

© Peter Harris

Foreign matrimonial property régimes.

What to do if you wish to move to the United Kingdom, married under one.

30th June, 2014.

Before moving to Great Britain, consider modifying your matrimonial property régime to take advantage of the non-domiciliary tax régime, and so as not to be surprised by the conflict of laws on arrival.

Most couples' main and legitimate preoccupation is with the question of their tax status as non-domiciliaries resident in the United Kingdom, in relation to property that they may keep or to which they may become entitled.

They frequently omit to take advice before moving on the property law consequences on a couple married under a foreign matrimonial property régime.

Overseas Chamber advises on both aspects: tax and property. We can therefore address both these issues and give a structural advice with effective Jersey customary law additions which are beyond the ken of most English firms and chambers.

Although over two thirds of the World's geographical legal surface bathes in the conceptual light of the matrimonial property régime, Great Britain is, as yet, comparatively untouched by this idea. The English courts are becoming increasingly obliged to take account of the American concept of the "pre-nup", which is rather more of a disaster containment strategy than the civil

Foreign matrimonial property régimes.

What to do if you wish to move to the United Kingdom, married under one

Date: 30th June, 2014

.../...

law framework of a property framework in which the newlyweds combine their efforts and provides home, shelter and wealth for themselves and their issue. This civil law conception is applied over 2/3 of the legal surface of the planet, but not in the zone under the influence of the British common law. Matrimonial settlements, i.e. trusts, were known in the past, but these were not allowed to be "in consideration of marriage" and have since slipped out of fashion. They may well recover, but not as "*contrats de mariage*".

It will come as no surprise therefore that the British legal system treats such foreign property régimes as alien. Although constant British case law has and will continue to recognise a foreign matrimonial property-régime in its legal effect and give effect to these; if the foreign law is pleaded before it, the Family Division has little truck whatsoever with these concepts in the event of a liquidation of a matrimonial property régime on a divorce. Why, because it has jurisdiction over the liquidation of the marriage under British ancillary relief provisions, which have precious little to do with civil law property entitlement or ownership. In that situation, put bluntly, the concept of a 50/50 division of all assets still remains the rule of fairness, which therefore will attempt to override the foreign matrimonial property arrangements to which a couple may have subjected their relationship, both as to Proper property "*propres*" acquired before or during the marriage, and the property acquired or created by the couple during their union. Unfamiliarity, in this area, creates distrust, leading to effective contempt.

The only manner in which a foreign matrimonial property régime will be recognised in the Family Division is where it is fair. If it goes against the 50/50 rule, then the person insisting that it applies will be required to show that both parties entered into the marriage contract or convention with full awareness and being fully appraised. What is more, if they move to Great Britain under the regime, they will have to show that both parties received adequate advice on

Foreign matrimonial property régimes.

What to do if you wish to move to the United Kingdom, married under one

Date: 30th June, 2014

.../...

the effects of the régime and any changes made to it in the light of English law as it would apply to it. Hence the need to make sure that the régime is checked for its compatibility with both English property law, and the liquidation attitude of the Family Division in the case of a divorce, despite the decision of the Supreme Court in *Radmacher*. The Law Commission' report is not yet law.

Certain notaries in France are aware of this and advise their clients to modify their régimes prior to their move, which is the only really safe time to do it, but sometimes are unfamiliar with the effects that the couple's decision will have on their actual property law position in the United Kingdom following their arrival and taking up their life there.

Whilst any French child will; have been educated in the matrimonial property régime issue, as part of their civil education at School, the English judge will not be aware of that, and will insist that further advice and assistance be given prior to the move of any attempt is made to argue *propres* or a different allocation of assets.

To hope for perfection is human, to expect it divine.

So, even if you have moved to the United Kingdom, it is still possible to preserve the basis of your union by taking appropriate advice and modulating your régime to meet with you agreed property allocations, and adjust these with a French notary after the move. However this should not be done without taking advice on the drafting in French and in English of the modifications and a written advice as to the position in Great Britain. Neither should it be done without

Foreign matrimonial property régimes.

What to do if you wish to move to the United Kingdom, married under one

Date: 30th June, 2014

.../...

correlating this with the non-domicile tax position under Inheritance Tax, which will affect assets within the United Kingdom, and, after a certain period, assets outside it.

A failure to take this precaution will simply lead to difficulties in the case of a breakup of the marriage, or in relation to the rights of the spouse and of children where one spouse predeceases the other, under the cover of the régime.

The position is set to change radically under the draft Council Regulation currently before the European Parliament on the treatment of matrimonial property régimes in Europe, from which the United Kingdom has opted out. The treatment of a régime created by a contract or marriage before the introduction of the Regulation, due to coincide with that of the Succession Regulation in August, 2015 forecast in 2015, and one created afterwards will also need to be addressed.

Overseas Chambers is specialised in this type of advice and advisory work. We can draft and communicate in both languages, and therefore have a unique approach, with a library of authoritative French precedents for sophisticated adjustments to both the *régime légal*, and other less frequent arrangements .

We are used to working with French notaries, and are overseas correspondents of Juris Défi, a French association of notaries, avocats, and huissiers de justice, which give us access to the latest thinking on the issue.

Foreign matrimonial property régimes.

What to do if you wish to move to the United Kingdom, married under one

Date: 30th June, 2014

.../...

The position is now critical, as the European proposal for a unified matrimonial property regime by choice or default will be introduced by August 2015.

If it remains in its current geometry, the Regulation will remove the prior underlying harmony and simplicity of the French and British "scissionist" approach to the main régime and that applicable to immovable property. However, Overseas Chambers has an answer to that, using both the Regulation's Germanic mechanisms and the English law of property.

Do not miss this opportunity.

It is therefore essential, if the couple moving to Britain has a property in France, to take advantage of this window in time to create a scissionist convention over their French immovable, or to adopt a particular form of clause which can be treated as part of the British régime which will be inferred by the French courts to apply under the incoming reregulation.

Peter Harris

Barrister in overseas practice

LLB. (Hons.) Dip. ICEI (Amsterdam)

Revenue Bar Association, Mediator

E: peter.harris@overseaschambers.com