Strategic Planning For International Divorces

by
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I. Introduction

Lawyers representing clients with significant international connections who are contemplating a divorce may have a duty to provide strategic advice about the various potential divorce forums. They may even have a duty to advise clients about how to restructure their circumstances so as to facilitate alternative divorce jurisdictions. This article contends that such duties exist and that such advice is often necessary to protect the interests of international clients. Alternatively, lawyers with internationally-connected clients may be well advised to expressly disclaim their provision of such advice.

These opinions should be of concern to family lawyers who are admitted to practice only in their local jurisdictions and who do not have expertise, experience, or knowledge concerning the laws and practices of other countries. However, it may be unethical for a lawyer to provide information and advice about the laws and practices of other jurisdictions, except to the extent expressly authorized by the rules governing the practice of law in the relevant jurisdictions and by the rules of the attorney's home jurisdiction.[1] While the ethical issues may be tricky, the need for many international clients to obtain reliable, practical, and strategic advice about forum selection matters is clear.

Professional soccer teams usually win more games when they play at home than when they play away, even though the rules of the game are the same wherever the games are played.[2] But in

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1 Rule 5.5 of the ABA *Model Rules of Professional Conduct* provides that, "(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

2 *See* Thomas Peeters & Jan C. van Ours, *Seasonal Home Advantage in English Professional Football; 1974–2018*, The Economist, Aug. 8, 2021, https://doi.org/10.1007/s10645-020-09372-z.

the arena of international family law, the place of the divorce case matters far more than a mere change in the location of a sporting event. The rules and practices governing divorce, finances, and child custody vary dramatically from forum to forum,[3] leading to outcomes that may vary dramatically, sometimes in life-changing ways. Yet lawyers often do not provide the advice about these issues that clients urgently require, and that many clients are entitled to expect, perhaps to the significant detriment of the clients' best interests.

The starting point in planning for an international divorce may be when a lawyer is first informed of the client's impending marriage. Lawyers representing international clients who plan to marry and who want the protection of a prenuptial agreement should always consider the international ramifications of any proposed agreement. Clients may also seek professional advice concerning premarital financial planning, which can be greatly complicated if the parties have substantial international connections.

The purpose of this article is to discuss the lawyer's role in working appropriately with clients to plan strategically for a potential divorce that has significant international elements. In Part II, this article first discusses the premarital issues that family lawyers handling international clients may face. In Part III, it then focuses on the situations that arise after the marriage when an internationally-connected client seeks advice about a potential or actual separation or divorce.

II. Pre-Breakdown Planning

A. *International Prenuptial Agreements*

1. *Overview*

Clients will often ask for an "international prenuptial agreement." Of course, there is no such thing. Prenuptial agreements are drafted under the laws of specific jurisdictions, and no lawyer can draft a prenuptial agreement that will be globally enforceable.

Not only do divorce requirements and procedures vary from country to country, but so do the substantive laws concerning the division of assets and spousal and child support. Moreover, the

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[3] *See, e.g.,* Jessica Pacwa, *Marriage and Divorce*, 24 Geo. J. Gender & L. 671, 702 (2023).

laws about prenuptial agreements and marriage contracts vary considerably around the world.[4] Outside of the European Union, there is generally no international law that governs the application of local law to international personal relationships. Just as important, the attitudes of courts about such contracts diverge significantly from country to country.

Accordingly, lawyers must not assume that a "prenup" that is currently valid in the place of the marriage, or the place of current residency, will be equally valid in other places which might have divorce jurisdiction in the future. Indeed, they should assume and advise that there will most likely be significant differences.

While conventional domestic prenuptial agreements raise grave malpractice concerns for family lawyers, these concerns become a hazardous minefield when the issues are multi-jurisdictional. This is a very highly specialized area, with significant risk for family law practitioners who do not have the requisite experience. Counsel should be prepared to work with foreign counsel, to understand foreign law, to become familiar with different legal concepts that may apply to the client's circumstances, and to work in an environment in which there are no clear-cut rules or procedures. Accordingly, the client should be advised that local counsel will need to be retained in the various foreign jurisdictions, and that it is local counsel's advice upon which the client will ultimately be relying. This should be supported by an appropriate protective letter to the client and confirmatory notes to the attorney's file.

2. *One "Quarterback"*

It is strongly recommended that one lawyer should usually be in overall charge of the entire process, as the chief coordinator among the various lawyers in the different jurisdictions. This lawyer should manage the client's retention of the lawyers in foreign jurisdictions to advise on their local laws and procedures, or should obtain clear authority from the client to engage those lawyers as well as sufficient funding to cover the anticipated legal charges to avoid potential responsibility for such legal fees.

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[4] *See, e.g.,* Robert E. Rains, *A Prenup for Prince William and Kate? England Inches Toward Twentieth Century Law of Antenuptial Agreements; How Shall It Enter the Twenty-First?*, 23 Fla. J. Int'l L. 447 (2011); John Sill, Comment, *The Enforcement of Premarital Agreements at the International Level,* 27 J. Am. Acad. Matrim. Law. 245 (2014-2015).

3. *Potential Jurisdictions*

Prenuptial agreements for internationally-connected people must often be drafted with a view to their potential enforceability in an array of potential jurisdictions. These might include the states or countries of the current place of residence, domicile, or nationality of either spouse; or in which they marry; or in which they might reside together during their marriage; or in which they currently have or might in the future have significant assets; or in which either of them might reside after a separation.

Once potential jurisdictions are identified, the burden should be placed on the client, preferably in writing, to identify the jurisdictions that fall or are likely to fall within these categories. The client should then be asked to provide instructions to the principal lawyer who is retained to oversee the preparation of the agreement as to whether the lawyer should work with counsel in each such jurisdiction concerning such matters as the potential enforceability of the agreement and whether any modifications to the proposed agreement are recommended. However, a client cannot make these judgments without receiving at least some knowledgeable input from the principal attorney concerning the process of obtaining the advice that will be needed for the client to make informed decisions on these matters, unless the client clearly disclaims any concerns about enforceability in other jurisdictions or the lawyer expressly states that no advice concerning any other jurisdictions is being provided.

The risk letter to be delivered to and executed by the client should acknowledge the client's well-informed decisions concerning these issues and should provide clear instructions as to which foreign jurisdictions should be reviewed. The risk letter should stress that the jurisdictions as to which the client or the primary lawyer will seek the advice of local lawyers are limited to those specific jurisdictions that the client has selected and to no others.

