

Part L -  
What should  
happen  
when people  
or property  
have a link  
to another  
country?

# Chapter 32 – Cross-border issues and the PRA

## Introduction

- 32.1 In an increasingly globalised world, property matters under the PRA are more likely to be complicated by a “cross-border” element. One partner may have a connection with another country or an item of disputed property may be located overseas. This is a growing phenomenon due to increased international mobility,<sup>1</sup> rising numbers of “international couples”<sup>2</sup> (where the partners come from different countries) and globalisation enabling the ownership of property in other countries.
- 32.2 Cross-border elements create additional issues that do not arise where the property dispute is confined to New Zealand. To properly resolve such issues, the partners, their lawyers and the courts involved must identify and understand private international law and the effect of sections 7 and 7A of the PRA.
- 32.3 This chapter summarises the current law that applies where cross-border elements are present in property matters under the PRA. We use two case studies to illustrate why sections 7 and 7A are problematic and should, in our preliminary view, be reformed. We identify three key questions that must be addressed to effectively deal with PRA matters involving a cross-border element:
- (a) When should the PRA apply?
  - (b) When will a New Zealand court decide the matter?
  - (c) How and where can a remedy be enforced?

<sup>1</sup> In New Zealand there are statistics that show the rise in net migration into New Zealand. In the year to 31 March 2017 the net gain from immigration rose to 71,932 while the number of migrants arriving was 129,500. This was a new annual record: Statistics New Zealand “Migrant arrivals at new record of 129,500 a year” (press release, 26 April 2017).

<sup>2</sup> Although we do not have statistics for New Zealand, a glance at figures from overseas indicates the strong trend in couples where the partners are from different countries. For example, in 2011 the European Commission identified 16 million married couples in the European Union (EU) alone that lived in a country other than their own or owned property in another country: European Commission “Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships” COM (2016) 108 def. In Eurostat’s annual demography data collection it was found that marriages involving at least one foreigner accounted for 11 per cent of all marriages in the EU: Eurostat *People in the EU: Who We Are and How Do We Live?* (European Union, 2015) at 91.

- 32.4 Chapter 33 then looks at possible approaches to reform.
- 32.5 Cross-border issues under the PRA may arise on the death of partner as well as on separation. We discuss in Part M how the PRA applies on death. The discussion in this part focuses on the context of separation but we would welcome the identification of any particular cross-border issues that arise on the death of a partner.

## What are cross-border issues in the PRA context?

- 32.6 Cross-border issues arise where either one or both partners, or their property, is located outside New Zealand or where the partners and property are in New Zealand but the partners have a strong connection to another country. The property may be movable (such as money or shares in a company) or immovable (like land).<sup>3</sup>
- 32.7 One example might be a New Zealand couple who returned to New Zealand after their “OE” (overseas experience) but kept their apartment in London as an investment. Another example would be a New Zealand couple owning a holiday apartment or time share in Australia or the Pacific Islands. Similarly an Australian couple may have purchased a holiday house in Queenstown, or a Dutch couple may have relocated to New Zealand for a few years for work and bought a house in New Zealand while keeping all their other property in the Netherlands. The overseas relocation of formerly New Zealand-based companies can mean that New Zealanders who have never even travelled abroad can find themselves owning assets abroad in shares in an overseas company.
- 32.8 As more people travel overseas for work and leisure, the chances of forming a relationship with someone from another country have increased. It is easier to live and work abroad for a short period while still maintaining the family home and chattels in New Zealand. New Zealand is also an attractive destination for families wanting to immigrate. Partners coming from other countries may have signed an agreement in their country of origin that sets out what should happen to their property if they

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<sup>3</sup> See discussion at paragraphs [32.35] to [32.38].

separate. The question of whether or not such an agreement is valid in New Zealand is one of the many potential cross-border issues that might arise.

## The intersection of private international law and the PRA

- 32.9 Principles of private international law (PIL) are used to resolve cross-border issues that arise in PRA proceedings. PIL rules determine which country has jurisdiction to hear a dispute and which country's law applies. The outcome of the proceedings can be very different depending on the answer to these two questions, and might be very different to what one or both partners reasonably expected would happen if they separated. It may also mean that the outcome looks nothing like what would happen under the PRA in a purely domestic context.
- 32.10 The policy of the PRA is a just division of property.<sup>4</sup> A just division is generally achieved through an equal division of the pool of relationship property. Each partner is entitled to an equal share of the relationship property as a result of the equal contributions each makes to the relationship. Cross-border issues can complicate this approach.
- 32.11 An example helps illustrate this. Partner A and partner B are New Zealanders and live in New Zealand. They have separated and are fighting about an apartment in France in the name of partner A. Partner B claims the apartment is relationship property. If the apartment was in New Zealand it would probably be relationship property and partner B would be entitled to half. Under the rules of PIL, however, a New Zealand court cannot make an order relating to that apartment. This is because the apartment comes within the jurisdiction of France. Making an order about the apartment would be seen to encroach on the sovereign jurisdiction (the right to make its own laws) of France and its courts.<sup>5</sup> To ensure a just division of relationship property it might be anticipated that the New Zealand court could therefore give

<sup>4</sup> See Chapter 3 of this Issues Paper for a discussion of the policy and principles of the Property (Relationships) Act 1976.

<sup>5</sup> Chan notes that following the decision of *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628 English courts can make financial orders even after divorce and financial orders have been made in another jurisdiction. Chan suggests it may be possible for a financial order made under the Property (Relationships) Act 1976 to be supplemented by an order by the English courts to produce a "two jurisdiction" result: see Anita Chan "Section 21 and 21A Agreements – International Issues" (paper presented to the New Zealand Law Society Family Law Conference, November 2011) 347 at 355.

partner B more of the relationship property in New Zealand to compensate for the apartment in France. The Court of Appeal however has rejected the argument that compensation can be paid from the relationship property pool in recognition of a party's interest in foreign immovable property because of the concern that this is effectively an interference with France's sovereignty.<sup>6</sup> This illustrates how the rules of PIL can affect the PRA and, sometimes, take priority. Layering the rules of PIL over the PRA may lead to a result that is not consistent with the PRA's policy of a just division of relationship property.

- 32.12 There is nothing extraordinary in the fact that the PRA must interact with the rules of PIL. This happens in many areas of domestic law. The question in Part L is whether the right balance is struck to ensure the rules of PIL are respected while also giving effect to the policy of the PRA to the greatest extent possible. As with cross-border issues in all areas of law, there needs to be accommodation of both PIL and the relevant domestic law.
- 32.13 Our preliminary view is that the objectives of the legal framework where cross-border issues arise in the PRA context should be to:
- (a) provide clear answers to the three questions set out at paragraph 32.3;
  - (b) ensure outcomes are consistent with core New Zealand public policy (usually unwritten principles that underlie New Zealand's laws such as the equality of men and women); and
  - (c) reach an outcome in line with partners' reasonable expectations (that the outcome is either in accordance with the law and policy of the country that has the closest connection to the relationship or in accordance with the partners' intentions as expressed in a valid written agreement).
- 32.14 This view is based on our preliminary consultation and research and is informed by, and consistent with, the policy and principles of the PRA as discussed in Chapter 3 of this Issues Paper. As they

<sup>6</sup> In *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA) the Court of Appeal held that an order that gave the wife a greater share of relationship property in New Zealand if she signed a document forgoing any claim to property in Sri Lanka owned by the husband was in breach of s 7 as it effectively made orders relating to foreign immovable property. This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC). At the same time the High Court in *Shandil* distinguished *Walker v Walker* [1983] NZLR 560 (CA) where Richardson J in the minority took the view that while the Court cannot exercise jurisdiction over the foreign immovable property (the definition of movable and immovable property is discussed below), it could classify that property as relationship property and make a compensatory adjustment from the pool of New Zealand property.

stand, sections 7 and 7A of the PRA do not properly implement some of these principles.

## What is private international law?

32.15 Before identifying the specific issues that arise when PIL applies to PRA matters, it is important to have an understanding of what PIL is.<sup>7</sup> PIL is the law that deals with problems that arise because the dispute, transaction or relationship has a connection with more than one country. PIL seeks answers to the three key questions that arise when there is a link with more than one country:

- (a) Which country's law applies to resolve the particular dispute?
- (b) Which court will apply the law and resolve the dispute?
- (c) Can the judgment in one country be given effect in another country and, if so, how?

32.16 PIL comprises a mix of general PIL principles arising from case law (for example the principle that one country won't make an order about land in another country), specific laws set out in the domestic laws of each country (for example sections 7 and 7A of the PRA) and bilateral and multilateral treaties between countries. This means that "PIL" as a body of law is different in every country.

32.17 PIL helps us answer the three key questions that arise in New Zealand cross-border disputes dealing with relationship property.

## Choice of law: Which country's law applies to resolve a particular dispute?

32.18 A New Zealand court may apply the law of another country. Likewise, a court in another country could in certain circumstances apply the PRA.

32.19 There is no body of PIL rules that every court in every country will apply. The laws or rules that help a New Zealand court determine which law it should apply are New Zealand's laws or rules.

<sup>7</sup> This discussion is based on David Goddard and Campbell McLachlan "Private International Law - litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 1-14.

Where there are cross-border issues in disputes over relationship property, the New Zealand courts will look to sections 7 and 7A of the PRA to determine if it is the PRA or the law of another country that must be applied to resolve the dispute.

- 32.20 If a New Zealand court needs to apply the law of the other country evidentiary issues can lengthen proceedings and increase costs. For example, the courts may require experts to help them interpret what the law of the other country means.

## Jurisdiction: Which court(s) decide a dispute?

- 32.21 The question of which law applies (choice of law) is separate to the question of which court decides a dispute (jurisdiction of the court). The set of PIL rules that determine whether a New Zealand court has jurisdiction are unique to New Zealand. Because each country has its own set of PIL rules there may be proceedings in the courts of two countries, hearing the same matter simultaneously.
- 32.22 Just because a New Zealand court is exercising jurisdiction, it does not mean the court is applying New Zealand law. As we discuss throughout Part L, sometimes a New Zealand court will apply the law of another country.

## Enforcement of judgments and orders: in New Zealand and in other countries

- 32.23 Once a court has given a judgment or made an order, the question then arises of how and where that judgment or order will be enforced.<sup>8</sup> Judgments and orders made by foreign courts can be brought to New Zealand to be enforced against New Zealand residents and businesses and their New Zealand-based assets.<sup>9</sup> A New Zealand court will not impose sanctions for failing to comply with an order made by a foreign court.<sup>10</sup> Instead someone with a foreign judgment in their favour can bring an action in the New

<sup>8</sup> David Goddard and Campbell McLachlan “Private International Law – litigating in the trans-Tasman context and beyond” (paper presented to the New Zealand Law Society Seminar, August 2012) at 57–69.

<sup>9</sup> Under *Kemp v Kemp* [1996] 2 NZLR 454 (HC) a judgment of a foreign court is to be regarded as final and conclusive in New Zealand. Such a judgment is not examinable on its merits, whether regarding matters of fact or law. There are three exceptions to this outlined at 458 of *Kemp*: (1) where the judgment was obtained by fraud; (2) where enforcement of the judgment would be contrary to local public policy; and (3) where the proceedings in which the judgment was obtained were contrary to natural justice.

