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LA RUPTURE DU MARIAGE EN DROIT COMPARÉ

RAPPORTS NATIONAUX

Sous la direction de Frédérique Ferrand et Hugues Fulchiron,
Professeurs à l'Université Jean Moulin Lyon 3

Université Jean Moulin Lyon 3 – Faculté de Droit
Institut de droit comparé Édouard Lambert – Lyon – 2015

Équipe de Droit International, Européen et Comparé

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Questionnaire in English

Institut de droit comparé Edouard Lambert - Centre de droit de la famille

The marriage breakdown, a comparative study

I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

2. Give a brief history of the main developments of your national divorce law

3. Are prospective reforms currently under consideration?

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

5. If any, provide statistical data regarding divorce and legal separation?

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

B. Conflict of Laws

7. How is marriage defined in your national law?

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

11. Is parties' will taken into account in order to determine the applicable law for divorce?

12. If parties may choose the applicable law, how shall this choice be expressed and when?

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

15. What is the applicable law for parental responsibility?

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

    a) Is separation sufficient to establish irretrievable breakdown?
    b) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

31. Must the spouses be separated before introducing the claim? If yes, for how long?

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

35. How is consent between spouses taken into account regarding irretrievable breakdown?

36. How is separation between spouses taken into account regarding irretrievable breakdown?
    a) Is separation sufficient to establish irretrievable breakdown?
    b) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- Before marriage;
- During marriage;
- During the divorce proceedings?

44. If yes, may the judge scrutinize the spousal agreement?

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

50. Does divorce have effects regarding
    - Citizenship eventually granted to the foreign spouse by marriage;
    - Residence permit granted to the foreign spouse by marriage?

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

52. Does divorce produce automatic effects regarding parental responsibility?

53. Can the exercise of parental responsibility be subject to a parental agreement?

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

56. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

57. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
    - Compensation,
    - Maintenance,
    - Compensation of rights to pension benefits,
    - Damages
    - Any other payment or property rights?

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets (incomes, capital, assets, pension, benefit…) of can they be discharged from full and frank disclosure?

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

87. May the competent authority during the course of divorce proceeding make interim orders on

- the family home,
- the children,
- maintenance between the spouses,
- the consequences of marital abuse ?

88. Is appeal available against the divorce order or against an out of court divorce decision?

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene
    - in divorce proceeding,
    - in proceedings on parental responsibility if separated from the divorce proceeding?

    If yes, on which grounds?

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

IV. RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:
    a) the termination of marriage,
    b) financial consequences of divorce,
    c) the settlement of matrimonial assets,
    d) parental responsibility,
    e) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

95. What are the consequences of registration or lack of registration?

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

Questionnaire en français

Institut de droit comparé Edouard Lambert - Centre de droit de la famille

La rupture de mariage en droit comparé

I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

b). Rome 3 n'est pas applicable

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

B2. Effets du divorce

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

15. Quelle est la loi applicable à la responsabilité parentale ?

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

II. LE DROIT MATERIEL

A. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre **de** demandes présentées sur chaque fondement.

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?
    a) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?
    b) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

36. Dans cette procédure, quelle place est laissée la séparation des époux ?
    - La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?
    - Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

B. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
    - avant le mariage ;
    - pendant le mariage ;
    - pendant la procédure de divorce ?

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

50. Le divorce produit-il des effets
    - au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;
    - au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?

ii. Les effets du divorce à l'égard des enfants

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

b. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre
    1. une compensation financière,
    2. une créance alimentaire,
    3. une compensation de droits à pension de retraite,
    4. des dommages-intérêts
    5. ou d'autres sommes ou droits patrimoniaux ?

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- au logement familial,
- aux enfants,
- à l'obligation alimentaire entre époux,
- aux conséquences de violences conjugales ?

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir
    - à l'instance en divorce ;
    - à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?

    Si oui, sur quels fondements ?

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives
    a) à la rupture du lien matrimonial ?
    b) aux effets pécuniaires du divorce ?
    c) à la liquidation des intérêts patrimoniaux des époux ?
    d) à la responsabilité parentale ?
    e) aux obligations alimentaires entre parents et enfants ?

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

AUSTRIA

AUSTRIA

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The current source of Austrian divorce law is section 46 *et seq* Austrian Marriage Act *(Ehegesetz)*.[1]

2. Give a brief history of the main developments of your national divorce law

The history of civil divorce legislation in Austria goes back to 1938. Until that time there was no divorce under Austrian private law, and it was only possible to obtain a decree of judicial separation *(Scheidung von Tisch und Bett);* such a decree did not dissolve the marriage, however, and Catholics were unable to remarry.[2] The first civil divorce legislation to be enacted, the Austrian Marriage Act 1938, was based on the principle of fault, but it also provided for divorce on the ground of irretrievable breakdown.[3] Austrian divorce law was reformed in 1978, when divorce on the ground of irretrievable breakdown was widened and divorce by consent was introduced.[4] The most recent amendment, in 1999, further

[1] *DRGBL* (Reich Law Gazette) I No. 807/1938, last amended by the *BGBL* (Federal Law Gazette) I No. 135/2009. All Austrian legislation is posted on the Internet (see http://www.ris.bka.gv.at).
[2] Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/107.
[3] Berka, *Scheidung und Scheidungsreform*, 2000, p. 65.
[4] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 485.

diminished divorce based on fault by abolishing adultery and the refusal to have children as so-called 'absolute grounds' for divorce.[5]

3. Are prospective reforms currently under consideration?

In 2011, some members of the Austrian parliament recognized the need to reform the Austrian divorce law. Accordingly, two motions for resolutions were proposed dealing with the abolishment of the principle of fault and the revision of the grounds for divorce and annulment, which were considered to be outdated.[6] The motions for resolutions were assigned to the committee of justice, which has not yet begun the deliberations about the proposed issues. In the current legislation period – which lasts until 2013 – more concrete reform proposals of the Austrian divorce law are not planned.[7] As mentioned in Question 2, the most recent reform was in 1999.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

Generally, a marriage can be dissolved through an annulment or cancellation judgment or a divorce decree.[8] The grounds for annulment are exhaustively listed in section 21 *et seq* Austrian Marriage Act and comprise: the infringement of the formal conditions required for a marriage; lack of legal capacity; the sole purpose of the marriage is to provide one spouse with the name or the nationality of the other spouse; remarriage in case of declaration of death of the former spouse despite the fact that the engaged couple knew that the person declared to be dead is alive; violation of marriage prohibitions such as bigamy or intermarriage.

Grounds for cancellation refer to the failure of intent of the engaged couple.[9] Similarly to the grounds for annulment the grounds for cancellation are exhaustively enumerated in the Austrian Marriage Act including lack of the legal representative's approval,[10] misapprehension,[11] willful deceit and threat,[12] and remarriage in case of a declaration of death.[13] If, however, a marriage was concluded flawlessly dissolution can only be reached through divorce.[14] The annulment judgment has *ex tunc* effect, whereas the cancellation judgment and the divorce decree are applied *ex nunc*.[15] In short, there are various possibilities to dissolve a marriage depending on the fact whether the marriage was concluded mistakenly or flawlessly: The breakdown of a marriage, which was entered into in accordance with the laws in force can only be dissolved through divorce.

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[5] These grounds led to a divorce irrespective of any breakdown of the marriage: Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 9.
[6] http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK0610/ (17.07.2012).
[7] According to the information provided by the Ministry of Justic by e-mail dated 22.08.2012.
[8] Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/106.
[9] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. 1, 13th Edition, 2006, p. 459.
[10] Section 35 Austrian Marriage Act.
[11] Section 36 *et seq* Austrian Marriage Act.
[12] Section 38 Austrian Marriage Act.
[13] Section 43 (2) Austrian Marriage Act.
[14] Faffelberger, *Familienrecht,* 2010, p. 16; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. 1, 13th Edition, 2006, p. 485.
[15] Faffelberger, *Familienrecht,* 2010, p. 16.

5. If any, provide statistical data regarding divorce and legal separation?

In 2011, the total number of divorces amounted to 17,295 which means that the total divorce rate was 43,02%.[16] However, the number of divorces has been declining since 2007.[17] In more than 86% the divorce took place by mutual consent. The number of children of divorced parents amounted to 19,451.[18] In the same year 13 registered partnerships had been dissolved.[19]

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

The Austrian Registered Partnership Act *(Eingetragene Partnerschaft-Gesetz),* which entered into force in 2010, enables same-sex couples to register their partnership at the competent district authority.[20] The registration establishes a long-term relationship with mutual rights and obligations.[21] The grounds for divorce set forth in the Austrian Registered Partnership Act are identical with those stipulated in the Austrian Marriage Act.[22] Generally, a divorce claim is heard in contentious proceedings and has to be filed at the district court.[23] The divorce by mutual consent is subject to different regulations since it constitutes a so-called non-contested matrimonial matter.[24] Section 43 (1) No. 2 and 25 Austrian Registered Partnership Act stipulates *inter alia* that the rules governing the divorce proceedings of heterosexual couples shall apply to the dissolution of registered partnerships respectively. Accordingly, divorce proceedings of same-sex couples are identical to those of heterosexual couples.

B. Conflict of Laws

7. How is marriage defined in your national law?

A marriage is a contract between two persons of different sexes, who declare to live together in an indissoluble union, to beget and raise children and to give each other mutual support pursuant to section 44 General Austrian Civil Code.

B1. Grounds for divorce

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[16] Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/index.html (21.08.2012).

[17] Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/index.html (21.08.2012).

[18] Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/index.html (21.08.2012).

[19] Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/gleichgeschlechtliche_partnerschaften_eintragung_und_aufloesung/partnerschaftsaufloesungen/index.html (21.08.2012).

[20] Curry-Summer, 'A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe', in: Boele-Woelki & Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd Edition, 2012, p. 77.

[21] Section 7 *et seq* Austrian Registered Partnership Act.

[22] Faffelberger, *Familienrecht,* 2010, p. 30 *et seq*; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 144; Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, section 15 Austrian Registered Partnership Act, 2011, marg. No. 1 *et seq*.

[23] Section 431 *et seq* in particular section 460 Austrian Code of Civil Procedure.

[24] Sections 93-96 Austrian Non-Contentious Proceedings Act; Roth, *Zivilprozessrecht,* 2012, p. 93.

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

The Austrian Conflict of Laws Act provides for very limited freedom of the choice of law; in the area of family law a choice of law is only permitted regarding matrimonial property rights.[25] Accordingly, a choice of the applicable law regarding the preconditions and the consequences of a divorce is prohibited under Austrian law, rather the applicable law is determined pursuant to section 20 Austrian Conflict of Laws Act.[26]

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

A marriage is explicitly defined as a contract between two persons of different sexes; hence it is not possible that same sex couples marry in Austria. As already mentioned[27], persons of same sexes have the possibility to register their partnership since 2010. Until the issuance of a joint statement of the interior ministry and the ministry of justice in August 2011 it had been disputed whether marriages between same sex persons validly celebrated abroad are recognized. However, the joint statement clarified the legal situation by determining that marriages of same-sex couples validly concluded abroad are considered as registered partnerships pursuant to section 27a Austrian Conflict of Laws Act.[28]

Sections 15 and 17 Austrian Marriage Act set forth the formal requirements which have to be fulfilled in order to conclude a legally valid marriage. A marriage can only be concluded if it takes place before a marriage registrar.[29] The engaged couple must be present at the same time and must personally declare their will to get married before the registrar. These requirements are not merely of formal nature, rather they constitute conditions for the validity of the marriage.[30] If the marriage is not concluded before a marriage registrar the marriage is *ipso facto* ineffective.[31] Accordingly, confessional or private marriages are not considered as valid in Austria.

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[25] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 126; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 4; Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 100.

[26] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 4; *see* Question 10.

[27] *See* Question 6.

[28] http://www.queernews.at/archives/2599 (3.10.2012); Wautelet, 'Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe', in: Boele-Woelki & Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd Edition, 2012, p. 158 *et seq*, p. 165 *et seq*.

[29] Section 15 Austrian Marriage Act.

[30] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 15 Austrian Marriage Act, marg. No. 1 and section 17 Austrian Marriage Act, marg. No. 1; Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/12.

[31] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 15 Austrian Marriage Act, marg. No. 1.

Monogamy is a basic principle of the Austrian Marriage Law as well as of the entire social system.[32] An existing marriage bond prohibits the conclusion of a new marriage.[33] As a consequence section 8 Austrian Marriage Act forbids polygamous marriage. Entering into a polygamous marriage constitutes a punishable offence pursuant to section 192 Austrian Criminal Code.[34] Polygamy constitutes a qualified impediment to marriage, is a ground for annulment and is therefore not permitted in Austria.[35] However, a polygamous marriage which was validly concluded abroad is recognized in Austria.[36]

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

In case the Rome III Regulation is not applicable the Austrian Conflict of Laws Act determines which law is applicable for divorce. Section 20 Austrian Conflict of Laws Act sets forth that the preconditions and effects of a divorce must be assessed according to the law which is decisive for the legal effects of a marriage *(Ehewirkungsstatut)* and refers to section 18 Austrian Conflict of Laws Act.[37] This provision stipulates that the personal legal effects of a marriage – and accordingly also of a divorce – must either be identified by the joint or in absence of such by the spouses' last joint residence if at least one of them retained that personal statute.[38] Apart from that the personal legal effects must be determined by the law of the state of the spouses' habitual residence or in absence of such by their last common habitual residence if one of them still has his/her habitual residence there.[39]

If, for whatever reasons, there are no connecting factors, it is prescribed that the law applies according to which the marriage exists and to which both spouses have a stronger common relation compared to Austrian law.[40] If no stronger relationship to another law exists or the relations are equally strong compared to those existing to the Austrian law this law prevails and is applicable.[41]

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[32] Höllwerth, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 8 Austrian Marriage Act marg. No. 1.
[33] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 8 Austrian Marriage Act, marg. No. 1.
[34] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 53.
[35] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 39.
[36] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 127; Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 02.19.
[37] Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 154.
[38] Section 18 (1) Austrian Conflict of Laws Act.
[39] Section 18 (2) Austrian Conflict of Laws Act; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 18 Austrian Conflict of Laws Act, marg. No. 8.
[40] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 18 Austrian Conflict of Laws Act, marg. No. 7.
[41] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 133; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 18 Austrian Conflict of Laws Act, marg. No. 7

There are, however, two exceptions where the personal statute of the claiming spouse at the time of the divorce applies:[42] (i) the marriage cannot be divorced due to the facts claimed pursuant to the law which is applicable according to section 18 (1) Austrian Marriage Act; (ii) none of the connecting factors set forth in section 18 Austrian Conflict of Laws Act is available.[43] The application of the statute of claimant must be the *ultimo ratio*, because the recourse infringes the equality of the spouses.[44] Accordingly, the Austrian Conflict of Laws Act refers only once to the application of foreign law namely if section 18 Austrian Conflict of Laws Act is not applicable and both spouses have a stronger relation to the law according to which the marriage exists compared to Austrian law.

