divorce itself is of relatively little importance compared with which jurisdiction the finances will be dealt with. The stress of determining where the divorce is dealt with is usually exacerbated by the fact that, once the divorce jurisdiction is established, that is where the finances will normally be dealt with. It does not necessarily follow in every jurisdiction that finances have to be dealt with in the jurisdiction where the divorce is and, certainly in EU countries, the Regulations that apply expressly allow for

the separation of different elements across jurisdictions. For example, you could have a situation where the divorce and some financial elements were dealt with in Spain, the maintenance elements (as between the couple) in France and the childcare elements in England and Wales. Usually the norm, however, is that the jurisdiction to deal with financial claims flows from the jurisdiction to deal with divorce and many countries have no freestanding jurisdiction to deal with financial issues resulting from a marriage in the event that divorce proceedings have been issued elsewhere. For example, in the case of *K v K* (*Leman-Klammers v Klammers* [2007] EWCA Civ 919), a couple living in England, who were both French, had the jurisdiction to divorce either in France or in England. The petitions were issued on the same day in each jurisdiction and the question that the courts in both jurisdictions had to consider was which one was first in time. After a long argument, it was ultimately established that the English petition was first in time and the financial aspects of the divorce followed on in England. The wife in that case was able to claim significantly more than she would have done had the divorce happened in France. These kind of competing proceedings, "forum shopping" matters, are fairly common now (although it is rare for petitions to be filed on the same actual day) precisely because there is no harmonisation of laws relating to the division of assets on divorce or the levels of and extent of maintenance, which extend to very different outcomes in different jurisdictions.

Outside the EU, where the *forum non conveniens* rule may apply, or in EU states where they recognise this doctrine and the competing proceedings are outside the EU, it may be necessary to apply for a stay in the jurisdiction where the other party has served proceedings and/or even an anti-suit injunction (if such injunctions exist in the relevant jurisdiction – not all jurisdictions purport to exercise extra-territorial jurisdiction as is the case with, for example, England and Wales and Australia). These matters are complex and the outcomes are very often unpredictable because they tend to be dealt with on a discretionary basis and there is not always a lot of precedent.

There is no national or federal law, with the exception of aspects of child support and child abduction, in the United States with respect to family law. There are 50 states in the United States each with their own family law approaches, particularly relative to financial matters.

As set out above, although finances are nearly always dealt with in the same jurisdiction where the divorce takes place, this is not invariably the case. For example, under the EU Maintenance Regulation (Council Regulation (EC) No 4/2009), it is possible to have issues of support dealt with in a different jurisdiction from where the divorce is taking place. The Maintenance Regulation again provides jurisdictional bases for making applications, allows for choice of court for some claims and is very helpful in terms of enforcement. It does, however, change a lot in the day-to-day practice of the courts and we are still finding our way in terms of how it operates as between the EU Member States.

In England and Wales, under Part III of the Matrimonial and Family Proceedings Act 1984, it is possible for the English court to consider or reconsider a financial claim after an overseas divorce (there is also similar, but usually less generous, provision in other jurisdictions, for example Scotland and some states in the United States). This is possible whether or not there was a financial order made in the other jurisdiction. This is frequently criticised by other countries as allowing an applicant to have a "second bite of the cherry". It originated in order to deal with a number of cases where a divorce had taken place in a jurisdiction where the non-working wife was entitled to no financial provision and the courts of England, where she lived, were powerless to provide for her. The English court is cautious about re-opening these matters and there has to be a substantial connection with England and Wales for it to do so, but it has been established in case law that an applicant is able to make such a claim without having to establish particular hardship.

One significant difference between common law jurisdictions, such as most of the English-speaking countries in the world, and civil law jurisdictions, often in non-English-speaking countries, is that civil law jurisdictions tend to have matrimonial regimes. There are also a number of hybrid civil and common law jurisdictions, like South Africa and Scotland. Where there is a matrimonial regime this means that, on marriage, couples are deemed to hold property in a particular manner, either at that time or deferred to a future date. The nature of the regimes varies in different jurisdictions, but the default regime in many jurisdictions is that the assets acquired during the course of the marriage are shared equally, usually excluding gifted and/or inherited assets and assets created or acquired prior to the marriage. The regimes are concerned with division/ownership of property during the marriage, not questions of maintenance or what will occur on divorce, and there is a marked distinction between the two in civil law jurisdictions. The job of the family courts in many civil law jurisdictions is first to divide the property in accordance with the matrimonial regime and, secondly, to deal with any questions of maintenance (in addition, of course, to dealing with the divorce itself). The courts normally have little discretion regarding the division of property as that division is already established in law. This is quite different in the common law jurisdictions where the court tends to have more discretion in respect of the division of property.