<sup>10</sup> David Goddard and Campbell McLachlan “Private International Law – litigating in the trans-Tasman context and beyond” (paper presented to the New Zealand Law Society Seminar, August 2012) at 57.

Zealand courts based on the foreign judgment or by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934.<sup>11</sup> We note that “a judgment given by a foreign court in circumstances in which the New Zealand court would itself exercise jurisdiction may not be enforced by the New Zealand court.”<sup>12</sup>

- 32.24 The position relating to the enforceability of New Zealand judgments or orders overseas is different in every country. As a general rule, it is not possible to enforce a non-money order from a New Zealand court in another country (for example an order vesting property that is not money in another person), although the Trans-Tasman Proceedings Act 2010 makes enforcement easier in relation to Australia.<sup>13</sup> Non-money orders from a New Zealand court can be enforced in Commonwealth countries or in the United States but certain prerequisites must be met. New Zealand is not currently party to any multilateral treaties that relate to the reciprocal enforcement of judgments in other countries.
- 32.25 The question of how and where a judgment or order made in a New Zealand court would be enforced in a foreign country is therefore a real concern.

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<sup>11</sup> The Reciprocal Enforcement of Judgments Act 1934 streamlines the process for judgments from certain countries to be enforced (there is also the procedure in s 56 of the Judicature Act 1908 in certain circumstances). The Trans-Tasman Proceedings Act 2010 allows a range of Australian judgments to be enforced in New Zealand under the Reciprocal Enforcement of Judgments Act 1934. Where the dispute relates to a country other than New Zealand the process is set out in the common law.

<sup>12</sup> David Goddard and Campbell McLachlan “Private International Law – litigating in the trans-Tasman context and beyond” (paper presented to the New Zealand Law Society Seminar, August 2012) at 58.

<sup>13</sup> Under the Trans-Tasman Proceedings Act 2010 “most final judgments of Australian courts and tribunals will be able to be recognised and enforced in New Zealand”: David Goddard and Campbell McLachlan “Private International Law – litigating in the trans-Tasman context and beyond” (paper presented to the New Zealand Law Society Seminar, August 2012) at 84. While the Act applies to both money and non-money orders, under s 61(2) of the Trans-Tasman Proceedings Act 2010 a New Zealand court must set aside registration of a judgment under the Reciprocal Enforcement of Judgments Act 1934 if the judgment was given on a matter relating to immovable property or was about movable property that was not located in Australia at the time of the judgment.



# How does New Zealand law deal with cross-border issues in relationship property matters?

## Historical background

32.26 When recommending, in 1972, a “single, clear and comprehensive statute to regulate matrimonial property in New Zealand”, a committee comprising members of the Ministry of Justice and the New Zealand Law Society (Special Committee) considered there was a place in such a statute to address matrimonial property issues with a cross-border element to them.<sup>14</sup> The Special Committee stated that:<sup>15</sup>

*...there may be value in laying down what might be termed conflict of laws or jurisdictional rules, in the interests of convenience of reference, of avoiding the possibility of their being overlooked, and of removing certain obscurities and inconsistencies in the cases...What we have in mind is not a codification and revision of the rules of private international law on the subject, but the more modest aim of defining the applicability of the New Zealand legislation.*

32.27 Section 7 of the Matrimonial Property Act 1976 applied to immovable property in New Zealand and movable property in New Zealand or elsewhere if either spouse was domiciled in New Zealand. It enacted the long standing rule that:<sup>16</sup>

*...where proceedings concern land the courts of the country where the land is situated have exclusive jurisdiction. The underlying rationale for this rule is the reality that a court in one country is not in a position to make an enforceable judgment in respect of land in another country.*

32.28 Whether section 7 should be amended to address immovable property located overseas was considered in the lead up to the 2001 amendments.<sup>17</sup> Submissions received by the Parliamentary

<sup>14</sup> Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at [3].

<sup>15</sup> Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at [46].

<sup>16</sup> Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xv.

<sup>17</sup> Movable and immovable property are not defined in the Property (Relationships) Act 1976.

select committee suggested that all overseas property should form part of the property pool capable of division under the PRA.<sup>18</sup>

- 32.29 The Family Law Section of the New Zealand Law Society submitted that not including foreign immovable property could:<sup>19</sup>

*...cause hardship and injustice. Obviously it presents the New Zealand party with the prospect of being obliged to litigate over immovable property overseas....The result is that parties are faced with two sets of proceedings, or more likely, one set of proceedings and substantial concessions being given in relation to the property overseas. Basically it becomes uneconomic to pursue it. Clearly this can be extremely unfair.*

- 32.30 However, while sharing the concerns about problems presented to spouses when cross-border issues arise, the Family Law Section did not advocate fundamental change to the legislation at that time.<sup>20</sup>

- 32.31 The Principal Family Court Judge at the time, Judge Mahony, submitted that “the Court should be given greater or clearer jurisdiction to take into account real property owned by the parties out of the jurisdiction.”<sup>21</sup> No doubt aware of the issues related to extending section 7 to immovable property, the Judge said that “[i]f the Court has no power to order a sale of that property there is no reason why the Court could not take the value of it into account.”<sup>22</sup>

- 32.32 The Ministry of Justice was not, however, in favour of amending section 7 to include foreign immovable property, citing the risk of conflicting judgments in different countries over the same property; the potential to impact the undisclosed rights of third parties such as a mortgagee or potential constructive trust claimant; the difficulty of enforcement; and the disharmony between the rules relating to immovable property in different countries.<sup>23</sup> Finally the Ministry of Justice noted the ongoing work between New Zealand and Australian officials in relation to

<sup>18</sup> Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi.

<sup>19</sup> “Comments on the Matrimonial Property Act 1976 from the Family Law Section of the New Zealand Law Society” (5 May 1999) at 2.

<sup>20</sup> “Comments on the Matrimonial Property Act 1976 from the Family Law Section of the New Zealand Law Society” (5 May 1999) at 2; and Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi.

<sup>21</sup> Principal Judge Mahony “Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998” at [7.7].

<sup>22</sup> Principal Judge Mahony “Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998” at [7.7].

<sup>23</sup> Ministry of Justice *Matrimonial Property Amendment Bill – Foreign Immovables and Māori Land* (29 April 1999).

harmonising choice of law PIL rules between Australia and New Zealand. The Ministry considered that changes to section 7 to include all immovable property risked prejudicing this work and creating future anomalies.<sup>24</sup> Also, partners were not precluded from signing an agreement in writing that New Zealand legislation would apply to foreign immovable property.<sup>25</sup>

32.33 The Parliamentary select committee did not recommend any amendment to the immovable rule in section 7.<sup>26</sup> In 2001, section 7 was replaced with a new section 7 and section 7A, but these made no substantive changes to the law. These sections set out the current law relating to relationship property disputes that have a cross-border element. As with the PRA more broadly, partners can opt out of these rules.<sup>27</sup>

## Section 7

32.34 Section 7 provides:

### **7 Application to movable or immovable property**

- (1) This Act applies to immovable property that is situated in New Zealand.
- (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand—
  - (a) at the date of an application made under this Act; or
  - (b) at the date of any agreement between the spouses or partners relating to the division of their property; or
  - (c) at the date of his or her death.
- (3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor

<sup>24</sup> Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi; and Ministry of Justice Matrimonial Property Amendment Bill – Foreign Immovables and Māori Land (29 April 1999).

<sup>25</sup> Letter from the Government Administration Committee to the Family Law Section of the New Zealand Law Society regarding comment sought on committee consideration of various sections of the Matrimonial Property Act 1976 (29 March 1999).

<sup>26</sup> Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi. Note the Minority view of Labour members was that the New Zealand courts ought to be able to take judicial notice of the express intentions of the parties with respect to overseas-owned property in determining the division of matrimonial property: Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xix.

<sup>27</sup> Pursuant to ss 21 or 7A of the Property (Relationships) Act 1976.

resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

32.35 Under section 7(1), the PRA applies to all immovable property situated in New Zealand regardless of where the partners are domiciled or resident.<sup>28</sup> The natural consequence of section 7(1) is that the PRA does *not* apply to immovable property situated outside New Zealand.<sup>29</sup> Immovable property outside New Zealand will be dealt with by the law of the country where the property is located.

32.36 Section 7(2) states that the PRA covers all movable property (if it is in New Zealand or if the movable property is located overseas but one partner is domiciled in New Zealand).

32.37 Section 7 refers to “domicile” which is a term used elsewhere in this part. Domicile relates to a person’s permanent home country, which may not be where the person physically resides at a certain point. In section 9 of the Domicile Act 1976 domicile refers to an intention of making New Zealand the person’s permanent home.<sup>30</sup> Therefore an individual may live in New Zealand for many years without it being her or his domicile.

32.38 Where neither partner is domiciled in New Zealand the PRA will only apply to the partner’s movable property if the partners expressly agree in writing.<sup>31</sup> Under section 7(3), however, a court may decline to make an order in respect of any movable property

<sup>28</sup> Property (Relationships) Act 1976 (PRA), s 7(1) subject to s 7A(2). In *Howson v Howson* HC Hamilton M52/01, 22 August 2002 the parties had been resident in Australia throughout their relationship. Property proceedings were underway in the Family Court of Australia when the wife issued proceedings in New Zealand under the PRA, relating to the sale and disposition of the proceeds of sale of land owned in New Zealand by the couple as tenants in common in equal shares. The High Court held that it had jurisdiction to hear the question of whether the husband could be reimbursed to compensate for post-separation contributions made to the property by way of maintenance and paying the principal on the loan. The Court did not, however, consider that it could examine the status of a relationship debt (by way of a loan to the husband to buy the property), which the Court considered should be determined by the Australian courts along with other relationship property matters.

<sup>29</sup> Unless the parties have agreed in writing under s 7A(1) that the Property (Relationships) Act 1976 is to apply. A New Zealand court may also be required to consider foreign immovable property in a claim made other than under the Property (Relationships) Act 1976, for example, if a constructive trust is claimed over property owned overseas.

<sup>30</sup> The domicile that a person has after the commencement of the Act is determined with reference to the Domicile Act 1976, notably s 9 which sets out the rules about acquiring New Zealand domicile. It provides that:

A person acquires a new domicile in a country at a particular time if, immediately before that time,—

- (a) he is not domiciled in that country; and
- (b) he is capable of having an independent domicile; and
- (c) he is in that country; and
- (d) he intends to live indefinitely in that country.

Section 5 of the Domicile Act 1976 also abolished the rule that a wife’s domicile depended on that of her husband.

<sup>31</sup> Property (Relationships) Act 1976, s 7A(1).

situated outside New Zealand.<sup>32</sup> This may happen, for example, if a court concludes that an order would not be capable of being enforced in an overseas jurisdiction.

