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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

**ADDENDUM
GERMANY**

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German National Report
on
Matrimonial Property
Addendum

- I.** We have been asked to add more information to our report as to the following questions:
1. Working and efficacy of the internal and private international law rules
 2. Statistical and numerical data with respect to the frequency of decisions and international marriages.

To satisfy this request we have checked the available statistics, have again reviewed the published court decisions and the legal literature, and have sent out a questionnaire to five practitioners who can be considered to be legal experts in the field of the law on matrimonial property in Germany: Dr. Bergschneider (attorney in Munich), Dr. Reimann (notary public in Passau), Judge Borth (president of the Amtsgericht Stuttgart), Judge Jaeger (senior judge at the OLG Köln), and Dr. Hübstege (government official in Munich). All of these practitioners have published books and articles on issues of matrimonial property. We did receive substantial answers, however, only from Dr. Bergschneider and Dr. Reimann.

II. Working and efficacy of matrimonial property law

Preliminary remark: The request leaves open the criteria of “efficacy”. According to one expert in comparative matrimonial property law, Professor Henrich, the decisive criteria for a modern law in this field ought to be: The law should satisfy the principle of sexual equality, it should be just and equitable in its substance, practical to apply and flexible in the hands of the marriage partners.¹

¹ *Henrich*, in: Henrich/Schwab, *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich* (1999) p. 361 ff.

1. Internal law

The internal German law causes several problems in detail, but it is nevertheless in general widely accepted in Germany. The primary regime of “Zugewinnngemeinschaft” (Report Nr. 1.1.3., 1.2.2.) is accepted by more than 90 % of the spouses,² and the practitioners state that the law functions “relatively well”. The dangers and injustices inherent to the statutory regime,³ especially where one of the spouses runs an enterprise or where substantially gains have occurred during marriage but without any relation to the marriage, can be avoided by a contractual modification of the statutory regime. This is what the vast majority of marriage contracts in Germany are about – the optional property regimes of joint or separate property (Report Nr. 1.2.3.) have little significance in practice. German law does not, however, effectively prevent manipulations with the property of one spouse when divorce becomes a likely course of events – manipulations which, as a result, may make his or her gains “disappear” before the decisive moment when the divorce suit is failed (§ 1384 BGB).⁴ Unjust results may also occur when the “poorer” spouse dies first without leaving a will - § 1371 I BGB gives the surviving part an additional portion of the estate, although, in case of divorce, he/she would have had to pay instead of having received. But this is accepted because, according to the prevailing view in Germany, the surviving spouse should get most of the decedent’s estate anyway.⁵

Although the German “Zugewinnngemeinschaft”, despite the above mentioned shortcomings, is widely accepted within Germany, comparative experts prefer the “community of gains” as a model for a unified European law: It seems to be the prevailing system in Europe, and in the practical outcome the differences between both systems are smaller than in the theoretical approach.⁶

² *Henrich* *ibid.* 364; experts *Reimann* and *Bergschneider*, statements of 18 February and 6 March 2003, respectively.

³ For details and the actual court practice see *Koch*, *Die Entwicklung der Rechtsprechung zum Zugewinnausgleich*, *FamRZ* 2003, 197 ff.

⁴ Statement *Bergschneider*, who also refers to § 1378 II BGB, which limits the claim of the other spouse to the assets still present at the time when the divorce has become final.

⁵ *Henrich* *ibid.* 365, 366.

⁶ *Henrich*, *Zur Zukunft des Güterrechts in Europa*, *FamRZ* 2002, 1521, 1526.; *Henrich*, *Ist eine Neuordnung des Güterrechts angezeigt?*, in: *Bitburger Gespräche*, Jb. 2001, p. 57 ff.; comp. also *Pintens*, *Europäisierung des Familien- und Erbrechts*, *FamRZ* 2003, 329, 333.

To the extent that the parties opt for a contractual regime, they do it nearly exclusively in favour of separate property; community property, although regulated extensively in the German Civil Code, has virtually died out.⁷

2. International law

After the reform of art. 15 EGBGB in 1986, which established conformity with the principle of sexual equality and allowed for a choice of law by the spouses (see Report 2.3.), the German rules on conflict of laws seem to function well. There are but few published court decisions (infra III. 2.), and none of the experts reports major difficulties. In international marriages, the choice of law-clause of art. 15 II EGBGB is widely used.⁸

Problems arise, however, in cases where the property regime is dissolved by the death of one spouse – the lack of coordination between international matrimonial law and succession law (Art. 25 EGBGB) has already been described in our report (2.3.2.2.2.). The application of German conflict of law rules in a given case may be very complicated.⁹ A proper conflicts rule should take account of the various models of property distribution between spouses in different countries.

III. Numerical and statistical data

1. Marriages

The number of marriages has nearly continuously dropped since World War II – from 750 452 marriages per year in 1950 to 418 550 in 2000 and 389 591 in 2001.¹⁰ In the year 2000, 16 % were “international” marriages: 13,6 % were mixed German/foreign marriages, 2,7 % were purely foreign marriages. As to the statistical details for the “mixed marriages”, see the following chart:¹¹

⁷ Notary public Dr. *Reimann* has not witnessed one single agreement of this kind in the last 15 years of his practice; see also Dr. *Bergschneider* and *Henrich* *ibid.* 363.

