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**Comparison of Code Civil and
Common Law Jurisdictions
IAFL Introduction to International
Family Law Symposium, Sydney
Australia
at the Australian National Maritime
Museum**

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Common Law

- Civil Law vs Common Law
- Discretion vs Certainty
- Henry II and the Emperor Justinian
- English speaking world and the rest of the world with some fused systems.
- Property regimes
- Trusts

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Civil Law

- Civil law derives from the Corpus Juris Civilis, but is heavily overlaid by Napoleonic, Germanic, cannonical, feudal and local practisces.

- Civil law proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural rules.

- Sources of law are 1. Constitution; 2. Legislation (statutes and subsidiary legislation); 3. Custom. It holds case law secondary and subordinate to statutory law.

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Civil Law

- The judge's role is to establish the facts of the case and to apply the provisions of the applicable code.

- The role of the judge is to interpret the law, he or she usually has a much more limited discretion compared to a judge in a common law system.

- Evidence demands are within the sovereign inquisitorial function of the court — not within the lawyers' role. For example the contact with a witness is frowned upon and can lead to the fact that any conclusiveness is lost.

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Civil Law

- *Agreements on jurisdiction* ("Prorogation") for pecuniary claims (i.e division of matrimonial property and/or maintenance (see Art. 23 rev Lugano Convention) are possible.

- *Choice of law* is (in principle) possible and the court will apply foreign law.

- *Property/maintenance/pension:* For each of these financial side-effects there are clear legal rules that make it possible to forecast (more or less) the outcome of legal proceedings.

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Family Law in England and Wales

- How are matters dealt with on divorce in Common Law jurisdictions?
- Foreign law is not applied in England although it may be taken into account.
- England Wales: Matrimonial Causes Act 1973.
- What orders can the court make?
- The court takes into account various factors.
- Courts deal with "resources" not assets.
- Civil law countries consider that England and Wales has "separation of property" regime. Is that accurate?
- *White –v- White* 2001 1ALL ER1, HL. An equal division of marital assets has come be the starting point since 2001.
- Property/maintenance/pensions – not such demarcation as in civil law jurisdictions.
- Frequent departure from equality; needs trump sharing.
- The distinction between capital and pensions maintenance is not so stark.

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Common Law in England and Wales

- Procedure
- Cases argued many times on paper and then orally too.
- Each hearing requires a skeleton argument in addition to the pleadings.
- Bundles limited to 350 pages per hearing – but there can be a lot of them.
- Thorough system of getting at the assets/resources. Duty of full and frank disclosure
- BUT – cumbersome system
- Length of hearing.
- Cross-examination
- Arbitration available but rarely used
- Cases in Private

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Procedure in Civil Law

1) 90% of all cases are settled outside of court or in the first phases of court proceedings. Court then approves agreement

2) Litigation in 10% of the cases:
   - Settlement hearing
   - Statement of claim, response, "Replik" (plaintiff's answer to defendant's answer), "Duplik". In complex cases always in writing. Legal documents with more than 100 pages are common.
   - Taking of evidence. Witnesses are questioned by the court. The parties may ask supplementary questions
   - Main hearing orally
   - Judge of first instance renders judgement
   - Possibility to appeal to cantonal court
   - Possibility to appeal to federal court
   - Duration: 2 to more than 10 years

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Case Study

"Florian and Susanna have been married for 20 years.

They have 2 children, one aged 19 at university and one aged 12. Florian is a successful entrepreneur who, during the marriage, founded a public limited company. The shares he holds are worth CHF 15 million. In addition, there are assets of CHF 5 million held jointly by Florian and Susanna in investments and property, including the house they live in. All these assets were acquired during the marriage, essentially through Florian's earnings. Susanna has assets of her own of CHF 1 million which she inherited from her parents.

Florian was a businessman and Susanna was mainly responsible for childcare looking after the home. Susanna had worked as a travel agent but gave up work after the birth of their first child.

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Case Study

10 years ago, the parties concluded a marriage contract under Swiss law in which they agreed that the business was Florian's own property. The consequence of this is that the company remains undivided with Florian, i.e. it no longer belongs to the shared property.

In addition, Florian holds assets of CHF 4 million in a Jersey bank account that are not taxed and of which Susanna has no knowledge. Florian disclosed this fact to his lawyer, but gave clear instructions that the asset should be concealed in court proceedings.

In court proceedings, the notary (a friend of Florian's) who notarised the marriage contract, is to appear as a witness at the request of Susanna. Florian's lawyer contacts the witness before the court hearing and discusses the circumstances of the notarisation with him at the time".
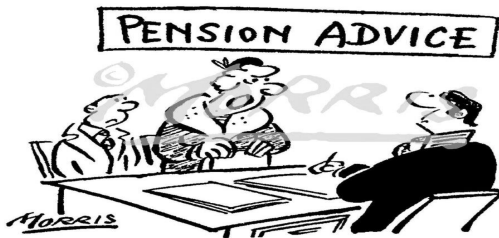
Civil Law: Occupational Pensions

Art 122 Swiss CC: «In the event of a divorce, any occupational pension assets accrued during the marriage up to the point at which divorce proceedings commence are divided equitably»

In Switzerland (contrary to Germany) this division cannot be waived in advance in a marriage contract. In the divorce proceedings themselves, the division can only be waived if sufficient assets are otherwise available to ensure retirement provision.