## The classification of property as movable or immovable varies in different countries

32.39 Movable and immovable property is classified differently in different countries.<sup>33</sup> For example, a New Zealand court would accept that a mortgagee's interest in land in the United Kingdom is immovable property,<sup>34</sup> although in New Zealand it would be movable property.<sup>35</sup> Under New Zealand law, whether or not something is movable or immovable is determined with reference to where the property is situated.<sup>36</sup>

32.40 Examples of how New Zealand law treats certain property include:<sup>37</sup>

- (a) A debt is situated in the country where the debtor resides; while a judgment debt is situated in the country where the judgment is recorded.
- (b) Negotiable instruments and transferable securities are situated where the paper representing the security is located.
- (c) Shares in a company incorporated in New Zealand are situated in New Zealand unless registered on a branch register outside New Zealand.<sup>38</sup>
- (d) A bank account is at the branch where the account is held.
- (e) An interest in trust property is in the country where the trust property is located; but if the beneficiary has only

<sup>32</sup> Property (Relationships) Act 1976, s 7.

<sup>33</sup> Lawrence Collins (ed) *Dicey, Morris, & Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [22-004].

<sup>34</sup> *Re Hoyles* [1911] 1 Ch 179 (CA).

<sup>35</sup> *Re O'Neill* [1922] NZLR 468 (SC).

<sup>36</sup> David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society seminar, August 2012) at 154.

<sup>37</sup> David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society seminar, August 2012) at 154.

<sup>38</sup> *Re Terry (deceased)* [1951] NZLR 30 (SC).

a right of action then the interest is situated where the action may be brought.

- (f) Patents and trademarks are situated where they can be transferred according to the law relating to their creation.

32.41 Identifying where the property is situated is more difficult where the property has an intangible quality to it. For example, does a partner's interest in a business reside in the country where the firm is based or where the partner is domiciled?<sup>39</sup> In *Tyson v Tyson* the Family Court held that the husband's Australian pension (which was paid by the Commonwealth of Australia, could not be paid outside Australia, and which under Australian law was not a property right but simply a series of payments) was immovable under Australian law.<sup>40</sup> Because it was immovable property and was not situated in New Zealand, the Matrimonial Property Act 1976 (as it then was) did not apply. In *Fischbach v Bonnar* a German state pension based in Germany was considered a superannuation scheme entitlement under section 2 of the PRA, and the Family Court held that the portion accrued during the relationship was relationship property.<sup>41</sup> The Court considered that it had jurisdiction to make an order in relation to the scheme by virtue of section 7 of the PRA, but also noted that it could decline to do so if it wished under section 7(3).<sup>42</sup>

32.42 If there is no evidence on whether the country where the property is located would classify the property as movable or immovable then in New Zealand the position is assumed to be the same as New Zealand law.<sup>43</sup>

<sup>39</sup> In *Haque v Haque (No 2)* (1965) 114 CLR 98 (Cth) the partner's business was held to reside where the firm was based. In *Sudeley (Lord) v Attorney-General* [1897] AC 11 (HL) it was held that a beneficiary's interest in an unadministered estate is located in the same country as the personal representatives of that estate.

<sup>40</sup> *Tyson v Tyson* [2000] NZFLR 927 (DC).

<sup>41</sup> *Fischbach v Bonnar* [2002] NZFLR 705 (FC).

<sup>42</sup> *Fischbach v Bonnar* [2002] NZFLR 705 (FC) at [12]

<sup>43</sup> In *M v B* FC North Shore FAM-2009-044-726, 30 April 2010 the dispute related to the right to use an Australian cell phone number. The Family Court concluded with no evidence of the relevant Australian law that Australian law was congruent with New Zealand law and therefore the right was a movable.

## At what date should property be classified as movable or immovable property?

32.43 The Family Court has found that the date of hearing is the correct date for classification.<sup>44</sup> The date of classification can be important because property can change between being movable and immovable. Depending on when that change occurred there may be consequences for the division of relationship property. For example in *Shepherd v Shepherd* the property in question was the proceeds from the sale of a farm in Australia that was allegedly bought with relationship property. The farm was sold after an application for the division of relationship property was filed in the Family Court.<sup>45</sup> The proceeds from the sale (movable property) was transferred into the husband's bank account in New Zealand and were within the Court's jurisdiction under section 7(2).<sup>46</sup>

## Foreign immovable property and the Moçambique Rule

32.44 As a general rule of PIL, a New Zealand court cannot make a judgment or order relating to foreign immovable property.<sup>47</sup> Disputes over foreign immovable property are to be dealt with under the law in the country in which the property is situated. This is described as the Moçambique Rule and it comes from a decision of the United Kingdom House of Lords in 1893.<sup>48</sup> In a recent decision the UK Supreme Court commented that:<sup>49</sup>

*...much of the underpinning of the Moçambique rule...has been eroded. All that is left of the Moçambique rule...is that there is no jurisdiction in proceedings for infringement of rights in foreign land where the proceedings are "principally concerned with a question of the title, or the right to possession, of that property."*

32.45 The Moçambique Rule continues to apply in New Zealand, however, two exceptions have been established through case law.

<sup>44</sup> *Shepherd v Shepherd* [2009] NZFLR 226 (HC) at [61].

<sup>45</sup> *Shepherd v Shepherd* [2009] NZFLR 226 (HC).

<sup>46</sup> *Shepherd v Shepherd* [2009] NZFLR 226 (HC) at [61].

<sup>47</sup> Captured in legislation in s 7(1) of the Property (Relationships) Act 1976.

<sup>48</sup> *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL). In *Enright v Fox* (1989) 5 NZFLR 455 (HC) the High Court considered that s 7(1) of the Matrimonial Property Act 1976 by implication excludes foreign immovables from the jurisdiction of the New Zealand courts.

<sup>49</sup> *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

The Rule now applies primarily to disputes relating to title or possession of immovable foreign property.<sup>50</sup> The first exception relates to the administration of a deceased estate.<sup>51</sup> The second exception arises where:<sup>52</sup>

*there exists some personal obligation between the parties arising out of a fiduciary relationship, implied contract or other conduct which, in the view of the Court of equity in this country, would be unconscionable.*

32.46 This second exception emphasises the personal obligation of a party rather than the title to or right of possession of the property. The High Court in *Birch v Birch* said that a New Zealand court has jurisdiction in “cases where one party has inequitably dealt with a foreign immovable” and that “[i]n determining whether there is an equity, the Court considers the question against local and not foreign law.”<sup>53</sup> In that case the High Court found that, where the wife had contributed to the equity in property in Australia, the second exception to the Moçambique Rule applied and the Court determined that the wife was entitled to half of the sale proceeds.<sup>54</sup>

32.47 It is unclear to what extent the Moçambique Rule affects relationship property disputes. Some of the historical reasons why overseas immovables are not covered by the PRA are no longer persuasive in our globalised world.<sup>55</sup> We note, however, that the policy behind the rule in PIL that one country will not exercise jurisdiction over immovable property in another country is linked to respect for State sovereignty and this remains an important concern.

<sup>50</sup> *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

<sup>51</sup> In such cases a New Zealand court can make a judgment or order over the foreign immovable where the deceased was domiciled in New Zealand and his or her estate included New Zealand immovables or movables. In *re Fletcher Deceased* [1921] NZLR 46 (SC) the New Zealand Supreme Court held that it had jurisdiction to interpret a will where there was property in both Tonga and New Zealand. This was justified as an exception to the Moçambique Rule.

<sup>52</sup> *Birch v Birch* [2001] NZFLR 653 (HC) at [9].

<sup>53</sup> *Birch v Birch* [2001] NZFLR 653 (HC) at [9].

<sup>54</sup> *Birch v Birch* [2001] NZFLR 653 (HC) at [51].

<sup>55</sup> For example, how to value an overseas property may once have seemed difficult but there are equally difficult questions about how to value, say, shares in overseas businesses. Difficulty of valuation is not of itself a valid reason to exclude immovable property. There is an ongoing issue about enforcement of a judgment or order relating to foreign immovables.



## Option for reform: Expressly state in section 7 which exceptions to the Moçambique Rule apply or do not apply in New Zealand

- 32.48 One option for dealing with the question of foreign immovable property and its exclusion from the pool of relationship property to be divided is to state in the PRA there are certain exceptions which mean that foreign immovable property can be dealt with in the PRA.
- 32.49 Some have argued that proceedings to enforce an agreement regarding immovable relationship property would come within the exception of actions based on contract or equity between the parties.<sup>56</sup> Proceedings alleging a constructive trust over foreign immovable property are likewise arguably based in equity and therefore within the exception.<sup>57</sup> By analogy a claim to determine an entitlement to relationship property may come within the exception relating to a claim in contract.
- 32.50 Clearer statutory guidance could help the courts identify whether any exceptions to the Moçambique Rule could apply to what would otherwise be relationship property to be dealt with under the PRA.

### CONSULTATION QUESTION

- L1 Should there be express statutory reference to exceptions to excluding foreign immovable property from the PRA in keeping with the exceptions to the Moçambique Rule?

## Compensating for overseas immovable property

- 32.51 The majority of the Court of Appeal has rejected the argument that compensation can be paid from the relationship property pool in recognition of one partner's interest in foreign immovable property under the PRA. In *Samarawickrema v Samarawickrema* the Court of Appeal held that an order that gave the wife a greater share of relationship property in New Zealand if she signed a document forgoing any claim to property in Sri Lanka owned by the husband was in breach of section 7 as it effectively made

<sup>56</sup> David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 393.

<sup>57</sup> David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 393.

orders relating to foreign immovable property.<sup>58</sup> However, where relationship property in New Zealand is used post-separation to acquire the foreign immovable, a compensatory order may be made. For example, partner A uses funds from the partners' joint bank account in New Zealand to buy an apartment in New York after separation but before partner B applies to the court for a division of relationship property under the PRA. Section 18C of the PRA allows a court to compensate partner B from the pool of relationship property. This is because the partner's rights to the New Zealand property existed at separation. These rights are unaffected by the property being transformed into a foreign immovable.

### **Option for reform: Make provision for a court to compensate one partner for foreign immovable property**

32.52 It is all too easy for one partner to avoid accounting for what would be relationship property under the PRA because the property is a foreign immovable. The likely increasing number of partners with an international connection suggests such a scenario is likely to arise more often in the future. An option for reform is to retain the statement in section 7 that the PRA does not apply to foreign immovables but expressly allow a court to compensate a partner for foreign immovable property in relation to which the court cannot make an order.<sup>59</sup> Unless the partner in control of the overseas property provides a personal undertaking to follow a court's directions relating to the property (for which they could then be held accountable for any breach), compensation could be ordered from the pool of relationship property.

32.53 There is an issue whether such a power would be viewed as interfering with the jurisdiction of another court to make a determination in relation to the property. Such a power could also impact on the potential interests of third parties, and might be of minimal value if there is little or no relationship property in New Zealand from which compensation may be ordered.

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<sup>58</sup> *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA). This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC). At the same time the High Court distinguished *Walker v Walker* [1983] NZLR 560 (HC) where Richardson J in the minority took the view that while the Court cannot exercise jurisdiction over the foreign immovables, it could classify that property as relationship property and make a compensatory adjustment from the pool of New Zealand property.

<sup>59</sup> This is similar to the approach taken in British Columbia, where a court can order compensation or the substitution of domestically-based property instead of the foreign-based property: Family Law Act SBC 2011 c 25, s 109(2)(a).