There are significant differences in how the issue of maintenance is dealt with in various jurisdictions across the world. For example, in England and Wales alone, it is well-known that spousal periodical payments are "generous" compared with other jurisdictions and are often ordered on a "joint lives" basis, although there has been some movement away from that now. By contrast: in Scotland, spousal support is uncommon after divorce with any need to help a party adjust to the loss of support that will ensue after divorce being capitalised to effect a clean break if possible; in Sweden and Finland, the concept of spousal maintenance barely exists; in Australia and many other countries, joint lives spousal maintenance orders are very rare; in England and Wales, there is an obligation on the court to try to achieve a "clean break" between the parties, but this will often involve a capitalisation of the maintenance payments which is only possible where there is a lot of money; in France, maintenance is dealt with by way of a lump sum called a "*prestation compensatoire*"; and in other countries, the calculation of maintenance is rather formulaic. In short, there is little consistency around the world and often huge variations of approach within one jurisdiction, for example, Northern and Southern Germany and within one country (made up of different jurisdictions), like the UK and the United States.

The United States, in particular, has seen a real backlash on the matters of spousal support. The question of when support will end is the subject of legislation in many states. There are also efforts to limit the amounts of the awards. Further, there is now a very real expectation that both parties to the divorce proceedings contribute to their own support. In some cases, income will be imputed to a dependent spouse regardless of their actual earnings. There have been significant changes recently in the tax treatment of spousal support in the United States, which is very much a hot topic there and may impact markedly on outcomes.

Whether or not parties have been married is critical to the sort of provision that can be made when they separate. Many

religious marriages, for example, are not recognised if they take place in a country like England, but might be recognised by the English courts if they take place abroad and conform with rules for marrying validly in another jurisdiction. Some summary overseas divorces will not be recognised either in some jurisdictions. Most United States courts will only recognise marriages where the law of the place of marriage comports with United States recognition of individual rights. Again, this is a state-by-state topic with some recognising marriages under Sharia law and others not.

The availability of financial provision following cohabitation varies hugely across the world and often is not as one might expect. For example, in the UK, the law of England and Wales does not give the courts power to deal with the allocation of finances at the end of a period of cohabitation (other than in limited circumstances where rights in property ownership have been established under trusts law and/or where there are minor children), whereas in Scotland former cohabitants have statutory rights to make financial claims.

When it comes to the enforcement of orders made abroad, whether they fall under the heading of "maintenance" or "property division" is often a crucial factor. European Regulations, Hague and Lugano Conventions and other legislation have assisted in this as far as maintenance is concerned, but there are still issues with the enforcement of capital orders. It is important to remember that sometimes capital orders which are made to provide for the needs of an individual may very well fall under the heading of a "maintenance" order, even though they are not periodical payments and can therefore benefit from some of the enforcement provisions that exist.

Child Abduction and Relocation

In an increasingly globalised world, disputes between parents over their children's country of residence are on the rise. At its most extreme, this field can involve the unlawful removal of a child to another jurisdiction by one parent. Although removing a child from the jurisdiction without permission of the other parent is generally against the law, domestic courts are inherently unsuited to dealing with such cross-border issues, lacking the ability to have their orders enforced without government involvement. As a result, various international agreements exist to combat child abduction. It is worth noting that whilst some countries are not signatories to the 1980 Hague Convention on Child Abduction (see below), there may be bilateral agreements between individual states that deal with this issue (for example, as exists between Pakistan and the UK). If the state is not one of the 101 parties to the 1980 Hague Convention, the solution may have to be found through diplomatic routes as opposed to legal ones.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction is an international agreement that seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. There are procedures to ensure the swift return of any children unlawfully removed (or retained) from their country of habitual residence. There are various conditions that must be met for the 1980 Hague Convention to apply. The Convention is a state-to-state treaty which means that party states have an obligation to each other to ensure that the Convention is upheld in their domestic law.

