

A match made in Europe

Ishtar Khalaf-Newsome and Dr Kerstin Niethammer-Jürgens outline the differences between family law in England and Germany

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The diversity of family law legislation among the 26 current member states of Europe continues to pose a challenge to family practitioners, who find themselves in an expanding and increasingly fluid Europe.

European Union statistics estimate that approximately 350,000 marriages and around 170,000 divorces in the EU have an international dimension. These figures suggest that international or 'cross-border' marriages, partnerships and divorces (pulling in their wake international custody disputes) are no longer a prerogative of wealthy, highly mobile families. They have become commonplace in Europe and thus have become a force to be reckoned with for European family lawyers who, on a daily basis, will be expected to be able to advise swiftly and expertly on cases with a cross-border dimension. Failure to do so can result in vast differences in financial outcome for clients.

In a first step towards harmonisation in the European Union the Brussels II Convention (2001) was introduced, as amended by Brussels II *bis* (2005), which brought about uniformity concerning jurisdiction and enforcement of judgments in matrimonial matters. The regulation legislated that the court of the member state first seised had jurisdiction. This effectively put an end to the conciliatory and consensual approach in divorce matters, as encouraged by the Resolution Code of Practice. As a result many international couples have no choice but to engage in a race to court, to secure jurisdiction. The 'letter before action' practice has

been laid to rest in such cross-border jurisdiction races.

Last summer, rather than speeding ahead on the road to further harmonisation with Rome III, which introduced amendments to Brussels II *bis*, the member states reached a cul-de-sac. Rome III sought to introduce harmonised conflict of law rules or 'applicable law' in divorce and legal separation matters. The member states failed to reach the required unanimity (the UK had decided to opt out at an early stage) and Rome III was shelved as a result. Applicable law therefore remains a significant sticking point in the divorce law of the different member states. Next on the European Commission's agenda for achieving greater harmonisation in matrimonial matters is a meeting on the draft proposal of Rome IV (also known as Brussels III), which took place at the end of September 2009. This is likely to cause further hiccups on the road to harmonisation. In matrimonial property regimes there is great diversity among the different member states, in particular between the civil law jurisdiction of the European member states and the common law jurisdiction of England and Wales.

Using the civil law jurisdiction of Germany and the common law jurisdiction of England and Wales as an example, let us look at some of the key differences in the matrimonial law of the two countries. We also need to take account of some of the recent reforms in German family law which came into effect on 1 September 2009 and 1 January 2008.

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The German law of divorce and ancillary relief (*Scheidungsverfahren und Scheidungsfolgenvereinbarungen*)

The issue of 'applicable law' (*Kollisionsrecht*) represents a crucial difference between Germany and England and Wales in matrimonial proceedings. 'Applicable law' or 'conflict of law' rules are not a feature in England and Wales (or in another seven European member states). Irrespective of the nationality of the spouses the English courts will always apply their own domestic law, the *lex fori*.

By contrast, in international or cross-border divorce cases, Germany will, according to the rules of German private international law,

lived, be divorced under Spanish law as applied by the German courts. Where there is no common nationality of the spouses the court will check the place of the parties' last joint habitual residence and apply the law of that jurisdiction. Picture a scenario in which an English husband seeking to divorce his German wife issues divorce proceedings in Germany rather than in England and Wales, on the assumption that he would get a better financial settlement in Germany. Imagine his surprise when he discovers that the German courts will apply the law of England and Wales under the conflict of law rules because the place of the parties' last joint habitual residence was England.

refused to grant an expedited divorce to a Moroccan wife who had suffered domestic violence at the hands of her Moroccan husband. The judge ruled that there was no evidence of 'unreasonable hardship' that would make it necessary to dissolve the marriage immediately. Making reference to the Koran, rather than to the relevant paragraph 1565 of the German Civil Code which deals with hardship, the judge argued that the wife should have 'expected' that her husband, who had grown up in a country influenced by Islamic tradition, would exercise the 'right to use corporal punishment against a disobedient wife', as his religion grants him such rights. Once a feature of Moroccan law of personal status, a wife's 'duty of obedience' to her husband was in fact rescinded by reforms enacted in 2004. The Court in Frankfurt removed Datz-Winter from the case, saying it could not justify her reasoning as it represented a violation of German constitutional law. Fortunately German law prevailed on this occasion.

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approach this in several steps (Art 17,14 EBG – *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, the German code on conflict of laws). If the spouses have a common foreign (ie, non-German) nationality but reside in Germany, the German courts will apply the law of the country of the spouses' nationality. For example, a Spanish couple who have lived in Germany for all or most of their lives will, irrespective of where they have

Quite how the German courts (and the courts of other European member states) are able to decide divorce and financial settlements arising from divorce according to, say, Greek law one day and Jordanian law the next is a conundrum which continues to puzzle the members of the *lex fori* group. Their scepticism appeared to be validated when in 2007 Christa Datz-Winter, a German judge at Frankfurt's family court,

Divorce: some differences

English family practitioners should be aware of a number of differences in the divorce process when dealing with a case with a German element. Some of the aspects outlined below are significant when issuing proceedings to secure jurisdiction in divorce matters under Brussels II *bis*.