- 32.54 There are strong policy reasons for allowing a court to compensate one party for foreign immovable property that, had the property been in New Zealand, would be relationship property under the PRA. Compensation is already a feature of the PRA and an important tool to ensure the outcome under the PRA is a just division of property.
- 32.55 This option would mean that section 7 would not require reform and would remain in line with general principles of PIL (if that was desirable). However, as it stands, excluding foreign immovables in section 7 undermines the purpose of the PRA to provide a just division of relationship property.

## CONSULTATION QUESTION

- L2 Should provision be made in the PRA to allow a court to order compensation to take into account foreign immovable property?

## Section 7A

- 32.56 Section 7A applies where the parties have made an agreement on what law should be applied to their property. It states that:

### **7A Application where spouses or partners agree**

- (1) This Act applies in any case where the spouses or partners agree in writing that it is to apply.
  - (2) Subject to subsections (1) and (3), this Act does not apply to any relationship property if—
    - (a) the spouses or partners have agreed, before or at the time their marriage, civil union, or de facto relationship began, that the property law of a country other than New Zealand is to apply to that property; and
    - (b) the agreement is in writing or is otherwise valid according to the law of that country.
  - (3) Subsection (2) does not apply if the court determines that the application of the law of the other country under an agreement to which that subsection applies would be contrary to justice or public policy.
- 32.57 Partners can expressly agree that the PRA will apply, even if neither partner is domiciled in New Zealand. If such an election is made this would cover all immovable and movable property

over which the PRA has jurisdiction. Partners may also expressly agree that the law of another country should be applied. Provided that agreement is valid (see section 7A(2)), the law to be applied by the courts will be that of the stated country. This may require a New Zealand court to apply the law of another country. Under section 7A(3) a New Zealand court can decide not to apply the law of another country if that would be contrary to justice or public policy.<sup>60</sup>

32.58 Where partners agree that the law of a country other than New Zealand may apply, it is important to note that:

- (a) Section 7A only relates to agreements made before or at the time their marriage, civil union or de facto relationship began.<sup>61</sup> Atkin points out that this “rule reflects the position in a number of European or European former colonies, whereby on marriage parties may opt for an alternative property regime.”<sup>62</sup> However, this is out of step with the increased number of de facto relationships prior to marriage and the entry into property sharing agreements at that stage of the relationship.
- (b) The agreement must specify which law is to apply and not simply that New Zealand law is *not* to apply.<sup>63</sup>
- (c) The agreement must refer to the “property law” of another country under section 7A(2)(a) yet it is possible that the relevant law of another country is not “property law” but something else, such as family law.

<sup>60</sup> For example, it might be contrary to public policy in New Zealand that taonga were dealt with under the law of another country if that law did not result in an outcome consistent with New Zealand law or resulted in taonga being taken overseas or kept overseas. For discussion more generally on the repatriation of taonga see Arapata Hakiwai “He Mana Taonga, He Mana Tangata: Māori Taonga and the Politics of Māori Tribal Identity and Development” (MHS PhD Thesis, Victoria University of Wellington, 2014). In his thesis Hakiwai considered “the role Māori taonga play within contemporary Māori communities as part of tribal self-determination and the advancement of Māori development and identity.” The question was researched in the context of taonga held in museums and other institutions in New Zealand and overseas.

<sup>61</sup> Property (Relationships) Act 1976, s 7A(1). In *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 the parties entered into an agreement in South Africa after they started living in a de facto relationship but before their marriage. The court stated at [29] that the agreement was therefore outside the scope of s 7A of the Property (Relationships) Act 1976.

<sup>62</sup> Bill Atkin “Classifying Relationship Property: A Radical Re-shaping” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

<sup>63</sup> In *Bergner v Nelis* HC Auckland CIV 2004-404-149, 19 December 2005 the husband was Dutch and the wife German and when they married in the Netherlands, the couple signed a prenuptial agreement stating no community of property would be acquired during the marriage (or in other words that property was to be kept separate). The couple separated while living in New Zealand and at that time signed an agreement under s 21 of the Property (Relationships) Act 1976 confirming their Dutch agreement and the application of Dutch law. It was held that the Dutch agreement should not be given effect given that it did not expressly stipulate the applicable law in the agreement.

- (d) The agreement need not be valid according to the law of the country where it was made but it needs to be in writing.
- (e) An unwritten agreement will be valid if it is also valid according to the law of the country where it was made.
- (f) It is unclear whether there can be an implied agreement. This may arise where, for example, a couple gets married and enters into an agreement in a certain country, implying that it is the law of that country that applies to the relationship without an express agreement to the contrary.
- (g) The partners may agree to depart from the agreement so that the PRA becomes applicable under section 7A(1).
- (h) It is unclear how the court should determine whether the application of the law of another country would be “contrary to justice or public policy.” Arguably the older the agreement the more willing the court may be to set it aside if it risks substantially depriving a party of rights to property which would otherwise be available under the PRA.
- (i) A court will not take notice of the effect of foreign law, but will seek expert evidence on the point.<sup>64</sup>
- (j) An overseas agreement that satisfies Part 6 of the PRA may be upheld under Part 6. An agreement that otherwise falls short may still be upheld under section 21H if the partners have not been materially prejudiced.<sup>65</sup>

## What happens when an agreement does not comply with section 7A(2)?

32.59 An agreement made after a relationship is entered into or that does not state which country’s law is to apply will not comply with section 7A. This means that if one or both partners acquire immovable property in New Zealand then the PRA will apply to that property (although this does not preclude another country

<sup>64</sup> *Koops v Den Blanken* [1998] NZFLR 891 (HC) upheld by the Court of Appeal in *Koops v Den Blanken* (1999) 18 FRNZ 343 (CA).

<sup>65</sup> *Stark v Stark* [1996] NZFLR 36 (DC). See also Chapter 30 of this Issues Paper.

finding it also has jurisdiction). If the parties are domiciled in New Zealand then the PRA will also apply to any movable property.<sup>66</sup>

If the parties are not domiciled in New Zealand then the PRA will not apply to any movable property in or outside of New Zealand nor immovable property outside New Zealand.

- 32.60 The concern about agreements that do not comply with section 7A is that partners have organised their affairs in reliance on the agreement made between them. While an agreement may still be upheld under section 21H of the PRA, if this is not possible, then the parties may find themselves bound by the rules of the PRA contrary to their intentions.
- 32.61 Section 7A(3) allows a New Zealand court to determine that applying the law of another country would be contrary to public policy or justice. In such cases section 7A(2) would not apply and the court would disregard the agreement. There is no statutory guidance on the threshold for establishing that the application of the law of another country would be “contrary to public policy or justice.”
- 32.62 Very few cases provide an indication of how section 7A(3) will be interpreted.<sup>67</sup> We have found one case where section 7A(3) was applied and in that case the threshold of finding the outcome would be contrary to public policy or justice was high.<sup>68</sup> In *P v P* the Family Court refused to recognise a South African pre-nuptial agreement because the agreement amounted to unjust enrichment under New Zealand common law.<sup>69</sup> In that case the parties entered a pre-nuptial agreement in South Africa that identified the value of assets each party brought into the marriage and provided for subsequent division of matrimonial property. Prior to arriving in New Zealand, the parties established a “frozen fund” from which each party might seek repatriation of funds to New Zealand. All investments, bank accounts and other funds were put into a single fund in the name of the husband. This left the wife with no property. The Court held that the South African

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<sup>66</sup> For a discussion as to “domicile” see paragraph [32.36].

<sup>67</sup> In *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005 the High Court said in obiter that it left “open also the extent of the ‘public policy’ or ‘contrary to justice’ exceptions set out in s 7A(3) of the [Property (Relationships) Act 1976]” at [25].

<sup>68</sup> *P v P* [2000] NZFLR 72 (FC).

<sup>69</sup> *P v P* [2000] NZFLR 72 (FC).

agreement was bad for public policy, contrary to justice, unfair and unreasonable, and the Court would not uphold it.<sup>70</sup>

## What happens when the current law is applied?

32.63 In this section we discuss what the current law in sections 7 and 7A of the PRA can look like in practice. Below are two case studies which highlight that applying the PRA can result in outcomes that:

- (a) are inconsistent with the policy of the PRA;
- (b) would likely see the partners incur significant legal costs; and
- (c) would mean resolution of the dispute would likely take a long time.

32.64 The outcomes are also unlikely to reflect what the partners would have reasonably expected to happen.

### Case study: Gil and Evelyn

Gil and Evelyn are a New Zealand couple in their 60s who have been married for over 30 years. Things have not been going well between them since they both retired. Recently Gil and Evelyn sold their holiday apartment in Queenstown and bought a holiday apartment on the Gold Coast in Australia. Soon after they purchased the apartment on the Gold Coast they ended their marriage. Gil and Evelyn disagree over who should keep the Gold Coast apartment and who should keep their holiday bach in New Zealand. The two properties are of equal value.

#### Likely outcome

32.65 A New Zealand court cannot make an order over the Gold Coast apartment as it is immovable property and within the jurisdiction of the Australian courts. Gil and Evelyn would have to apply to an Australian court for an order relating to the property. This may mean there could be proceedings in both New Zealand and Australia, which would result in both Gil and Evelyn incurring additional legal expenses. In neither proceeding could the court

<sup>70</sup> *P v P* [2000] NZFLR 72 (FC) at [77].

make an order considering the immovable property in the other country.

### **Alternative facts and outcome**

32.66 Imagine now that Gil and Evelyn had sold the apartment in Queenstown, transferred the money to a bank account in Australia in anticipation of buying an apartment but separated before they purchased any property in Australia. A New Zealand court could apply the PRA to the money in the bank account in Australia as it is movable property. A money judgment of the New Zealand court will be recognised and enforced by the Australian courts.

### **Are these the outcomes Gil and Evelyn would reasonably have expected?**

32.67 Two aspects of these alternative outcomes are remarkable. First, an Australian court would have jurisdiction to apply Australian law to the apartment on the Gold Coast even though the parties are New Zealanders and the country with which the relationship has its closest connection is New Zealand. Second, whether the property was held as money in an Australian bank account (movable) or was the apartment (immovable) changes which country's court can hear the case and what law applies to that property.

## **Case study: Tania and Henri**

Tania and Henri are South African. After living together for five years Tania and Henri married in Johannesburg. Just prior to the marriage they entered a written relationship property agreement (the pre-nuptial agreement). Under South African law couples must enter into an agreement unless they want to have a community of property (meaning they share all property), which is the default regime in South Africa. Tania and Henri did not want a community of property regime so entered the pre-nuptial agreement. It did not expressly state what law was to apply. The couple lived in a house that Tania had bought prior to their relationship. Henri owned an apartment he rented out and from which he used the income to help pay the mortgage on the house.

Ten years later Tania and Henri immigrated to New Zealand. Tania sold the house and Henri sold his apartment. On arriving in New Zealand they followed the



same arrangement. Tania bought a house which the couple lived in together. Henri bought an investment apartment and used the rent to help pay off the mortgage. Two years after they arrived in New Zealand Tania and Henri separated.

