

<p>IAML EUROPEAN CHAPTER YOUNG LAWYERS AWARD 2015</p>
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FACTS OF THE CASE:

- Laura ("W") and Charlie ("H") are both Australian citizens, with H also having Italian citizenship;
- They were married in Australia in 2009 and signed a prenuptial agreement in Australia, where they established their first matrimonial home;
- The agreement foresees that H will not be entitled to make any claims against the separate property of W and that in application of the relevant Australian Act that H or W will receive AUD 1 in maintenance;
- A governing law and jurisdiction clause are included in the agreement electing for the jurisdiction of Australia and the application of Australian law;
- Towards the end of the first year of their marriage, they moved to France for W's job where they are housed by her employer;
- The spouses do not have any children and H is not employed.

To understand the different issues that a French judge will call into question, it is necessary to independently examine how the different financial consequences of the divorce will be analyzed, and namely (i) the liquidation of the matrimonial property regime, (ii) the spouses' eventual maintenance obligations, as well as (iii) the attribution of the former matrimonial home.

PRELIMINARY REMARKS ON JURISDICTION AND THE LAW APPLICABLE TO THE DIVORCE

As both spouses have their habitual residence in France at the time of the divorce petition, French courts have jurisdiction to rule on the divorce of H and W in application of Article 3 (a) of Council Regulation (EC) n° 2201/2003 of 27 November 2003 (known as Brussels II *bis*).¹

In regards to the law applicable to the divorce,² Council Regulation (EU) No. 1259/2010 of 20 December 2010³ allows for spouses to choose the law applicable to their divorce, and in absence of such an agreement, sets out the rules for determining the applicable law.

The governing law clause provided in the prenuptial agreement only covers the provisions set out for the financial consequences of the divorce, meaning that no law would be considered as elected to govern the divorce itself.

¹ It should be noted that H's Italian citizenship will not permit him to file a petition with the Italian courts since he did not reside in Italy for six consecutive months before filing the petition - Ultimate paragraph of Article 3 (a) of the Brussels II *bis* Regulation.

² From a French perspective, this law will also govern, for example, the grounds for divorce, the right for a spouse to keep the name of the other spouse, when the divorce comes into effect etc.

³ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

In application of Article 8 of Regulation No. 1259/2010, the law applicable to the divorce would be French law, as it is where the spouses have their habitual residence at the time of the filing of the petition.

1. THE LIQUIDATION OF THE MATRIMONIAL PROPERTY REGIME

Concerning French courts' jurisdiction to rule on the liquidation of the spouses' matrimonial property regime, no specific rule is foreseen via an international convention or a European regulation. Furthermore, Preamble (8) of Brussels II *bis* states that its provisions do not apply to the "*property consequences of the marriage or any other ancillary measures*".

In the absence of a specific convention or European text, the French default international private law rules apply. These rules foresee that the courts ruling on the divorce also have jurisdiction to rule on the liquidation of the spouses' matrimonial property regime.⁴ French courts would therefore have jurisdiction.

French courts recognize marriage contracts signed abroad and established under foreign law. The contract must, however, be validly formed under the foreign law.⁵ If the contract was validly formed in Australia, no further formality requirements are needed.

Pursuant to French law, for the choice of law to be valid it has to be one of the choices offered by the Hague Convention on the law applicable to matrimonial property regimes.⁶ As the spouses were habitually residing in Australia at the time the agreement was signed and are also Australian nationals, the choice of Australian law would be considered as valid by the French courts.

Even though the spouses did not specifically elect Australian law to govern their matrimonial property regime, the general governing law clause at the end of the agreement would suffice for a French judge to consider that they had effectively chosen Australian law.

Even though the spouses were married under a common law regime, the French courts will assimilate the Australian laws on marital assets to what is referred to in France as a matrimonial property regime and set out ownership rules during the marriage and at its dissolution due to death or divorce.

In regards to which matrimonial property regime would be applied, the prenuptial states only that H has no entitlement to the property and financial resources in Schedule 'B' (Laure's separate property) and does not make mention of any marital property. This clause and the election of Australian law for which the default property regime is considered a separation of assets regime in

⁴ Articles 266 and 255 10° of the French Civil Code; Jcl. Fasc. 420 – *Divorce prononcé en France – Introduction – Compétence des tribunaux français – Particularités de l'instance*, Hélène Gaudemet-Tallon, n°106.

⁵ Article 12 of the Hague Convention on matrimonial property regimes of 14 March 1978: "*The marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses.*"

⁶ Article 3 of the Hague Convention on matrimonial property regimes of 14 March 1978: "*The spouses may designate only one of the following laws - (1) the law of any State of which either spouse is a national at the time of designation; (2) the law of the State in which either spouse has his habitual residence at the time of designation; (3) the law of the first State where one of the spouses establishes a new habitual residence after marriage.*"

France⁷ will lead the French courts to consider the spouses married under a separation of assets regime.

