International Divorce — conflicts of law and harmonisation in Europe? What can we expect in 2015?

14 JANUARY 2015

CATEGORY:
BLOG

Over the last few months of 2014, a number of judgments have been handed down which deal with issues flowing from divorce in this jurisdiction between foreign nationals, notably from Italy and France. One hot topic, upon which practitioners are keeping a keen eye, is the scenario whereby divorce proceedings are brought before courts of different member states and there is a contest as to whether jurisdiction has been firmly seised in one country or another. This can, of course, have a major bearing on the consequential financial claims available to the parties. Another is the significance (or lack of) afforded by the Family Court in England and Wales to foreign marriage contracts (as distinct from prenuptial contracts or agreements). English courts apply English law, but the existence of a foreign marriage contract will, more often that not, have an important role to play in the consideration of the parties' intentions and plans at the commencement of their marriage, even more so, since Radmacher v Granantino gave the judicial thumbs up to party autonomy. **The race to divorce first in Europe** : **France v England** Looking at the first topic, Mostyn J, direct and to the point as ever, has sought clarification from the Court of Justice of the European Union as to when and how the French Court has seised jurisdiction in the context of separation proceedings which precede divorce proceedings. In the case of S v S (Brussels IIr: Articles 19(1) and (3): reference to CJEU) [2014] EWHC 3613, both parties were French. The husband issued judicial separation proceedings in France. The wife then filed a divorce petition in England. This was dismissed by consent, the jurisdiction of France having been established under the Brussels IIr Regulation. Later, the husband filed for divorce in France but this was also dismissed, because the judicial separation proceedings were continuing. Under French law, the judicial separation suit would lapse after 30 months, when the clock struck midnight on 17th June, but whilst these proceedings remained alive, neither spouse could start proceedings for divorce. This gave the husband an advantage in issuing his divorce petition in the court in France before the wife could issue her petition in England because of the time difference between the two countries. The question referred to the ECH was whether the jurisdiction of the French Court in the divorce proceedings had been 'established' by the husband in France by his issuing judicial separation proceedings, albeit he had done nothing to progress the separation proceedings for over 30 months. Was due diligence a prerequisite to seising of jurisdiction? A response is awaited. **Italy v England** In another jurisdiction race case, Ville De Bauge v China [2014] EWHC 3975, Article 19(1) of Brussels IIr was under the judicial spotlight again, this time in tandem with the Italian Family Court. This case centred on whether the principle of lis pendens (case pending) applied between Italian separation proceedings and subsequent English divorce proceedings. Here, the wife was a French National residing in London and the husband was an Italian National, residing in Italy. The parties' marriage broke down in 2008 and in October 2008 the husband issued a petition for personal separation in Italy. Whilst this is a separate process from divorce, in Italy (unlike France or England) it is a necessary precursor to divorce in the Italian court. In December 2008, the wife issued a divorce in England, which was stayed by the court of its own motion. The wife challenged the basis of the husband's separation petition in Italy but eventually, the Italian Court made a ruling as to legal separation in November 2012. The wife then issued a second divorce in England in 2013. However, even though the Italian Court had made the separation order, it would not become final until served by either of the parties on the other and either then, only after a 30-day appeal period had elapsed. As and until the separation order became final, proceedings were continuing and neither party had the right to start divorce proceedings. The husband finally served the separation order on the wife in July 2013 and 30 days later promptly issued a divorce petition in Italy. The joint expert on Italian law in the case confirmed that the Italian separation and divorce proceedings were separate and distinct. However, the separation proceedings were not final until the time for appeal had expired. Failure to serve was not sufficient to end the Italian court's jurisdiction and during that period the parties' hands were tied and they were precluded from issuing Italian or English divorce proceedings. The husband succeeded in securing jurisdiction in Italy. Can it be right that inaction in separation proceedings should enable one spouse to 'steal a march' on the other in separate divorce proceedings? Surely the purpose of European legislation in this field is to harmonise procedures and minimise forum races. Be that as it may, this case highlights, once again, the reality of the situation: the different procedures and laws which apply to relationship breakdown across European jurisdictions do not fit squarely into a one-size-fits-all European Regulation, whatever its stated purpose. **Foreign marriage contracts — how relevant are they in England?** Turning to the second topic of marriage contracts and prenuptial agreements, what is the latest guidance from the court and how can we best advise clients? Well, according to the judgment of Roberts J, in the case of Y v Y [2014], EWHC 2920, parties to a French contrat de marriage must not only be clear about the consequences of entering into a particular property regime (separation de biens or biens communs, for example) as applies throughout the marriage, but also be clear about the potential implications on the future breakdown of that marriage. Though, under French law, a notarised marriage contract is absolutely binding on the spouses once the marriage is celebrated, and notwithstanding the parties in this case were both found to be highly intelligent, highly educated and capable, the Judge found in divorce and financial remedy proceedings brought in the English Court, that the wife did not fully appreciate the extent to which the contract would govern the financial consequences when the marriage came to an end. A distinction was drawn with the case of Z v Z (No 2) (Marriage Contract) (a case in which Withers acted) where the agreement was upheld and the contract was entered into freely by the parties with a full understanding of its implications. In Y v Y, Roberts J went further than this, however, and endorsed Mostyn J's (arguably controversial) view as expressed in B v S that, to have effect, the parties must have intended the agreement to apply wherever they might be divorced and, in particular, if they were divorced in a regime that operated a system of discretionary equitable distribution (as in England) – an important consideration for our European colleagues. So, we start this year, as we mean to go on, straddling two legal arenas: one based on English private international common law and the other based on the growing body European case law. In the meantime, we await guidance from the ECJ (and should keep an eye on the GMT time-difference between England and the rest of Europe….).