## Likely outcome

- 32.68 Despite having a pre-nuptial agreement, it is likely that the PRA would apply to the house and that the house (as the family home) would be divided equally between Tania and Henri. Under the PRA Henri's apartment would be his separate property and not available for division. All the family chattels would be divided equally between them.
- 32.69 This is because although the parties had an agreement between them it is probably not valid under section 7A(2). First, it was signed after the de facto relationship had started (even though it was prior to the marriage). The agreement must have been entered into "before or at the time their marriage, civil union, or de facto relationship began." Second, there was no express provision on what law should apply. On that basis the PRA becomes the default law to be applied.

## Alternative facts and outcome

- 32.70 Imagine now that having lived in New Zealand for two years, Henri was offered a job back in Johannesburg. Annelotte (Tania and Henri's daughter) has two years left at high school so Tania and Henri decide that Tania would stay on in New Zealand with Annelotte. Tania and Henri both sell their respective properties. Tania rents an apartment for herself and Annelotte. Tania and Henri both pay the deposit on a house in Johannesburg. However, because only Henri is living in Johannesburg the partners agreed it would be easier to keep the house in Henri's name and to keep the rest of their funds in a South African bank account in Henri's name. Henri pays the mortgage on the house while Tania pays the rent on the apartment in New Zealand.
- 32.71 Trying to maintain a long-distance relationship was hard. Tania did not want to return to South Africa but Henri loved his job and reconnecting with friends and family back in Johannesburg. After one year apart Tania and Henri agree to separate.
- 32.72 It would be difficult to advise Tania and Henri which country's law would apply to the division of their property. Both partners

appear to have a different domicile – Tania in New Zealand and Henri in South Africa. Because Tania is probably domiciled in New Zealand, the PRA may apply to all movable property including the bank account in South Africa.<sup>71</sup> The PRA would not apply to the apartment in Johannesburg (as it is immovable property and excluded under section 7(1)). Because Henri is probably domiciled in South Africa there could be proceedings in South Africa. As the partners had signed the pre-nuptial agreement electing not to have a community of property then both the house and bank account in Johannesburg would appear on the face of it to be the separate property of Henri under South African law. Expert advice would be needed to determine what the implications would be under both New Zealand and South African law and proceedings might be issued in both countries.

### **Is the outcome what Tania and Henri would have reasonably expected?**

32.73 Tania and Henri may have reasonably expected that the pre-nuptial agreement they entered into would be upheld. It does not appear rational that the agreement was not valid because it was entered into after the start of the de facto relationship (but before the marriage). Although South African law was not expressly nominated as the relevant law in the pre-nuptial agreement it is arguably implied, given that the agreement was entered into in South Africa, complying with South African law. The possibility of proceedings in two countries and the costs entailed does not promote an efficient and just resolution of the dispute. In addition, if the New Zealand and South African courts both made orders in relation to the bank account and those orders conflicted, this could be a very difficult situation to resolve. Finally, even if the PRA was found to apply to all movable property (based on Tania's domicile), Tania may be prevented from receiving a just division of relationship property given that the PRA would not apply to the house in South Africa, the partners' key asset.

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<sup>71</sup> Because the pre-nuptial agreement between Tania and Henri was entered into after the parties lived together (and therefore probably after the start of the de facto relationship) it would probably not be valid under s 7A(2) of the Property (Relationships) Act 1976.

## Summary of problems when the current law is applied

32.74 These two case studies illustrate the issues with sections 7 and 7A. In summary, the issues are:

- (a) The PRA may not help partners (and lawyers) determine what court will hear a dispute.
- (b) The PRA may not help partners (and lawyers) determine what law will be applied.
- (c) It may be difficult to enforce a judgment or order of a New Zealand court in a foreign country, frustrating a partner's entitlement under the PRA.
- (d) The outcome is not always consistent with the partners' reasonable expectations.
- (e) The express intentions of partners captured in a written agreement may not be given effect to due to non-compliance with section 7A, but the justification for these compliance requirements is unclear.
- (f) Applying sections 7 and 7A may lead to outcomes inconsistent with the PRA's policy of a just division of relationship property.

32.75 If sections 7 and 7A frustrate either a just division of relationship property under the PRA or the right of partners to opt out of the PRA and be confident in their own arrangements, we consider that reform is needed. The implications of not having an accurate understanding of the law can have serious consequences in the cross-border context. This is because it is not just the application of the PRA at issue. The law of another country may apply and the outcome of applying the law of another country may be very different. This emphasises the need for clarity and, as far as possible, simplicity in the law.

32.76 Cross-border issues can be complex. Lawyers may take a long time to identify and understand the issues, as in *Calkin v Roland*, where the protest to jurisdiction was not lodged until just prior to the substantive hearing.<sup>72</sup> Legal advice at the outset of a case may need to be revisited as the cross-border issues are discovered.

<sup>72</sup> The Family Court in *Calkin v Roland* [2013] NZFC 3768, [2014] NZFLR 833 at [2]–[3] noted that “although this issue should have been obvious to counsel from the beginning, they appear to have overlooked it for 14 months... It was

These factors contribute to our preliminary view that the law in the PRA relating to cross-border issues needs reform.

## CONSULTATION QUESTION

L3 Do you agree that reform of the law is needed?

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only when the dispute was set down for a settlement conference that counsel for the respondent began to think about jurisdictional issues.”

# Chapter 33 – Approaches to reform

- 33.1 In the New Zealand context, the three key questions that must be addressed to effectively deal with PRA matters involving a cross-border element are:
- (a) When should the PRA apply?
  - (b) When will a New Zealand court decide the matter?
  - (c) How and where can a remedy be enforced?
- 33.2 This chapter addresses each of these questions, highlighting the issues arising and suggesting options to ensure that outcomes are consistent with the rules of PIL and the policy of the PRA as well as meeting the reasonable expectations of partners who find themselves in a relationship property dispute with cross-border issues.

## When should the PRA apply?

- 33.3 Just because a New Zealand court has jurisdiction to hear a dispute between partners over relationship property does not mean that the court will apply the PRA. In this section we identify scenarios where the PRA is not automatically the law the court will apply.

## Agreements that expressly provide for New Zealand law to apply

### Case Study: Anaïs and Louis

Anaïs and Louis are French and have been living together for several years. Anaïs falls pregnant and the couple decide they want to immigrate to New Zealand. Louis has explained to Anaïs that in New Zealand de facto couples are treated like married couples, a situation very different to France. Before their child is born Anaïs and Louis sign a written agreement saying they wish New Zealand law to apply to their property, should they separate. After the baby is born Anaïs, Louis and the baby move to New Zealand to have a trial run of their new home. Just in case things don't go well they have left

their savings in a French bank account as security. The move to New Zealand does not go well and shortly after arriving, Anaïs and Louis separate.

## What is the likely outcome under the PRA?

- 33.4 As a general rule, where there is a written agreement stating that the PRA is to apply, then the PRA will apply. There are no further express requirements set out in section 7A. This is different to the provisions in Part 6 of the PRA allowing partners to contract out of the PRA. Given that partners are making a conscious choice to contract into the PRA (rather than out of the PRA) there would seem to be no logical reason the same safeguards would apply. The safeguards are implicit in the rules of the PRA itself because they represent policy choices as to how the State considers relationship property should be distributed in New Zealand. In contrast when partners contract out of the PRA, the safeguards in Part 6 ensure that they understand the potential implications of not having the security of the default rules in the PRA apply.
- 33.5 Applying the PRA would mean that Anaïs and Louis would share equally all relationship property. Any order made for division could include any movable property back in France, such as the bank account. The PRA would not, however, apply to any immovable property in France.

## Two matters for clarification

- 33.6 Section 7(1) refers to “this Act” (being the PRA) applying when the partners agree in writing it is to apply. It is just as likely that an agreement could refer to “New Zealand law” rather than specifically identifying the PRA. We suggest that this difference should not upset the validity of an agreement. Reference to New Zealand law is broader and would encompass any unforeseen circumstances where a broader application of New Zealand law might be required to ensure justice.
- 33.7 Section 7A(2) refers to the agreement being entered into “before or at the time” the partners’ relationship began. There is no such requirement in section 7A(1). Our preliminary view is that this requirement should be removed from section 7A(2) as there seems to be no reason to exclude agreements made at any other time during or even after the relationship.

- 33.8 A clear indication of the choice of law the parties have made is likely to help resolve a dispute quickly and in accordance with the wishes of the partners.

### CONSULTATION QUESTIONS

- L4 Do you agree that section 7A should refer to an agreement to apply “New Zealand law” rather than the PRA?
- L5 Do you agree there should be no timing requirement for agreements entered into under section 7A(1)?

## Agreements that implicitly provide for New Zealand law to apply

### Case Study: Omar and Fatima

Omar and Fatima have immigrated to New Zealand from Turkey. They married shortly before they left Turkey. Just prior to their marriage (knowing they were coming to New Zealand) they signed a written agreement that stated Turkish law was not to apply if they divorced. Despite immigrating to New Zealand, the couple retained close ties with Turkey including Fatima running an online business based in Turkey. Five years after arriving in New Zealand, the couple separate.

### What is the likely outcome under the PRA?

- 33.9 Without an express agreement about choice of law it is open for one partner to argue in relation to any movable property that New Zealand law should not be applied (for example claiming that the parties remained domiciled in Turkey). However, without either partner putting evidence to the contrary before the court, the court would likely apply New Zealand law as the default rules.

### What should happen?

- 33.10 This scenario raises the question of whether an implicit choice of law can be recognised. In this scenario the express rejection of Turkish law and the fact the parties were resident in New Zealand strongly favours New Zealand law being the applicable law. The reasonable expectation of the partners would be to give effect to the agreement by applying New Zealand law.

## CONSULTATION QUESTIONS

- L6 Should the PRA always apply if partners do not say in their agreement which country's law should apply?
- L7 Should there be recognition of an implicit choice that New Zealand law is to apply?

## Agreements that expressly provide for the law of another country to apply

### Case study: Brian and Taggie

Brian and Taggie are British citizens. Two months before the couple are due to marry they decide to immigrate to New Zealand. Taggie asks Brian to sign a pre-nuptial agreement that says if they separate, English law is to govern how they organise their affairs. They sign the agreement before they get married. The couple move to New Zealand. Taggie buys a house for the couple to live in. Brian receives a very generous inheritance from a great-aunt just before the couple move to New Zealand. He uses this to pay the couple's bills and day-to-day expenses. Taggie runs a successful property development business. While she runs the business side of things, Brian does most of the physical labour involved in renovating the properties before they are on-sold. The business and the bank accounts are in Taggie's name. Six years later the couple separate. Brian still has a large part of his inheritance and can continue to live with the same standard of living as the couple had during the marriage.