11. Is parties' will taken into account in order to determine the applicable law for divorce?

The Austrian Conflict of Laws Act restricts the possibility of the choice of law; in the area of family law a choice of law is only permitted regarding matrimonial property rights.[45] The applicable law for a divorce cannot be chosen under Austrian law, rather it is determined pursuant to section 20 Austrian Conflict of Laws Act.[46] Therefore, the parties' will is not taken into account in determining the applicable law for divorce.

12. If parties may choose the applicable law, how shall this choice be expressed and when?

As already mentioned,[47] a choice of law is only permitted concerning matrimonial property rights.[48] In this regard a valid choice of law requires a foreign relation, whereby the intent to move abroad is sufficient.[49] The choice can be made at the time of entering into the marriage, during the marriage, in the event of a divorce and even retrospective.[50] The choice is not subject to formal requirements however, an implied choice is invalid.[51]

B2. Consequences of divorce

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[42] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 1; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 155.

[43] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 137; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 9 *et seq*.

[44] Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 98; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 9.

[45] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 126; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 4; Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 100.

[46] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 4; *see* Question 10.

[47] *See* Question 11.

[48] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 126; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 20 Austrian Conflict of Laws Act, marg. No. 4; Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 100.

[49] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 135.

[50] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 04.23.

[51] Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 153; Judgment of 23.3.1995, Oberster Gerichtshof, 1 Ob 264/98z.

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

Generally, the effects of a divorce must be determined according to section 20 in connection with section 18 Austrian Conflict of Laws Act,[52] but there are numerous exceptions to this rule.[53] The so-called European Maintenance Regulation[54] harmonizes procedural and conflict of law issues of the maintenance law in the European Union.[55] It covers maintenance obligations resulting from family relationship, parentage, marriage and affinity.[56] The conflict of law rules are not determined in the regulation itself, rather Art 15 European Maintenance Regulation refers to the Protocol on the Law Applicable to Maintenance Obligations.[57] International treaties – in particular the Convention of 2 October 1973 on the Law applicable to Maintenance Obligations – were replaced by the Protocol on the Law Applicable to Maintenance Obligations.[58] In relation to those states which have not ratified the Protocol on the Law Applicable to Maintenance Obligations (Switzerland, Japan, Turkey and Liechtenstein) the Convention remains applicable.[59]

The Protocol on the Law Applicable to Maintenance Obligations stipulates that the applicable law for maintenance obligations must primarily be determined according to the spouses' choice of law.[60] Moreover, Art 8 (1) Hague Protocol on the Law Applicable to Maintenance Obligations contains a list of eligible legal systems – such as the law of the nationality or the law of the habitual residence of one of the parties – which may be chosen at any time. In absence of a choice of law, the law of the state of the habitual residence of the creditor applies.[61] Additionally, Art 5 and Art 6 Hague Protocol on the Law Applicable to Maintenance Obligations contain special provisions.[62]

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

The applicable law for matrimonial assets is to be determined according to section 19 Austrian Conflict of Laws Act.[63] In absence of an explicit choice of law section 19 Austrian Conflict of Laws Act refers to the law which is decisive for the legal effects of a marriage *(Ehewirkungsstatut)*[64] at the time when entering into a marriage.[65] Section 19 Austrian Conflict

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[52] *See* Question 10.
[53] Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 56; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 156.
[54] 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.
[55] Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 56.
[56] Art 1 (1) 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.
[57] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[58] Art 18 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[59] Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 56.
[60] Art 7 and 8 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[60] Art 18 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[61] Art 3 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
[62] See Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 57 *et seq.*
[63] Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 50.
[64] *See* Question 10.

of Laws Act applies to agreements concluded in the framework of a marriage, e.g. agreement on the treatment of marriage savings after the dissolution of a marriage.[66] The allocation of the marital home and the household – being in nature of maintenance – is governed by the divorce statute pursuant to section 20 Austrian Conflict of Laws Act.[67] In case of doubt agreements between spouses regarding assets are considered as divorce consequences and accordingly are governed by section 20 Austrian Conflict of Laws Act.[68]

15. What is the applicable law for parental responsibility?

In Austria the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the Convention) entered into force on 1 April 2011. It contains rules for determining the applicable law regarding parental responsibility.[69] The Convention replaced the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infant, but the latter still applies in relation to Turkey and Macao.[70] The Convention uses the term parental responsibility comprising *ex lege* parental responsibility and measures for the protection of children, both are governed by the law of the state of the habitual residence of the child.[71] Similarly, the exercise of parental responsibility is governed by the law of the state of the child's habitual residence.[72] If the child's habitual residence changes the parental responsibility is governed by the law of the state of the new habitual residence.[73]

The Convention prevails over the Austrian Conflict of Laws Act.[74] However, the Austrian Conflict of Laws Act applies regarding infants from third states and infants which are habitually resident outside the scope of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children and the Convention concerning the powers of

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[65] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 19 Austrian Conflict of Laws Act, marg. No. 5 *et seq.*

[66] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 135; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 154.

[67] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 105; Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 135.

[68] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 105; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 154.

[69] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 160.

[70] Art 51 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 165; See Roth & Döring, 'Das Haager Abkommen über den Schutz von Kindern. Eine Revision des Haager Minderjährigenschutzabkommens von 1961', *JBl,* 1999, 758 *et seq.*

[71] Art 16 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[72] Art 17 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Roth & Döring, 'Das Haager Abkommen über den Schutz von Kindern. Eine Revision des Haager Minderjährigenschutzabkommens von 1961', *JBl,* 1999, 758 *et seq.*

[73] Art 15 (3) Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 59.

[74] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 172; Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 08.21.

authorities and the law applicable in respect of the protection of infants.[75] Pursuant to sections 24, 25 (2) and 27 Austrian Conflict of Laws Act the applicable law for parental responsibility has to be determined according to the personal statute of the child.[76]

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

Child maintenance is governed by sections 24 and 25 Austrian Conflict of Laws Act. According to these provisions the personal statute of the child determines the applicable law regarding the child maintenance.[77] Until the entry into force of the European Maintenance Regulation[78] on 18th June 2011 – which regulates the applicable law by reference[79] to the Protocol on the Law Applicable to Maintenance Obligations – the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children took precedence over the respective provisions of the Austrian Conflict of Laws Act.[80] As between contracting states that have not signed the Protocol on the Law Applicable to Maintenance Obligations such as Switzerland, Japan, Liechtenstein, Turkey and Macao the Convention on the law applicable to maintenance obligations towards children is still applicable;[81] it covers children below the age of twenty-one years and stipulates that the child maintenance is to be determined according to the law of the habitual residence of the child.[82] The Conflict of Laws Act applies if the Convention on the law applicable to maintenance obligations towards children denies the maintenance claim[83] or if the Convention is not applicable.[84] Due to Austria's reservation Austrian maintenance law is always applicable if the maintenance claim is submitted to Austrian courts, the debtor and the child are Austrians and the debtor has his/her habitual residence in Austria at the time of the application.[85]

Art 7 Protocol on the Law Applicable to Maintenance Obligations allows the choice of law under certain circumstances.[86] In absence of a choice of law, the law of the state in which the child has his/her habitual residence is applicable.[87] If, however, the child or his/her legal

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[75] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 173.
[76] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 24 Austrian Conflict of Laws Act, marg. No. 3; Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 08.26.
[77] Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 230; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 165.
[78] *See* Question 13.
[79] Art 15 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; Roth, *Zivilprozessrecht,* 2012, p. 173.
[80] Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 220; Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 150; Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 10.77.
[81] Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 220; Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 56.
[82] Art 1 Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.
[83] Art 3 Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.
[84] Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 10.84.
[85] Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 10.80; Schwimann, *Internationales Privatrecht einschließlich Europarecht*, 3rd Edition, 2001, p. 166.
[86] Verschraegen, *Internationales Privatrecht,* 2012, marg. No. 210.
[87] Art 7 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

representative submits the maintenance claim at the court where the debtor is habitually resident the *lex fori* prevails and applies.

The Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children entered into force on 1 January 1962.[88] It is a parallel agreement to the Convention on the law applicable to maintenance obligations towards children and was replaced by the European Maintenance Regulation, except in relation to Liechtenstein and Turkey.[89]

Despite the fact that Austria is not a signatory state of the Convention of 2 October 1973 on the Law applicable to Maintenance Obligations, circumstances might occur that require Austrian judges to apply the Convention namely, if a comprehensive reference is made to the law of a signatory state, which is a third state – such as Albania, Japan, Switzerland and Turkey – or the state is no member to the Protocol on the Law Applicable to Maintenance Obligations such as Denmark or the United Kingdom. The Convention on the Law applicable to Maintenance Obligations stipulates that the law of the habitual residence of the maintenance creditor shall govern the maintenance obligations.[90]

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

The judge has to establish the facts containing a foreign element and consequently he/she has to subsume the facts under the respective provisions of the Austrian Conflict of Laws Act.[91] However, the obligation to determine the facts leading to the application of the Conflict of Laws Act is limited to cases where sufficient indications to foreign elements are available.[92] The official investigation can be omitted if the parties have the free choice of law according to sections 19 and 35 Austrian Conflict of Laws Act and if their submissions can be considered as true without the need of further examination pursuant to the procedural law.[93] If the judge finds that foreign law is applicable pursuant to the Austrian Conflict of Laws Act he/she has to apply the foreign law *ex officio.*[94]

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

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[88] Verschraegen, *Internationales Privatrecht*, 2012, marg. No. 217.
[89] Nademleinsky, 'Die neue EU-Unterhaltsverordnung samt dem neuen Haager Unterhaltsprotokoll', EF-Z 2011/82, 131.
[90] Art 1 Convention of 2 October 1973 on the Law applicable to Maintenance Obligations.
[91] Section 2 Austrian Conflict of Laws Act; Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 01.18; Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 2 Austrian Conflict of Laws Act, marg. No. 2 *et seq.*
[92] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 2 Austrian Conflict of Laws Act, marg. No. 4.
[93] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 2 Austrian Conflict of Laws Act, marg. No. 5.
[94] Section 3 Austrian Conflict of Laws Act.

If the Austrian Conflict of Laws Act refers to the application of foreign law the judge is obliged to determine this law by his own motion.[95] For interpretative purposes the judge has to consider the wording of the law and established case law, because the foreign law has to be applied as in the country of origin.[96] To facilitate the investigation the judge may consult the involved parties, may request information from the ministry of justice and obtain expert opinions.[97] If despite all efforts the foreign law cannot be ascertained within a reasonable time period the judge has to apply Austrian law.[98] The content of the rule can be justified by the principle *iura novit curia* and basically consists of two tiers: First the judge is obliged to determine the foreign law *ex officio*, but if he/she is unable to do so within a reasonable time Austrian law applies.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

It depends what kind of divorce may be claimed. To obtain a divorce pursuant to section 55a Austrian Marriage Act (divorce my mutual consent), the matrimonial partnership must have been dissolved for at least six months, so, by implication, the marriage must have been in existence for at least six months.[99] To obtain a divorce under section 50 to 52 Austrian Marriage Act no particular duration of the marriage is required. Section 55 (1) Austrian Marriage Act requires a break op of the 'domestic community' for three years, while section 55 (3) Austrian Marriage Act requires a six-year break up.[100] Therefore, the marriage must have been in existence for either three or six years at least, depending on the provisions applied. Besides, there are no rules which make obtaining a divorce conditional upon a specific duration of the marriage.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

A person who is lacking legal capacity cannot enter into a marriage.[101] Minors or persons having limited legal capacity need the approval from their legal representative and from the person who is responsible for the care and education in order to conclude a legally valid marriage.[102] Accordingly, the submission of a divorce claim of a person whose legal capacity

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[95] Section 4 Austrian Conflict of Laws Act.
[96] Section 3 (2) Austrian Conflict of Laws Act.
[97] Verschraegen, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2004, section 4 Austrian Conflict of Laws Act, marg. No. 2; Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 30.
[98] Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 01.19.
[99] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 55a Austrian Marriage Act, marg. No. 1.
[100] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 64; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 99 *et seq*.
[101] Section 2 Austrian Marriage Act.
[102] Section 3 Austrian Marriage Act.

is limited needs the approval from the legal representative as well.[103] The declaration of a divorce by mutual consent constitutes a right which is highly personal in nature and therefore requires capacity of discernment and sagacity *(Einsichts- und Urteilsfähigkeit)*.[104] If a spouse is lacking the necessary insight or denies his/her consent the consent can neither be replaced by a custodian nor by the court.[105] In absence of the capacity of discernment and sagacity a divorce can only be obtained in contentious proceedings.[106] In case of a coma patient, who lived already apart from his spouse prior to the disease, the Austrian Supreme Court found that the custodian – who was responsible for all matters – is allowed to file a divorce claim.[107]

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

Austrian divorce law provides for divorce on three grounds[108]:

- Divorce on the ground of fault
- Divorce on the grounds of irretrievable breakdown
- Divorce by consent

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

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[103] Aichhorn, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 55a Austrian Marriage Act, marg. No. 22.
[104] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 4; Judgment of 04.03.2008, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 120.107.
[105] Judgment of 26.03.1996, Oberster Gerichtshof, 1 Ob 518/96.
[106] Judgment of 04.03.2008, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 120.107.
[107] Judgment of 10.05.2005, Oberster Gerichtshof, 5 Ob 94/05t.
[108] Section 49 *et seq* Austrian Marriage Act.

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

c) Is separation sufficient to establish irretrievable breakdown?

d) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

Total Number of Divorces 2011[109]	17,295
Divorce on the ground of fault	1,097
Divorce by consent	14,891
Divorce on the ground of irretrievable breakdown	1,073
Divorce based on other grounds	234

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

The relevant source is section 55a Austrian Marriage Act. As already mentioned, divorce by consent was introduced in 1978. The intention behind the legislation was that divorce by consent should be conditional on irretrievable breakdown, as shown by section 55a (1). This provision requires that each spouse makes a declaration conceding that an irretrievable breakdown has occurred. The question as to whether the court is bound by the spouses' concession is controversial.[110] In the interest of an expeditious and easy procedure, divorce proceedings under section 55a Austrian Marriage Act are non-contentious.[111]

31. Must the spouses be separated before introducing the claim? If yes, for how long?

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[109] Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/index.html (21.08.2012).