4. *Selection of the Governing Law*

A critical element of any international prenuptial agreement is the choice of the jurisdiction under whose law the agreement will be drafted. Obviously, lawyers should not be wedded to their own jurisdiction as the "home" of the agreement. It must also be recognized that silence concerning the choice of law might equate to the selection of the jurisdiction in which the agreement is drafted.

Deciding on the best choice of law provision requires adequate information and input about the applicable laws and practices of the various competing jurisdictions and about the potential effect of the foreign law in any of the potential jurisdictions.[5] The decision should be made upon the advice of counsel with substantial experience in international family law matters, who has consulted or will consult with appropriate local counsel in other relevant jurisdictions. It is likewise important to be aware that choice of law clauses may or may not be valid in other jurisdictions.[6]

A choice of law clause should usually be drafted broadly and provide for the application of both the substantive and the procedural laws of the foreign jurisdiction to be effective.

5. *Choice of Court Clause*

A "choice of court" clause, whereby the parties select their preferred forum for a future divorce case, can be extremely useful. It enables the parties to know in advance which court is supposed to handle their case, and it may strengthen their choice of law clause if the chosen court and the chosen law are the same.

However, there is no guarantee that courts in other countries will respect such a clause.[7] Certainly, the parties cannot create jurisdiction by contract in a court whose rules do not confer jurisdiction in the particular case. If the jurisdiction requires a minimum period of residency for a divorce, or that the parties be nationals, domiciliaries, or habitual residents of the country, the choice of court clause may well fall flat. Moreover, matters relating to children may be subject to separate jurisdictional rules that cannot be amended by contract.

Nevertheless, it may prove most helpful if the prenuptial agreement requires the parties to commence their divorce case

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5 *See generally* Magdalena Pfeiffer, *Choice of Law in International Family and Succession Law,* 2 Law. Q. 291 (2012), https://tlq.ilaw.cas.cz/index.php/tlq/article/viewFile/50/41.

6 *See, e.g.,* Sinha v. Sinha, 834 A.2d 600 (Pa. Super. Ct.) (deriving from intranational law an international choice of law approach to a divorce involving spouses from India).

7 The Hague Convention on Choice of Court Agreements arts. 2(a), 2(b), June 30, 2005, 44 I.L.M. 1294, does not apply to family law matters including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships, as well as maintenance obligations.

in one of several potential forums in which jurisdiction is realistically likely to be accepted. Accordingly, a choice of court clause should often be included in prenuptial agreements for international people.

6. *Other Recommendations*

It is good practice to require the client to sign a thorough and carefully drafted risk disclosure letter that includes the special elements of risk that exist when foreign countries are or may be involved.

Clients should be informed that there are no guarantees concerning the enforceability of any prenuptial agreements, that such uncertainty is increased when foreign countries are involved, and that foreign jurisdictions vary substantially as to the extent to which they enforce prenuptial agreements.

Clients should also understand not only that a prenuptial agreement cannot control future decisions about child custody or child support, but that the future international relocation of children might create dramatically adverse consequences affecting all aspects of the current and future relationship between the spouses. An international move might significantly impact a parent's ability to acquire sole or unequal custody of children pursuant to the laws and practices of another jurisdiction and might enable a parent to prevent further international visits or moves. The consequential power imbalance may then have dramatic financial consequences to the benefit of one parent and the detriment of the other.

Counsel should understand that the way the courts of a particular country apply their own laws or foreign laws may vary considerably. For example, when reviewing foreign law it is important to understand that the meaning of the terms the foreign local lawyers may use, such as "marital property,"[8] "regime," "domicile," "needs" and "fairness," can vary dramatically.[9]

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[8] For example, marital property in Sweden includes the spouses' premarital assets, Swedish Marriage Code, ch. 7, § 1); in Thailand, the "Sin Somros" property that is divided equally upon a divorce does not include items necessary for the job or profession of one party, Thai Civil and Commercial Code, § 1471, while in Switzerland, marital property does not include the matrimonial home as to which there are special rules, Swiss Civil Code art. 201.

[9] Thus, under the English common law a "domicile of origin" is automatically acquired upon a person's birth in the location of birth, and it is

Similarly, counsel should be alert to the fact that there may be significant differences concerning the substantive laws that apply in other jurisdictions, including provisions that a prenuptial agreement or marriage contract cannot limit a spouse's right to spousal maintenance.[10]

Consideration should also be given as to differences in the various jurisdictions concerning such factors as the validity of the method of execution,[11] the need for independent legal representation,[12] any requirements concerning drafting procedures,[13] any need for disclosure of assets, the applicability and meaning of overall considerations of fairness or unconscionability,[14] and the potential applicability of conflict of laws issues.[15]

Counsel should also ascertain whether either or both parties have any language barriers that need to be addressed in a way to ensure that they understand the process of signing the prenuptial agreement and its meaning. Counsel should also secure clarity on client confidentiality whenever a foreign lawyer is retained because the applicable rules vary considerably between different jurisdictions. Furthermore, counsel should ensure that clients understand that future relocations of either or both of the spouses might have

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revived upon the abandonment of a subsequently-acquired domicile of choice unless immediately superseded by a new domicile of choice. Barlow Clowes Int'l. Ltd. v. Henwood, [2008] EWCA Civ 577. However, in many other common law countries a domicile of origin is not revived upon the abandonment of a domicile of choice. *See, e.g.*, Domicile Act 1982 § 7 (Austl.); Jahed v. Acri, 468 F.3d 230 (4th Cir. 2006).

10 *See* Delphine Eskenazi & Inès Amar, *The Impossible Existence of the Concept of Matrimonial Regime in Common Law Countries, or How to Fit a Square Peg into a Round Hole,* 52 (2) NYSBA Fam. L. Rev. 26 (Summer 2020).

11 For example, a prenuptial agreement entered into in Brazil must be made by "public deed" in accordance with Brazilian law. Brazil Civil Code art. 1.653.

12 Australian law requires that each party be independently represented. Family Law Act 1975 § 90G (Austl.).

13 In France, all matrimonial agreements must be drafted by deed before a French *notaire*. Code Civil art. 1394(1) (Fr.).

14 *See* Jeremy D. Morley, *International Prenuptial Agreements Are Necessary but Dangerous,* 46 (2) NYSBA Fam. L. Rev. 8 (Summer 2014).