### What is the likely outcome under the PRA?

- 33.11 Provided the parties were not already in a de facto relationship when the agreement was signed then the agreement would likely be upheld. If the parties were in a de facto relationship when the agreement was entered into then it would not be valid under section 7A. Assuming the agreement was valid, it would be open to one or both of the parties to rely on and prove in court the relevant English law. If this is done then a New Zealand court would probably apply English law and make orders accordingly. Because under English law a financial order would only be made for financial need, which on these facts does not exist, Brian might not be entitled to any business profit or a share of the house.<sup>73</sup>
- 33.12 Provided the agreement was otherwise valid, a New Zealand court could, however, elect not to give effect to the agreement

<sup>73</sup> As per the Matrimonial Causes Act 1973 (UK). This Act and the approach taken in England is discussed in Part A.



if it determined that applying English law would be contrary to justice or public policy. Brian might argue that given his payment of day to day expenses and his work in Taggie's business it would be unjust for him not to share in a division of the house and the business.

## What should happen?

### **The requirement that a section 7A(2) agreement be entered into before the relationship began**

- 33.13 We see no persuasive reason for the validity of an agreement to depend on the time it was entered into. Section 7A(2) has been interpreted by the High Court as meaning that an agreement made by a couple already in a de facto relationship in contemplation of marriage would not be upheld.<sup>74</sup> This interpretation does not fit with the reality today that many married couples first live together in a de facto relationship. For many couples a de facto relationship will lead to marriage and at the point of marriage formal arrangements might be put in place, including an agreement under section 7A(2). There may be other reasons an agreement is entered into after the start of a relationship, such as the birth of a child or the decision to move overseas. There appears to be no sound basis for excluding agreements just because they are made after the relationship began.
- 33.14 There also seems to be no good reason partners cannot enter into a section 7A(2) agreement at the end of a relationship. There may be valid reasons why partners living in New Zealand or with property in New Zealand wish the law of another country to apply to their property, as highlighted throughout the case studies in this part.
- 33.15 Ideally, people should be enabled to make their own arrangements to best meet their own needs. At different points of a relationship, partners may identify that their needs require them to enter into an agreement that identifies the law of a certain country will apply if the relationship ends. It seems unhelpful to prevent partners from relying on an agreement based on when in the relationship the agreement is entered into. Our preliminary view is that this requirement should be removed from section 7A(2).

<sup>74</sup> *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 at [27]-[29].

## CONSULTATION QUESTIONS

- L8 Do you think that a couple should be able to agree at any point during their relationship, or even after separation, that a different law should govern how they divide their property?
- L9 Do you agree that the timing requirement should be removed from section 7A(2)?
- L10 Should there be recognition of an implicit choice that the law of another country should apply?

### Is the reference to “the property law of another country” overly restrictive?

- 33.16 Section 7A(2) refers to the “property law of another country”. We consider this phrase is unnecessarily restrictive. In other countries “property law” may not be the relevant law for dealing with the economic consequences when a relationship ends. This is the case, for example, in England and Wales, where the Matrimonial Causes Act 1973 (UK) is not directly concerned with distributing relationship property. Replacing “property law of another country” with “law of another country” would limit the risk of excluding agreements where the relevant law falls outside of the strict wording of section 7A(2), potentially rendering the agreement void.

## CONSULTATION QUESTION

- L11 Would it be sufficient to refer to the law of another country without stating which body of law should apply (for example property or family law)?

### When should an agreement not be upheld?

- 33.17 An implicit principle of the PRA is that partners should be free to make their own agreement regarding the status, ownership and division of their property subject to safeguards.<sup>75</sup> Part 6 of the PRA provides a regime whereby partners can contract out of the PRA’s rules of property classification and division. However, an agreement under section 7A(2) does not have the same safeguards that exist in relation to contracting out agreements under Part 6 of the PRA (notably the requirement for legal advice on the implications of the agreement). On what grounds should a court

<sup>75</sup> See Chapter 3 of this Issues Paper for a discussion of the principles of the Property (Relationships) Act 1976.

be permitted to set aside an otherwise valid agreement under section 7A(2)?

- 33.18 As discussed above, section 7A(3) provides that an agreement will be set aside if a “court determines that *the application of the law of the other country* under an agreement to which that subsection applies *would be contrary to justice or public policy*” (emphasis added). There is little judicial guidance to indicate how section 7(3) will be interpreted in the context of cross-border issues and when an outcome will be said to be contrary to justice and public policy. Given the vast range of potential factual scenarios, a clear test would give a court greater scope to prevent injustice and to ensure a just division of relationship property.
- 33.19 Potential options for a test for setting aside an otherwise valid agreement under section 7A(2) include:
- (a) **Option 1: Adopt a test similar to the test used in section 21J of the PRA allowing a court to set aside a contracting out agreement.** This test is whether giving effect to the contracting out agreement would cause “serious injustice.” This is a high threshold but is justified as the partners have deliberately ordered their own affairs and as long as it meets the procedural requirements, the contracting out agreement and, by extension, the partners’ wishes, should not be easily overturned. As discussed in Chapter 30 the fact the contracting out agreement would lead to an unequal result for the partners is, of itself, not enough to set aside an agreement under section 21J. Currently a section 7A agreement does not have the same list of procedural criteria for the agreement to be valid. There is therefore no guarantee, for example, that both partners were informed of and understood the implications of the agreement. As the agreement must be valid according to the law of the nominated country and every country will have different tests for validity, it may be that the test for setting aside a section 7A agreement should not be as high as for contracting out agreements.
  - (b) **Option 2: add to section 7A(3) a list of factors that a court must consider before upholding an agreement.** These could include:

- (i) Whether or not the agreement was a device when it was entered into furthering a goal contrary to the policy of the PRA. For example, where the agreement sought to escape the obligations of one partner.
  - (ii) Whether there has been significant change of life circumstances of one or both of the partners that could reasonably require that the partners revisit the agreement. This is different to the point of the relationship when the agreement was entered into, which would not as a general rule relate to the justice of the agreement.
  - (iii) Where there has not been a significant change of life circumstances, however a significant period of time had passed since the agreement was entered into.
- (c) **Option 3: continue with the current approach under section 7A(3) but provide a clear statutory test.** This option would retain the current power to set aside an agreement as contrary to justice or public policy. It might apply, for example, if the outcome would not be balanced between the partners. The statutory test could list the relevant factors that would establish that an agreement is contrary to justice or public policy. These factors could include those listed above at Option 2. Alternatively the test could be changed to be whether the agreement could cause serious injustice. The factors listed in section 21J of the PRA might then likewise be used in this context in assessing serious injustice.

## CONSULTATION QUESTIONS

L12 Do you agree that a clear test for when a court can set aside an agreement under section 7A would be useful?

L13 Which of the options do you prefer and why? Are there any other “relevant factors” you would include? Are there any other options you would like to suggest?

# Agreements that implicitly provide for the law of another country to apply

## Case study: Maxima and Robert

Maxima and Robert are Dutch. Before marrying they agree in writing that they opt out of a community of property regime but do not specify what law is to apply to the agreement. Robert is a school teacher and Maxima is a fashion designer. Several years after they are married, Maxima is offered a role at a top fashion house in Auckland on a two year contract. Although they leave their house and chattels in Amsterdam, Maxima buys an apartment in Auckland and the couple move to New Zealand. Robert does not feel confident speaking English so he stays at home and writes a novel rather than looking for paid work. After a year Robert wants to return to the Netherlands and start work again. Maxima loves her work and wants to complete her contract in New Zealand. The couple separate.

### **What is the likely outcome under the PRA?**

33.20 As the agreement entered into at the time of their marriage does not nominate the law of another country to apply, it is likely that the PRA will apply. On this basis Robert will probably be entitled to half of the apartment in Auckland and any family chattels in New Zealand. A New Zealand court will not make an order about the house in Amsterdam but it may make an order relating to the partners' chattels in Amsterdam if it found that either partner was domiciled in New Zealand. There is therefore the potential for two sets of proceedings to resolve all property matters – one in New Zealand under the PRA and one in the Netherlands under the relevant Dutch law.

### **What should happen?**

33.21 There will be scenarios when it is understandable that an otherwise compliant section 7A(2) agreement is entered into but there is no designation of which country's law is to apply. This may be because the partners move every few years and they do not know at the outset of their relationship which country's law will be most relevant on separation. Requiring partners at the start of the relationship to elect the property regime they wish to apply to their property if they are to separate is inflexible and, we consider, unnecessary.

- 33.22 In *Herbst v Herbst* the parties entered into an agreement while living in South Africa and several years before immigrating to New Zealand.<sup>76</sup> This agreement was entered into under South African law that requires that when two people marry they must choose whether they will have community of property or not. The agreement stated there was to be no community of property between the partners but did not state expressly that the property law of South Africa was to apply. The High Court of New Zealand found that the agreement did not comply with section 7A(2) as it “was one which contracts out of the relevant South African matrimonial property legislation but does not explicitly state which country’s property laws are to apply to any relationship property acquired in other jurisdictions.”<sup>77</sup> While there was no agreement in writing that the law of South Africa would apply, we consider that it could be reasonably implied that the relevant law was that of South Africa.
- 33.23 One option is to allow an implied agreement or at least implied terms of an agreement in cases such as *Herbst v Herbst*. The benefit of allowing an implied term or terms to be read into an agreement is that the reasonable expectations of the partners would not be upset by, for example, applying the PRA when the parties did not want this to happen. There would need to be a mechanism to allow a court to identify which country’s law should be applied. At paragraphs 32.30 to 32.37 we will discuss shifting the focus from the relevant law being determined with reference to the location and nature of the property, to the relevant law being determined with reference to the country that has the closest connection to the relationship.
- 33.24 A similar approach could deal with agreements that choose which country’s laws are to apply but then only refer to certain items of property. Having a test that applied the law of the country to which the relationship had its closest connection could permit an implied term that this law applied to property not dealt with under an otherwise valid agreement. The disadvantage to this approach is that a situation could arise where a New Zealand court had to apply the law of country A to designated property under the agreement and the law of country B (because the relationship had its closest connection to country B) to the rest of the property. The alternative approach would be to make New Zealand

<sup>76</sup> *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460.

<sup>77</sup> *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 at [26].

law the default law to be applied to property not covered in an otherwise valid agreement (that applies the law of country A to designated property). This is rational because the dispute is being dealt with in New Zealand.

## CONSULTATION QUESTIONS

L14 Do you think a court should be able to read an implied term into an agreement on which country's law should be applied?

L15 Do you agree that if an agreement deals with only certain items of property, New Zealand law should apply to all other property of the partners?

## Where foreign law is not relied on or proven

### Case Study: Mi Na and Tony

Mi Na and Tony immigrated to New Zealand from Korea. They married in Korea and entered into an agreement just before their marriage stating that Korean law was to be used to resolve any property dispute that arose if they separated. After living in New Zealand for four years, Mi Na and Tony separate. They cannot decide what should happen to the house in New Zealand which is held in Mi Na's name but for which Tony pays the mortgage, and ask the Family Court to decide for them.

### What is the likely outcome under the PRA?

- 33.25 If neither Mi Na nor Tony seek to prove and rely on Korean law to determine the dispute then New Zealand law will apply. This is the case even if they still have a very strong connection to Korea, including owning property in Korea. A New Zealand court can apply the PRA.<sup>78</sup>
- 33.26 The result would be the same even if there was no agreement between the partners but the relationship had its strongest connection with another country.<sup>79</sup> Without one partner seeking to prove and rely on evidence that the law of another country should apply, a New Zealand court will apply New Zealand law.
- 33.27 We have not identified any issues with this outcome. Failing to prove and rely on the law of another country amounts to an

<sup>78</sup> See obiter comments in *Birch v Birch* [2001] 3 NZLR 413 (HC) at [49].