The French courts will therefore uphold the prenuptial agreement on this aspect and will consider that neither spouse can make a claim on the other's personal property under the liquidation of the separation of assets regime.⁸

2. THE SPOUSES' MAINTENANCE OBLIGATIONS UPON DIVORCE

French courts will apply Regulation (EC) No. 4/2009 of 18 December 2008⁹ (the "Maintenance Regulation") to rule on the enforceability of the jurisdiction and governing law clauses stipulated by the spouses concerning their eventual maintenance obligations.

2.1. Enforcement of the jurisdiction clause as regards maintenance obligations

The rules concerning the validity of a jurisdiction clause are set out under Article 4 of the Maintenance Regulation.¹⁰

The Maintenance Regulation applies universally, meaning that it will apply even if one of the spouses is located, at the time of the petition, in a Non-Member State. This does not, however, necessarily mean that the provisions allowing for spouses to elect for the jurisdiction of a Member State to rule on their maintenance obligations, should be extended to Non-Member States.

It could be argued that it would only make sense for the jurisdiction clauses to be universal, as for applicable law clauses concerning maintenance obligations, and that excluding the jurisdictions of non-Member States from the application of Article 4 of the Maintenance Regulation, is too literal of an interpretation.

At least one decision from the first instance court of Paris adopted this approach when it upheld a jurisdiction clause in favor of the courts of a non-Member State to rule on maintenance obligations.¹¹

⁷ The fact that under "the financial provisions of the Family Law Act 1975, the Family Court has the discretionary power to alter parties' property interests on marriage breakdown if it is satisfied that, in all the circumstances, it is just and equitable to make the order" would most likely be considered by the French courts as pertaining more to the spouses maintenance obligations.

⁸ Please see below for how the separate property clause will apply concerning the occupation of the former matrimonial home.

⁹ Regulation (EC) No. 4/2009 of 18 December 2008⁹ on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations and which came into effect on 30 January 2009. The date of the marriage contract is posterior to the date on which the Regulation came into effect. However, it is interesting to note that even if the marriage contract had been signed before 30 January 2009, any governing law or jurisdiction clauses made in accordance with the Regulation would still be enforceable as long as the divorce proceedings commenced after 30 January 2009.

¹⁰ Article 4 : "The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them : ... (c) in the case of maintenance obligations between spouses or former spouses: (i) the court which has jurisdiction to settle their dispute in matrimonial matters; or (ii) a court or the courts of the Member State.

¹¹ Order from the *Juge aux affaires familiales*, 18 March 2013, No. 13/33889, D. Eskenazi, *Qui dit contractuel dit juste, entre la validation d'une clause délection de for de la loi applicable et le contrôle d'une renonciation des époux à une compensation financière*, AJ Famille 2013, p. 376. The judge in this case first ruled on the conformity of the clause providing for a spouse to receive only AUD 1 with French international public order before declining its jurisdiction in favor of the courts elected by the spouses, which were in fact the Australian courts. This was however an erroneous application of international private law rules, as it is not necessary to examine the content of the provisions on which the judge must rule to determine jurisdiction. Furthermore, as the choice of Australian courts was ruled valid, they had exclusive jurisdiction

However, it is debatable whether such a permissive interpretation is justified. First, unlike the provisions for the applicable law in the Hague Protocol or in Regulation n° 1259/2010 on the law applicable to divorce were it is specifically provided that the laws of a Non-Member State may be elected by the spouses, no such provision is included for jurisdiction clauses. Second, the Regulation provides that if the parties grant jurisdiction to a signatory State of the Lugano Convention¹² that is not a Member State, the said Convention will apply. It could be argued then that if the clause is made in favor of a State that is neither a signatory of the Lugano Convention or a Member State that the Maintenance Regulation would not apply and France courts would not be bound by the jurisdiction clause.

This being said, allowing for the election of the courts of a Non-Member State allows for a coherence between the law chosen to govern the maintenance obligations and the court's ruling on the provisions of that law. Giving a universal application to Article 4 of the Maintenance Regulation permits the choice of law clause receive full effect as the outcome could differ greatly between jurisdictions.

In light of this consideration and the one known decision, the French court would most likely uphold the jurisdiction clause, even though it is in favor of the courts of a Non-Member State.

In the event however that French courts would consider the jurisdiction clause invalid, which remains a possibility until this question is further clarified by the courts, several remarks should be made on how the French courts would interpret the provisions concerning the amount of maintenance to be awarded.

2.2. Enforcement of the provisions on the amount of maintenance to be awarded

The Regulation No. 4/2009 refers, in its Article 15, to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. Article 2 of the Protocol specifies that it applies universally, meaning that it is not limited to the laws of Member States.

The choice of Australian law will therefore be considered as valid. After this has been established, the French judge will verify whether the provisions of Australian law and of the prenuptial agreement are compliant with a form of French public order¹³ known as as attenuated public order (*ordre public atténué*), as maintenance obligations in France are typically considered an imperative body of rules.¹⁴

French public order (*l'ordre public*) may be defined as the body of principles of a universal justice considered in French public opinion as applying absolutely and internationally and which aim to protect an individual and his or her dignity.