One-year separation

Under German law the parties will need to demonstrate to the court that they have been separated for one year before they can issue divorce proceedings. After one year of separation there is an presumption that the marriage has broken down if both partners want to divorce (§1566 of the *Bürgerliches Gesetzbuch* (BGB), the German civil code). The court will still need to be convinced that the marriage has failed irretrievably. After three years of separation there is an irrefutable presumption that the marriage has broken down irretrievably. A petition issued prematurely, ie before one year of separation, will be rejected by the German courts as defective, leaving the court second seised to obtain jurisdiction. In the context of Brussels II this means that in an Anglo-German

Marital contracts (*Eheverträge*)

Marital contracts, which include both pre-nuptial and separation agreements, provide a legal device for spouses to exclude the provisions of the German statutory regime of community of acquisitions. Marital contracts need to be concluded before a joint notary in the presence of both parties (§1410 BGB). The notary's position is neutral and they will not advise the parties but merely record the agreement reached between them. Certain choices are not permitted by law. It is, for example, not possible to stipulate a foreign law regime only in relation to divorce, nor is it possible to avoid the obligation to pay child maintenance. Marital contracts which contain provisions deemed manifestly unfair, for example those seeking to unduly restrict spousal maintenance, can be set aside by the court, whose role it is to protect the weaker party.

Interestingly, it was a German pre-nuptial agreement which gave rise to what has been widely described as the most important decision on pre-nuptial agreements in English law to date. While previously unenforceable in England and Wales, the recent decision of the Court of Appeal in *Radmacher v Granatino* [2010], which declared a German pre-nuptial agreement to be valid, has given pre-nuptial agreements significant recognition in England and Wales – subject to a further appeal.

choice of jurisdiction a spouse wishing to issue divorce proceedings in Germany immediately following the parties' separation will not be able to do so. They will have practically no chance of winning the 'race to issue', as the under the law of England and Wales no such separation period is required. An exception to the one-year separation rule can be made in cases of intolerable hardship, such as domestic violence (as in the above mentioned case of the Moroccan wife), where an expedited divorce can be granted.

Minimum period of marriage

Under German law there is no requirement as to the minimum period for which the parties have to have been married before issuing divorce proceedings, although the one-year separation rule automatically imposes the one-year requirement which exists in England and Wales.

No judicial separation

German law does not know the concept of judicial separation: while the parties are required by law to have been separated for a year prior to issuing divorce proceedings there is no option for the separation to be given any formal recognition by the courts in Germany.

No personal service of divorce petition

Whereas English solicitors have the option of effecting service of a divorce petition either through the courts, by post or by instructing a process server, in Germany only the courts may serve a petition.

The *Scheidungsfolgen*: ancillary relief after divorce

Capital

Unlike in Germany, and in fact in most of the other continental European member states, England and Wales does not have a formal statutory matrimonial property system. Most continental European jurisdictions operate different versions of statutory matrimonial property regimes, based on separation of property or community of property. Unless the spouses elect a different regime by marital contract they are subject to the statutory regime. The concept of 'community of property' embraces the idea that marriage (and civil

partnership in some jurisdictions) has an automatic effect on the spouses' property rights.

The regimes across Europe vary significantly as to what assets will be affected and when or if they will be treated as joint property. As a result assets owned by the spouses individually prior to marriage can become joint assets, although gifts, inheritances, and to some extent pre-marital property can, under the different European regimes, be excluded from the matrimonial pot.

assets on marriage and are divided equally on divorce.

If no marital contract exists the default regime of community of acquisitions will apply. The name is slightly misleading as it is not a community but, much like English law, denotes the separation of the parties' assets during the marriage. It is often described as form of 'deferred' community of property or gains, because it is only on divorce that the accrual of the respective

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Some regimes come into effect on marriage, while others are deferred (ie, it operates on divorce). The German statutory matrimonial property regime falls into the latter category, but there are some peculiarities which one should be aware of:

The statutory matrimonial property regime in Germany (*Zugewinnngemeinschaft*)

The law of matrimonial property in Germany is codified in the BGB. Accordingly, the statutory matrimonial property regime in Germany is 'community of acquisitions' or 'accrued gains', the *Zugewinnngemeinschaft* (s1363ff BGB) (see below). It is the default marital property regime which applies to all married couples in Germany unless the parties decide to exclude provisions of the statutory regime and opt into one of the following two other regimes by way of marriage contract.

- Separation of property (*Gütertrennung*) (s1414 BGB). Favoured by wealthy spouses, this leads to the parties keeping their separate property on divorce.
- Complete community of property (*Gütergemeinschaft*) (s1415ff BGB). Rarely chosen, this means that all assets of the respective spouses become joint

parties' assets are compared and shared equally.

