

STEP JOURNAL

Downloaded on 15th August 2024 - 17:49

Trust Quarterly Review

Pain in the nexus

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Possible links of international couples to Germany

Residence, citizenship and assets

The criteria for the establishment of a legally relevant residence differ depending on the rule in question. With regard to potential German family law consequences, the legal concept of habitual residence, in particular, may play a role. The establishment of such a residence is not a tick-the-box matter but depends on all the circumstance of the individual case. This is especially the case if there is a place in Germany where one or both spouses can stay; however, they should have a closer look at potential legal (not to mention tax) implications. Whenever in doubt, appropriate advice should be sought. It has to be remembered that legal implications may arise irrespective of ownership or tenancy of property in Germany. It also must be pointed out that residence is not only relevant with regard to the present situation but also in respect of various other points in time; for instance, it may also be relevant if the couple has lived in Germany before or will live in Germany in the future.

As an important link to Germany, citizenship may refer to both partners or to just one of them. German citizenship may also be just one among two or more citizenships. It might also exist even if there is no current German passport, for example, in the case of its acquisition by birth. In German nationality law, the passing on of citizenship by birth is still one of the basic principles (*ius sanguinis*).

Finally, assets may be based in Germany, which may invite potential legal consequences and so require an advisor's attention. This could be German real estate or a bank account, for example.

German jurisdiction, application of German law and claims under German law

The legal issues potentially connected to links to Germany are innumerable. This article will give an account only of some of the most important German family law aspects with regard to the potential consequences of a foreign marriage. First, however, some preliminary points regarding the recognition of a foreign marriage in Germany.

Recognition of a foreign marriage in Germany

Germany does not have any special procedure for recognition of marriages entered into abroad. Only if the existence of a valid marriage plays a role in an administrative or court proceeding then the validity of the foreign marriage will be determined as a part thereof. The rules of recognition relate to

the circumstances of the marriage and of the spouses. Generally, if the marriage conforms with their home jurisdiction, it will be acknowledged, subject to multiple exceptions.[\[1\]](#)

There is also no duty to be registered as married in German civil status records, even if living in Germany.

The existence of a marriage may, however, also play a role with regard to more indirect effects. One of many examples here is tax residence, because German tax authorities apply a presumption of a family home in Germany for a spouse if the other spouse lives in Germany.[\[2\]](#) This may be a particularly undesirable consequence for the spouse who sees themselves based abroad. In such cases, individual tax advice should be sought.

German jurisdiction with regard to divorce, the matrimonial property regime and maintenance

German courts might have jurisdiction if an international couple with a German nexus divorces. German courts could, *inter alia*, have jurisdiction if a spouse with German citizenship is habitually resident in Germany at least six months immediately before they make the application for divorce.[\[3\]](#) This six-month period might, under specific circumstances, not even be necessary (a so-called residual jurisdiction).[\[4\]](#) Residual jurisdiction again depends on the habitual residence and citizenships of the spouses. A German court taking jurisdiction on the divorce itself might also decide on related matters such as the matrimonial property regime[\[5\]](#) and maintenance.[\[6\]](#)

The application of German material law (private international law)

A German court hearing a case connected to an international marriage, such as a divorce, that can establish its jurisdiction will always apply German private international law (PIL) in order to determine the applicable law to the material issues before it. German PIL in this regard consists primarily of EU law. The most relevant EU regulations are:

- *Council Regulation (EU) No 1259/2010* (Rome III Regulation,[\[7\]](#) *Rom III-Verordnung*)
- *Council Regulation (EU) 2016/1103* (EU Matrimonial Property Regulation,[\[8\]](#) *Europäische Güterrechtsverordnung*)
- *Council Regulation (EC) No 4/2009* (EU Maintenance Regulation,[\[9\]](#) (*Europäische Unterhaltsverordnung*) in connection with the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (the Hague Maintenance Protocol,[\[10\]](#) *Haager Unterhaltsprotokoll*)

If there is no choice of law (explored below) or if it is ineffective, the general rules on the determination of the applicable law apply. These rules differ depending on whether the divorce and

legal separation itself, property relationships relating to the matrimonial property regime or maintenance obligations are concerned. Generally, the connecting factor of habitual residence at varying points of time plays a major role, depending on the rule concerned.