[110] This view is taken by Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 494; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 7; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 55a Austrian Marriage Act, marg. No. 3; Judgment of 25.04.1979, Vienna Regional Court (Landesgericht für Zivilrechtssachen), *EFSlg.* 34.020. It is opposed by Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 31 *et seq*; Simotta, *Das Zerrüttungsgeständnis im Verfahren über die einvernehmliche Scheidung*, Kralik-Festschrift, 1986, p. 329 *et seq*; Konecny,'Wiederaufnahme im Außerstreitverfahren, insbesondere im Verfahren zur einvernehmlichen Scheidung', *JBl,*1983, 30; Aicher, 'Ehescheidung und Scheidungsfolgen', in Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 107 *et seq*; Mänhardt, 'Die Scheidung im Einvernehmen' in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978,* 1979, p. 128 *et seq;* Judgment of 15.07.1982, Landesgericht für Zivilrechtssachen Wien*, EFSlg*. 41.261; *cf.* Verschraegen, *Die Einverständliche Scheidung in rechtsvergleichender Sicht*, 1991, p. 463 *et seq*.

[111] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 138.

Section 55a Austrian Marriage Act establishes that the 'matrimonial partnership' must have ceased to exist for at least six months. The question which has to be answered is thus whether such a breakdown requires a separation. A crucial indication of the breakdown in this connection is that the relationship of the spouses is no longer determined by a 'matrimonial frame of mind'.[112] Thus even if there is no physical separation (the spouses still share the same dwelling), the 'matrimonial partnership' may still have dissolved, because the spouses, for instance, lo longer spend any time together or have no community of mind. In short, a period of separation is not required but the breakdown of the matrimonial partnership – which may also be evidenced by a separation[113] – must have persisted for at least six months.

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

Spouses seeking divorce by consent must file a joint application for divorce *(gemeinsamer Scheidungsantrag)* under section 55a (1) Austrian Marriage Act. The interpretation of the term 'joint' is controversial. Some authors[114] take it to mean 'simultaneous' while the majority[115] regard it as sufficient that one spouse should file the application and the other consents thereto. However, the district court will deny considering the application for divorce if a joint petition for divorce pursuant to section 55a (1) Austrian Marriage Act is lacking.[116]

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

Under section 55a (2) Austrian Marriage Act the spouses must reach a written agreement with regard to the consequences of the divorce covering the following matters: the principal place of residence or custody of the children;[117] contact with the children (visiting times, etc.);[118] maintenance of the children of both spouses who are unable to provide for themselves;[119] the settling of matrimonial property,[120] which will include the necessary

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[112] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar,* vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 5; This opinion is supported by the case law, e.g., Judgment of 21.02.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.016; Judgment of 25.04.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.019; Judgment of 09.05.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.214 and Judgment of 13.02.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.628.

[113] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 55a Austrian Marriage Act, marg. No. 2.

[114] Aicher, 'Ehescheidung und Scheidungsfolgen' in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 115; Mänhardt, 'Die Scheidung im Einvernehmen' in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978,* 1979, p. 127.

[115] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 3; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 55a Austrian Marriage Act, marg. No. 7; Judgment of 17.05.1988, Vienna Court of Appeals (Oberlandesgericht), *EFSlg.* 57.178.

[116] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 2.

[117] See Section 177 General Austrian Civil Code.

[118] Section 148 General Austrian Civil Code.

[119] Section 140 General Austrian Civil Code.

arrangements in the event that one spouse works in gainful employment of the other;[121] the division of the matrimonial property (dwellings, cars, etc.) and savings;[122] maintenance of a spouse.[123] The listed matters must be covered, unless a final court order already exists concerning one issue or another (e.g. custody), section 55a (3) Austrian Marriage Act. The provisions do not leave a margin of appreciation to the judge to hold about the divorce consequences, because either the issues have already been decided by a judge or they must be covered by the spouses' agreement. However, all agreements relating to children require the approval of the custody court, but the lack of an approval does not prevent the issuance of a divorce order, section 55a (3) Austrian Marriage Act. As to the contact with the children, spouses may also agree to reserve this issue for later determination, section 55a (2) last sentence Austrian Marriage Act.

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

Sections 50-55 Austrian Marriage Act distinguish the following grounds of irretrievable breakdown:

(a) Section 50 Austrian Marriage Act – Behaviour due to mental disturbance

Under section 50 Austrian Marriage Act a spouse may apply for a divorce if the marriage has broken down irretrievably due to the behaviour of his or her mentally deranged partner. The breakdown must be such that there is no reasonable prospect of restoring the marital union.[124] Examples of mental disturbance are hysteria,[125] drug addiction[126] and general mental problems on a lower level (depression, confusion, etc.).[127] Yet, under section 50 Austrian Marriage Act the ground for divorce is not the mental disturbance itself but the resulting behaviour which may not be regarded as a fault/matrimonial offence, solely because the

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[120] This may also be reached by a renunciation of any mutual property claims by the spouses. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 138.

[121] See section 98 General Austrian Civil Code. Some authors are of the opinion that agreements on compensation under section 98 General Austrian Civil Code do not fall under section 55a (2) Austrian Marriage Act; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 17; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 55a Austrian Marriage Act, marg. No. 14. In contrast, Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 495; Aicher, 'Ehescheidung und Scheidungsfolgen' in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 113; Mänhardt, 'Die Scheidung im Einvernehmen' in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978,* 1979, p. 133.

[122] Section 81 *et seq* Austrian Marriage Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 138.

[123] This may also be fulfilled by renouncing any reciprocal maintenance claims. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 138.

[124] Judgment of 10.11.1977, Oberster Gerichtshof, *EFSlg.* 29.557; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.234; Judgment of 30.03.1981, Oberlandesgericht Wien, *EFSlg.* 38.730.

[125] Judgment of 10.10.1982, Oberster Gerichtshof, *EFSlg.* 41.219; Judgment of 24.05.1989, Oberster Gerichtshof, *EFSlg.* 38.730.

[126] Judgment of 05.05.1971, Oberster Gerichtshof, *SZ* 44/66; Judgment of 22.03.1990, Oberster Gerichtshof, *EFSlg.* 63.399; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.233.

[127] Established case law, e.g., Judgment of 03.11.1950, Oberster Gerichtshof, *SZ* 23/313; Judgment of 03.02.1954, Oberster Gerichtshof, *SZ* 27/2; Judgment of 22.03.1990, Oberster Gerichtshof, *EFSlg.* 63.399; Judgment of 30.07.1992, Oberster Gerichtshof, *EFSlg.* 69.233.

spouse in question is unable to understand the consequences of his or her behaviour.[128] As in the case of fault-based divorce under section 49 Austrian Marriage Act,[129] established case law assumes an irretrievable breakdown where the petitioner has irrecoverably lost his or her marital conviction due to the behaviour of the other spouse.[130]

(b) Section 51 Austrian Marriage Act – Mental illness

Pursuant to section 51 Austrian Marriage Act a spouse may seek a divorce if the other spouse is mentally ill and the illness has reached a gravity that has extinguished the spouses' community of minds,[131] without any reasonable prospect of restoration.[132] No specific form of behaviour is required by section 51 Austrian Marriage Act, as the mental illness itself is sufficient for a divorce. Community of minds is defined as the ability to communicate with the spouse at a rational and emotional level[133] (to share thoughts, to react in an appropriate way, etc.)[134] A mental illness is any anomaly which causes the loss of the necessary community of minds, e.g. schizophrenia.[135]

(c) Section 52 Austrian Marriage Act – Infectious or repulsive illness

This ground enables a spouse to obtain a divorce if the other spouse suffers from a serious infectious or repulsive illness, and if there is no reasonable prospect of it being cured or eliminated in the foreseeable future. Although not expressly mentioned in section 52 Austrian Marriage Act, to obtain a divorce on such grounds an irretrievable breakdown is necessary and must have been caused by the infectious or repulsive illness.[136] Similar to sections 49 and 50 Austrian Marriage Act, the predominant view assumes that there is an irretrievable breakdown where the petitioner has once and for all (definitely, incurably) lost his or her marital conviction due to the illness of his or her partner.[137] The illness must therefore be serious and chronic, and a temporary illness may not be cited as a ground for

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[128] Koziol & Welser, Grundriss des Bürgerlichen Rechts, vol. I, 13th Edition, 2006, p. 489 *et seq*; Holzhammer & Holzhammer, *Ehe und Familie,* 2nd Edition, 2001, p. 25 *et seq*; Judgment of 03.02.1954, Oberster Gerichtshof, *SZ* 27/23; Judgment of 02.10.1963, Oberster Gerichtshof, *SZ* 36/124; Judgment of 06.11.1982, Oberster Gerichtshof, *EFSlg.* 41.218; Judgment of 14.07.1987, Oberster Gerichtshof, *EFSlg*. 54.410; Judgment of 27.11.1991, Oberster Gerichtshof, *EFSlg.* 66.240.

[129] *See* Question 33.

[130] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 50 Austrian Marriage Act, marg. No. 2; Judgment of 14.01.1970, Oberster Gerichtshof, *EFSlg.* 13.862; Judgment of 11.07.1974, Oberster Gerichtshof, *EvBl* 1975/91.

[131] Judgment of 10.09.1952, Oberster Gerichtshof, *SZ* 25/238.

[132] Judgment of 08.06.1977, Oberlandesgericht Linz, *EFSlg.* 29.564.

[133] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 51 Austrian Marriage Act, marg. No. 2.

[134] See Judgment of 18.01.1978, Oberlandesgericht Wien, *EFSlg.* 31.680; Judgment of 21.11.1979, Oberlandesgericht Wien, *EFSlg.* 33.985.

[135] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 51 Austrian Marriage Act, marg. No. 3; Deixler-Hübner, Scheidung*, Ehe und Lebensgemeinschaft,* 10th Edition, 2009, marg. No. 111; Judgment of 10.09.1952, Oberster Gerichtshof, *SZ* 25/238.

[136] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 52 Austrian Marriage Act, marg. No. 1.

[137] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 52 Austrian Marriage Act, marg. No. 1; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 223 *et seq*. In contrast Gschnitzer & Faistenberger, *Österreichisches Familienrecht*, 2nd Edition, 1979, p. 40; Kerschner, 'Zum Unterhalt nach Scheidung nach neuem Recht', *JBl*, 1979, 561, footnote 5.

divorce under section 52 Austrian Marriage Act.[138] In order to assess whether an illness is repulsive an objective standard must be applied.[139] Examples of serious, chronic diseases are: AIDS, venereal disease, leprosy and tuberculosis. An unbearable odour caused by skin cancer or psoriasis is an example of a repulsive illness.[140]

(d) Section 55 Austrian Marriage Act – Break up of the 'domestic community'

Under section 55 (1) Austrian Marriage Act a spouse may obtain a divorce if the 'domestic community' *(häusliche Gemeinschaft)* has ceased to exist for a period of three years and the marriage has broken down irretrievably. Views as to the question of when the 'domestic community' terminates vary widely. While some authors purport that the community is always dissolved if the spouses have separated,[141] the prevailing case law – in addition to separation – also takes into account the abandonment of shared economic resources and the ceasing of sexual relations.[142] However, case law indicates that sexual relations alone do not suffice to maintain the 'domestic community'.[143] If the spouses inhabit the same dwelling, the 'domestic community' may nevertheless be dissolved if they use different rooms and there is little personal contact.[144] Whether separation is a mere objective criterion or whether at least one spouse must also show the intention to terminate the 'domestic community' (subjective criterion) is a matter of controversy.[145] The prevailing view denies that the 'domestic community' has broken up when the spouses are separated due to external circumstances, e.g. occupational reasons, hospitalization, imprisonment, etc.[146]

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[138] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 52 Austrian Marriage Act, marg. No. 2.

[139] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 52 Austrian Marriage Act, marg. No. 3.

[140] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 52 Austrian Marriage Act, marg. No. 2 *et seq*.

[141] Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 231 *et seq*; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 55 Austrian Marriage Act, marg. No. 2; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 491; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 114. In contrast Kerschner*, Familienrecht*, 2010, 4th Edition, marg. No. 2/122; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 7 *et seq*.

[142] Judgment of 07.03.1985, Oberster Gerichtshof, *EFSlg*. 48.789; Judgment of 28.09.1989, Oberster Gerichtshof, *EFSlg*. 60.215; Judgment of 28.09.1989, Oberster Gerichtshof, *EFSlg*. 60.218; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg*. 63.404.

[143] Judgment of 19.02.1986, Oberlandesgericht Wien, *EFSlg*. 51.620; Judgment of 06.10.1987, Oberlandesgericht Wien, *EFSlg*. 54.429; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg*. 63.404; Judgment of 31.03.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 90.295.

[144] Judgment of 24.01.1984, Oberlandesgericht Wien, *EFSlg*. 46.207; Judgment of 02.09.1985, Oberlandesgericht Wien, *EFSlg*. 48.787 and Judgment of 31.03.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 90.294.

[145] For a mere objective test see: Koziol & Welser, *Grundriss des Bürgerlichen Rechts,* vol. I, 13th Edition, 2006, p. 491; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 278; Judgment of 25.06.1974, Oberster Gerichtshof, *EFSlg*. 22.795; Judgment of 21.06.1950, Oberster Gerichtshof, *SZ* 23/205. Contra Kerschner, *Familienrecht*, 2010, 4th edition, marg. No. 2/122; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 7; Judgment of 02.02.1949, Oberster Gerichtshof, *JBl,* 1949, 238; Judgment of 29.03.1950, Oberster Gerichtshof, *SZ* 23/84; Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg*. 51.621; Judgment of 17.03.1998, Oberster Gerichtshof, *JBl* 1998, 593 requiring the intention to dissolve the domestic community.

[146] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 10; Kerschner, *Familienrecht*, 2010, 4th edition, marg. No. 2/122; Judgment of

The period of three years runs from the termination of the 'domestic community' and begins anew in the event of reconciliation.[147] Occasional visits do not, however, restore the community.[148] In the above-mentioned cases of separation by external circumstances the three-year period does not run before at least one spouse has lost his or her desire to resume the common household.[149]

In addition to the requirement of a three-year break up of the 'domestic community' a divorce under section 55 (1) Austrian Marriage Act may only be granted if the marriage has irretrievably broken down. As under sections 49, 50 and 52 Austrian Marriage Act this is the case if the emotional, mental and physical community between the spouses has ceased to exist; yet established case law considers it as sufficient if the petitioner has definitely lost his or her marital conviction.[150] Section 55 (1) last sentence Austrian Marriage Act stresses the fact that the breakdown must be irretrievable: thus, even if the spouses have separated for a period of three years the court has to dismiss the petition for divorce if it reaches the conclusion that there is a reasonable prospect of resuming the matrimonial community.

The respondent has a right to object to the divorce under section 55 (2) Austrian Marriage Act: at his or her request the divorce petition must be rejected if the petitioner is entirely or predominantly responsible for the irretrievable breakdown and the divorce would result in greater hardship for the respondent than would a dismissal for the petitioner.