The jurisprudence on the Convention comes from across the world, and there are significant complexities. In somewhat overly simplistic terms only, therefore, some of the critical elements are that the child in question must be under the age of 16 and must have been (prior to the removal or retention) habitually resident in the state in respect of which the return application is being made. Moreover, the applicant parent (or in some cases, applicant institution) must have had rights of custody over the child in question.

Providing that the application is made within 12 months of the wrongful removal, the courts of the country where the child has been taken/is being retained are required to order their return forthwith. These courts should in theory deal with the matter within six weeks. Various defences exist that can prevent a return order being made, such as the other parent consenting to the removal or a risk of grave physical or psychological harm if the child is returned. Generally speaking, the 1980 Hague Convention is an effective method of swiftly returning children who have been unlawfully removed from their home jurisdiction, if an application is made within 12 months. However, once the child has been absent for over a year, the return process is more difficult. In some jurisdictions, courts are able to use domestic law powers to return a child, even if a return under the Convention is not made out. In 2019, the IAFL intervened in a case before the United Kingdom Supreme Court – "In the matter of NY (A Child)" (https://www.supremecourt.uk/cases/uksc-2019-0145.html). Practitioners from 17 different jurisdictions gave information to the UK courts about the extent to which their courts would use domestic, inherent jurisdiction, powers (or not) and how Article 18 of the Convention was interpreted in their jurisdiction. You can find out more about the submissions made on behalf of the IAFL at http://www.iafl.com and the judgment can be found here: https://www.supremecourt.uk/cases/docs/uksc-2019-0145-judgment.pdf.

The law in this area is fast-moving, and you should be sure to review the case law on the relevant Article(s) of the Convention on the INCADAT website (https://www.incadat.com/en). The outcomes are often not as people would anticipate, as there is often an erroneous assumption that the court will be concerned about the welfare of the child when the issues should not generally have great regard to such matters – which should be for the court of the child's habitual residence to deal with. For example, in the case of Re L (1980 Hague Convention) (Lithuania) [2015] EWCA Civ 720, the court returned an 11-year-old child to a country, contrary to her wishes. The case concerned an application to return an 11-year-old girl to Lithuania. The mother, who had brought the child to the UK, resisted the application on the basis that the child objected and that there was risk of grave physical/psychological harm if she were to be returned to Lithuania. The Court of Appeal in England and Wales upheld the decision of the lower court that the child should be returned to Lithuania. Although the child in question wished to remain in England, the court noted that the issue of the mother's influence weighed heavily on the trial judge's mind. As such, considering all the circumstances of the case, the child was returned to Lithuania.

There are other relevant Hague Conventions, too; for example, the 1996 Hague Convention (https://www.hcch.net/en/instruments/conventions/full-text/?cid=70-), usually known as the "Protection Convention". This Convention bolsters the provision of the 1980 Convention in some respects and extends provision for children who move internationally, beyond the child abduction regime; for example, by including provision to allow orders made in different jurisdictions to be enforced. For example, if a child has been unlawfully removed and there is an order in favour of the left-behind parent in their country of habitual residence, the order will be enforceable in other jurisdictions. In some cases, this can offer a second route to pursue for left-behind parents in a child abduction scenario. The 1996 Convention applies to children up to the age of 18. There are only 52 contracting parties to the 1996 Convention.

Brussels IIa also contains provisions relating to child abduction between EU Member States, and these build on and enhance the 1980 and 1996 Hague Convention provision. Brussels IIa can therefore be useful as it contains better provision in a number of respects.

Private Children Law

As parents move from state to state, either with or without their children, various legal issues arise. The most obvious issue for people with children relates to cross-border relocation, but the international context also touches upon enforcement of orders and jurisdiction.

i) Leave to Remove (Relocation)

Many parents choose to pursue international relocation through the courts by an application for leave to remove the children from another jurisdiction to "go home", to follow a job or a new partner or for a lifestyle choice. Regrettably, many parents (and lawyers!) do not realise that it is a criminal offence in many parts of the world to remove a child without the appropriate consent, generally of every party with parental responsibility, or without an order of the court. Generally, the need for written consent of all those with parental responsibility (or from the court) being required before a child can be removed exists in many countries. There are significant differences across the world, however, especially in some Sharia-based systems or when it comes to the role of the views of the child or young person.