For example, the applicable law with regard to the divorce itself will primarily be the spouses' common habitual residence at the time the divorce is filed. However, if this and other criteria fail, it may also be the law of the country where the court is seized.^[11] The applicable law with regard to the matrimonial property regime, on the other hand, will primarily be the spouses' first common habitual residence after the conclusion of the marriage.^[12] For maintenance issues, the habitual abode of the eligible spouse in Germany might suffice.^[13] In other words, the result regarding the applicable law depends on the circumstances of the spouses' lives in the past and present and the application of German law may be limited to a specific aspect of the marriage.

Claims under German family law

If German law is applicable, in cases of divorce, the requirements of German law must be fulfilled to bring the divorce to conclusion and there can also be claims under German law, in particular a potential claim for equalisation of accrued gains and maintenance claims. For example, with regard to the matrimonial property regime, the claims arising on termination of marriage differ immensely depending on the nature of the regime. If a court considers the marriage to have been subject to the statutory property regime of community of accrued gains (*Zugewinnngemeinschaft*), such gains would be equalised on divorce. That means that the wealth gains made by one spouse during the marriage must be shared with the other spouse as far as they exceed the gains of the other. In particular, for spouses owning a business, this can lead to extraordinary high claims, even jeopardising the continuation of the business in some cases.

As an aside, a spouse is also entitled to a compulsory share if the other spouse passes away and there was no compulsory share waiver in place. Whereas this question is usually governed by the conflict-of-law rules for inheritance law, such compulsory share can even be protected for the surviving spouse if general foreign inheritance law applies, according to German case law (public order, *ordre public*). Pre-nuptial agreements therefore often also contain a waiver of the compulsory share. Care should be taken regarding its formal requirements in the specific case.

Managing German family law consequences and risks

Controlling jurisdiction (jurisdiction agreement)

German jurisdiction for divorce proceedings cannot always be prevented by agreement.

A choice of forum with regard to a potential future divorce in advance of proceedings is generally not possible under the applicable German conflict-of-law rules.^[14] This means that even if an international couple chooses a specific jurisdiction for a divorce in their foreign pre-nuptial agreement, this cannot prevent that a German spouse moves (back home) to Germany and files for divorce there, potentially with the necessary waiting period. If divorce proceedings were pending in another jurisdiction before a spouse made their application in Germany, this may hinder German jurisdiction. Whether an earlier application outside the EU hinders German jurisdiction generally hinges on a prognosis from a German perspective on whether a decision in such proceedings could be respected in Germany.

However, with respect to questions around the matrimonial property regime, the jurisdiction can be controlled by way of an agreement, even if only to some extent. With regard to marital property claims during lifetime,^[15] the jurisdiction may be agreed for cases only in which it is not being dealt with as part of a divorce.^[16] The jurisdiction for maintenance matters can also be subjected to a choice by both spouses, to some extent.^[17]

Controlling the applicable law (choice of law)

The law applicable to a divorce, to the matrimonial property regime and to maintenance can be chosen under certain circumstances. There are various criteria that can alternatively be fulfilled for such a choice of law to be accepted by a German court, depending on the respective jurisdiction. For example, with regard to all three subject matters of divorce, matrimonial property regime and maintenance, concurring a choice can be made, *inter alia*, in favour of the law of the state where the spouses are habitually resident or of the country whose citizenship one of the spouses possesses, both at the time the agreement is concluded.^[18]

Controlling potential claims under the application of German law

It has been shown that German law might be applicable to cases involving international marriages if and to the extent an effective choice of foreign law from a German perspective could not be made, because the necessary prerequisites as to habitual residence in Germany are not fulfilled. If that is the case, the following cornerstones of German marital law should be kept in mind.

German law generally allows for agreements on the personal effects of marriage, the matrimonial property regime, the rules on maintenance and the law on divorce, including the consequences of such a divorce (pre-nuptial/marital agreement).

The German statutory matrimonial property regime (being the community of accrued gains) can be fully excluded and instead, separation of property (*Gütertrennung*) can be agreed on. An equalisation of accrued gains will not then take place at the end of the marriage (either by divorce or death). Alternatively, the statutory regime can be modified due to its flexibility, which can be more advantageous in the case of German inheritance tax.