<sup>79</sup> On the basis of the rules set out in ss 7 and 7A of the Property (Relationships) Act 1976 (PRA), which state when the PRA applies to property.

implied agreement that New Zealand law should apply, which seems appropriate.

## Where the relationship has its closest and most substantial connection with New Zealand

### Case study: Manu and Theo

Manu is Portuguese and Theo is Chinese. They have been in a long term de facto relationship. They met in New Zealand while travelling and settled in Tauranga. Manu works as a gardener and Theo is a consultant chef who travels extensively to work for short periods in restaurants throughout the Asia-Pacific region. They both have jobs in New Zealand and are permanent residents. They live in Tauranga in a house owned by Manu and they pay the mortgage with income from renting out Theo's apartment in Beijing. The couple own as tenants in common a small holiday house in Fiji where they spend five months each year during winter. They keep a bank account open in Fiji to use when they are there. Every year Manu spends a month in Lisbon visiting family. After ten years together the couple separate. Manu and Theo have entered no form of property sharing agreement.

### What is likely to happen under the PRA?

- 33.28 On the face of it Manu and Theo's relationship (and property) has connections with several countries – Fiji, China, Portugal and New Zealand. This could lead to very complicated, long and costly proceedings in New Zealand and the other countries. The PRA would apply to immovable property in New Zealand and depending on a finding as to domicile of the partners it would apply to movable property in New Zealand and overseas. The PRA would not apply to any immovable property overseas. It is unclear whether the partners are domiciled in New Zealand given how often they travel and live abroad and the interests they retain in the other countries. This can have implications as to whether the PRA would apply to movable property in other countries.
- 33.29 The likely outcomes risk being far removed from what Manu and Theo could have reasonably expected to happen. The reasonable expectations of the partners will probably not be met if they must rely on the courts in more than one country to resolve the matter. Nor would they be met if property in New Zealand is subject to equal sharing under the PRA but the property in other countries is not covered under the PRA and would therefore be distributed according to the law of that country.



## What should happen?

- 33.30 Much of the complexity that arises in this scenario is because the law applied depends on the nature and location of the property. A different approach would be to focus on the country with which the relationship has its closest connection. If this was the focus Manu and Theo probably have their closest connection with New Zealand. They live the majority of time in New Zealand; they formed, conducted and ended their relationship in New Zealand; while each partner has a connection to another country the partners have a mutual connection to New Zealand and both partners work in New Zealand (at least sometimes). If this approach were taken then arguably the PRA applies to all their relationship property and the New Zealand court could decide the case on that basis (provided it has jurisdiction as discussed below).
- 33.31 Focusing on the country to which the relationship has the closest connection reflects a move away from the test of habitual residence used in other areas of the law with cross-border implications such as inter-country child abduction<sup>80</sup> or tax residency in a country.<sup>81</sup>
- 33.32 Different countries have different rules to deal with which law to apply in relationship property disputes.<sup>82</sup> For example, in Ontario, Canada:<sup>83</sup>

*the property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.*

<sup>80</sup> The test of habitual residence is used in the Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).

<sup>81</sup> See the recent New Zealand case of *G v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261. In that case the Court of Appeal had earlier taken a “common sense approach to making the legislation work in accordance with Parliament’s purpose”: Douglas White “A Personal Perspective on Legislation: Northern Milk Revisited – Soured or Still Fresh?” (2016) 47 VUWLR 699 at 705. The Court of Appeal was looking for a “close and clear connection” between the applicant and New Zealand in order to establish the applicant’s entitlement to New Zealand superannuation, despite the applicant having lived overseas for 20 years: *Chief Executive of the Ministry of Social Development v G* [2014] NZCA 611, [2015] 3 NZLR 117 at [32]. The Court took a large number of factors into account in making its findings. This included factors unrelated to residence. This decision was overturned on appeal to the Supreme Court which found that the appellant was not ordinarily resident in New Zealand. The Supreme Court said at [32] that the meaning of the words “ordinarily resident” turned on the particular statutory context in which they were used. In this case the relevant statute was the Social Security Act 1964 and the term “ordinarily resident” “denote[s] a place in which someone resides”: at [36].

<sup>82</sup> In the European Union, the Brussels II regulation states that the court in which proceedings were first started has exclusive jurisdiction: Regulation 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of personal responsibility [2003] OJ 338/1.

<sup>83</sup> Family Law Act RSO 1990 c F.3, s 15.

- 33.33 In New Zealand, the general approach has been to resolve the conflict by referring to where the partners are domiciled (habitually reside). The situation immediately becomes more complex, however, if one partner is ordinarily resident in another country or where the partners are domiciled or resident in New Zealand but want the law of another country to apply to their dispute.
- 33.34 Focusing on domicile and habitual residence may fail to capture the true centre of gravity for the relationship. For example, residence at the time of marriage fails to recognise that partners may change residence, and residence at the time of separation is arbitrary and does not necessarily have any link to the relationship. Domicile is still used in section 7 of the PRA but fails to capture the increasing reality that two partners can be domiciled in different countries.<sup>84</sup>
- 33.35 Focusing on the country to which the relationship has its closest connection can also be used in reverse to deal with couples whose relationship has its closest connection with another country but who also have a minor connection with New Zealand. This could be done by extending the provision in section 7(3).
- 33.36 Take as an example Cynthia and Michael, who are a de facto couple living and working in Singapore. They are Singaporean citizens but spend every holiday in Wanaka where Cynthia owns a holiday home. From the perspective of the time, cost and complexity involved, it is not logical that any dispute over the Wanaka property is dealt with by a New Zealand court. The outcome under New Zealand law, which generally treats de facto couples like married couples, could be different to that under Singaporean law. Such an outcome could be different to that reasonably expected by Cynthia and Michael. Focusing on the country to which the relationship has the closest connection would address these issues.
- 33.37 The habitual residence of each partner may be an important factor in determining the country to which the relationship has its closest connection, but it would only be one factor. Other factors could include the time the partners spend apart and together in a certain location, joint and separate property ownership, social connections, whether the partners had a permanent home

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<sup>84</sup> The history of the domicile test is linked to historical conceptions of the wife as the property of the husband as her domicile would be linked to where the husband resided.

somewhere, where the relationship ended, where the income earning activities of the relationship are based, evidence of any property sharing agreements and where any children of the relationship live.

## CONSULTATION QUESTIONS

L16 Do you agree that where a relationship has its closest connection with New Zealand the PRA should be the law applied to any relationship property dispute?

L17 What factors will be relevant in determining the place a relationship has its closest connection with?

# When will a New Zealand court decide the matter?

33.38 Jurisdiction can be a complicated matter in cross-border proceedings and is often mixed up with questions of choice of law (what law should apply). To bring a matter before a court, both subject matter jurisdiction and personal jurisdiction must be established.

## Subject matter jurisdiction

33.39 Section 22 of the PRA states that “every application under this Act must be heard and determined in the Family Court.”<sup>85</sup> The New Zealand Family Court therefore has jurisdiction to hear every matter to which the PRA applies, which includes matters relating to all property that comes within section 7. This is called subject matter jurisdiction.<sup>86</sup> If a court has subject matter jurisdiction to deal with a relationship property dispute then the law applied is the PRA.<sup>87</sup> A court can make orders in relation to any property covered by the PRA (the question of enforceability of that order will be considered below).

33.40 If the partners have agreed in writing that the law of another country applies under section 7A(2), then the Family Court does

<sup>85</sup> This is unless a Family Court transfers the matter to the High Court: Property (relationships) Act 1976 s 38A.

<sup>86</sup> See David Goddard “Relationship Property Disputes – the International Dimension” (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at [2.2].

<sup>87</sup> Bill Atkin “Distribution of Property on Divorce” in J Heaton and B Stark (eds) *Routledge Handbook of International Family Law* (2017, Routledge, Abingdon, UK) (forthcoming), Ch 6.

not have subject matter jurisdiction. This becomes a matter for the District Court or High Court as discussed below.

## Personal jurisdiction

- 33.41 Personal jurisdiction must also be established. Personal jurisdiction generally requires that there is valid service of proceedings on the person against whom the claim is made (the defendant). The PRA only addresses subject jurisdiction and does not deal with personal jurisdiction. This means that in PRA cases personal jurisdiction follows the general rule that there must be valid service of proceedings on the defendant.
- 33.42 Proceedings must be served on the defendant under the rules of the Family Court, the District Court and where relevant the High Court. A defendant can be served at any time he or she is in New Zealand. Service can be difficult where the defendant is overseas.<sup>88</sup> The rules for service differ depending on a range of factors including whether there is an agreement between the partners, whether the defendant has submitted to the jurisdiction of the New Zealand court, whether the claim is under the PRA, the law of contract, constructive trust law or the law of another country and whether the defendant is ordinarily domiciled in New Zealand or elsewhere.
- 33.43 In certain circumstances leave of the court will be required for proceedings to be served.<sup>89</sup> When a defendant is served overseas additional documents need to be provided. Notice must be given to the defendant informing the defendant of, amongst other things, the scope of jurisdiction of the court, the arguments of the plaintiff and the defendant's right to object to the jurisdiction.<sup>90</sup>

## When jurisdiction is not exercised by a court

- 33.44 Under section 7(3) of the PRA a court can decline to exercise jurisdiction over foreign movable property, where the defendant is neither domiciled nor resident in New Zealand.<sup>91</sup>

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<sup>88</sup> Rule 130 of the Family Court Rules 2002 states that rr 6.23–6.27 of the District Court Rules 2014 apply to service abroad of proceedings under the Property (Relationships) Act 1976.

<sup>89</sup> District Court Rules 2014, r 6.24; and High Court Rules 2016, r 6.31.

<sup>90</sup> District Court Rules 2014, r 6.27; and High Court Rules 2016, r 6.31.

<sup>91</sup> The approach in New Zealand will be different to the approach in other countries. See for example the Australian approach taken in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

- 33.45 In addition a defendant served overseas can object to the court exercising jurisdiction. An objection can be made on three separate grounds:
- (a) There was no arguable case that the grounds for serving proceedings abroad without leave were satisfied.<sup>92</sup> The burden is then on the applicant to prove there was a good arguable case and there are serious issues to be tried.
  - (b) There are no serious issues to be tried.
  - (c) That New Zealand is *forum non conveniens* (New Zealand is not the most appropriate forum for the matter to be heard and decided and that another forum would be more appropriate). We discuss this below.
- 33.46 If the defendant succeeds in establishing one of the above grounds, the applicant must then establish that the New Zealand court should exercise jurisdiction, including showing that New Zealand is *forum conveniens* (New Zealand is the most appropriate forum). A partner seeking to establish that New Zealand is the most appropriate forum will have a more persuasive case if there has been consideration of how to minimise costs and obstacles such as giving evidence by video link or meeting the costs of the other party or by conceding certain pieces of overseas evidence.
- 33.47 Where proceedings were served on a defendant in New Zealand, the defendant cannot object to jurisdiction because it has already been established. A defendant can, however, request that the court stay the proceedings if he or she can establish that New Zealand is *forum non conveniens*.<sup>93</sup> A key factor in determining whether another country is the appropriate forum is the question of enforceability.