15 *See In re* Marriage of Proctor, 125 P.3d 801 (Or. Ct. App. 2005), opinion adhered to as modified on reconsideration, 129 P.3d 186 (2006) (applying the chosen law only to the construction of the agreement, not to asset division matters, because of the limited language of the choice of law provision).

an enormously significant bearing on the potential divorce forum and on the future enforceability of the prenuptial agreement.[16]

It is also essential to decide whether to have two or even more agreements that contain essentially the same terms as the primary agreement but are executed in accordance with the various local laws, or instead to insist that there should be one global prenuptial agreement to avoid unnecessary confusion. If more than one agreement is to be executed, it is essential to include terms that will determine the priority among the various agreements.

If there will be only one agreement, counsel should consider whether to insist on compliance with the procedural and substantive requirements of the "toughest" potential jurisdiction, or whether to comply with such rules as to all potential jurisdictions.

B. *Premarital Financial Planning*

Family lawyers might also be asked to provide advice concerning other financial matters before marriage. One specific area of advice might concern trusts, such as asset protection trusts.[17]

For internationally-connected clients, it might be advisable or necessary to consult with lawyers in other jurisdictions concerning the likelihood that assets that are placed in trust will be immune from being treated as assets that can or must be divided between the spouses upon a divorce. The treatment of such trusts varies considerably among foreign countries and is entirely uncertain in many other countries.[18] These issues may well require thorough analysis as well as careful disclaimers.

C. *International Postnuptial Agreements*

During the marriage it might be appropriate for a client to propose a postnuptial agreement to handle the possible consequences of a potential divorce. As is the case with purely domestic potential divorces, a postnuptial agreement for internationally-connected parties may well clarify the terms of a potential divorce

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16 *See* Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 Mo. L. Rev. 793 (2007).

17 *See, e.g.,* Trent Maxwell, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 B.Y.U. L. Rev. 477.

18 *See* Adair Dyere, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention,* 32 Vand. J. Transnat'l L. 989 (2021).

and provide security and peace of mind to the parties. However, the viability of such agreements for international couples might require far more careful analysis than would be the case for purely local parties.

The primary issue will be whether postnuptial agreements are generally enforceable in each of the potential jurisdictions. For this, the same process should be undertaken as described above in respect of prenuptial agreements, while recognizing that courts in many jurisdictions do not enforce postnuptial agreements or hold them to a higher level of scrutiny.

There also needs to be a consideration of whether choice of law and choice of court clauses will likely be upheld, whether the material factors, especially jurisdictional, will alter significantly if one or both spouses relocate to another state or country.

III. Advice upon Actual or Anticipated Marital Breakdown

Once a client seeks advice concerning a possible or actual breakdown of a marriage that has international issues, there are many factors that may need to be considered.

A. *Divorce Jurisdiction*

The first issue will usually be to consider that of jurisdiction to handle the divorce and the financial and child-related consequences of the divorce. There are substantial variations in the rules of countries around the world concerning jurisdiction in these cases. Accordingly, in considering the availability of potential divorce jurisdictions, lawyers will need to be knowledgeable about such rules or to become knowledgeable about them. Lawyers should certainly not assume that the rules about jurisdiction that apply locally are those that apply overseas. It is far safer to start with the expectation that the rules will be different and that the practical effect of those rules will be even more different.

Family lawyers in the United States should understand that U.S. rules about divorce and child custody jurisdiction are particularly unusual. The rules fall into at least three fundamental and distinct jurisdictional groupings. There are different rules about jurisdiction for a bare divorce than there are for the financial consequences

of a divorce, and there are further and different rules for child custody jurisdiction.[19] This results from the unique provisions of the U.S. Constitution and the uniform child custody laws that apply throughout the country but with individual variations between the states. In addition, the rules concerning divorce residency requirements vary significantly between the states, both statutorily and in their judicial interpretation. Consequently, issues concerning the jurisdiction of courts in the United States to handle family law matters are unusually complex and, in the author's experience, both surprising and confusing to family lawyers in other countries.

In some countries, there are liberal rules about jurisdiction for divorce and child custody, which are moderated by providing judges with broad powers to stay or dismiss individual cases as necessary for convenience and fairness.

Thus, in Australia, the Family Law Act 1975 provides that proceedings for a divorce order, which include proceedings concerning the financial consequences of a divorce, may be instituted if, at the date on which the application for the order is filed, either party to the marriage (a) is an Australian citizen, or (b) is domiciled in Australia, or (c) is ordinarily resident in Australia and has been so resident for one year immediately preceding that date. The Act further provides that proceedings may be instituted in relation to a child if: (a) the child or a parent of the child or a party to the case is present in Australia or is an Australian citizen, or is ordinarily resident in Australia, or (b) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.[20] However, an Australian court may decline jurisdiction if it considers itself a "clearly inappropriate forum" to resolve the dispute.[21]

Courts in some other countries have substantially broader powers to dismiss matrimonial cases for reasons of convenience or fairness.[22] In sharp contrast, in civil law countries there is generally

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19 *See* David D. Siegel, New York Practice § 102. *Rem Jurisdiction of Marital Status* (6th ed. 2022).

20 Family Law Act (1975) § 39(3) (Austl.).

21 Voth v. Manildra Flour Mills, (1990) 65 ALJR 83 (HC).

22 In England, the Domicile and Matrimonial Proceedings Act, 1973, sch. 1,§. 9, provides for a discretionary stay based on the balance of fairness and convenience if a matrimonial case is proceeding in another jurisdiction.

no such power and discretionary dismissal is generally unavailable. Accordingly, stays for reasons of fairness and convenience in divorce cases cannot be issued by courts in the European Union.[23] In other countries such as Argentina, both divorce and child custody jurisdiction exist if the parties' last conjugal residence was in that country, and child custody jurisdiction follows automatically and without a discretion to stay or dismiss.[24]

Once the rules and practices concerning the availability to the parties of different potential jurisdictions are collected, an analysis should be made whether it would be appropriate and beneficial to discuss with the client whether the necessary connections to any specific jurisdictions could or should be enhanced or reduced to maximize or minimize the opportunity to have the divorce and related litigation be conducted in a favorable or unfavorable jurisdiction.

B. *Forum Selection or Forum Shopping*

Forum selection is an essential element of any international family lawyer's work. The differences between alternative international forums can be momentous.

For example, in some jurisdictions, including England,[25] Australia,[26] and Connecticut,[27] the courts have the power to consider and divide all of the parties' assets, including their premarital assets, while in other jurisdictions, such as most U.S. states, premarital assets are separate property that usually cannot be equitably divided.[28] And in other jurisdictions such as India, the divorce courts will generally make no division of any of the parties' assets that are not in joint names.[29]

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23 *See* Owusu v. Jackson [2005] E.C.R. I-1383, [45]-[46].