In most countries, the welfare of the child is the paramount consideration. Different states determine this in different ways, and there is also considerable variation in the extent to which the court will have regard, and give weight, to other factors. For example, some states will give fairly significant weight to the desires and welfare of the parent making the application to move (framing that often as impacting on the child). Many other states, however, adopt a tougher approach to international relocation, whilst still characterising this as coming from a "welfare" approach. For example, in Germany, a parent can only lawfully remove a child from the jurisdiction if the other party consents or if they are granted sole care of the child by the court. This is relatively rare and decided with reference to the best interests of the child. Case law in Germany has tended to focus on deficiencies in the care of the other parent when granting permission to relocate, resulting in a much stricter approach. There can be significant subtleties from state to state that need to be understood before a strategy is adopted. For example, within the UK, there have tended to be different outcomes – applications for relocation tend to be more successful in England and Wales than Scotland, and in the United States you will find a variety of approaches to a motion for relocation; however, the trend is generally to prohibit.

There is no parallel provision to the 1980 Hague Convention on International Child Abduction with regard to leave to remove applications. However, this area of law is showing some nascent signs of harmonisation. At the International Judicial Conference on Cross-Border Family Relocation in Washington, D.C. in March 2010, this issue was considered. Over 50 judges and experts signed a declaration that there should be no presumption either way when matters of international relocation come before a court: welfare should be the determinative principle.

Overseas relocation can also engage Articles 6 and 8 of the European Convention on Human Rights (ECHR) (the right to a fair trial and the right to respect for private and family life, respectively). The ECHR requires that states scrutinise and evaluate the parents' plans with reference to the proportionality principle, especially in light of the links being severed between the child and a parent.

ii) Jurisdiction

As would be expected, the primary basis for jurisdiction in most states is the habitual residence of the child. If habitual residence cannot be established, then the state where the child is present will likely have jurisdiction. There are some exceptions to these general rules, but they are rather limited. Most take the form of a lingering jurisdiction from a previous country of residence and require the consent of all parties, but some Sharia-based systems do provide for jurisdiction based upon parentage.

In the United States, there is a uniform law known as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), generally adopted in most states, which provides that jurisdiction is where the child has been a resident for six months, with some exceptions.

Beyond this, Brussels IIa governs jurisdiction between Member States of the EU, in relation to the allocation, exercise and restriction/removal of parental responsibility. However, it does not cover all issues, with notable exclusions being the establishment of parent-child relationships, adoption, maintenance obligations, trusts and succession and the determination of a child's name. The main areas of private children law, such as custody and rights of access, are expressly included – again, this is because the EU law in the arena of family law is directed not at the substantive law (which remains a matter for states themselves), but rather at the PIL provisions as between the Member States.

As would be expected, in EU Member States, the primary basis for jurisdiction is the habitual residence of the child. If habitual residence cannot be established, then the state where the child is present will have jurisdiction. There are some exceptions to this general rule, but they are rather limited. One exception is when a child lawfully moves to another jurisdiction within the EU. The state the child has just left retains jurisdiction for three months for the purpose of modifying a judgment on access rights.

Another exception applies where matrimonial proceedings are ongoing in another jurisdiction. Jurisdiction will be established in relation to parental responsibility connected with the application if at least one spouse has parental responsibility for the child and jurisdiction has been unequivocally accepted by the spouses and all holders of parental responsibility, and it is in the best interests of the child to do so. This jurisdiction comes to an end when the proceedings for divorce/separation come to an end, and final judgment is given in the relevant proceedings.

iii) Enforcement

In terms of enforcing existing orders, in the EU, Brussels IIa has provision to ensure that access endures when the parties move between Member States. This is by a mechanism called an "access order". A certificate will be issued by the original judge, certifying that all parties (and the child) have had the opportunity to be heard and that the respondent party has had the chance to prepare a defence. The access judgment will become automatically recognised and enforceable in all Member States. The enforcement process will be determined by the Member State. However, it is worth bearing in mind that in some states there will also, concurrently be jurisdiction to make a fresh application to the new state's court. In this sense, access rights

are far from guaranteed. There will soon be changes to the enforcement regime, which should make it easier still to have recognised and enforced orders from another EU Member State – these come from the recast of Brussels IIa, which is likely to come into effect in 2022.