The application of French public order depends on the intensity with which the facts of the case can be linked to France, or if they are against fundamental human rights, such as discrimination due to sex, religion or race. Furthermore, the application of French public order differs according

to rule on maintenance; meaning that the French judge did not have jurisdiction to rule on the conformity of the maintenance clause with French international public order.

¹² The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 30 October 2007.

¹³ 1^{re} Civ., 25 mai 1948, pourvoi n° 37.414, *Bull. civ.* 1948, I, n° 163, *RCDIP* 1949, p. 89.

¹⁴ Before the Maintenance Regulation came into effect, spouses were prohibited from entering into agreements independent of divorce proceedings on the amount of maintenance to be awarded in the name of public order.

to whether the rights invoked were acquired in France or abroad legitimately with the effects to be recognized in France.¹⁵

Before the Maintenance Regulation was in effect, French courts had the opportunity to rule on German prenuptial agreements where neither spouse received maintenance upon divorce. The Supreme Court first upheld the provisions of such a contract in 1972.¹⁶ This has since been confirmed by different Courts of appeals in France, and particularly the Court of appeals of Nancy in 2011¹⁷, which motivated its decision by stating that "*the clauses of the marriage contract are compliant with German law, the provisions of which may not be eschewed only upon internal French public order which prohibits only agreements between spouses on the consequences of a divorce independently of any proceedings, but must be appreciated with regards to the rights acquired by the spouses abroad and French international public order and to which the provisions do not seem contradictory in the context where family law is becoming more contractual.*" The German marriage contracts have also been considered as not being against French public order due to their reciprocal nature, as in the present case.

Even in instances where French law applies, it is common that no maintenance is awarded if the duration of the marriage is considered to be very short (generally one or two years). Here, the spouses were married for four years, a relatively short duration. It should be noted that if they had been married for 30 years and had lived in France for a major portion of that time, it is not impossible that the French judge would be more adamant about the imperative nature of the maintenance obligations in an international context.

In light of the above decisions and French international public order, the clause in the agreement providing that the spouses are only entitled to AUD 1 as maintenance would be upheld by the French courts, should their jurisdiction be confirmed.

It is unlikely that the presence of children would modify the above reasoning, as the court would rule separately on the children's needs and the parent with whom the children primarily reside would be entitled to receive the amount corresponding to the children's maintenance to cover their needs.

3. THE ATTRIBUTION OF THE FORMER MATRIMONIAL HOME

As concerns the matrimonial home, the French courts would normally accept jurisdiction to attribute it to one of the spouses as an interim measure based on the fact that it is a consequence of the divorce.¹⁸

As the matrimonial home is rented through W's employer, the imperative rules set out under Article 1752¹⁹ of the French Civil Code and by which both spouses are considered as rightful tenants are applicable. This has been confirmed by the French Supreme Court through a decision dated 10 January 2007,²⁰ where the court ruled that even though the lease was under the husband's

¹⁵ 1^{re} Civ., 17 avril 1953, pourvoi n° 2.520, *Bull.* 1953, I, n° 121.

¹⁶ Civ. 1^{re}, 7 nov. 1972, n° 71-14.470, *Bull.* Civ. I, n° 231.

¹⁷ CA Nancy, 3^e chambre civile, 21 février 2011, No. 03/01709.

¹⁸ It could also be argued that the attribution of the matrimonial home is an expression of maintenance obligations and that as such, the Australian courts should have jurisdiction. However, in the present case, and to simplify the enforcement of the decision, it would be in the spouses' interest to have the French courts rule on the attribution of the matrimonial home for the interim measures.

¹⁹ The rules set out under this Article are part of the French primary matrimonial regime and which constitute imperative rules (*lois de police*).

²⁰ Civ. 3^{ème}, 10 janvier 2007, No. 05-19914.

employer's name, that Article 1752 was applicable, the wife was to be considered a co-tenant and could thus be attributed the matrimonial home.

Therefore, even though the lease is under W's employer's name, H would be allowed by the French judge to reside there as an interim provision. The fact then that he is not entitled to W's separate property is irrelevant as his right to live there derives from the primary matrimonial rules in France or eventually an expression of maintenance obligations.

It is not impossible that, seeing that H is without employment and will not be receiving maintenance, the French judge would try to compensate this by attributing the matrimonial home to him.²¹ In addition, if the spouses had children and H was the primary caretaker, it is also possible that this would lead the French judge to attribute the former matrimonial home to him to avoid having the children move, should their primary residence remain with H.

²¹ In the aforementioned decision rendered by the first instance courts of Paris and where the facts of the case are very similar (Order from the *Juge aux affaires familiales*, 18 March 2013, No. 13/33889), the French judge decided that since the lease was under the wife's employer's name, the husband could not be attributed the use of the apartment for the interim measures. This is in flagrant contradiction with the Supreme Court decision of 10 January 2007.