24 Diego Horton, Perez Maraviglia & Horton Abogados, Family Law in Argentina: Overview (2023).

25 *See* Jane Croft, *England Stands Out as Most Generous Country for Divorcing Spouses,* Fin. Times, Dec. 15, 2013, https://www.ft.com/content/4db2c882-63f3-11e3-98e2-00144feabdc0.

26 Family Law Act (1975) § 79 (Austl.).

27 Ct. Gen. Stat. § 46b-81 (2019).

28 *See Property Division Laws in Divorce: 50-State Survey,* Justia, https://www.justia.com/family/divorce/dividing-money-and-property/property-division-laws-in-divorce-50-state-survey/ (last visited Nov. 21, 2023).

29 Rajinder Goyal, *Foreign Court Decree of Divorce, Its Competency & Validity in India with Analysis of Concept of Matrimonial Property,* SSRN (Nov. 2, 2022), http://dx.doi.org/10.2139/ssrn.4266289.

Likewise, differences concerning spousal support vary dramatically between different jurisdictions. While English[30] and California law[31] provide for generous spousal support, the laws and practices of Texas provide for less generous support,[32] the laws of Pakistan and of most other Islamic jurisdictions provide for very little,[33] and the laws of Japan provide for no such support.[34]

While courts in New York County will likely award shared and equal custody to the parents wherever possible,[35] Japanese law currently provides that only one parent may have sole custody of a child,[36] and in Kuwait (or most of the Middle-Eastern countries) legal guardianship automatically belongs to the father.[37]

Unmarried partners in British Columbia, Canada, may be deemed to be in a "spousal relationship" that entitles them to be treated as spouses for the purpose of securing financial remedies upon the termination of the relationship as if they were actually married,[38] whereas without a signed contract, such rights do not exist in New York.[39]

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30 See Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 and its progeny.

31 *See Long-Term Spousal Support*, California Courts Self-Help Guide, https://selfhelp.courts.ca.gov/spousal-support/longterm (last visited Nov. 20, 2023).

32 Jeffrey Johnson, *Texas Alimony & Spousal Support (2023 Guide)*, Forbes, Jan. 26, 2023, https://www.forbes.com/advisor/legal/divorce/texas-alimony/#:~:text=Texas%20treats%20spousal%20support%20differently,monthly%20income%2C%20whichever%20is%20smaller.

33 *Pakistan,* Global Repository of Muslim Family Laws, https://campaignforjustice.musawah.org/repository/pakistan/ (last visited Nov. 22, 223).

34 Mikiko Otani & Masami Kittaka, *Family Law in Japan: Overview* (2023), https://1.next.westlaw.com/Document/Iaa16253c776c11e79bef99c0ee06c731/View/FullText.html?transitionType=Default&contextData=(sc.Default)(last visited Nov. 22, 2021).

35 This is based on the author's experience in handling custody cases in New York City.

36 Yoko Konno, *A Haven for International Child Abduction: Will the Hague Convention Shape Japanese Family Law?,* 46 Cal. W. Int'l L.J. 39 (2016).

37 Jeremy D. Morley, *Notes on Kuwait, Child Custody and Child Abduction,* https://www.international-divorce.com/kuwait-family-law (last visited Nov. 20, 2023).

38 Family Law Act § 3(1) (B.C.).

39 Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154 (N.Y. 1980).

Marriage contracts are enforceable in Sweden,[40] but prenuptial agreements are enforceable in Jamaica only if they are deemed to be fair,[41] and prenuptial agreements are not enforceable in Ireland[42] or India.[43]

If forum selection is identified as "forum-shopping," a court may consider it to be inappropriate. That may certainly be the case in international child custody matters. Indeed, the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). and its implementing legislation are designed to "prevent an international version of forum-shopping."[44] Similarly, the Uniformed Services Former Spouse's Protection Act was enacted "in response to concerns about 'forum-shopping' spouses who might seek to divide the pension in a state with more favorable laws, but with little contact with the pensioner."[45] It is also well established that the public policy of statutes requiring in-state residency for the initiation of divorce cases, is "to prevent forum shopping by divorce litigants."[46]

On the other hand, there is great merit to the opinion that,

> Trying to stay in one court and out of another may appear manipulative, but it is nothing new. Lawyers should not be chastised and punished unless they bring frivolous claims, or the forum they choose plainly lacks jurisdiction over the case. Rather, they should be applauded for engaging in the appropriate and necessary practice of forum selection. Forum shopping is bad and evil only if we use the phrase to mean the bringing of frivolous claims in an improper forum.[47]

A U.S. district court judge correctly insisted that, "[i]n reality, every litigant who files a lawsuit engages in forum shopping when

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40 *Family Law: Information on the Rules,* Swedish Ministry of Justice, https://www.government.se/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf (last visited Nov. 21, 2023).

41 Family Property (Rights of Spouses) Act § 10 (2003) (Jam.).

42 Jeremy D. Morley, *Prenuptial Agreements in Ireland,* https://www.international-divorce.com/prenuptial-agreements-in-ireland (last visited Oct. 9, 2023).

43 *Krisha Aiyar v. Balamma,* ILR (1911) 34 Mad 398, but see Amrita Ghosh & Pratyusha Kar, *Pre-Nuptial Agreements in India: An Analysis of Law and Society,* 12 Nujs L. Rev. 2 (2019) indicating that the prohibition may be moderating.

44 Navani v. Shahani, 496 F.3d 1121, 1128–29 (10th Cir. 2007).

45 *In re* Marriage of Sullivan, 89 Cal. App. 5th 585, 595, 306 Cal. Rptr. 3d 215, 222-4 (Cal. Ct. App. 2023).

46 Alwazzan v. Alwazzan, 596 S.W.3d 789, 808-09 (Tex. App. 2018).

47 Georgene M. Vairo, *Foreword: The Last Frontier,* 40 Loy. L.A. L. Rev. 1247 (2007).

he chooses a place to file suit."[48] International family lawyers work to assist their clients in that process. Indeed, the Iowa Supreme Court held that even though the plaintiff had chosen to move to the state to benefit from its liberal divorce laws, it was perfectly appropriate to do so and it did not justify staying or dismissing the case.[49]

Accordingly, international family lawyers should often be retained to engage in the process of international forum selection and should pursue the selection of the best available jurisdiction diligently and enthusiastically once they are expressly retained to work as part of a team that is hired for that purpose. On the other hand, they must recognize that if their work is likely to be viewed as forum-shopping, it might be inappropriate, unhelpful, or even counterproductive.