The result of this division is important for the calculation of any maintenance claims for the period after retirement.

PENSION ADVICE

"Should he stay in his occupational scheme or get into a personal pension scheme? That's what's worrying me - I mean him."

Common Law: Occupational Pensions

- Since 2000, the English court can share pensions in whatever proportions it deems appropriate.
- Pensions are part of the "resources" of the parties.

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Civil Law: Division of Matrimonial Property

Main questions:

- Which law is applicable? Did the spouses make a choice of law? (A choice of law is possible in the area of marital property regime. The spouses may choose the law of the state in which they are both domiciled or will be domiciled after the marriage celebration, or the law of a state of which either of them is national [article 52 PIL]).

- Is there a marital agreement (pre or post nup) wherein the spouses agreed on a
  1) Modification of the statutory marital property regime of Participation in Acquired Property;
  2) Separation of Property
  3) Community of Property?

Note: *such agreements (notwithstanding if entered into before or after the marriage) are binding and can not be modified by the divorce judge.*
Independent legal advice, full disclosure of assets and income and «time factor» not mandatory but highly recommended.

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Position	Husband	Wife
Assets		
Shares in public limited company	15'000'0000	
Jointly held assets (House and investments)	2'500'000	2'500'000
Susanna's assets		1'000'000
Total	17'500'000	3'500'000
Own property		
Shares (according to prenup)	15'000'000	
Susanna's (inherited) assets		1'000'000
Total	15'000'000	1'000'000
Surplus (= partition substrate)	2'500'000	2'500'000

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Common Law: Florian and Susanna

- Starting point: 50% of what has been created within the marriage. But many departures from that.
- Equal contribution of each spouse, whether by way of money earner or other contribution.
- Needs versus sharing.
- Role of the marriage contract/pre-nuptial agreement. Choice of law?
- Money held in a Jersey bank account which Susanna has no knowledge of. Florian's lawyer has been told not to disclose it.
- Potential cross-examination in court.

"And I thought she was high maintenance when we were married."

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Common Law: Maintenance

- This is very much dealt with as part of the overall claim.
- Is it needed in addition to the capital from the division?
- To what extent is Susanna expected to invest her own capital?
- What will she have to invest over and above her housing need?
- Should any maintenance be capitalised?
- Duxbury calculations – capitalising maintenance.
- Joint lives maintenance – does that still exist? Some comparisons
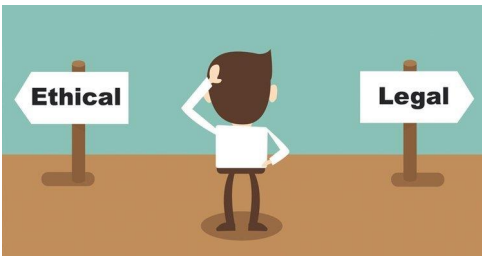- Potential cross-border issues/Brexit/EU regulations/Lugano

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Civil Law: Maintenance

In practice, the determination of post-marital support is done in five steps:
1) «short» or «long» marriage?
2) What was the standard of living experienced during the marriage?
3) What income can the spouse who is entitled to support earn himself or herself?
4) Does the spouse required to pay support have sufficent earning capacity?
5) How long does support requirement last?

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Civil Law: Maintenance

The "**five steps**" applied to the marriage of Susanna and Florian:
1) Clearly a long marriage
2) Presumably a high standard of living experienced during the marriage. To be determined with a thorough analysis of the cost of living. Burden of proof on the wife's side
3) Low earning capacity of the wife. Asset income as well as the result of the division of pension assets are taken into account.
4) The husband has such a high income (or must have such an income taken into account in view of his financial circumstances) that he can pay maintenance for the wife without further ado.
5) Obligation to pay *monthly maintenance* at least until the wife reaches retirement age; possibly even for life. *One-off lump-sum* settlement possible, but not standard case.

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Common Law: What are the duties of the parties' lawyers to the court?

- How does it work in England? Lawyers have a duty to the court. Parties have a duty to the court.
- Duty of full and frank disclosure – Form E, Questionnaires etc.
- Very thorough system.
- Contempt of court can be severely punished.
- Adverse inferences drawn.
- Tensions between Common Law and Civil Law duties to the court.

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Civil Law: What are the duties of the parties to the court?

- Duty of full and frank disclosure for the ***parties***. A breach of this obligation gives the other party the opportunity to demand revision of a final decision within 90 days form the date on which the grounds for a revision were discovered.

- If the court becomes aware of untaxed funds, it is obliged in most cantons to file a complaint with the tax office. This results in massive additional and punitive taxes.

- Reversal of the "onus probandi"

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Civil Law: What are the duties of the parties' lawyers to the court?

- Fraud in court is a deception of the court by untrue party claims with the aim of causing the court to pass an incorrect judgment to the detriment of the opposing party. Can the lawyer be charged with aiding and abetting?

- Prohibition of influencing witnesses. Inciting false testimony is a criminal offence. Contact with a witness outside the trial leads to his losing all or substantially of his evidential value.

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Civil Law: What are the duties of the parties' lawyers to the court?

- The attorney is prohibited from deliberately making untrue claims or using untrue evidence to mislead as to a fact that is material to the assessment.

- The sanctions can vary from a reprimand, a fine to a permanent ban on practising the profession.

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