Community of acquisitions provides that:

- All property acquired by each spouse before or during the marriage remains their separate property.
- The spouses do not automatically share assets acquired during the marriage. They are of course able to purchase property jointly, just as non-married parties do.
- Although assets are administered separately there are some restrictions. For example, neither spouse is free to dispose of property considered 'household goods', nor may one spouse dispose of all or the majority of their assets without the other spouse's consent.
- It follows that a spouse will generally not be personally liable for debts which were acquired by the other before or during the marriage.

On divorce, equalisation of accrued gains takes place. Here the initial capital (at the point of marriage) and the final assets (on divorce) of each spouse are compared to calculate the

total increase in assets or acquisitions realised in the course of the marriage. The spouse with the greatest accrual must compensate the other by paying them up to 50% of the accrued gain to ensure that the gains are equalised (unless the court would consider such an equalisation payment grossly unfair). The parties have an obligation to the court to prove their final and initial assets, but in cases of dispute the asset in question will be considered part of the community of accrued gains.

marital home, for the period from marriage to separation. It does not give rise to a claim to the property itself or its realised value. Furthermore, assets received as personal gifts or as part of an inheritance do not form part of the divisible marital property. This is very different to the approach adopted by the Courts of England and Wales. Pursuant to the Matrimonial Causes Act 1973 the court will take into account all assets to which the parties are

support themselves due to, for example ill health or old age.

With regards to maintenance payable to a spouse who is raising young children, this too was caught by the recent amendments to the law (as of 1 January 2008). A spouse is now expected to return to part-time work when the child reaches the age of three. For maintenance to continue beyond then a spouse will have to prove that there is a valid reason, such as illness of the child or lack of childcare facilities. When calculating the level of spousal maintenance the German courts apply strict formulas and will in addition take into account the lifestyle of the spouses during the marriage. In general an unemployed spouse is entitled to claim three-sevenths of the employed spouse's net income (from which child maintenance will have been deducted already) and half of any other income. Where both parties are employed the economically weaker party is entitled to claim three-sevenths of the difference of net incomes of the respective spouses.

The payment of child support follows strict guidelines, as set out by the *Düsseldorfer Tabelle* (table), and the level awarded depends on the income of the non-resident parent.

Summary

In the absence of harmonised divorce laws the main differences between the divorce regimes in Germany and England and Wales are here to stay. They concern in particular the concepts of applicable law and matrimonial property, neither of which are a feature of the law of England and Wales. The German courts' formulaic approach to divorce financial settlements, as dictated by the statutory matrimonial property regime of the community of acquests, contrasts with the powers of the English courts to reallocate matrimonial assets on divorce. In cross-border divorce cases the difference in divorce financial settlements can therefore be enormous depending on the jurisdiction chosen. Awareness of these differences and how to navigate them is crucial for the English family law practitioner. ■

Radmacher v Granatino
[2009] EWCA Civ 649

The statutory matrimonial property regime in Germany is 'community of acquisitions' or 'accrued gains', the Zugewinnngemeinschaft.

Possessions purchased during the marriage to replace items brought into the marriage by a spouse, such as a computer, for example, do not form part of the divisible property, as they are considered part of that spouse's original property.

The *Zugewinnngemeinschaft* celebrated its 50th birthday a year ago, which was used as an opportunity to introduce reforms effective as of 1 September 2009. To mention only two of the recent changes:

- Debts which existed at the point of marriage and were paid off during the marriage will be deducted from the indebted spouse's share of calculated accrued gains, making the calculation of the accrual much fairer to the spouse who came into the marriage without any liabilities.
- For the purpose of calculating the accrued gain of the assets during the marriage the parties can, when issuing divorce proceedings, request information about the value of the assets at the point of separation. This is meant to ensure that neither spouse will be able to manipulate their financial affairs in the period after separation.

The above described property rights regime gives a spouse a potential claim to the increase in value of a property, such as the

legally and beneficially entitled, no matter how they were acquired or by whom, and whether now or in the foreseeable future.

Maintenance

In Germany there is a strict separation between matrimonial property law and the laws relating to maintenance on divorce. Whereas in England and Wales the courts, having regard to the needs and contributions of the parties, can exercise wide powers to make financial provision after divorce by way of lump sums, property transfer orders and periodical payments, this is not so in Germany. The German courts cannot redistribute marital assets as part of a divorce settlement. The community of acquest regime provides for an equalisation payment, but this is not designed to provide for the spouse's needs after divorce. It is simply meant to compensate them for any losses or gains resulting from the marriage.

The English courts have a duty to consider a 'clean break' order, and commonly employ property transfers or lump sum orders to achieve such a clean break. By contrast, the concept of a 'clean break' is not known under German law. Although spouses are obliged to be able to maintain themselves independently (s1569 and s1577 BGB) there exists in theory a continuing, life-long obligation for spouses to support each other. This will apply where a spouse is unable to