To provide advice as to international forum selection, a lawyer must take the same kind of protective steps that are discussed above concerning international prenuptial agreements. Full disclosure to the client of the limits of the lawyer's knowledge and ethical capability is absolutely essential, and the selection of the specific potential jurisdictions to consider should be made with the express input and authorization of the client, and with the clear advice of local counsel in each such potential jurisdiction.

C. *Relevant Issues for Each Potential Jurisdiction*

Once the potential jurisdictions have been identified, the factors to be considered for each potential jurisdiction should include the following:

1. *Divorce Grounds*

Counsel will need to determine whether a divorce is available to the parties, analyzing what the client will need to prove to secure a divorce and what evidence the client must secure to do so. A divorce is not available in at least one jurisdiction (the Philippines)[50]

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48 Texas Instruments, Inc. v. Micron Semiconductor, Inc., 815 F. Supp. 994, 996 (E.D. Tex. 1993).

49 *In re* Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991).

50 Sui-LeeWee, *'Just Like Medicine': A New Push for Divorce in a Nation Where It's Illegal,* N.Y. Times, Nov. 4, 2023, https://www.nytimes.com/2023/11/04/world/asia/philippines-divorce-illegal-legislation.

and in many jurisdictions a period of separation must exist prior to a non-consensual divorce (e.g., China[51] and Singapore[52]) or even prior to a consensual divorce (e.g., Malta).[53]

2. *Applicable Law*

Counsel will further need to determine the law that a foreign court will apply under its choice-of-law rules. This concept is unfamiliar to most U.S. divorce lawyers since courts in the United States generally apply the law of the forum to divorce issues.[54] That does not hold true for foreign countries, especially civil law jurisdictions. For example, in Japan the Act on General Rules for Application of Laws provides that their divorce will be governed by the law of their shared nationality or their shared habitual residence or otherwise of the country that is most closely connected with them, except that Japanese law will apply if either spouse is Japanese.[55]

3. *Assets to Be Divided*

The rules in each target jurisdiction regarding the property that is subject to being apportioned between the parties upon a divorce, or that can be considered in making an economic apportionment between the spouses, should then be evaluated.

In some countries, there are no provisions for any division of assets upon a divorce except for jointly-owned assets or assets that are the subject of binding interspousal contracts. Examples include the Sharia law countries such as Pakistan and Egypt, which require that assets payable pursuant to the spouses' Islamic marriage contract should normally be delivered upon a divorce but provide for no division of any other assets of the parties regardless of the

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51 Civil Code of China art. 1079.

52 Singapore Women's Charter § 94(1).

53 *Divorce and Legal Separation: Malta,* https://e-justice.europa.eu/content_divorce-45-mt-maximizeMS_EJN-en (last visited Nov. 20, 2023).

54 Rhonda Wasserman, *Family Law Disputes Between International Couples in U.S. Courts*, 43(2) Fam. Advoc. 22 (2020).

55 Japan's Act on General Rules for Application of Laws arts. 25, 27.

length of the marriage or the needs of the parties.[56] Likewise, cases under the Hindu Marriage Act in India do not allow for any claim to divide assets that are not already in joint name.[57]

Another specific issue that may need to be analyzed concerns the treatment of premarital assets, since, unlike most U.S. states, some jurisdictions, including Australia, allow and even encourage the courts to divide even a party's premarital assets.[58] Likewise, it may be critical to consider the treatment that is given to assets that a spouse has placed in trust, since jurisdictions vary considerably in their treatment of these assets, such that some jurisdictions will "pierce" the trust (e.g., in Hong Kong a discretionary trust will constitute a financial resource if, at the spousal settlor's request, the trustee acting in good faith would likely advance the trust's capital or income to that spouse,[59] while the courts in other countries including South Africa[60] will not do so unless the trust was created or funded with fraudulent intent.[61]

Other issues to be evaluated include the rules concerning inherited assets, since although many jurisdictions do not divide assets that a spouse has received as an inheritance, some countries do[62]; and the rules concerning gifted assets, since many jurisdictions do not divide assets that a spouse has received as a gift, but some do. Other issues to be considered include the rules about matrimonial residence, because some but not all jurisdictions have specific rules that are designed to protect both parties' rights to

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56 Mufti Muhammad Anas Rizwan, *Reforms in Muslim Family Laws with Special Reference to Pakistan*, 4(1) Al-Meezan Res. J. (2022), https://almeezan.org.pk/ojs/index.php/journal/article/view/240/211.

57 Pinky Anand, *Family Law in India: Overview,* Global Guide to Family Law, https://ca.practicallaw.thomsonreuters.com/6-581-5985?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a506117 (last visited Nov. 20, 2023).

58 Australian Family Law Act § 79.

59 *See, e.g.*, Poon Lok To Otto v. Kan Lai Kwan [2014] HKCFA 66 (July 17, 2014).

60 WT v. KT (933/2013) [2015] ZASCA 9; 2015 (3) SA 574 (SCA) (Mar. 13, 2015).

61 P A F v. S C F (788/2020) [2022] ZASCA 101; 2022 (6) SA 162 (SCA) (June 22, 2022).

62 For example, section 4 of the Ontario Family Law Act provides that assets inherited during a marriage are not "net family property" except to the extent used for the purchase of a matrimonial home. Ontario Family Law Act § 4.

the marital residence (e.g., Canada[63] and Germany[64]), while others do not (e.g., Japan); and the treatment of commingled assets, since some jurisdictions have special rules that separate non-divisible property may be converted to divisible marital property if it is commingled with marital property.

4. *Effect of a Prenuptial or Postnuptial Agreement*

If a prenuptial agreement is in force, or a postnuptial agreement is being contemplated or already exists, counsel should analyze whether such agreements are enforceable in each potential jurisdiction and if so whether there are any potential defenses to complete enforcement. Jurisdictions vary significantly as to the bases upon which such prenuptial agreements may be invalidated or restricted, the nature of the burden of proof concerning their validity, and other critical factors concerning their applicability. The existence of a prenuptial or a postnuptial agreement requires counsel to determine whether it is likely to be upheld in the target jurisdiction; whether any modification of its terms is likely or possible; and whether any exceptions to the extent of recognition will be imposed.[65]

Particular consideration may also need to be given to unforeseen circumstances that occurred subsequent to the agreement, such as financial success or failure; the birth or death of children; unforeseen health issues; or family relocation.

