

Family law arbitration – A comparative analysis of German and English law and practice

Especially in family law, long contradictory proceedings display an exceptional financial as well as emotional challenge for the parties. As a result, alternative dispute resolution mechanisms, in particular mediation, have gained in importance. The research reviews the relevance of arbitration as a dispute resolution method in German and English law and practice. The comparison is based on an analysis of both legal systems in this regard as well as an online-survey among German and English family lawyers and interviews with family arbitrators which have been conducted during the research.

Whereas in both legal systems it is widely felt that the resolution of divorce matters is not arbitrable, this does not apply to the arbitrability of matters relating to divorce consequences. The study shows that in England and Wales as well as in Germany, most of the family matters relating to financial divorce consequences can be subject to arbitration. Differences remain, however, regarding the arbitrability of child matters, which is neglected by the majority of German legal experts. In England and Wales, however, disputes relating to private child matters can be resolved by arbitration.

In practice, family law arbitration mainly operates within arbitral institutions in both countries. The *Institute of Family Law Arbitrators* (IFLA) in England and Wales and the *Süddeutsche Familienschiedsgericht* in Germany can be named as example. The comparison displays, however, that the IFLA operates more systematically and professionally than comparable institutions in Germany. Coming along with that, in England and Wales the incorporation of arbitration in family law practice is increasing. The professional setup facilitates a consistent use of family law arbitration and enhances legal security and trustworthiness in this mechanism. It also seems to have an impact on the perception and acceptance of family law arbitration. That this dispute resolution technique is better known and more frequently recommended to clients in England and Wales does not only reflect in the conducted survey but also in case numbers and the comparably vivid academic discourse. In contrast, family law arbitration in Germany has neither reached a great popularity nor acceptance to the present day.

A final evaluation of family law arbitration in Germany and England and Wales shows that it depends on the individual case and sometimes even on the jurisdiction surveyed what can be seen as family law arbitration's advantages and disadvantages. In any case, the procedural flexibility could increase the chance to find a conflict solution which fully takes into account the parties' individual needs and offers benefits over the state jurisdiction – especially because in compiling a coherent overall solution the parties can determine the dispute resolution's subjects, the proceeding, the order and the decision-maker themselves without being too much tied to statutory claims. In order to realize this individualization of the procedure in the family law context, the study has shown that a responsible handling with the instrument arbitration would have to be guaranteed in order to avoid that the flexibility opened up by arbitration out-plays sufficient legal certainty for the parties. A blend of additional procedural requirements, e.g. securing the qualification of family law arbitrators as well as consulting with a solicitor before entering the arbitration agreement, and (if necessary increased) judicial control regarding the practical implementation of these requirements could ensure a fair arbitration process as well as sufficient legal security for all parties. Additionally, this would contribute to the practicability of family law arbitration and would enhance trust and acceptance in the dispute resolution mechanism. For this reason, the research ends with recommendations for improving the German law and practise in this regard, which suggest themselves from a

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legal comparative perspective and aim for establishing a systematic and differentiated framework for family law arbitration by law or at least by a nationally consistent scheme.