However, if the 'domestic community' has already been dissolved for a period of six years, the marriage will be dissolved irrespective of any hardship or prospect of restoration, section 55 (3) Austrian Marriage Act. According to the prevailing view, it is not even necessary to assess whether the marriage has broken down (the so-called 'absolute' ground for divorce):[151] Section 55 (3) Austrian Marriage Act is considered as an irrebuttable presumption of the irretrievable breakdown.[152]

10.05.1947, Oberster Gerichtshof, *EFSlg.* 2.523; Judgment of 11.06.1981, Oberster Gerichtshof, *EFSlg.* 38.738; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.405; Judgment of 26.02.1998, Oberster Gerichtshof, *SZ* 71/43.

[147] Judgment of 19.02.1986, Oberlandesgericht Wien, *EFSlg*. 51.619; Judgment of 17.09.1999, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 90.302.

[148] Judgment of 05.07.1995, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 78.647.

[149] Established case law: Judgment of 17.11.1981, Oberster Gerichtshof, *SZ* 54/170; Judgment of 28.08.1986, Oberster Gerichtshof, *EFSlg.* 51.621; Judgment of 28.08.1985, Oberster Gerichtshof, *EFSlg.* 51.622; Judgment of 28.02.1990, Oberster Gerichtshof, *EFSlg.* 63.405.

[150] Established case law, e.g., Judgment of 30.04.1980, Oberster Gerichtshof, *EFSlg.* 36.360; Judgment of 16.12.1982, Oberster Gerichtshof, *EFSlg*. 41.243.

[151] Unanimous case law, e.g., Judgment of 25.09.1979, Oberster Gerichtshof, *SZ* 52/140; Judgment of 22.09.1980, Oberster Gerichtshof, *EFSlg*. 38.755; Judgment of 17.02.1982, Oberster Gerichtshof, *EFSlg*. 41.257; Judgment of 21.05.1985, Oberster Gerichtshof, *EFSlg*. 48.799; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 55 Austrian Marriage Act, marg. No. 9; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 23; Holzhammer & Holzhammer, *Ehe und Familie*, 2nd Edition, 2001, p. 27; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 101. In contrast Hopf & Kathrein, *Eherecht – Kurzkommentar*, 2005, 2nd Edition, p. 283 *et seq*; Aicher, 'Ehescheidung und Scheidungsfolgen', in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht,* 1979, p. 102 *et seq*; Ent, 'Die Eherechtsreform 1978', *Österreichische Notariats-Zeitung* , 1979, 122; Schwind, *Kommentar zum österreichischen Eherecht*, 2nd Edition, 1980, p. 127.

[152] Kerschner, *Familienrecht*, 2010, 4th edition, marg. No. 2/123; Kerschner, 'Zum Unterhalt nach Scheidung nach neuem Recht'*, JBl,* 1979, 561.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

Spouses may reach an agreement on certain subjects. For example, none of the provisions regarding post-divorce spousal maintenance are mandatory, [153] so the spouses are free to reach a settlement on this issue.[154] They may also reach an agreement on the maintenance and custody of children,[155] as well as on the division of matrimonial property (dwellings, cars, etc.) and savings.[156]

If both spouses consent to the divorce during the divorce proceedings on the ground of irretrievable breakdown and the requirements for a divorce by mutual consent are fulfilled the spouses may file a joint petition for divorce by mutual consent with the same court.[157] A divorce on the ground of mutual consent is heard in non-contentious proceedings, whereas a divorce on other grounds is settled in contentious proceedings. However, obtaining a divorce in non-contentious proceedings is the simpler, faster and cheaper option compared to contentious proceedings.[158]

36. How is separation between spouses taken into account regarding irretrievable breakdown?

c) Is separation sufficient to establish irretrievable breakdown?

Section 55 (1) Austrian Marriage Act imposes two independent conditions for obtaining a divorce: irretrievable breakdown of the marriage and a break up of the 'domestic community' (i.e. usually separation) for at least three years.[159] Separation on its own is thus not sufficient evidence of an irretrievable breakdown under this provision. However, if the 'domestic community' has already ceased to exist for at least six years, irretrievable breakdown does not require proof under section 55 (3) Austrian Marriage Act; it is rather irrebuttably presumed (the so-called 'absolute' ground for divorce).[160]

d) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

Under section 55 (1) Austrian Marriage Act the break up of the 'domestic community', which is usually tantamount to separation,[161] must last for at least three years, and under section 55 (3) Austrian Marriage Act for at least six years. The three year and the six year period start with the date of the break up of the 'domestic community'.[162] The period begins

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[153] Schwimann & Kolmasch, *Unterhaltsrecht*, 6th Edition, 2012, p. 237.
[154] Section 80 Austrian Marriage Act.
[155] Section 177 General Austrian Civil Code.
[156] Section 85 Austrian Marriage Act.
[157] Sections 114a (3) Austrian Jurisdiction Act, 460 (10) Austrian Code of Civil Procedure.
[158] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 138.
[159] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 4. *See* also Question 34.
[160] For references see at the end of Question 34.
[161] *See* Question 34.
[162] Aichhorn, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 55 Austrian Marriage Act, marg. No. 8.

anew if the 'domestic community' was continued; even if only for a short time.[163] Occasional visits, however, do not re-establish the marriage.[164]

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

During divorce proceedings on other grounds spouses may file a joint petition for divorce by mutual consent with the same court, under sections 114a (3) Austrian Jurisdiction Act, 460 (10) Austrian Code of Civil Procedure.[165] This results in the suspension of the proceedings on other grounds. If the spouses are divorced on the ground of mutual consent the divorce action based on other grounds is considered to have been withdrawn. If, on the other hand, the spouses withdraw their joint petition for divorce by consent or the court dismisses this petition the suspended proceedings on other grounds are only resumed if one spouse so requests.[166] However, it is not possible to convert divorce proceedings on the ground of mutual consent into proceedings based on other grounds, section 42 (1) (4) Austrian Jurisdiction Act.

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

The fault grounds for divorce are governed by section 49 Austrian Marriage Act in the form of a general clause with two standard examples. Under the general clause a spouse may request a divorce if the other has culpably disrupted the marriage by an aggravated matrimonial offence or through disgraceful or immoral behaviour, so that a reconciliation cannot be expected. The demonstrative examples are adultery and the infliction of physical violence and severe mental cruelty.

Divorce under section 49 Austrian Marriage Act may only be obtained if the culpable behaviour has caused the irretrievable breakdown of the marriage. Irretrievable breakdown is defined as a loss of matrimonial community[167] which will be apparent if the emotional, mental and physical community between the spouses has ceased to exist (objective element)[168] and at least one spouse is aware of this (subjective element).[169] Case law has

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[163] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 114; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55 Austrian Marriage Act, marg. No. 12.

[164] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 114.

[165] As already mentioned divorces on the ground of mutual consent are heard in non-contentious proceedings, whereas those on other grounds in contentious proceedings.

[166] Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts,* 2nd Edition, 1990, marg. No. 2364; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 145.

[167] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 49 Austrian Marriage Act, marg. No. 2.

[168] For case law see the Judgment of 13.04.1989, Oberster Gerichtshof, *EFSlg*. 60.177; Judgment of 22.02.1990, Oberster Gerichtshof, *EFSlg*. 63.383; Judgment of 04.09.1992; Oberster Gerichtshof, *EFSlg*. 69.215; Judgment of 18.03.2009, Oberster Gerichtshof, *EF-Z* 2010/43, 74.

[169] Koziol & Welser, *Grundriss des Bürgerlichen Rechts,* vol. I, 13th Edition, 2006, p. 486; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft,* 10th Edition, 2009, marg. No. 96; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 49 Austrian Marriage Act, marg. No. 17; Judgment of 24.05.1977, Oberster Gerichtshof, *RZ* 1978, 85 No. 43; Judgment of 30.04.1980, Oberster

established that an irretrievable breakdown occurs where the petitioner has once and for all lost marital conviction due to the offending behaviour of the other spouse.[170] The question as to whether a matrimonial offence is a ground for divorce if an irretrievable breakdown has already occurred before the offence was committed is controversial.[171]

39. Are there some specific requirements regarding proof of fault in this proceeding?

There are no specific provisions governing the proof of fault in divorce proceedings, hence the general rules of evidence will apply, sections 292 *et seq* Austrian Code of Civil Procedure. Under the Austrian Code of Civil Procedure the following forms of evidence are admissible: documentary evidence, sections 292-319 Austrian Code of Civil Procedure; witness evidence, sections 320-350 Austrian Code of Civil Procedure; expert evidence, sections 351-367 Austrian Code of Civil Procedure; inspection by the judge (site visits, etc.), sections 368-370 Austrian Code of Civil Procedure; evidence given by the parties in person, sections 371-383 Austrian Code of Civil Procedure.

Whether this enumeration is final or merely exemplary is a matter of disagreement. Case law speaks of a final interpretation whereby other evidence is therefore inadmissible,[172] as do some legal authorities.[173] The majority view, however, is that the list is exemplary and that all forms of evidence may be used to prove the facts.[174] Having said this, the dispute is of no practical importance, since almost all evidentiary means fit into one of the five forms set out in the Austrian Code of Civil Procedure.[175]

The best means of proving fault is probably that of naming witnesses or producing documents (photographs, letters, hotel bills, etc.), sections 371-383 Austrian Code of Civil Procedure.

Gerichtshof, *JBl,* 1981, 36; Judgment of 03.03.1990, Oberster Gerichtshof, *RZ* 1990, 177 No. 78; Judgment of 30.01.1997, Oberster Gerichtshof, *SZ* 70/19. Against the differentiation between the objective and subjective elements *see* Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 49 Austrian Marriage Act, marg. No. 3.

[170] Judgment of 24.09.1958, Oberster Gerichtshof, *EvBl* 1959/34; Judgment of 02.10.1963, Oberster Gerichtshof, *SZ* 36/124; Judgment of 27.01.1987, Oberster Gerichtshof, *EFSlg.* 54.388; Judgment of 13.04.1989, Oberster Gerichtshof, *EFSlg.* 60.187; Judgment of 07.02.1990, Oberster Gerichtshof, *EFSlg.* 63.384.

[171] Against Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 49 Austrian Marriage Act, marg. No. 17 and, e.g. Judgment of 30.03.1979, Oberster Gerichtshof, *EFSlg.* 34.051; Judgment of 04.06.1987, Oberster Gerichtshof, *EFSlg.* 54.396; Judgment of 17.09.1996, Oberster Gerichtshof, *EFSlg.* 81.682; Judgment of 16.11.1999, Oberster Gerichtshof, *EFSlg.* 90.284; for such a position see Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 49 Austrian Marriage Act, marg. No. 4 and, e.g., Judgment of 27.01.1983, Oberster Gerichtshof, *EFSlg.* 43.635; Judgment of 13.04.1983, Oberster Gerichtshof, *EFSlg.* 43.637; Judgment of 22.04.1984, Oberster Gerichtshof, *EFSlg.* 46.181; Judgment of 29.09.1987, Oberster Gerichtshof, *EFSlg.* 54.395; Judgment of 18.01.1989, Oberster Gerichtshof, *EFSlg.* 60.188; Judgment of 20.04.1989, Oberster Gerichtshof, *EFSlg.* 60.192.

[172] Judgment of 07.07.1950, Oberster Gerichtshof, *JBl,* 1950, 507 and Judgment of 04.01.1950, Oberster Gerichtshof, *SZ* 23/1.

[173] e.g., Holzhammer, *Österrechisches Zivilprozessrecht*, 2nd Edition, 1976, p. 238, 252.

[174] Deixler-Hübner & Klicka, *Zivilverfahren,* 7th Edition, 2011, marg. No. 136; Fasching, *Lehrbuch des österreichischen Zivilprozessrechts*, 2nd Edition, 1990, marg. No. 925.

[175] Fasching, *Lehrbuch des österreichischen Zivilprozessrechts*, 2nd Edition, 1990, marg. No. 925; Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 721.

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

A divorce judgment pursuant to section 49 Austrian Marriage Act has to contain a decision as to fault if fault was asserted by claim, counterclaim or request.[176] The decision as to fault shall be included *ex officio*; however this needs to be distinguished from the fact that each party must claim and prove the misconduct of the other party.[177] In other words, the claimant is obliged to prove respondent's fault and *vice versa*. If a party requests the court to hold that both spouses were equally guilty this petition must be taken into account and binds the court.[178] This implies that the judge must not pronounce a judgment against both parties without a respective claim or request from a party.

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

Under section 56 Austrian Marriage Act there is no right to obtain a divorce on grounds of fault / matrimonial offence if the innocent spouse's behaviour indicates that he or she has forgiven other spouse's offence or has not considered the offence as resulting in an irretrievable breakdown. In essence, in order to forgive an offence, the innocent spouse must know all the facts thereof and his or her behaviour must indicate an unreserved intention to continue the marriage;[179] however, suspensive conditions and time-limits are possible.[180] A reconciliation is irrevocable.[181]

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

The legal protection of rights and duties arising out of a marriage is depending upon whether the right being invoked is of personal or non-personal nature.[182] Severe violations of personal matrimonial duties constitute a ground for divorce.[183] Besides, the protection of

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[176] Section 60 Austrian Marriage Act; Aichhorn, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 60 Austrian Marriage Act, marg. No. 1; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 60 Austrian Marriage Act, marg. No. 1.

[177] Gruber, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 60 Austrian Marriage Act, marg. No. 3.

[178] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 60 Austrian Marriage Act, marg. No. 1.

[179] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 107; Judgment of 02.03.1988, Oberster Gerichtshof, *EFSlg.* 57.185; Judgment of 30.06.1988, Oberster Gerichtshof, *EFSlg.* 57.186; Judgment of 15.12.1988, Oberster Gerichtshof, *EFSlg*. 57.187; Judgment of 22.022.1990, Oberster Gerichtshof, *EFSlg*. 63.430.

[180] Gruber, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 56 Austrian Marriage Act, marg. No. 5; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 56 Austrian Marriage Act, marg. No. 3.

[181] Gruber, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 56 Austrian Marriage Act, marg. No. 2; Judgment of 15.12.1988, Oberster Gerichtshof, *EFSlg.* 57.187; Judgment of 22.02.1990, Oberster Gerichtshof, *EFSlg*. 63.430.