5. *Asset Division Methodology*

Once the rules of each target jurisdiction concerning the assets that are likely to be divided upon a divorce have been identified, counsel will then generally need to analyze the ways in which the courts or other agencies in each such country determine the division. The relevant issues will include the division formula or the factors that a court will consider in determining the division of the assets. This includes a review of the impact, if any, of the conduct or fault of the parties, since some jurisdictions take only economic

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63 *Id.*

64 German Civil Code arts. 1568a, 1568b.

65 An analysis of the laws of many countries is available at Jeremy D. Morley, *Prenuptial Agreements Around the World,* https://www.international-divorce.com/prenuptial-agreements-around-the-world-2 (last visited Oct. 9, 2023).

fault into consideration, others consider fault only in extreme circumstances, while others evaluate conduct under religious law or customs and the conclusions have a substantial impact on the financial outcome.[66] Further issues include the methods that the courts in each of the target jurisdictions apply to value assets such as interests in business or real estate, the date as of which assets are valued, and the tax impact of any division.

6. *Interim Remedies*

The ability to obtain orders that prevent the interim disposition of assets while divorce proceedings are pending varies substantially from country to country. Moreover, many jurisdictions impose automatic stays on the disposition of assets as soon as divorce cases are filed. The rules and practices of different courts on such issues may have a highly material impact on the ultimate result.

There may well be a need for additional interim orders, such as to prevent the removal of children, or to secure (or resist) applications for interim support orders and these issues must often be further analyzed and compared.

7. *Discovery Rules and Practices*

The differences between the discovery rules and procedures in the various potential jurisdictions might be of great consequence. American lawyers are accustomed to liberal rules of discovery, which are often extremely effective whenever an adverse party is not forthcoming in providing financial information, but the United States is to some extent an outlier in this regard. There are vast differences between the disclosure requirements in divorce cases in different countries. Such differences may well lead to a significant difference in the outcome of cases even in situations in which the

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66 For example, in Austria a divorce may be based on the fault of one party, in which case that party must pay maintenance to the other spouse if certain conditions are established. Alfred Kriegler, *Family Law in Austria: Overview,* https://uk.practicallaw.thomsonreuters.com/7-568-0448?transitionType=Default-&contextData=(sc.Default)&firstPage=true (last visited Nov. 19, 2023). In Hong Kong, the Court of Appeal upheld the refusal of the trial court to recognize a judgment obtained by the husband in the Shenzhen Intermediate People's Court in China because of the conduct of the husband in secreting vast assets and not disclosing them to the court in China. ML v. YJ, [2009] HKCA 230.

applicable substantive provisions concerning the division of assets and the determination of support are similar.

While American jurisdictions such as California,[67] and countries such as England, Canada, Australia, Singapore, and Hong Kong are at one extreme in requiring complete financial disclosure, in civil law jurisdictions the typical practice is for the parties to be required to present their own evidence to the court but there are generally no procedures for a party to engage in self-directed discovery.[68] For example, no discovery is provided for in Japan.[69] In Germany divorced spouses are required to provide information to each other as to their income and assets, and the Code contains mechanisms to compel the delivery of such declarations,[70] but there is little that a party can do in advance of trial to probe such declarations or to search for suspected assets. In Austria, neither the General Austrian Civil Code nor the Austrian Marriage Act contain any explicit provisions obliging the spouses to provide each other or the competent authority with information on their income and assets.[71]

In China, effective on January 1, 2023, the Hengyang County People's Court issued specific rules ordering divorcing spouses to truthfully declare their marital assets. Courts in other provincial governments have since followed suit. How effective these requirements will be remains to be seen.[72]

Accordingly, in any consideration of appropriate jurisdictions, international family law counsel must carefully evaluate the discovery rules in each potential jurisdiction and should especially consider the ways in which the statutory rules are actually applied.

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67 *See* Cal. Fam. Code §§ 721, 2100(c), 2103, 2107(c); *In re* Marriage of Feldman, 153 Cal. App. 4th 1470, 64 Cal. Rptr. 3d 29 (Cal. Ct. App. 2007).

68 Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299 (2002).

69 *Id.*

70 German Civil Code § 1580.

71 Christian Klausegger & Therese Fritz, *U.S. Discovery: The Austrian Perspective,* https://www.bindergroesswang.at/fileadmin/user_upload/Media_Library/Publications/PDF_Publications/2012-01_DAJV_Newsletter__US_Discovery_-_The_Austrian_Perspective.pdf (last visited Nov. 21, 2023).

72 *See* Jeremy D. Morley, *China Divorce Law: A Major Development* (Aug. 9, 2023), https://www.international-divorce.com/chinese-divorce-law-a-major-development.

8. *Spousal Support*

There are extreme variations between countries as to the availability of post-divorce spousal support. For example, none is available in Japan, although a (usually modest) lump-sum might be payable,[73] and none is available in France, although a "compensatory allowance" may be ordered.[74] There are also substantial differences as to the amount of spousal support and the duration of spousal support. For example, only three months of support is available in Sharia law countries, whereas in Ireland spousal support is payable until death or remarriage.[75] Other issues that might need to be considered include the criteria for the award and calculation of support, the extent to which discovery of income and assets is available, whether the courts will impute income if a party asserts an inability to work, the effect of health issues, the consideration to be given to child support, and the tax consequences of spousal support payments.

9. *Child Support Issues*

Similarly, there are extreme variations between countries as to the availability of child support, the determination of the amount of basic support, the obligation to cover specific expenses such as educational costs, healthcare expenses, and discretionary items such as summer camps, and the length of time during which payments must be made. In many countries, spousal maintenance is limited to a transitional period that is designed to assist a spouse in adjusting to new circumstances. In Finland, although spousal maintenance is provided for by the Marriage Act, in practice, it is rarely awarded. In Denmark, spousal maintenance is generally awarded, if at all, for only a year or two. One recent analysis shows that there is a large discrepancy between the average annual amounts received by lone mothers within the European Union, ranging from only €4,710 in Austria to just €512 in Hungary.[76]

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73 Jeremy D. Morley, *Japan: Contested Divorce Laws*, https://www.international-divorce.com/Japan_contested_divorce_laws (last visited Oct. 25, 2023).

74 French Civil Code arts. 270 – 281.

75 Ireland's Family Law (Divorce) Act 1996 § 13.

76 Mia Hakovirta & Merita Mesiäislehto, *Lone Mothers and Child Support Receipt in 21 European Countries,* 38 J. Int'l & Comp. Soc. Pol'y 56 (2022).