Outside of the EU, the solution may be to seek a "mirror order" of a foreign judgment in the home jurisdiction, or vice versa. This is essentially an order in the same terms as the foreign order. This can be useful in international relocation cases, requiring the relocating party to undertake to secure an order relating to access in the new jurisdiction before leave to remove is granted. Again, this is not a straightforward area of law, as some states will not make an order before the child is within that court's jurisdiction and there is no such thing as a mirror order. For example, in India, the courts will not consider mirror orders and will begin every examination afresh. This matter can become particularly complicated in Islamic countries where the matter is complicated by Sharia compliance and the fact that many of these countries have not adopted the 1980 Hague Convention.

iv) Child Support

Child support again is a matter of domestic law. Jurisdiction is not always only with the courts in the place where the child is habitually resident and in some places you can, for example, sue in the place where the maintenance creditor (payee) is. As there can, again, be variations from place to place in relation to outcome, advice should be taken on where there is jurisdiction and the likely range of outcomes one might expect. The extent to which child support can be claimed and/or enforced across jurisdictions varies hugely. In some jurisdictions, a formula is applied, whereas in others it is a matter for the courts to determine what amount should be paid.

Should a court order child maintenance, or there be an entitlement under the regime in any given state, in respect of the parent outside of the jurisdiction, it will need to be enforced. There are a number of international arrangements that exist, including the 2007 Hague Convention – known as the "Maintenance Convention" – and there are also a number of reciprocal enforcement of maintenance orders (REMOs) arrangements between various countries. There is provision specific to EU Member States in the Maintenance Regulation. These treaties can ensure payment when the paying party lives outside of the jurisdiction.

The Hague Conventions

These are conventions proceeding from The Hague Conference on Private International Law (HCCH) – a number have already been touched upon. The Hague Conventions are relevant to international family law in terms of developing both substantive law and procedure. Although the most well-known convention relates to child abduction – the 1980 Convention – the Conventions also cover a range of other important areas, many of them procedural. They include the Hague Service Convention 1965, The Hague Evidence Convention 1970, The Hague Convention on the Recognition of Divorces and Legal Separations 1970, The Hague Trusts Convention 1995 and a number of others, some of which have been used as the foundations of EU instruments that enhance the provision for EU Member States.

Trusts and Other Financial Vehicles

The power of the court to interfere with trusts varies hugely. Trusts are essentially a common law concept and often misunderstood, and mistrusted, by the courts in civil law jurisdictions. Many jurisdictions will struggle to deal with assets held in a trust in the context of financial proceedings on divorce.

It is probably in the jurisdiction of England and Wales that the trust is most prevalent. The court there has the power to vary a "nuptial settlement" as part of financial proceedings (including a structure that they define as a "nuptial settlement" drawn under the law of another place). There is no precise definition of a nuptial settlement, but case law has drawn a wide net when considering this issue. It is some form of settlement which makes continuing provision between spouses and can be created before or after marriage. The court should not interfere with the settlement further than is necessary and must be wary of the impact on third parties.

There are many other financial structures that are used commonly – for example, there are many partnerships drawn under the law of Delaware, to benefit from the legal regime there, where otherwise there is no other Delaware connection. You may well need to get advice on the structure in the relevant jurisdiction, as well as considering how your own jurisdiction should deal with it – both in the context of the financial provision application, and also when it comes to variation and enforcement against the trustees/officers.

Whether or not variation is possible in your jurisdiction, as ever with assets based outside of the jurisdiction, enforcement will always be an issue. A trust outside the jurisdiction may well also hold assets in England and Wales. It may therefore be possible for an English court to have recourse to this property if it can be argued that it is "available" to one of the parties.

Procedure

Even if the substantive differences in the law have been addressed, the procedural idiosyncrasies of any jurisdiction must also be considered. It is crucial to look beyond the letter of the law to see how family proceedings will actually play out in practice. On a general level, the differences in the substantive law can impact on procedure. For example, in Brazil there is provision for "no-fault" divorce and parties can attend court with their marriage certificate, ID documents and a fee in order to obtain a divorce and in France there is now a non-court-based option for divorce. In contrast, the procedure in England and Wales can take much longer as divorce requires a justification and a sequence of paperwork to be lodged at court. Procedural differences also arise in some more discrete areas, such as disclosure, court process and timing.