[182] *See* Höllwerth, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 90 General Austrian Civil Code, marg. No. 6 *et seq.*

[183] Schwimann & Ferrari, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 90 General Austrian Civil Code, marg. No. 13.

absolute rights such as physical integrity, property, honor and privacy, which are by all means enforceable against a spouse and the violation of proprietary matrimonial rights might entail claims for damages.[184] If matrimonial duties have been infringed the legal protection does not cover the actual interest in performance, rather the follow up costs resulting from the violating behavior may be asserted.[185] According to established case law detective costs incurred to prove adulterous behavior of one spouse can either be required from the adulterer or the third person that maintained a relationship with the spouse.[186] Moreover, the Austrian Supreme Court awarded the costs incurred by successfully proving non-paternity and the maintenance paid until this establishment.[187] Psychological damages caused by adultery are, however, not recoverable.[188] Similarly, the claim for compensation due to the violation of the duty of loyalty was denied.[189] The Austrian Supreme Court left the question whether further claims for damages might be possible (e.g. due to the negligence of household and childcare) open.[190] In short, it has to be decided on a case-by-case basis whether consequences resulting from the culpable behavior of one spouse entitle the other spouse to claim damages.[191] Accordingly, a general rule cannot be deduced from the solution of individual cases. However, as far as the Austrian Supreme Court awarded claims for damages based on adultery, no differences from classical tort law actions are apparent. Lastly, it should be noted that the criminal liability of adultery (former section 194 Austrian Penal Code) was abolished with the Penal Code reform in 1996.[192]

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

In contrast to the German legal system, the Austrian legal system does not provide a statutory basis for contracts which modify the consequences of a divorce, rather the term 'marriage contract' *(Ehevertrag)* refers to entering into a marriage.[193] In practice, however, an increasing need to settle the consequences of a possible divorce already when concluding a marriage has become evident.[194] According to Austrian law the spouses have the possibility

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[184] Höllwerth, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 90 General Austrian Civil Code, marg. No. 9; Judgment of 15.03.1984, Oberster Gerichtshof, *SZ* 57/53.

[185] Höllwerth, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 90 General Austrian Civil Code, marg. No. 12; Judgment of 28.08.1997, Oberster Gerichtshof, *SZ* 70/163.

[186] Judgment of 25.09.1979, Oberster Gerichtshof, SZ 52/138, RS 0022943; See Hofmann & Grüblinger, 'Ehebruch und Schadenersatz (Teil I)', EF-Z 2009/95, 139.

[187] Judgment of 15.03.1984, Oberster Gerichtshof, *SZ* 57/53.

[188] Judgment of 20.02.2003, Oberster Gerichtshof, *SZ* 2003/16.

[189] Schwimann & Ferrari, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 90 General Austrian Civil Code, marg. No. 15.

[190] Schwimann & Ferrari, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 90 General Austrian Civil Code, marg. No. 15; Judgment of 15. 3. 1984, Oberster Gerichtshof, *SZ* 57/53.

[191] Critical regarding the claim of damages against the third person who maintains a relation to one spouse: Hofmann & Grüblinger, 'Ehebruch und Schadenersatz (Teil I)', *EF-Z* 2009/95, 138 *et seq*; Hofmann & Grüblinger, 'Ehebruch und Schadenersatz (Teil II)', *EF-Z* 2009/114, 172.

[192] Hofmann & Grüblinger, 'Ehebruch und Schadenersatz (Teil I)', EF-Z 2009/95, footnote 14.

[193] Section 44 Austrian General Civil Code; Deixler-Hübner, *Der Ehevertrag*, 2nd Edition, 2010, p. 24 *et seq*.

[194] Deixler-Hübner, *Der Ehevertrag*, 2nd Edition, 2010, p. 23.

to settle the consequences of a divorce in advance.[195] Particularly, they can agree on the consequences regarding child and spousal maintenance, property and custody at the time when concluding the marriage, during the marriage and in case of a divorce.[196]

A divorce based on mutual consent pursuant to section 55a Austrian Marriage Act compulsory requires an agreement on the consequences of the divorce covering child and spousal maintenance, parental responsibility, the right to access to the child and reciprocal rights in property.[197] If a divorce is claimed in contentious proceedings an agreement is possible, but not mandatory.[198] A divorce is the judicial dissolution of a marriage, which will be effective with the substantive *res judicata (materielle Rechtskraft).*[199] Accordingly, the date at which the divorce comes into force is not in the spouses' discretion.

44. If yes, may the judge scrutinize the spousal agreement?

The agreements on post-divorce spousal maintenance, the allocation of the matrimonial property (dwellings, cars, etc.) and savings are subject to the rules of contract law, and may thus be scrutinized, for instance, with regard to the legal incapacity of one party or the violation of good morals *(bonos mores).*[200] Agreements relating to child maintenance and parental responsibility require the approval of the custody court, which will be granted if the agreement corresponds with the interests and well-being of the child.[201]

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

As already mentioned, the judge has to approve the agreement dealing with parental responsibility if this agreement serves the best interest of the child according to section 177 (3) General Austrian Civil Code. The judge is obliged to examine the submitted agreement comprehensively in the sense of reviewing both the agreement regarding the main residence of the child and the agreement concerning the parental responsibility.[202] If the agreement is not in accordance with section 177 General Austrian Civil Code or does not serve the best interest of the child, the judge has to deny the approval of the agreement[203] and must act *ex officio*: Primarily, the judge should work towards the conclusion of a respective agreement

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[195] Kerschner & Wagner, *Zivilrecht VI Familienrecht*, 2nd Edition, 2010, marg. No. 9/90; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 516.
[196] Deixler-Hübner, *Der Ehevertrag*, 2nd Edition, 2010, p. 24.
[197] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 102.
[198] Deixler-Hübner, *Der Ehevertrag*, 2nd Edition, 2010, p. 155.
[199] Sections 96 and 43 (4) in connection section 38 Austrian Non-Contentious Proceedings Act; Section 460 No. 8 in connection with 416 (1) Austrian Code of Civil Procedure; Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 46 Austrian Marriage Act, marg. No. 1
[200] Schwimann & Kolmasch, *Unterhaltsrecht*, 6th Edition, 2012, p. 237; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 516 *et seq.*
[201] Section 177 (3) General Austrian Civil Code as to custody; section 154 (3) General Austrian Civil Code as to maintenance. Without judicial approval the maintenance agreement is only binding between the spouses, but not as against the child. Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. *516 et seq.*
[202] Gründler, 'Die gemeinsame Obsorge nach dem KindRÄG 2001', ÖJZ, 2001, 707 et seq.
[203] Deixler-Hübner, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 177 General Austrian Civil Code, marg. No. 19.

between the spouses. If, however, this attempt fails the judge has to entrust one parent with the sole parental responsibility.[204]

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

There is no legal separation under current Austrian law.

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

Divorce officially breaks the marriage, when the decision was delivered to both parties and neither party decided to appeal against the decision, which means that the decision is final and binding and has the effect of *res judicata*.[205] The decision becomes legally binding after four weeks of the written delivery to both ex-spouses if they did not waive their right to appeal.[206]

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

After the divorce decision becomes legally binding, remarriage is not subject to certain restrictions. A remarriage is allowed after the legally binding dissolution of the former marriage.[207]

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

After divorce spouses do not automatically regain their former family names.[208] Section 62 Austrian Marriage Act stipulates that the spouses generally retain their common married name after the divorce.[209] However, the divorced spouse has the option to adopt his/her prior name through an official certificate or an officially recognized document to be made before a civil registrar.[210] It is also possible to adopt a name used in a previous marriage, if

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[204] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 9.

[205] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 55a Austrian Marriage Act, marg. No. 29; Höllwerth, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 46 Austrian Marriage Act, marg. No. 1; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 136.

[206] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 69.

[207] Schwimann & Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 8 Austrian Marriage Act, marg. No. 2.

[208] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 109.

[209] Gruber, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 62 Austrian Marriage Act, marg. No. 2.

[210] Section 93a General Austrian Civil Code ; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 178.

there are one or more children of this marriage.[211] Currently, a draft amending the law on family matters and the law relating to the use of names is under consideration.[212] In this regard it has been proposed that after divorce a spouse may assume any former name without restrictions; however, this option should be granted only once.[213]

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**

According to section 26 Austrian Citizenship Act the Austrian citizenship will be lost if a person acquires a foreign citizenship, enters into the military service of a foreign state, waives its citizenship or the citizenship is withdrawn.[214] However, a divorce has no effects regarding the citizenship of the ex-spouse, even if the citizenship was granted, because he/she was married with an Austrian national for a certain time period according to section 11a Austrian Citizenship Act.[215]

- **Residence permit granted to the foreign spouse by marriage?**

In this regard two cases must be distinguished:

(a) Family members' right to settle

Generally, family members[216] who are holders of a residence title according to section 8 (1) No. 2[217],4[218],5[219] and 8[220] Austrian Residence and Settlement Act *(Niederlassungs- und Aufenthaltsgesetz)* have an independent right to reside in Austria.[221] A family member receives a residence title if the marriage was divorced due to the main fault of the other spouse or in particular cases (e.g. family member has become a victim of violence and an order was issued

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[211] Section 93a Austrian Civil Code.

[212] *See* http://www.justiz.gv.at/internet/html/default/2c948485398b9b2a013a4a270f9f072b.de.html;jsessionid=74864A23A313FE50DC78D3695208C580 (23.10.2012).

[213] Proposed section 93a (2) and section 93b General Austrian Civil Code http://www.justiz.gv.at/internet/file/2c948485398b9b2a013a4a270f9f072b.de.0/begutachtungsentwurf.pdf (23.10.2012).

[214] See Bachmann, in: Bachmann et. al. (ed.), *Besonderes Verwaltungsrecht*, 2012, 9th Edition, p. 184 *et seq.*

[215] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 496.

[216] In this context the term 'Family Members' comprise spouses, registered partners and unmarried minors including adoptive and step children pursuant to section 2 (1) No. 9 Austrian Residence and Settlement Act.

[217] Residence permit 'Red-White-Red Card Plus' entitles to temporary residence and unlimited labor market access and is available for the following groups: Family members of (i) very highly qualified workers (ii) skilled workers in shortage professions (iii) other key workers (iv) graduates of universities and colleges of higher education in Austria (v) holders of an EU Blue Card (highly qualified third country citizens) and (vi) foreign citizens permanently settled in Austria.

[218] 'Settlement permit' entitles to temporary residence and unlimited labor market access.

[219] 'Settlement permit – employment excluded' entitles to temporary settlement without being entitled to seek employment.

[220] Residence permit 'Family member' entitles to temporary residence with the possibility to get the residence permit 'Long-term resident - Family member' pursuant to section 8 (1) No. 9 Austrian Residence and Settlement Act.

[221] Section 27 (1) Austrian Residence and Settlement Act.

against the so-called sponsor[222]); although the general requirements for granting a residence title according to section 11 Austrian Residence and Settlement Act are not fulfilled.[223]

(b) Right to reside for family members of EEA nationals

Nationals of the European Economic Area (hereinafter EEA nationals) who are family members (e.g. spouses) of an EEA national who is permitted to reside according to the European Free Movement Directive[224] are entitled to reside in Austria for more than three months.[225] A divorce does not affect the right of family members to continue residing in Austria.[226]

Third country nationals who are spouses of an EEA national who is permitted to reside according to the European Free Movement Directive are entitled to reside in Austria.[227] In case of divorce the spouses' right to reside maintains if the conditions set forth in section 51 (1) No. 1 and 2[228] Austrian Residence and Settlement Act are fulfilled and (i) the marriage has lasted at least three years including one year in the federal territory (ii) the third country national is responsible for the child of the EEA national (iii) to prevent undue hardships (iv) the third country national has the right of access to a minor child and the custody court has ruled that such access must be granted in the federal territory.[229]

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

Section 177 (1) General Austrian Civil Code provides that the parental responsibility of both parents maintains after a divorce, unless the parents agree otherwise.[230] Parents must not reach an agreement regarding parental responsibility however, if the parties want to maintain joint parental responsibility, they must submit an agreement to the court naming the parent with whom the child will primarily reside (i.e. where the centre of the child's life will be).[231]

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[222] Section 2 (1) No. 10 Austrian Settlement and Residence Act: A sponsor is a third country national who is legally residing in the federal territory or from whom a right pursuant to the Austrian Residence and Settlement Act is derived.

[223] Section 27 (2) Austrian Residence and Settlement Act.

[224] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[225] Section 52 (1) Austrian Residence and Settlement Act.

[226] Section 52 (2) Austrian Residence and Settlement Act.

[227] Section 54 (1) Austrian Residence and Settlement Act.

[228] Such requirements are for instance: The third country national is self-employed or employee in Austria; has sufficient resources for him/herself and the family members and has sufficient sickness insurance.

[229] Section 54 (5) Austrian Residence and Settlement Act.

[230] See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1181; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 198.

[231] Section 177(2) General Austrian Civil Code; See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182; Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005,

This agreement aims to ensure the continuity of child-rearing to the greatest extent possible.[232] The so-called 'domicile parent' *(Domizilelternteil)* must necessarily be entrusted with the entire parental responsibility.[233] Accordingly, the residence of the child entails that the parent with whom the child lives is entrusted with the entire child custody. This parent has also the right to determine the children's place of residence and is thus entitled to move to another place with the child pursuant to section 146b General Austrian Civil Code.[234] Hence, the exercise of parental responsibility and the issue of the residence are linked, insofar as the parent is living with the child. From the viewpoint of the other parent – who has parental responsibility, but does not live together with the child – these issues are distinct from each other. However, apart from the fact that this parent does not have the right to determine the place of residence of the child there are no further legal consequences. Generally, parents with joint parental responsibility have the same rights and duties and should act in concert.[235]

52. Does divorce produce automatic effects regarding parental responsibility?

After a divorce the parental responsibility of both parents remains in effect according to section 177 (1) General Austrian Civil Code. The parents have to submit an agreement regarding the prospective habitual residence of the child.[236] It is not possible to maintain joint parental responsibility if one parent objects thereto.[237] Hence, a divorce produces no automatic effects regarding parental responsibility.

53. Can the exercise of parental responsibility be subject to a parental agreement?

Generally, the joint parental responsibility remains in effect after a divorce.[238] In practice the parents have wide discretion in determining the parental responsibility:[239] The parties can decide that either both parents are entrusted with parental responsibility or that only one parent is responsible for the child.[240] Moreover, in case the former spouses agree on joint parental responsibility, they can restrict the parental responsibility of one parent, which means that this parent is only responsible for certain matters, e.g. education, medical treatment or the administration of assets.[241] The parents, however, cannot agree that the

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section 177 General Austrian Civil Code, marg. No. 2; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 547.

[232] Huber, *Streit um das Kind,* 2010, p. 30.

[233] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 205; Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 177 General Austrian Civil Code, marg. No. 4.

[234] Judgment of 14.06.2005, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 110.760; Verschraegen, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 146b General Austrian Civil Code, marg. No. 2.

[235] Section 145b General Austrian Civil Code; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 190.

[236] *See* Question 51.

[237] Huber, *Streit um das Kind,* 2010, p. 28.

[238] Section 177 (1) General Austrian Civil Code; *see* Question 52.