10. *Child Custody Issues*

Forum selection concerning child custody matters is often critical because jurisdictions around the world vary enormously in their treatment of children upon a divorce and concerning the rights of parents regarding their children. Issues about children are often the most important matters as to which effective, knowledgeable, and experienced international legal advice is most critically required. Such disputes frequently overshadow disputes about financial matters in the eyes of clients. In other cases, and most unfortunately, disputes about children may be used tactically as leverage in disputes that are really about money. In any event, the financial consequences of a divorce are typically intertwined with child custody issues.

Child-related disputes for international people frequently revolve around the issue of deciding the country in which the children will reside, and whether the children will visit the country in which the non-residential parent will reside. The rules and practices on relocation and international visitation vary dramatically from country to country.[77] And since international child abduction is rampant, lawyers may need to provide effective and knowledgeable advice concerning the prevention of international child abduction or even whether removing a child overseas to escape domestic violence would be legal and advisable.[78] International family lawyers must advise about measures to prevent – or permit – the removal of children overseas.

The primary method of forum selection concerning children is that of physically moving the child to another country or to prevent such a move. These matters often require immediate and knowledgeable action if a move overseas is imminent.

Unlike most other countries, the United States has no exit controls.[79] A parent or even a third party may take a child

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77 *See, e.g.,* Matheu D. Nunn & Jeralyn L. Lawrence, *Child Relocation: Case Law, Social Science, and Practice Implications*, 32 J. Am. Acad. Matrim. Law. 383, 383 (2020).

78 Any such discussions should be handled with exceptional care. Consider the consequences, for example, of being informed by a client that he or she intends to abduct a child and the duty of lawyer who determines that that would constitute the crime of international parental kidnapping under 18 U.S.C. § 1204.

79 *International Parental Child Abduction,* U.S. Dep't. of State, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/for-providers/for-judges.html (last visited Oct. 24, 2023).

overseas without oversight by governmental agencies. As long as the person has the requisite passports, either legal or otherwise, to satisfy an airline agent that they may enter the destination country, they will be allowed to board a plane for a ticketed departure. However, there are steps that can and should be taken, often on an emergency basis, to prevent an abduction. Any lawyer who is informed of a threat to abduct children by the other parent has a duty to recommend immediate and effective action to prevent such an abduction and then to take such action if retained to do so.

If a child is removed or retained away from the country of the child's habitual residence without the consent of a person with a right of custody over the child under the laws of the habitual residence, it is normally deemed to be international child abduction within the meaning of the Hague Convention.[80] The effects of such an action will depend on whether the two countries are treaty partners under the Convention, whether any of the treaty exceptions to the requirement of expeditious return can be established, whether the country to which the child is taken complies with the Convention, whether a custody case can be effectively brought in that country, whether the criminal laws in the habitual residence will have a helpful or unhelpful impact in seeking the return of the abducted child, and a host of other factors.[81]

It may be the duty of a lawyer to advise a client about the potential consequences of the other parent's intended or potential removal of a child for the purpose of visiting a foreign country. It would surely be negligent for a lawyer in such a circumstance to tell a client that a visit to Peru would be safe because it is a treaty partner with the United States under the Hague Convention without warning the client that the U.S. State Department has reported

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80 *See, e.g.,* Katherine Jenkins, Note, *The Hague Convention on International Parental Kidnapping: Still the Best Hope for Children?*, 6 Cardozo Int'l & Comp. L. Rev. 623, 624 (2023).

81 *See* Jeremy D. Morley, The Hague Abduction Convention, Practical Issues and Procedures for Family Lawyers (American Bar Association, 3d ed. 2021); Jeremy D. Morley, International Family Law Practice, ch. 9, 10 (Thomson Reuters, 2020 ed.); Jeremy D. Morley *International Child Abduction and Non-Hague Convention Countries, in* Research Handbook on International Child Abduction (Edward Elgar Research Handbooks in Family Law Series 2023).

to Congress that Peru is noncompliant with the Convention.[82] Likewise, it would be inappropriate for a lawyer to tell a client that his child's visit to India with the other parent should be safe because he has a strong custody order issued by a U.S. court when the likelihood that the Indian courts will effectively secure the child's return is minimal.[83]

If the international relocation of a child is consensual, but a marital breakdown then ensues, the impact of the move on both custody issues and financial issues can be momentous. The same applies if the relocation occurs after a breakdown of the marriage if the relocation is court-authorized, or even if the relocation is an abduction but there are no significant adverse consequences in the destination country.

If the children relocate overseas with one parent, will the other parent have effective and reasonable rights to see the children in both the new country and in the place where the children are currently located? This will depend on considering whether a parent moving overseas with a child can be relied on to facilitate the left-behind parent's rights and also on whether the legal system in the new country can be counted on to enforce those rights effectively and expeditiously. In some cases, it may be appropriate and necessary to insist on placing certain conditions on a proposed relocation, such as requiring that a mirror order be issued by a court in the new country that contains all of the terms and conditions of the custody order issued in the place of the children's current residence or that the initial custody order be homologous in the new country.

To take some extreme examples of such consequences, a citizen of China who moves with a child and foreign spouse to live in China will then likely have sole virtual control of the child, may even be able to compel the other parent to leave China, and may choose to condition the other parent's access to the child on

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82 Jeremy D. Morley, *U.S. Actions Against Peru for Noncompliance with Hague Abduction Convention* (Aug. 25, 2023), https://www.international-divorce.com/u-s-actions-against-peru-for-noncompliance-with-hague-abduction-convention.

83 Jeremy D. Morley, *Expert on Indian Child Custody Law—Jeremy Morley—2022 Ruling of Ontario Superior Court of Justice*, https://www.international-divorce.com/expert-on-indian-child-custody-law-jeremy-morley-2022-ruling-of-ontario-superior-court-of-justice (last visited Oct. 25, 2023).

a resolution of financial claims.[84] In the reverse situation, if such a family lives in China and then moves to the United States, the Chinese parent will be unable to exercise unilateral control over their child to the exclusion of the other parent and will normally be unable to return to China with the child over the objection of the other parent.[85]

The optimal time for each parent to obtain the most useful and critical advice concerning the potential consequences of any such moves is well in advance of any breakdown of the marriage. The relevant issues concerning the child custody laws of any foreign jurisdiction primarily address the rules and practices concerning the allocation of rights of care, control, and decision-making about children.

