

# Pensions with an international element

## Overview

*Pensions within family law is a complex topic. When there is also an international element, the subject can become exceedingly complex. The issue may arise when there are English proceedings with a foreign pension, foreign proceedings with an English pension and in decisions taken about appropriate forum for the proceedings. The issue may arise before the final order and settlement is made or on implementation and enforcement. Invariably, liaison is needed with foreign lawyers and with specialist pension advisers.*

## Introduction

Within only a few years of each other in the 1990s, most Western jurisdictions created pension sharing orders within their financial provision laws. Just as within England, many family law cases around the world cannot have a fair settlement without the opportunity for pension sharing. However many pension companies in countries around the world require a pension sharing order or similar pension arrangement to be made by an order of their local court. They will not accept a foreign court order. Some will accept certain forms of marital agreement instead of orders.

The pension asset is sometimes one of the most important available marital resources. Enforcement by way of, or obtaining, a good pension sharing order can be so important that the location of the pension may have a bearing on the decisions taken about the most beneficial forum.

Three separate issues arise

- enforcing an English pension sharing order abroad
- enforcing a foreign pension sharing order against an English pension company
- impact of pension issues on forum consideration

## Enforcing an English pension sharing order abroad

The English family courts arguably have power to make a pension sharing order and a pension attachment order in respect of most foreign pensions; “pension arrangement” in s21A MCA. Some commentators e.g. David Davidson in “Pensions and Family Breakdown” (2008) Law Society have argued that the statutory instruments that govern pension sharing orders do not apply to foreign pensions and it is only if the trustees will co-operate that it is possible to proceed with them.

The primary issue in any event is implementation abroad. If an English order against a foreign pension cannot be implemented, it is academic if the court does or does not have power to do so.

Before any settlement, by agreement or adjudication, it is essential to liaise with lawyers in the jurisdiction in which the pension is located and administered. Dependent upon their own ability, it may be necessary for them or for the English lawyer to liaise with foreign specialist pension advisers. It may be very valuable to contact the pension company direct to ascertain whether they will enforce an English pension sharing order and, if not, what they will require.

Local advice should also be ascertained regarding the information discoverable about the foreign pension. This should be part of the ancillary relief proceedings in England before there is any final decision taken on seeking a pension sharing order.

Special note should be taken of the nature of the foreign pension. Some foreign financial investments are described as pensions yet are in reality no more than longer term savings accounts. Some pensions

can be taken well before the normal retirement age, although often with tax penalties. Some pension arrangements make no requirements or obligations on the person retiring as to how they invest the pension monies on retirement. Tax implications of foreign pensions should always be investigated and understood. Some carry significant tax advantages on payments into the pension e.g. some aspects of the UK schemes. Some carry tax benefits on draw down.

If enforcement of an English pension sharing order will be very difficult, costly or perhaps practically impossible, it will inevitably be better to seek an offsetting order i.e. seeking a substantially greater share of the other available assets against which there can be effective enforcement or other arrangements. Only a couple of other countries, the principal one being Germany, have similar freestanding applications for remedies equivalent to the 1984 MFPA legislation. As always, local advice must be taken where the pension is situated and at an early stage.

#### Enforcing a foreign pension sharing order against an English pension company

English lawyers may be contacted by family lawyers abroad who are either seeking a pension sharing order in proceedings in their local court against an English pension alternatively have already obtained a pension sharing order against an English pension company and then want to enforce.

A considerable majority of UK pension companies will not implement a pension sharing order made by a foreign family court order or a foreign pension sharing agreement. They require an English family court order. It is good practice initially, before any foreign orders are finalised abroad in respect of English pensions just as in England proceedings with foreign pensions as above, to ascertain from the pension company whether they will require a local English order or whether a foreign order or agreement will be sufficient. If the latter the lawyer should find out what requirements the English pension company would require in the final order. This is of fundamental importance if the English court would not have jurisdiction under Part III Matrimonial and Family Proceedings Act 1984.

Where the English pension company requires a local, English pension sharing order to give effect to the pension share arrangement either agreed abroad or following a foreign court order, the conventional approach is to apply for an order under Part III Matrimonial and Family Proceedings Act 1984. This provides financial provision in England after an overseas divorce. A pension sharing order or pension sharing attachment order is available under s17(1)(b) 1984 Act. This was an amendment to the 1984 legislation made by the Welfare Reform and Pensions Act 1999 and applies to applications made on or after 1 December 2000 under the 1984 Act. The application is made, in effect, by consent with a draft order lodged at the initial application for leave. It is good practice to show a letter from the English pension company requiring an English local order to give effect to the foreign pension sharing arrangement. This relief is arguably not available other than by consent as it has been said in case law that the 1984 Act should not be used for enforcement purposes only. This may be highly relevant if the proceedings abroad are or were contested.