[239] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 191; Gründler, 'Die gemeinsame Obsorge nach dem KindRÄG 2001', *ÖJZ,* 2001, 707 *et seq.*

[240] Deixler-Hübner, *Der Ehevertrag,* 2nd Edition, 2010, p. 149.

[241] See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177

parental responsibility is shared, neither in a temporal sense nor in terms of individual duties, meaning that each parent would be responsible for certain issues.[242] Further, parental responsibility agreements which are contrary to section 145a General Austrian Civil Code, namely the entrustment of a parent, who is not possessing full legal capacity with the administration of assets, or section 176 General Austrian Civil Code, which governs the restriction or withdrawal of parental responsibility, are not allowed.[243]

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The judge has to approve the agreement dealing with parental responsibility if this agreement serves the best interest of the child according to section 177 (3) General Austrian Civil Code.[244] The judge is obliged to examine the submitted agreement comprehensively in the sense of reviewing both the agreement regarding the main residence of the child and the agreement concerning the parental responsibility.[245] If the agreement is not in accordance with section 177 General Austrian Civil Code or does not serve the best interest of the child, the judge has to deny the approval of the agreement[246] and must act *ex officio*: Primarily, the judge should work towards the conclusion of a respective agreement between the spouses. If, however, this attempt fails the judge has to entrust one parent with the sole parental responsibility.[247]

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

If the parents do not reach an agreement within a reasonable period of time after the divorce, or the agreement is not in the best interest of the child, the judge has to entrust one parent with the parental responsibility.[248] The judge is not authorized to order that both parents have joint parental responsibility.[249] In case the parents are separated not merely temporaliy, the judge can rule on the exercise of parental responsibility according to the described procedure only if one parent requests so.[250]

General Austrian Civil Code, marg. No. 3; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 205.

[242] Hopf & Weitzenböck, 'Schwerpunkte des Kindschaftsrechts-Änderungsgesetzes 2001', *ÖJZ*, 2001, 489; Deixler-Hübner, Scheidung, *Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 205.

[243] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 3.

[244] Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182.

[245] Gründler, 'Die gemeinsame Obsorge nach dem KindRÄG 2001', ÖJZ, 2001, 707 et seq.

[246] Deixler-Hübner, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 177 General Austrian Civil Code, marg. No. 19.

[247] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 11.

[248] Section 177a General Austrian Civil Code; See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182 *et seq.*

[249] Deixler-Hübner, *Der Ehevertrag,* 2nd Edition, 2010, p. 149; Hopf & Weitzenböck, 'Schwerpunkte des Kindschaftsrechts-Änderungsgesetzes 2001', *ÖJZ,* 2001, 491.

[250] Section 177b General Austrian Civil Code.

The draft amending the law on family matters and the law relating to the use of names, which is currently under consideration proposes that the court may order a so called 'stage of preliminary parental responsibility' *(Phase der vorläufigen elterlichen Verantwortung)* for a period of six months if the former spouses cannot come to an agreement within a reasonable period of time or if one parent requests the sole parental responsibility and the order serves the interest of the child. In this phase the parent responsible for the child maintains the official parental responsibility, while the other parent should be granted sufficient contact with his/her child including the care and education of the child. Based on the experiences gained during the phase the judge has to take a final decision as to parental responsibility after the six months. According to the draft it should also be possible that the judge entrusts both parents with the parental responsibility; in this case the judge has to determine in whose household the child will live.[251]

56. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

A decision concerning parental responsibility is not irrevocable. If circumstances change the judge may *ex officio* or upon request entrust the other parent with parental responsibility.[252] However, a subsequent modification of the parental responsibility requires a concrete threat to the child's welfare[253] (e.g. child abuse).[254] Accordingly, an alteration is only possible due to important and serious reasons, particularly in terms of the child's welfare.[255] It constitutes a serious reason if the child itself wishes to change the parental responsibility.[256] Accordingly, a parent is deprived of his/her parental responsibility for reasons of misbehavior toward the child and not toward the other parent. However, the judge has to take into account the entire behavior of the parent.[257]

57. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

Generally, the parent who is not living in a common household with the child has the right to access to the child pursuant to section 148 (1) General Austrian Civil Code. The right to access to the child is guaranteed by Art 8 European Convention on Human Rights and Art 9 UN Convention on the Rights of the Child.[258] These provisions are aiming to maintain a close relationship to the parent who is living separately.[259] Section 145b General Austrian

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[251] Proposed section 180 (1) amended General Austrian Civil Code http://www.justiz.gv.at/internet/file/2c948485398b9b2a013a4a270f9f072b.de.0/begutachtungsentwurf.pdf (23.10.2012).

[252] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 212.

[253] Judgment of 22.10.2008, Oberster Gerichtshof, *EFSlg.*116.947.

[254] Judgment of 26.03.2009, Oberster Gerichtshof, *Zak* 2009/326, 215 *et seq.*

[255] Judgment of 04.06.1996, Oberster Gerichtshof, *EFSlg.* 81.129; Judgment of 26.09.2001, Oberster Gerichtshof, *EFSlg* 96.670; Judgment of 20.12.2007, Landesgericht Salzburg, *EFSlg.* 116.937.

[256] Judgment of 21.02.2006, Oberster Gerichtshof, *FamZ,* 2006, 79; Judgment of 30.07.2007, Oberster Gerichtshof, *iFamZ,* 2007, 146.

[257] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 214.

[258] Huber, *Streit um das Kind,* 2010, p. 51.

[259] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 217.

Civil Code sets forth a 'good behaviour clause'.[260] If the parent, who is entitled to visit the child, violates this clause, his/her right to access to the child may be restricted or entirely deprived.[261] Further, the right to access to the child can be restricted or deprived if the child's welfare is at risk. Judges have denied the right to access to the child for the following reasons: violence against the parent, who has the parental responsibility; mental illness or increased suicidal tendency; alcohol abuse throughout the visit; sexual offences or suspicion of sexual offences; imprisonment.[262]

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

If parents want to exercise the parental responsibility jointly after a divorce, they must submit an agreement to the court designating the parent with whom the child will primarily reside (centre of the child's life).[263] Despite the fact that both parents exercise the parental responsibility, the child should have one main place of residence *(Heim erster Ordnung).*[264] This ensures the continuity of child-rearing to the greatest extent possible.[265] The parent with whom the child resides has the right to determine the place of residence and is thus entitled to move to another place with the child pursuant to section 146b General Austrian Civil Code.[266] Agreements, whereby the child resides four days with one parent and three days with the other parent are not in accordance with the requirement of the child's main place of residence.[267]

When the parents decide that one parent is entrusted with parental responsibility partially, the child's main residence must be with the parent entitled with the entire parental responsibility.[268] Accordingly, it is not possible that the child has its main residence with the parent exercising parental responsibility only partially. If one parent is entitled with parental responsibility, the child obviously has its main residence with this parent. The other parent is left to his/her right to access to the child.[269]

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[260] Verschraegen, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 145b General Austrian Civil Code, marg. No. 2.
[261] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 219; Verschraegen, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 145b General Austrian Civil Code, marg. No. 3.
[262] Huber, *Streit um das Kind,* 2010, p. 59; Nademleinsky, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 148 General Austrian Civil Code, marg. No. 27.
[263] Section 177 (2) General Austrian Civil Code; See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182.
[264] Huber, *Streit um das Kind,* 2010, p. 30; Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 177 General Austrian Civil Code, marg. No. 4; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 7.
[265] Huber, *Streit um das Kind,* 2010, p. 30; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 199.
[266] Judgment of 14.06.2005, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 110.760.
[267] Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182; Weitzenböck, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 177 General Austrian Civil Code, marg. No. 4; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 6.
[268] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 205; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 547.
[269] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 217.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The parental responsibility of both parents remains in effect after a divorce according to section 177 (1) General Austrian Civil Code. The parents wishing to maintain joint parental responsibility have to submit to the court an agreement regarding the prospective habitual residence of the child.[270] The judge has to approve the agreement dealing with the main residence of the child if this agreement is in the best interest of the child according to section 177 (3) General Austrian Civil Code.[271] The judge will not approve the agreement if it does not serve the child's interests or it is contrary to section 177 General Austrian Civil Code.[272] In this case the judge should facilitate the conclusion of an agreement which meets the legal preconditions otherwise he/she has to decide *0*. If, however, the parents agree that the parental responsibility of one parent is restricted to certain matters or that only one parent is entitled to parental responsibility, the child will reside with the parent entrusted with the entire parental responsibility. Hence, in these cases the residence of the child cannot be subject of a parental agreement.

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

The right to access to the child is not merely a right of the parent, rather it is also a right of the child pursuant to section 148 (1) General Austrian Civil Code.[273] This right can be deduced from the following provisions: section 137 (2) General Austrian Civil Code (duty of mutual assistance between parents and children); section 178a (child's welfare); Art 8 European Convention on Human Rights (right to respect for private and family life) and Art 9 UN Convention on the Rights of the Child which explicitly refers to the child's right to maintain a personal relation and direct contact with both parents on a regular basis.[274] So far, Austrian courts have interpreted these provisions in the sense that the right to access to the child cannot be enforced against the will of the child.[275] Further, the courts denied that the child is entitled to regular visits.[276] To enforce the agreement regarding the right to access to the child who has been approved by the court, the court may take coercive actions such as

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[270] Section 177 (2) General Austrian Civil Code; See Roth & Stegner, 'Die Entwicklung der Obsorgeregelung in Österreich', in: Verbeke & Scherpe & Declerck & Helms & Senaeve (eds.), *Confronting The Frontiers Of Family And Succession Law,* 2012, p. 1182.

[271] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 9.

[272] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 177 General Austrian Civil Code, marg. No. 9.

[273] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 127; Judgment of 02.10.2001, Oberster Gerichtshof*, EFSlg.* 96.556; Judgment of 25.05.2005, Oberster Gerichtshof*, EFSlg.* 110.772; Judgment of 11.07.2007, Landesgericht für Zivilrechtssachen Wien*, EFSlg.* 116.822; Judgment of 30.03.2009, Oberster Gerichtshof, *Zak* 2009/326, 238 *et seq.*

[274] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 220.

[275] Judgment of 02.10.2001, Oberster Gerichtshof, *EFSlg.* 86.872.

[276] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 220; Judgment of 21.12.1994, Oberster Gerichtshof, *EFSlg*. XXXI/4.

fines or coercive detention if such a procedure is not considered to be contrary to the child's welfare.[277]

However, if a minor who has reached the age of fourteen or the parent which is living separately from the child refuses the personal contact despite the court has informed the parties that the contact to both parents is important for the child's welfare and tried to reach an amicable settlement, the court has to resist the enforcement of the right to contact.[278] Indeed, the mandatory enforcement would be inappropriate, particularly it would not facilitate the relationship between the parent and the child.[279] However, in case a parent unfoundedly refuses to have personal relations with the child, the following sanctions are provided: Firstly, the right to information and expression concerning matters affecting the child might be deprived pursuant to section 178 (3) General Austrian Civil Code and secondly the possibility of reducing the legal portion of inheritance according to section 773a Austrian Civil Code can be excluded.[280] These two sanctions are aiming to maintain the personal relationship to the child.

The draft amending the law on family matters and the law relating to the use of names, which is currently under consideration proposes that arrangements regarding the personal contact with the child may also be enforced against the will of the parent who is living separately from the child if the arrangement was ordered by court, the agreement was either approved by court or was delivered in the form of an official certificate or an authenticated document to a registrar.[281]

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

All disputes arising out of a matrimonial relationship between spouses can be claimed in the course of divorce proceedings, e.g. a maintenance claim.[282] These claims can even be submitted in pending proceedings as long as the hearing in the first instance has not been closed.[283] During pending divorce proceedings a maintenance claim must be submitted at the

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[277] Section 110 Austrian Non-Contentious Proceedings Act; Nademleinsky, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 148 General Austrian Civil Code, marg. No. 36.

[278] Section 108 Austrian Non-Contentious Proceedings Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 220; Wallisch, 'Der „andere Elternteil" und das Besuchsrecht', *ÖJZ,* 202, 487 *et seq.*

[279] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 148 General Austrian Civil Code, marg. No. 1a.

[280] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 148 General Austrian Civil Code, marg. No. 1a; Fischer-Czermak, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 148 General Austrian Civil Code, marg. No. 14; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 211.

[281] Proposed section 110 (1) (2) amended Austrian Non-Contentious Proceedings Act http://www.justiz.gv.at/internet/file/2c948485398b9b2a013a4a270f9f072b.de.0/begutachtungsentwurf.pdf (23.10.2012).

[282] Sections 76a and 100 Austrian Jurisdiction Act.

[283] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 119.

competent court for divorce which will subsequently decide on both issues.[284] However, the maintenance claim can also be asserted in separate proceedings.[285]

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

According to section 66 *et seq* Austrian Marriage Act former spouses are entitled to claim maintenance if certain requirements are fulfilled.[286] Besides, each spouse may request a legal allocation of matrimonial property and savings within one year after the divorce decision became legally binding provided that the spouses cannot reach an amicable settlement in this regard.[287]

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

Maintenance can be claimed at the time of the initial petition for divorce.[288] However, the maintenance claim can also be submitted in already pending divorce proceedings as long as the hearing in the first instance has not been closed.[289] Maintenance may also be claimed in separate proceedings.[290]

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

A maintenance claim can either be submitted during divorce proceedings or – after the divorce has been granted – in separate proceedings.[291] Maintenance claims fall under the statute of limitations of 30 years if it has not been enforced pursuant to section 1480 General Austrian Civil Code. Section 1481 General Austrian Civil Code specifies exceptions to the principle established by section 1480 and states that obligations based on family and

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[284] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 166.
[285] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 166.
[286] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 91 *et seq*; Kerschner & Wagner, *Zivilrecht VI Familienrecht*, 2nd Edition, 2010, marg. No. 9/37 *et seq.*
[287] Section 81 Austrian Marraige Act; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 122 *et seq;* Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 504.
[288] Sections 76a and 100 Austrian Jurisdiction Act.
[289] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 119.
[290] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 166.
[291] Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 66 Austrian Marriage Act marg. No. 29.

personal law are excluded from the statute of limitations.[292] Accordingly, the maintenance claim itself does not fall under the statue of limitations, although outstanding maintenance payments will lapse after three years.[293]

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

The divorced spouse is not equal to the married spouse, who is in charge of the household.[294] The divorced spouse, who was responsible for the household during the marriage cannot invoke the previous role allocation, rather he/she has to take up a suitable employment.[295] In determining whether an employment is suitable several factors must be taken into account, e.g. age, health, professional education, previous professional activities, individual opportunities on the labour market and parental responsibility.[296] Accordingly, the personal income of the maintenance creditor must be taken into account when determining the maintenance, thereby contributing to the discharge of the other spouse.[297]

Further, one spouse may be partially discharged from providing maintenance to the other spouse in case of self-inflicted indigence: If the maintenance creditor has self-inflicted his/her indigence the maintenance can be restricted to the necessary maintenance pursuant to section 73 (1) Austrian Marriage Act. The behaviour in question, e.g. alcohol abuse or pathological gambling must have caused the indigence.[298] In this case the maintenance debtor has to pay maintenance covering only the necessary needs of the ex-spouse.[299] Additional costs caused by gross negligence of the maintenance creditor shall not be considered as a valid reason for increased maintenance.[300]

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

The maintenance of a spouse may be restricted or deprived entirely if one of the following cases occurs:

(a) Forfeiture

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[292] Bydlinski, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 1481 General Austrian Civil Code, marg. No. 1; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 225.
[293] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 159.
[294] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 149.
[295] Judgment of 07.11.2002, Oberster Gerichtshof, 8 Ob 210/02v.
[296] Judgment of 16.02.2006, Landesgericht für Zivilrechtssachen, *EFSlg.* 114.286.
[297] *See* also Question 66: If one spouse is deprived from obtaining maintenance the other spouse is automatically discharged from providing maintenance; Judgment of 24.09.1998, Oberster Gerichtshof, *EFSlg.* 87.511; Judgment of 16.11.2005, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 111.259; Judgment of 31.07.2006, Landesgericht Salzburg, *EFSlg.*114.284.
[298] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 73 Austrian Marriage Act, marg. No. 3; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 115.
[299] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 161.
[300] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 73 Austrian Marriage Act, marg. No. 5 *et seq;* Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 73 marg. No. 7.