⁸ Statement *Bergschneider*.

⁹ Actual cases are reported by *Sonnenberger*, *Der Erbfall X. – Französisches Ehegüter- und Erbrecht vor dem deutschen Nachlaßrichter*, *Festschrift Geimer* (2002) 1241-1267; *Sonnenberger*, *Die question anglaise als Problem deutsch-französischer Nachlassspaltung*, *IPRax* 2002, 169-186.

¹⁰ Statistisches Bundesamt Deutschland, *Statistisches Jahrbuch* 2002.

¹¹ Press-release of the Statistische Bundesamt Deutschland, taken from *StAZ* 2003, 27.

Deutsch-ausländische Ehepaare ohne Kinder und mit Kindern unter 18 Jahren im April 2001 nach Staatsangehörigkeit des ausländischen Ehegatten

Staatsangehörigkeit des ausländischen Ehepartners	Insgesamt	Ohne Kinder ¹²	Mit Kindern unter 18 Jahren	Kinder unter 18 Jahren je Ehepaar mit Kindern unter 18 Jahren
	1000	Anzahl		
Ehepaar mit deutschem Ehemann und ausländischer Ehefrau				
Zusammen	398	174	224	1,64
EU-Staaten	104	46	58	1,64
Nicht-EU-Staaten	294	128	166	1,63
Europa	188	79	109	1,63
Afrika	13	6	7	1,78
Amerika	30	14	16	1,64
Asien	57	28	29	1,62
Übrige Welt ¹³	6	/	/	/
darunter:	294	127	161	
Fünf häufigste Staatsangehörigkeiten				
Asien	57	28	29	1,62
Polen	45	18	27	1,57
GUS	34	14	20	1,61
Türkei	30	8	22	1,96
Amerika	30	14	16	1,64
Ehepaare mit deutscher Ehefrau und ausländischem Ehemann				
Zusammen	368	165	203	1,69
EU-Staaten	141	69	72	1,72
Nicht-EU-Staaten	227	96	131	1,67
Europa	145	58	87	1,64
Afrika	25	12	13	1,78
Amerika	27	13	14	1,67
Asien	24	10	14	1,78
Übrige Welt ¹³	6	/	/	/
darunter:	227	93	128	
Fünf häufigste Staatsangehörigkeiten				
Türkei	60	20	40	1,71
Italien	44	18	26	1,83
Amerika	27	13	14	1,67
Österreich	26	16	10	1,55
Afrika	25	12	13	1,78
nachrichtlich: Ehepaare				
Zusammen	16 810	9 703	7 107	1,71
beide Ehegatten deutsch	14 951	9 008	5 943	1,68
beide Ehegatten ausländisch	1 093	356	737	1,96
beide Ehegatten aus EU-Staaten	236	94	142	1,73
ein Ehegatte aus EU-Staaten	26	11	15	1,68
Ehefrau aus Nicht-EU-Staaten	15	7	8	1,63
Ehemann aus Nicht-EU-Staaten	11	/	7	1,74
beide Ehegatten aus Nicht-EU-Staaten	831	251	580	2,02
deutsch-ausländische Ehepaare	766	339	427	1,66

Ergebnisse des Mikrozensus – Bevölkerung am Familienwohnsitz.

12) Als Kinder zählen ledige Personen, die in ihren Eltern oder einem Elternteil in einem Haushalt leben.

13) Australien und Ozeanien, Staatenlos.

/ = Kein Nachweis, da Ergebnis nicht ausreichend genau ist.

There were more foreign women who marry a German than the other way round.¹⁴ The foreign women came primarily from countries like Poland, Russia and Thailand, while the German women preferred men from Turkey, the former Yugoslavian States and Italy.¹⁵ In 60 % of all mixed marriages, the marriage was connected with a migration of the foreign partner to Germany.¹⁶ Since Germany has lowered the barrier for immigrants of the second and third generation to obtain German nationality, the number of formerly mixed marriages may drop – but the number of inter-cultural marriages is not reduced by a change of nationality.

2. Frequency of court decisions

There are no available data on the frequency of court decisions concerning matrimonial property issues, and there are no courts with special jurisdiction for international cases. However, the by far leading journal on family law, the “FamRZ”, publishes every year a “systematic index” of court decisions in the area of family law. The indices show a substantial number of decisions regarding matrimonial property, but most of them deal with problems of internal law. And even here, the number of decisions is smaller than in fields like post-divorce alimony or the division of pension rights. This picture is affirmed by the statements of practitioners, who estimate the number of court proceedings in matrimonial property to be “below average”.¹⁷ In the last 25 years, there have been published very few decisions in “international” cases, concerning private international law or foreign law.¹⁸ The significant international cases in Germany in this field are cited in our report.

¹⁴ In 2001: Men 39 234, women 45 750 (out of 418 550 of their sex group, respectively), Statistisches Bundesamt, Statistisches Jahrbuch 2002 p. 69.

¹⁵ <http://www.isoplan.de/aid/2001-2/statistik.htm>

¹⁶ <http://www.demographie.de/newsletter/artikel/990604.htm>

¹⁷ Dr. *Bergschneider*; Dr. *Reimann*.

¹⁸ For example between 1978 and 1985 only 4 cases; in the year 2000 no case, 2001 2 cases.