Substantial attention needs to be given to understanding the meaning behind the diverse labels that are used in various jurisdictions to allocate such responsibilities. Even within English-speaking countries, the terminology varies substantially. In Scotland, the applicable terms include "parental responsibilities" and "parental rights"[86]; in Australia the primary term is "parental responsibility"[87]; in New Zealand, the terms include "guardian" and "parenting."[88]

The relevant custody and access issues in the different potential jurisdictions as to which clients need competent and comparative advice include, for example, whether a foreign custody order will be recognized and enforced in the foreign country; whether and under what circumstances the courts in the foreign country will have the right to modify the orders of the courts in the child's prior residency;[89] whether the courts in the foreign country will apply their domestic laws or the laws of the parents' shared

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84 Jeremy D. Morley, *Expert Testimony: Chinese Family Law and Potential International Child Abduction to China,* https://www.international-divorce.com/international-child-abduction-china.htm (last visited Nov. 19, 2021).

85 Jeremy D. Morley, *China and International Child Abduction*, https://www.international-divorce.com/international-child-abduction-china.htm (last visited Nov. 19, 2023).

86 Children (Scotland) Act 1995 §§ 1, 2.

87 Family Law Act § 61B.

88 Care of Children Act 2004 §§ 15, 48.

89 Courts in Brazil might issue orders that purport to recognize foreign custody orders, but they are always modifiable. Jeremy D. Morley, *Child Relocation to Brazil, Mirror Orders and Homologized Orders*, https://

nationality (or of any other jurisdiction) to future child custody decisions;[90] whether their domestic child custody laws are based on gender factors, nationality factors, religious factors, age factors or other factors; whether preferential rights of custody are commonly accorded; whether child custody orders are enforceable and under what circumstances;[91] and how the rules that govern determinations in the foreign court are actually applied.

11. *Other Procedural Issues*

There are always substantial differences between the procedural rules and practices of courts in different jurisdictions. These differences might cause significant differences in the outcomes of potential matrimonial proceedings, and may well need to be taken into account when determining the best jurisdiction for a client.

An obvious example is that there can be substantial differences in the time that it will take for a divorce case to be commenced and concluded. This might inure to the benefit or to the detriment of a particular client, depending on the circumstances of the case. Merely by way of example, matrimonial cases proceed expeditiously in Kazakhstan, Sweden, and Singapore, and very slowly in India, Guatemala and Serbia.[92]

Likewise, some countries limit the availability of multiple appeals or other post-trial proceedings, while other countries have systems that encourage the filing of numerous post-trial proceedings, such as Mexico's *amparo* system.[93]

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www.international-divorce.com/child-relocation-to-brazil-mirror-orders-and-homologized-orders (last visited Oct. 25, 2023).

90 Abu Dhabi's non-Muslim Personal Status Law (Abu Dhabi Law No 14/2021) allows non-Muslims to obtain orders based on the law of their common nationality. *See* Jeremy D. Morley, *UAE: Abu Dhabi Divorce for Non-Muslims* (May 8, 2023), https://www.international-divorce.com/uae-abu-dhabi-divorce-for-non-muslims.

91 Visitation orders are not enforceable in Japan except by means of a fine. *See* Jeremy D. Morley, *Enforcement of Child Custody Orders in Japan*, https://www.international-divorce.com/enforcement-of-child-custody-orders-in-japan (last visited Nov. 21, 2023).

92 *See* World Justice Project, *Rule of Law Index,* https://worldjusticeproject.org/rule-of-law-index/factors/2022/Civil%20Justice (last visited Nov. 21, 2023).

93 *See, e.g.*, *In re* Sigmar, 270 S.W.3d 289 (Tex. App. 2008). On the latter issue, see Jeremy D. Morley, *Enforcement of Child Custody*

Other procedural factors to consider include whether differences in the rules of evidence might impact the outcome of the case, whether subpoenas will likely be needed and are available, what sanctions are imposed and what inferences are drawn as a result of nondisclosure or false disclosure, whether testimony will be required to be in person or can be provided by video or telephone, and whether court orders are enforceable.

12. *Philosophy and Integrity of the Courts*

In many jurisdictions, the courts have wide discretion in determining the issues that must be decided in a contested matrimonial case. Often the character, biases, and outlook of the decision-makers are far more important than the actual legal rules. Such factors are generally most apparent in determinations as to child custody, and most noticeable in countries that apply religious principles, such as Sharia law in Muslim countries[94] and Jewish (and Sharia) law in Israel,[95] but they also have application to matters concerning the division of assets and post-financial divorce support.

In addition, the independence of the judiciary and its susceptibility to bias and corruption often need to be frankly considered. In many cases, a client will claim that the other party has special influence in specific countries, and these issues will then need to be considered.

13. *Attorneys' Fees*

In many cases the preferred outcome may depend on the ability of a party to pay the legal fees that will be incurred and on the right to seek attorneys' fees from the other spouse. Thus, counsel should consider such factors as the anticipated legal fees in each target jurisdiction, the availability of legal aid, the ability to collect legal fees from the other spouse and the obligation of one side to

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Orders in Japan (May 26, 2021), https://www.international-divorce.com/enforcement-of-child-custody-orders-in-japan.

94 *See, e.g.,* Al Namani v. Watson, No. HHD-FA21-4091406-S, 2022 WL 19557922 (Conn. Super. Ct. May 31, 2022). For a discussion about this case, see Jeremy D. Morley, *Connecticut Court Refuses to Enforce UAE Custody Order*, www.international-divorce.com/connecticut-court-refuses-to-enforce-uae-custody-order (last visited Nov. 20, 2023).

95 Yoav Mazeh, *The Anomaly of Custody in Israeli Family Law*, 28 Israel Stud. Rev. 247 (2013).

pay such fees to the other party, and the other expenses that will likely be incurred, whether for experts, travel, or otherwise.

IV. Conclusion

Strategic planning for an international divorce is often necessary and even essential. It is a process that clients are entitled to expect from lawyers who agree to be retained for such work. It often raises a host of difficult ethical, procedural, and substantive challenges for counsel,. While it may be complex, tricky, and difficult, it is typically both intriguing and challenging, The work must be handled effectively and responsibly by lawyers who are competent to handle it, often as part of an experienced international team. Planning for an international divorce generally requires knowledgeable, adequate, effective, and complete disclosure to the client of the limitations of counsel's role in the process and of the various caveats that are discussed in this article.

When done well, such strategic planning will serve a client's interests appropriately and effectively. When it is not done well, it might even damage the client, violate ethical rules concerning the practice of law, and violate a duty of care that a client is entitled to expect.