After divorce the maintenance creditor loses his/her maintenance claim if he/she has committed a grave misconduct against the ex-spouse or he/she is leading a disreputable and immoral way of life against the will of the ex-spouse according to section 74 Austrian Marriage Act.[301] The term 'grave misconduct' includes a wide range of actions, such as persistent insults, physical violence, threats and defamation, whereas the term 'disreputable and immoral way of life' refers for instance to prostitution or procuration.[302] The forfeiture leads to the loss of the entire future maintenance.[303]

(b) Remarriage of the maintenance creditor

The obligation to pay maintenance terminates if the maintenance creditor remarries according to section 75 Austrian Marriage Act. The maintenance debtor has to pay the maintenance for the entire month in which his/her ex-spouse remarries.[304] Section 75 Austrian Marriage Act constitutes dispositive law, which means that the ex-spouses can also agree that even in the case of a remarriage maintenance must be paid.[305] If the second marriage is divorced maintenance cannot be claimed against the prior ex-spouse.[306]

(c) Death of the maintenance creditor

According to section 77 Austrian Marriage Act the maintenance claim expires if the maintenance creditor dies. In case of death of the maintenance debtor the duty is transferred to the inheritors.[307]

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

Equity is an underlying principle of the allocation procedure after a divorce.[308] The allocation of matrimonial property and savings should be adjusted to the individual case. Courts have determined that the economic consequences of a divorce should be settled as balanced as possible.[309] Section 83 (1) Austrian Marriage Act enumerates criteria, which should be taken into account when allocating the assets of the ex-spouses, e.g. amount of the spouses'

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[301] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 502.

[302] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 74 Austrian Marriage Act, marg. No. 8 *et seq;* Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 162.

[303] Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 74 Austrian Marriage Act marg. No. 15; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 162.

[304] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 75 Austrian Marriage Act, marg. No. 4; Judgment of 05.14.1967, Oberster Gerichtshof, *SZ* 40/45.

[305] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 75 Austrian Marriage Act, marg. No. 3.

[306] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 75 Austrian Marriage Act, marg. No. 5.

[307] Section 78 (1) Austrian Marriage Act; Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 99.

[308] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 84 Austrian Marriage Act, marg. No. 1*;* Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 83 Austrian Marriage Act, marg. No. 1 *et seq;* Bernat, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 83 Austrian Marriage Act, marg. No. 2.

[309] Judgment of 22.02.2002, Oberster Gerichtshof, 9 Ob 201/01a; Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 84 Austrian Marriage Act, marg. No. 1*;* Judgment of 20.02.2002, Oberster Gerichtshof, *9 Ob 202/01a.*

contribution for the creation of matrimonial property and savings.[310] Further, the livelihood of the ex-spouses should be preserved and the new stage of life should be facilitated.[311] Hence, the court shall find a balanced and fair solution for each individual case.[312] So far, courts have often rendered decisions allocating the assets between the spouses on a one-to-one basis irrespective of the individual facts of the case.[313] However, recent judgments have indicated that a significant larger contribution of one spouse might justify an allocation on an individual basis.[314] In short, the mentioned principles and case law are aiming to allocate the assets between the ex-spouses in a balanced and equitable manner.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

To answer this question it is necessary to clarify the relationship between the provisions relating to post-divorce maintenance and those concerning the division of matrimonial property. On closer inspection a connection emerges. Section 66 Austrian Marriage Act states that the guilty party must pay maintenance to the other spouse under certain circumstances. The maintenance payable by the guilty party is reduced if he or she would have difficulty in supporting him or herself and if the other spouse is capable of supporting him or herself from his or her own income and property.[315] The term 'property' means divided property, insofar as the matrimonial property must already have been divided between the parties. Under these circumstances, then, the rules regarding the allocation of matrimonial assets have an impact on determining the amount of maintenance.

However, the property of the guilty spouse may also fulfill a support function. As has been said, under section 66 Austrian Marriage Act the guilty party is obliged to pay maintenance to the other spouse. In order to be able to do so, the guilty party must also have recourse to his or her own property, and must therefore use the distributed matrimonial property.[316] The fact that the guilty spouse must use distributed property to meet his or her support obligations[317] represents another link between the rules relating to post divorce maintenance and those of other matrimonial property law.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

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[310] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 131.
[311] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 84 Austrian Marriage Act, marg. No. 20.
[312] Judgment of 09.03.1994, Oberster Gerichtshof, *SZ* 67/38.
[313] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 84 Austrian Marriage Act, marg. No. 23; Judgment of 28.01.2004, Oberster Gerichtshof, *EF* 108.383.
[314] Judgment of 09.03.1994, Oberster Gerichtshof, *EF* 117.525.
[315] Section 67 Austrian Marriage Act.
[316] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 38; Judgment of 18.07.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 48.867.
[317] The assets must only be realized by the guilty spouse if this is reasonable; Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 39; Judgment of 17.06.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 40.229; Judgment of 18.07.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 48.867; without this restriction see the Judgment of 20.12.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.753.

If a marriage is divorced on the ground of fault pursuant to section 49 Austrian Marriage Act the basis for the maintenance claim is section 66 *et seq* Austrian Marriage Act, which stipulates that the spouse whose misconduct had led to the divorce is obliged to pay reasonable maintenance.[318] However, the maintenance debtor is only obliged to pay maintenance if the creditor is not able to cover his/her maintenance.[319] A divorce on the ground of fault may also entail to a maintenance obligation of the innocent spouse irrespective of the other spouse's fault if this spouse is not able to meet his/her own needs due to the care and education of the joint children.[320] If both spouses are equally guilty as regards the divorce section 68 Austrian Marriage Act grants the spouse, who is not able to meet his/her own needs maintenance for a limited time period.[321] With the exception of section 68 Austrian Marriage Act the aforementioned provisions are also applicable if a marriage is divorced on the grounds pursuant to sections 50-52 Austrian Marriage Act.[322]

A divorce pursuant to section 55 Austrian Marriage Act (divorce on irretrievable breakdown) entitles one spouse to claim the same maintenance as during the marriage if it had been determined in the divorce decision that the other spouse caused the irretrievable breakdown.[323] A divorce according to sections 50-52 and 55 Austrian Marriage Act without a ruling as to fault leads to a so called 'equity claim' pursuant to section 69 (3) Austrian Marriage Act, which can be compared with the maintenance pursuant to section 68 Austrian Marriage Act.[324]

The maintenance should primarily be settled in an agreement concluded between the spouses if the divorce is based upon mutual consent according to section 55a Austrian Marriage Act. In absence of an agreement, the maintenance claim can optionally be based on section 69a (2) – which grants maintenance according to equity – or on section 68a Austrian Marriage Act – which allows for maintenance irrespective of fault if certain criteria are met.[325] In short, different grounds for divorce entail different maintenance claims, although they are not of major significance.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

Under section 70 (1) Austrian Marriage Act maintenance must be paid in regular instalments. The payments must be made once a month, in advance.[326] Payment in kind is not permitted as post-divorce maintenance;[327] hence maintenance must be paid in a monetary form.[328]

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[318] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 66 Austrian Marriage Act, marg. No. 1.
[319] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 110.
[320] Section 68a Austrian Marriage Act.
[321] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 68 Austrian Marriage Act, marg. No. 2; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 111.
[322] Sections 69 (1), 69b Austrian Marriage Act.
[323] Section 69 (2) Austrian Marriage Act; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 109.
[324] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 113.
[325] Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/131; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 115.
[326] Kerschner, *Familienrecht,* 4th Edition, 2010, marg. No. 2/140; Hinteregger, *Familienrecht*, 5th Edition, 2011, p. 115; Judgment of 28.01.1992, Oberster Gerichtshof, *EFSlg*. 69.163.
[327] During the marriage maintenance must be paid either in kind or in money. For details 94 (3) General Austrian Civil Code and Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, p. 204 *et seq.*

Under section 70 (2) Austrian Marriage Act a lump sum may be awarded at the request of the claimant on reasonable grounds. The payment of a lump sum may not place an inequitable burden on the debtor. Reasonable grounds for the payment of a lump sum include a change of residence by the debtor which represents an obstacle to the maintenance claim or increases the capital requirements of the creditor.[329] As stated above the payment of a lump sum may only be ordered if this is not inequitable for the debtor. A lump-sum payment will be inequitable if it places the financial position of the debtor at risk or if the disposal of the assets would only be possible at a considerable loss.[330] It should be noted that a lump-sum payment may always be agreed upon by the former spouses and that once in effect it represents a final settlement of the maintenance claim.[331]

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

Section 87 Austrian Marriage Act entitles the judge to transfer property or another right *in rem* due to both spouses used the marital home to one spouse. Accordingly, a judge can order the transfer of property, co-ownership share, condominium or another right *in rem* from one spouse to another.[332] Further, the judge may order the establishment of a contractual right, which entitles one spouse to use the marital home after a divorce.[333] However, the parties can jointly agree that the transfer of property or another right *in rem* regarding the marital home shall be excluded.[334] A respective agreement is binding upon the court.[335] If none of the ex-spouses has a right *in rem* regarding the marital home the judge can prescribe that one spouse continues the – so far shared – legal relationship on his/her own.[336] Further, a real allocation of the marital home, whereby different premises of the marital home may be assigned to the ex-spouses might contemplated; although, in practice the latter option is considered rather rarely.[337] Hence, the judge is vested with wide discretion regarding the allocation of the marital home.[338] However, an exception exists for official residences: If an official residence served as marital home the transfer of the

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[328] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 158; Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 70 Austrian Marriage Act, marg. No. 1.

[329] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 70 Austrian Marriage Act, marg. No. 4.

[330] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 70 Austrian Marriage Act, marg. No. 1.

[331] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 231.

[332] Bernat, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 87 Austrian Marriage Act, marg. No. 2; Kerschner & Wagner, *Zivilrecht VI Familienrecht*, 2nd Edition, 2010, marg. No. 9/76.

[333] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 513.

[334] Section 87 (1) last sentence Austrian Marriage Act; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 132.

[335] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 87 Austrian Marriage Act, marg. No. 7.

[336] Bernat, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 87 Austrian Marriage Act, marg. No. 5; Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 87 Austrian Marriage Act, marg. No. 8.

[337] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 87 Austrian Marriage Act, marg. No. 9.

[338] Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 87 Austrian Marriage Act, marg. No. 2.

permission to use this home can only be ordered with the approval of the employer and against appropriate compensation.[339]

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Under Austrian divorce law it is possible for spouses to reach an agreement on maintenance before, after and during divorce proceedings.[340] However, one has to distinguish further: As far as the spousal agreement is within the scope of the legal provisions governing maintenance and merely specifies the amount and the modalities of the maintenance the entitlement still remains a legal claim.[341] If the agreement is beyond the legal framework the maintenance is of contractual nature and does not constitute a legal claim:[342] If the maintenance claim exists according to the legal provisions but the spouses have agreed on an amount, which exceeds the legally provided sum considerably, not only the difference between the agreed higher amount and the amount determined by law constitutes a contractual claim, rather the entire sum is of contractual nature.[343]

The spousal agreement is void if it violates moral principles, e.g. the maintenance is grossly disproportionate in relation to the spouses' income and assets. [344] Hence, the spouses are generally free to determine the amount of the maintenance, but the agreement must be in accordance with the public morals. Section 70 (1) and (3) Austrian Marriage Act, which stipulates that the maintenance must be paid in regular instalments in a monetary form and once a month, in advance applies by analogy to contractual maintenance claims.[345] However, section 70 (2) Austrian Marriage Act, which prescribes that a lump sum may be awarded at the request of the maintenance creditor on reasonable grounds, cannot be applied by analogy.[346]

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[339] Section 88 Austrian Marriage Act; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 513; Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 113.

[340] Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 80 Austrian Marriage Act, marg. No. 1; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 167.

[341] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 80 Austrian Marriage Act, marg. No. 2; Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht,* 2011, section 80 Austrian Marriage Act, marg. No. 2.

[342] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 80 Austrian Marriage Act, marg. No. 3; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft,* 10th Edition, 2009, marg. No. 167.

[343] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 80 Austrian Marriage Act, marg. No. 3; Judgment of 24.02.1987, Oberster Gerichtshof, *SZ* 55/54; Judgment of 12.06.1997, Oberster Gerichtshof, *SZ* 70/111.

[344] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 80 Austrian Marriage Act, marg. No. 9; Deixler-Hübner, *Der Ehevertrag*, 2nd Edition, 2010, p. 133.

[345] Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 80 Austrian Marriage Act, marg. No. 1; Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 80 Austrian Marriage Act, marg. No. 17.

[346] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd Edition, 2007, section 80 Austrian Marriage Act, marg. No. 5; Judgment of 24.02.1987, Oberster Gerichtshof, *SZ* 60/31.

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The agreement is neither scrutinized nor approved by the judge. However, if the agreement violates the general contractual principles it may be void or reviewable for reasons such as lack of legal capacity, dissent, bogus deal or violation of public morals.[347]

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets (incomes, capital, assets, pension, benefit…) of can they be discharged from full and frank disclosure?