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<sup>92</sup> District Court Rules 2014, r 6.23.

<sup>93</sup> District Court Rules 2014, r 15.1; and High Court Rules 2016, r 15.1. See *Ghose v Ghose* (1997) 16 FRNZ 455 (HC).

## The forum conveniens test and the forum non conveniens test

33.48 The principles of forum conveniens or forum non conveniens are used by the courts in New Zealand when a party objects to the New Zealand courts exercising jurisdiction.<sup>94</sup>

33.49 A range of factors are considered by a court in identifying the most appropriate forum. These include:<sup>95</sup>

- (a) cost and convenience of proceedings in each of the potential jurisdictions;
- (b) the location and availability of witnesses;
- (c) how litigation has proceeded in these jurisdictions (in other proceedings);
- (d) whether all the parties are subject to New Zealand jurisdiction so all issues may be resolved in a single hearing;
- (e) whether the relevant law is New Zealand law or foreign law (because it is preferable to apply the law of a country in that country);
- (f) the existence of any agreement that refers to the appropriateness of either country to hear the dispute;
- (g) the strength of the plaintiff's case;
- (h) whether the judgment must be enforced;
- (i) whether the application is being made to gain a tactical advantage or whether it is because the defendant truly wants the hearing to be in another forum;
- (j) any procedural advantage in the particular jurisdiction; and
- (k) whether the other jurisdiction has held it is the most appropriate forum.

33.50 The fact that the PRA is the applicable law is only one factor to take into account.

<sup>94</sup> These principles were reviewed by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) and confirmed in New Zealand in *Wing Hung Printing Co v Saito Offshore Pty Ltd* [2011] 1 NZLR 754 (CA) at [43].

<sup>95</sup> David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 49–50.

33.51 In relationship property cases, the New Zealand courts have been influenced by where the property in dispute is located and the law that will be applied to determine the rights of the partners.<sup>96</sup>

### How have the courts applied these factors?

33.52 In *L v L* there was disputed property in both New Zealand and the United States.<sup>97</sup> The wife was domiciled in New Zealand when she made her application, and the husband was resident in the United States. The husband did not formally object to the New Zealand courts having jurisdiction, did not commence proceedings in the United States and even expressed the view that the courts in New Zealand should decide the matter. Having assumed that the property in the United States was movable property (given there was no evidence to the contrary), the New Zealand Family Court did not exercise the power under section 7(3) to *not* make an order. Instead it held that the movables in the United States were relationship property and therefore subject to division.

33.53 In *W v Y* the Family Court held that Taiwan was the appropriate forum.<sup>98</sup> The partners married and had their children in Taiwan. The husband helped settle the wife and some of their children in New Zealand but he remained resident and domiciled in Taiwan. The parties entered into a matrimonial property agreement in Taiwan. The wife claimed that she was forced into the agreement and did not understand her rights when she signed it. The Family Court noted the following points in finding that New Zealand was *not forum conveniens* and that the appropriate court to hear the dispute was in Taiwan:

- (a) the part of the relationship when the partners lived together as a couple was in Taiwan;
- (b) the income earning activities of the relationship were in Taiwan;
- (c) the partners were likely to be more aware of Taiwanese than New Zealand relationship property law;
- (d) neither partner was fluent in English;

<sup>96</sup> *Gilmore v Gilmore* [1993] NZFLR 561 (HC).

<sup>97</sup> *L v L* FC Levin FAM 2003-031-336, 8 December 2005.

<sup>98</sup> *W v Y* FC Manukau FAM 2004-092-1762, 30 March 2007.

- (e) the New Zealand courts had no jurisdiction over land in Taiwan;
- (f) the relevant investments were controlled by the husband in Taiwan; and
- (g) evidence relating to matters surrounding the matrimonial property agreement was more available in Taiwan.

33.54 In *S v S* the property was mostly movable property located outside New Zealand.<sup>99</sup> The wife was a New Zealand resident and the husband an American citizen residing in Guam. The wife commenced PRA proceedings in New Zealand and the husband commenced proceedings in Guam seeking a divorce and a division of community property. The factors against the New Zealand court dealing with the matter were that additional fees would be incurred by the partners and there was an increased evidential burden as information would have to be sought from overseas and explained to New Zealand counsel and the court. Factors in favour of the dispute being heard in New Zealand were that the wife might not be able to afford the cost of a lawyer in Guam nor afford the cost of representing herself in proceedings in Guam. The Family Court did not decline to exercise jurisdiction but granted leave to the husband to reapply if funds were provided to the wife to meet her legal costs in Guam.

## What are the issues with the rules relating to jurisdiction?

33.55 There do not seem to be any major issues in relation to the jurisdiction rules but we consider there is an issue relating to which New Zealand court should hear cases where another country's law is to be applied. This is due to the complexity inherent in applying the law of another country.

33.56 Goddard has noted that "because [section] 7 goes to the jurisdiction of the Family Court to hear the proceedings, the Family Court cannot hear a claim in respect of property to which [section] 7 does not apply."<sup>100</sup> This may include matters where the relevant law is not the PRA, and the dispute must be determined

<sup>99</sup> *S v S* FC Christchurch FAM-2006-009-2233, 27 April 2007.

<sup>100</sup> David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 397.



by reference to common law or equity. This may also include where the law to be applied to the matter is the law of another country. In such cases, the matter must go to the District Court or the High Court.<sup>101</sup>

- 33.57 Applying the relationship property law of another country is likely to be complicated and require the advice of experts. In addition, the Family Court will not have subject matter jurisdiction if the PRA does not apply, for example, if the partners had a valid written agreement that the law of another country applies. Proceedings involving the application of foreign law would need to be transferred to the District Court or the High Court, depending on the amount and nature of the claim.<sup>102</sup> Transfer of proceedings can be costly in both the money involved and the time it takes.
- 33.58 Two options discussed in Chapter 26 are relevant here. First is the option to have concurrent jurisdiction of the High Court and Family Court. Second is the option to allow the High Court to transfer proceedings from the Family Court. If the matter is complex,<sup>103</sup> or it involves the application of foreign law and requires transfer to a higher court, then the process could be improved.

## CONSULTATION QUESTIONS

- L18 Do you agree that any dispute involving the potential application of foreign law should be able to be transferred to the High Court? If not, why not?
- L19 Is there capacity for the Family Court to exercise originating jurisdiction, for example, if there is a dispute whether a section 7A(2) agreement is valid? If this was resolved and a finding that the law of another country was to be applied, should this then be transferred to the High Court?

<sup>101</sup> David Goddard “Relationship Property Disputes – the International Dimension” (paper presented to the New Zealand Law Society Family Law Conference, October 2003) at 397.

<sup>102</sup> In contrast the Employment Court has exclusive jurisdiction regardless of whether the relevant law is New Zealand law or the law of another country: *Bowport Ltd v Alloy Yachts International Ltd* HC Auckland CP 159/SD01, 14 January 2002.

<sup>103</sup> As per the threshold in s 38A of the Property (Relationships) Act 1976.

# How and where can a judgment or order be enforced?

- 33.59 In Chapter 14 we examined the range of orders a court may make under the PRA. These include vesting, ancillary, postponement and financial orders.<sup>104</sup> These orders provide flexibility under the PRA so a court can find a workable solution for the partners in their particular circumstances. When the proceeding has a cross-border element, the flexibility reduces. This is due to difficulties in enforcing the remedy overseas.
- 33.60 Although each country has different rules and approaches, the key point is that another country is unlikely to enforce a judgment from a foreign court over immovable property inside that country.<sup>105</sup> This means, in practical terms, that where the property in question is a foreign immovable, a New Zealand court should order relief of a different nature rather than an order purporting to vest overseas property in the applicant partner. For example, a court in New Zealand could impose a personal obligation on one partner to deal with overseas land as directed. Failure to uphold that obligation can lead to personal remedies against that partner, such as a finding that the individual is in contempt of court.<sup>106</sup>

## What should happen?

### Increased range of remedies to be used by a court

- 33.61 Any reform should focus on ensuring that a range of remedies is available under the PRA. Courts should be encouraged to consider all the facts relating to the partners, their circumstances and the dispute when deciding relief. For example, a financial order against a partner may be more appropriate and be more likely

<sup>104</sup> Section 33(1) of the Property (Relationships) Act 1976 gives a court a general power to:

make all such orders and give such directions as may be necessary or expedient to give effect, or better effect, to any order made under any of the provisions of sections 25 to 32.

<sup>105</sup> The Court of Appeal in *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA) has rejected the argument that compensation can be paid from the relationship property pool in recognition of a party's interest in immovable property located overseas. This avoids the accusation that the court is indirectly making a determination about property in the jurisdiction of another country's courts. This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC).

<sup>106</sup> For further discussion on contempt of court see Law Commission *Reforming the Law of Contempt of Court: A Modern Statute - Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at Chapter 5. At [5.5] the Law Commission states that a "person will be in contempt of court if he or she fails or refuses to comply with a lawfully made court order...an order requiring the payment of money cannot be enforced by contempt proceedings"

to be enforced (and failure to comply can lead to appropriate consequences that can likewise be enforced against the recalcitrant partner).

- 33.62 In Part G we discuss the power of a court to make orders concerning property held on trust that would otherwise be relationship property. Similarly, one option for reform in the cross-border context would be to give the courts greater express powers to consider relationship property overseas in order to effect a just division of the pool of relationship property.
- 33.63 In Chapter 26 we discuss a court's inventory function as explored by the High Court in *Yeoman v Public Trust Ltd*.<sup>107</sup> The Court noted that division of relationship property under the PRA includes inventory-taking, ascertaining relationship debts, applying division provisions under Part 4 of the PRA and making orders under Part 7.<sup>108</sup> It would seem a natural step for all overseas property (both movable and immovable) to be identified and accounted for as part of an inventory exercise. It would also be in accordance with the policy that a just division of property under the PRA requires that all relationship property be identified and accounted for. Failure of a partner to fully disclose overseas property could be subject to penalties, as discussed in Chapter 25. After a full inventory was taken of both overseas and domestic property, a court could call on the full range of remedies available under the PRA such as vesting, ancillary, postponement and financial orders and choose and adapt a remedy to best address the circumstances of the partners.
- 33.64 There are limitations with this approach, for example, if all the relationship property comprises overseas immovable property. However, a key benefit is that such an approach is more likely to be in keeping with the reasonable expectations of the parties. All relationship property is dealt with together by one court rather than the potential for different proceedings, under different laws, in different countries. If the law applied was the law of the country with which the relationship has its closest connection, then it would also be more likely that a majority of this property would be in that country. It would be rare for a relationship to have its closest connection with New Zealand but for all the relationship property to be overseas.

<sup>107</sup> *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

<sup>108</sup> *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

## CONSULTATION QUESTIONS

L20 Do you agree that a court should have to take into account all overseas property when making an inventory of all relationship property?

L21 Do you have suggestions for expanding the range of remedial measures?