With regard to spousal maintenance law, there are limits to waivers of maintenance, which cannot be avoided by agreement. Before a divorce is valid, spousal maintenance after separation cannot be waived or altered beforehand by agreement. After the divorce, maintenance can be limited by agreement but, depending on the circumstances (for example illness of one spouse, small children), often not completely. Further claims might also be subjected to the agreement.^[19] The potential entitlement of children to maintenance cannot be excluded or altered in any way by the spouses.

Generally, all such contractual arrangements can be subject to a material review by German courts. They might be struck down due to unilateral contractual burdens and the disparity between the financial positions of the spouses and unequal negotiating positions. However, if carefully drafted, such risk is much lower than under common-law regimes such as the UK.

Form requirements

Generally, an agreement including choices of jurisdiction and law and the extent of claims effective under German law is possible. This can be integrated into a pre-nuptial agreement for another jurisdiction. However, the first thing to keep in mind for such an agreement to be effective from a German perspective is that notarisation is necessary. In other words, in order to make any of the abovementioned possible agreements effectively, German form requirements must be fulfilled. This usually means that the agreement must be recorded by a German notary with both parties being present or at least represented.^[20] Foreign forms might be equivalent but this is a high hurdle and needs to be checked in each individual case.

Conclusion

When marrying, international couples should consider the legal consequences in all of the countries they had, have and plan to have links to. Potentially necessary legal arrangements will always need to be adapted to the individual needs and situation of the prospective spouses.

This article is limited to selected issues for international couples with a German nexus with regard to marriage and family law. Other aspects like child custody, inheritance law issues and tax aspects are often highly relevant as well. For example, the pre-nuptial agreement might sensibly include an agreement on succession matters and a choice of law in this regard. Otherwise, potential German inheritance claims not foreseen, such as on intestate succession or when disinheriting the spouse or certain family members (compulsory shares), remain unregulated. From a German perspective, the EU Succession Regulation is applied and so German inheritance law generally applies to everyone who had their last habitual residence in Germany on death. Further, links to Germany may trigger German tax liability, which may also affect foreign trusts under which a spouse with German tax liability is a beneficiary. German tax liability arises on maintaining a residence or habitual abode in Germany,

which is not a considerably high hurdle. Children enjoy special protection under German law, making it necessary for certain transactions to get third-party representatives or the family court involved. Advice in the individual case should take all of this into account. This shows the importance of holistic advice dedicated to private clients.

[1] Article 13 of the *Introductory Act to the Civil Code (Einführungsgesetz zum BGB)*.

[2] See s.8(5.2), sentence 1 of the *Application Decree for the Fiscal Code of Germany (Anwendungserlass Abgabenordnung)*.

[3] Article 3 lit.a(vi) of the *Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction*, commonly known as the Brussels IIb Regulation.

[4] Article 6 of the Brussels IIb Regulation.

[5] See art.5 et seq. of the of the *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* (the EU Matrimonial Property Regulation).

[6] See art.3 of the *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* (the EU Maintenance Regulation).

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

[8] *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*.

[9] *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*.

[10] *Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations*.

[11] See art.8 of the *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation* (Commonly known as Rome III).

[12] See art.26 of the *EU Matrimonial Property Regulation*.

[13] Article 15 of the *EU Maintenance Regulation* in connection with art.3 of the *Hague Maintenance Protocol*.

[14] See arts.3-6 of the *Brussels IIb Regulation*.

[15] Claims in that respect upon the passing of one spouse are governed by the *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*.

[16] See art.7 of the *EU Matrimonial Property Regulation*.

[17] See art.4 of the *EU Maintenance Regulation*.

[18] See art.5 para.1 lits.a) and c) of *Rome III*, art.22 no.1 of the *EU Matrimonial Property Regulation* and see art.15 of the *EU Maintenance Regulation*, read in conjunction with art.8 of the *Hague Maintenance Protocol*.

[19] An example would be potential claims to pension rights equalisation under German law (*Versorgungsausgleich*).

[20] Section 1410 of the *German Civil Code*.

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