Disclosure is one element of procedure in financial disputes that can have a huge bearing on the final outcome. A range of approaches exist across different jurisdictions. Common law jurisdictions tend to have more robust disclosure procedures. In California, for example, each spouse must fully disclose to the other all material information concerning the existence, characterisation and valuation of all assets. This duty is ongoing, meaning that updating disclosure is required up until each asset has been dealt with by the trial judge. Moreover, the onus is on the asset-holder to disclose information; it is not a defence to argue that the other party did not ask the appropriate questions. Monetary sanctions exist if disclosure is inadequate. The law in England and Wales is similar, requiring robust disclosure. Failure to disclose can result in two outcomes: if non-disclosure is suspected at the hearing, the court can (and frequently will) make assumptions as to the withheld information and adjust its order accordingly; or if non-disclosure comes to light after an order has been made, then there is the possibility for the matter to be reheard depending on how material the non-disclosure was.

In contrast, in some other jurisdictions, disclosure is minimal. This is particularly true in continental Europe. Many civil law

countries adopt the "hide and seek" approach. For example, in Austria and Scotland, there is no obligation on a spouse to disclose their assets. They must only do so if the other party makes a specific demand. As such, there is no effective way to guarantee a full and accurate picture of the assets of both parties. There are "declarations of honour" in some jurisdictions and not a lot more; in many civil law jurisdictions the lawyer's first duty is to the client and not to the court, which leads to less openness in financial proceedings on divorce. Where one is dealing with proceedings, or possible proceedings, in common law *vs.* civil law jurisdictions, these procedural differences may actually tip the balance in deciding where to try to proceed.

Accommodation must also be made for the differing court processes across the world. For example, common law jurisdictions tend to adopt an adversarial model, in which each party (or their advocates) will make representations and examine witnesses in front of a judge who will then make a decision. In contrast, many civil law jurisdictions will involve a judge engaging in a fact-finding exercise and questioning the parties directly, often for very limited time, with the majority of the process being undertaken in writing.

Summary

As can be seen, "International Family Law" is not a discrete field of law, but rather a more nebulous body of knowledge and experience that touches upon various aspects of a domestic family law practice. Many areas of international family law still resemble a patchwork of different approaches, and whilst other areas are embracing harmonisation, that is perhaps less the case in family law; certainly, in relation to substantive law, if not recognition and enforcement. Therefore, it remains crucial, now more than ever, for lawyers to seek specialist advice from a lawyer who knows the law in their own jurisdiction and has experience of international family law work.

Rachael Kelsey is a Scottish lawyer, who works in Edinburgh and London. She is one of only three Scottish lawyers in the Chambers and Partners *HNW Guide 2020*, the only Scottish lawyer in the *Spears Family Law Index 2020*, and has been in the top rank of *The Legal 500* and *Chambers and Partners* for well over a decade. She is President-Elect of the European Chapter of the IAFL.

The current edition of *The Legal 500* notes that "Rachael Kelsey is the go-to person on Scottish family law issues. She has accurate working knowledge of the law, a wonderful charm and an ease at being with demanding international clients" and describes her as "the doyen of Scots family law".

Rachael provides expert opinions on Scots law for courts outwith Scotland. Many of her cases have international or intra-UK jurisdictional issues, an area of specialism for which she is particularly well-known, not least as a result of her involvement from the outset in *Villiers v Villiers*.

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As a Fellow and past president of the American Academy of Matrimonial Lawyers, Marlene wrote and published "*What To Tell Children*", which is printed in both English and Spanish. She is currently president of the International Academy of Family Lawyers, having served as president of the U.S. Chapter. Marlene is one of only 100 members across the country selected as a Diplomat of the American College of Family Trial Lawyers and serves as secretary and an executive committee member of the organisation. She is also a board member and past president of the Tennessee Supreme Court Historical Society. Marlene was campaign chair for the Legal Aid Society of Middle Tennessee and a founding member of Middle Tennessee Collaborative Alliance. A Leadership Nashville alum, she is a board member and campaign co-chair of Family & Children's Service. Her chief hobbies include yoga, barre classes and walking. She and her late husband, Robert, are the parents of three grown children, Marissa (a partner in MTR), Caroline (a marketing manager at Nissan) and Ryan (an executive in family spirits business, Best Brands).

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