Where there is a pension sharing order or agreement abroad, it is good practice to advise foreign lawyers to include provision in the foreign order or agreement that the parties will apply by consent under the 1984 legislation for an order against the English pension.

There are relatively narrow jurisdictional requirements for the 1984 legislation, being specifically based on the pre Brussels II divorce jurisdiction laws. Some parties abroad with English connections and an English pension and involved in family law proceedings abroad do not qualify under the 1984 Act. There are two chief categories. The first are the many from abroad who have worked for some time in England and paid into an English pension but are now again living and working abroad. The second are the many Britons who have emigrated abroad but have a considerable English pension. Both categories may find that they do not satisfy the jurisdictional requirements of the MFPA 1984 although the question of domicile of one of the parties should be considered for the second category but only if they have retained strong links and connections with England.

In some cases it may be wholly impossible to enforce the pension sharing arrangement. Other arrangements may need to be made including a form of implementation once the pension is in payment. These are however very unsatisfactory in comparison to the opportunity for a pension sharing order.

The SFLA/resolution has proposed, with others, that the 1984 legislation is changed to provide an additional jurisdictional basis of having an interest in an English pension. It is hoped this will be brought into force in the next couple of years. It is not known if it would be retrospective, although generally the Act itself is retrospective in effect: *Chebaro* (1987) 2 FLR 456.

In the meantime, English lawyers must alert foreign lawyers to these issues of implementation and enforcement when an English pension is involved in foreign family court proceedings.

#### Impact of pension issues on forum consideration

Given the very real difficulties which can exist with enforcing pension orders against foreign situated pensions, and as the pension fund can be one of the largest marital assets, the location of the pension may be a very important issue in deciding the most beneficial forum for proceedings for a client. If the other most substantial asset is real property, which does not give so many difficulties for enforcement, there may be significant benefit in the proceedings being in the jurisdiction where the pension is situated if it also has jurisdiction for a divorce. This consideration will be of the party seeking to claim against the pension.

Therefore include the country where the pension is situated when considering the jurisdictions in which beneficially there may be proceedings,. Also take local advice on enforcement opportunities if the family law proceedings were to go ahead in any of the other possible countries with jurisdiction. Add enforceability against pensions to the forum checklist when discussing with lawyers in all possible countries which have forum. Even though the proceedings may not be in the country in which the pension is situated, it may be easier to enforce an order against the pension made in one country rather than another if the choice exists.

In any event, not all countries have the same pension sharing and pension attachment opportunities. Local advice is always needed especially in respect of a substantial pension asset

Although not yet a frequent occurrence, pensions can be transferred across international borders. Whenever there are anxieties about transfer or disposal of assets, freezing orders should extend to pensions. Again local advice will be needed to ascertain precisely what form of order would be needed to make sure that the pension fund was not transported internationally.

If enforcement of the pension order would be difficult or impossible and therefore recourse will be needed to offsetting, local advice will be needed regarding the practice and policy of the local courts in this situation.

## Pension issues for consideration in international cases

- What information can be gathered?
- Who is best to supply this; a family lawyer, a pensions adviser or any other financial adviser?
- What are tax and other financial aspects of foreign pensions?
- Is it a pension as commonly understood under English law?
- Always investigate issues of enforcement and implementation against foreign pensions before settlement including taking local specialist advice
- Will a foreign pension company directly recognise and enforce an English family court order?
- If so, what will they want to see in the terms of the order?
- If not, will a local order, following the terms of the English order, be possible and at what cost and what other issues may arise
- Is there jurisdiction abroad to make an order to implement the intended English pension sharing arrangement
- Will a foreign pension company accept a pension sharing agreement?
- If enforcement abroad is practically impossible or arrangements will be ineffective, take into account in the terms and form of the financial settlement
- In respect of foreign pension sharing arrangements for an English pension, is there jurisdiction under Part III MFPA?

### Recommended reading

“A Practical Guide to International Family Law” (2008) Jordans by David Hodson  
“Pensions and Family Breakdown” (2008) Law Society by David Davidson  
“Pension Sharing in Practice” (2003) Jordans by David Salter  
“Pensions and Divorce” (2008) Resolution/SIFA

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