Neither the General Austrian Civil Code nor the Austrian Marriage Act contains explicit provisions obliging the spouses to provide each other or the competent authority with information on their income and assets. Former case law[348] and some authors[349] had argued that a legal maintenance claim does not in principle oblige the debtor to provide information concerning his or her income and assets. According to this view the debtor is only obliged to provide information if the maintenance was agreed, since maintenance agreement may at least implicitly comprise the debtor's duty to provide information on his or her assets.[350]

However, more recent case law[351] has established that the debtor is obliged to provide information of all relevant facts determining the amount of maintenance if the maintenance constitutes a statutory right. Similarly, some legal authors support the view that the debtor is obliged to provide adequate information concerning his or her assets to the other spouse owing to the reciprocal duties of the (former) spouses.[352] However, two conditions must be fulfilled in order to require disclosure of the necessary information: the maintenance claim as such must exist and the balance of interests favours the creditor; this is the case if the creditor can file the maintenance claim only with considerable difficulties and the remedying information can be provided without undue efforts.[353] The claim for information must be made according to Article XLII Introductory Act to the Code of Civil Procedure under which the creditor petitions the court to order the debtor to submit information on his or her income and assets within a specified period of time.[354]

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[347] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 237.
[348] Judgment of 25.11.2004, Oberster Gerichtshof, *JBl* 2005, 455 .
[349] Fasching, *Kommentar zu den Zivilprozeßgesetzen*, vol. II, 1962, p. 92 *et seq*.
[350] Fasching, *Kommentar zu den Zivilprozeßgesetzen*, vol. II, 1962, p. 92 *et seq*.
[351] Judgment of 13.11.2007, Oberster Gerichtshof, *EFSlg.* 117.448; Judgment of 11.05.2007, Oberster Gerichtshof, *SZ* 2007/72.
[352] Harrer-Hörzinger, 'Zur Auskunftspflicht zwischen dem Unterhaltsschuldner und dem Unterhaltsberechtigten', in: Harrer & Zitta (eds.), *Familie und Recht*, 1992, p. 47 *et seq*; Bienert-Nießl, *Materiellrechtliche Auskunftspflichten im Zivilprozess: zugleich eine Untersuchung der prozessualen Mitwirkungspflichten der Parteien*, 2003, p. 179 *et seq*; Konecny, in: Fasching, *Zivilprozessgesetze,* 2nd Edition, 2002, Article XLII Introductory Act to the Austrian Code of Civil Procedure, marg. No. 68.
[353] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 6.
[354] Harrer-Hörzinger, 'Zur Auskunftspflicht zwischen dem Unterhaltsschuldner und dem Unterhaltsberechtigten', in: Harrer & Zitta (eds.), *Familie und Recht*, 1992, p. 50; Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 6.

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

As already mentioned,[355] current case law and some legal authors support the view that the maintenance debtor is obliged to provide information regarding his/her assets, income etc. for determining the amount of maintenance. However, if the debtor fails to comply with this obligation, the claim must be enforced under Austrian enforcement law, the relevant provision being section 354 Austrian Enforcement Act *(Exekutionsordnung):* in order to induce the debtor to provide the creditor with the required information, the court may threaten the latter with a fine or a term of imprisonment which may subsequently be enforced.

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

In Austria the amount of maintenance is still mainly dependent upon the divorce ruling as to fault:[356]

In case of a divorce based on fault pursuant to section 49 Austrian Marriage Act, the guilty spouse has to pay to the other spouse sufficient maintenance to retain his or her previous standard of living.[357] According to Austrian legal doctrine and case law, the standard of living as defined in section 94 General Austrian Civil Code[358] is determinative;[359] in other words, maintenance depends on the standard of living last enjoyed by the spouses during the marriage (at the time of divorce).[360] The standard of living is subject to objective criteria:[361] Neither very extravagant[362] nor frugal living conditions are taken into consideration. The amount of maintenance payable during and after the marriage does not fundamentally differ.[363] However, under section 66 Austrian Marriage Act the debtor is only obliged to pay maintenance if the other spouse's income from property and reasonable gainful employment is insufficient. The creditor's maintenance entitlement is thus reduced by his or her net income, e.g. regular income and single payments or unemployment assistance.[364] In determining whether gainful employment is reasonable various aspects should be taken into account: First, it is necessary to ask whether it is possible for the spouse to find

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[355] See Question 74.
[356] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 215.
[357] Section 66 Austrian Marriage Act.
[358] Maintenance during the marriage.
[359] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 11; Judgment of 25.02.1981, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 38.806; Judgment of 29.08.1986, Landesgericht für Zivilrechtssachen Wien*, EFSlg*. 51.674; Judgment of 09.03.1990, Oberlandesgericht Wien, *EFSlg*. 63.509.
[360] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 11; Gitschthaler, *Unterhaltsrecht,* 2nd Edition, 2008, marg. No. 684.
[361] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 13.
[362] Living 'in the lap of luxury'.
[363] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 158.
[364] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 218 et seq; Judgment of 23.04.1996, Oberster Gerichtshof, *EFSlg.* 81.671.

employment. Further, relevant aspects such as age,[365] physical and mental capacity,[366] health,[367] vocational education,[368] previous employment[369] and children[370] should be considered.[371] If the spouse does not engage in reasonable employment a fictitious income is imputed and thus reduces the maintenance claim.

Post-divorce maintenance under sections 50-52 and section 55 Austrian Marriage Act with a ruling as to fault must also be determined in accordance with the standard of living last enjoyed by the spouses during the marriage pursuant to section 94 General Austrian Civil Code.[372] If a divorce is based on section 55 Austrian Marriage Act with a ruling as to fault the creditor is not obliged to seek reasonable gainful employment.[373] Only actual income from reasonable employment must be taken into account.[374] In case of post-divorce maintenance under sections 50-52 and section 55 Austrian Marriage Act without a ruling as to fault, the spouse who requested the divorce must pay maintenance to the other spouse under section 69 (3) Austrian Marriage Act, insofar as this is equitable with regard to the needs, assets and earnings of the divorced spouses and relatives entitled to maintenance.

The non-fault-based maintenance entitlement under section 68a Austrian Marriage Act is limited to the needs of the petitioner. This form of claim represents a new category in Austrian maintenance law.[375] The provision in question takes its cue from section 1578 (1) second sentence German Civil Code *(Bürgerliches Gesetzbuch)*. The amount of the maintenance claim is a matter of controversy.[376] So far, the Austrian Supreme Court has mainly followed the view of *Deixler-Hübner*, who considers that the amount of maintenance should be in the intermediate area of the maintenance determined pursuant to section 66 and 68 Austrian Marriage Act, therefore between 15% and 33% of the debtor's income.[377]

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[365] Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751; Judgment of 30.03.1983, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 43.733; Judgment of 28.12.1990, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 63.498.

[366] Judgment of 08.04.1948, Landesgericht für Zivilrechtssachen Wien, *EvBl* 1948/410; Judgment of 03.10.1966, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 7.043.

[367] Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751.

[368] Judgment of 02.03.1978, Oberlandesgericht Linz, *EFSlg.* 31.751.

[369] Judgment of 20.11.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 51.687; Judgment of 16.06.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 57.258.

[370] Judgment of 20.03.1984, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 46.292; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSlg.* 72.340; Judgment of 08.06.1993, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 72.341.

[371] Zankl, in: Schwimann, *ABGB Praxiskommentar,* vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 19 *et seq.*

[372] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 500.

[373] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 224; Zankl, in: Schwimann, *ABGB Praxiskommentar,* vol. I, 3rd Edition, 2005, section 69 Austrian Marriage Act, marg. No. 5; Koziol & Welser, *Grundriss des Bürgerlichen Rechts,* vol. I, 13th Edition, 2006, p. 500.

[374] Judgment of 24.01.1985, Oberlandesgericht Wien, *EFSlg.* 47.479; Judgment of 12.09.1990, Oberster Gerichtshof, *EFSlg.* 63.250; Judgment of 06.09.1995, Oberster Gerichtshof, *SZ* 68/157.

[375] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 153a; Hopf & Kathrein, *Eherecht – Kurzkommentar*, 2005, 2nd Edition, section 68a Austrian Marriage Act, marg. No. 10.

[376] Hopf & Kathrein, *Eherecht – Kurzkommentar*, 2005, 2nd Edition, section 68a Austrian Marriage Act, mar. No. 10; Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 68a Austrian Marriage Act, marg. No. 11.

[377] Judgment of 21.01.2003, Oberster Gerichtshof, *EFSlg* 104.925; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 153a; Hopf & Kathrein, *Eherecht – Kurzkommentar*, 2005, 2nd Edition, section 68a Austrian Marriage Act, mar. No. 10.

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

According to prevailing doctrine[378] and case law[379] maintenance arrangements (by judgment or agreement) are subject to the *rebus sic stantibus* clause. A judgment's validity only extends to the circumstances considered in that judgment; hence a reassessment of the maintenance is possible, when there is a change in the substantive legal situation.[380] It is possible for the spouses to expressly exclude the application of this clause.[381] The application of the *rebus sic stantibus* clause is conditional on a change in the circumstances on which the judgment's facts or the maintenance settlement were based.[382] Changes only have to be considered if they are serious[383] and permanent.[384] The *rebus sic stantibus* clause applies to changes in the legal position,[385] case law[386] and the circumstances concerning the needs of the maintenance creditor and the performance capacity of the debtor.[387] Changes which must be taken into account are: birth of an illegitimate child;[388] need for additional medication;[389] and particularly any changes in income and assets.[390]

ii. Consequences regarding children

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[378] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 43; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 169; Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 209.

[379] Judgment of 28.12.1989, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 59.481; Judgment of 12.09.1990, Oberster Gerichtshof, *EFSlg*. 62.568; Judgment of 12.11.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 79.855; Judgment of 08.03.1996, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 81.863; Judgment of 20.09.1998, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 87.514.

[380] Judgment of 02.07.1958, Oberster Gerichtshof, *EvBl* 1958/323; Judgment of 12.06.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 34.075.

[381] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 169; Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 209.

[382] Zankl, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 66 Austrian Marriage Act, marg. No. 44 *et seq* with examples of case law.

[383] Judgment of 20.12.1978, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 31.730; Judgment of 31.08.1988, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 57.250.

[384] Judgment of 19.10.1982, Landesgericht für Zivilrechtssachen Wien, *EFSlg* . 41.308.

[385] Case law cited in the Judgment of 12.06.1979, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 34.073; Judgment of 30.04.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 36.398.

[386] This is controversial. See Rummel, in: Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* vol. I, 3rd Edition, 2000, section 901 General Austrian Civil Code, marg. No. 8 a.

[387] Judgment of 19.03.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.970; Judgment of 30.04.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.398; Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 209.

[388] Judgment of 26.11.1968, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 10.368.

[389] Judgment of 03.11.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.977.

[390] Judgment of 19.03.1970, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 13.970; Judgment of 11.05.1976, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 27.492; Judgment of 28.01.1980, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 36.409; Judgment of 08.08.1985, Landesgericht für Zivilrechtssachen Wien, *EFSlg.* 48.857; Judgment of 30.05.1986, Landesgericht für Zivilrechtssachen Wien, *EFSlg*. 51.682; Judgment of 22.09.1993, Oberster Gerichtshof, *EFSlg.* 72.348; Judgment of 19.12.1990, Oberster Gerichtshof, *RZ,* 1991, 231 No. 72.

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

Section 140 General Austrian Civil Code sets forth that both parents shall proportionately contribute to meet the reasonable needs of the child taking into account the child's skills, abilities and potential development.[391] The parent in charge of the household where the child lives thereby contributes to maintain the child.[392] The other parent has to contribute to the child maintenance in a monetary form.[393] Accordingly, both parents have to provide proportionately for the child's maintenance regardless of the parental responsibility or residence of the child. However, if the parent takes care of the child in his/her household, the childcare is considered to be his/her contribution to the child's maintenance.[394]

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

The parent who is not taking care of the child has to provide maintenance in regular instalments paid in a monetary form.[395] The payments must be made once a month, in advance and to the parent who is responsible for the childcare if the child is a minor.[396] The amount of maintenance is determined according to the children's age and needs on the one hand and the debtor's income and further maintenance obligations on the other hand.[397] Payments to a blocked account or to a bank book which is kept safe by the parent who is in charge of paying the maintenance is prohibited because of the supply purpose inherent to maintenance.[398] Upon request the court issues an order determining the amount of the maintenance claim.[399] It is also permitted that the spouses reach an agreement regarding the child maintenance during pending divorce proceedings. However, such an agreement needs to be approved by the court.[400]

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

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[391] Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/37.
[392] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 186;
[393] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 186; Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 133.
[394] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 92; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 172; Fischer-Czermak & Limberg, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 140 Austrian Civil Code, marg. No. 26 *et seq.*
[395] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 152; Fischer-Czermak & Limberg, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 140 Austrian Civil Code, marg. No. 32
[396] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 133, 138; Fischer-Czermak & Limberg, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 140 Austrian Civil Code, marg. No. 17.
[397] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 173.
[398] Neuhauser, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 140 Austrian Marriage Act, marg. No. 109.
[399] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 176c.
[400] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 176d; Stabentheiner; 'Scheidungsvergleich und pflegschaftsgerichtliche Genehmigung', *RZ* 1991, 250.

In the course of court proceedings parents may conclude an agreement regarding the child maintenance.[401] If divorce was granted based on section 55a Austrian Marraige Act the spouses must reach such a settlement.[402] The agreement needs to be approved by the court; once approved the agreement is also binding on the child.[403] Further, the parents may reach an agreement regarding e.g. the sharing of the maintenance burden.[404] However, the parents' possibility to agree on an internal burden sharing is constrained: The agreement is only valid if it does not impair the child's interests.[405] Usually, the parents' internal agreement does not affect the legal maintenance claim of the child.[406] The agreement is not subject to any formal requirements and does not need to be approved by the court. Accordingly, the agreement is not binding on the child.[407]

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

As already mentioned[408], the agreement needs the approval of the custody court in order to be legally effective.[409] The crucial criterion is the welfare of the child.[410] The custody court usually denies its approval if the agreed child maintenance is lower than the legal one; in this case the legal rules for child maintenance apply.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

Section 46 (1) Austrian Marriage Act states that a marriage may only be dissolved by a judicial decision.[411] As regards the financial consequences of a divorce sections 66-78 Austrian Marriage Act – which are governing the spousal maintenance after a divorce – are of optional nature, therefore, allowing the parties to reach a maintenance agreement.[412] After divorce has been granted the spouses may reach a maintenance agreement thereby

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[401] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 176d; Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 138.

[402] Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 138.

[403] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 176d.

[404] Fischer-Czermak & Limberg, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 140 General Austrian Civil Code, marg. No. 21; Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 160.

[405] Fischer-Czermak & Limberg, in: Kletečka & Schauer, *ABGB-ON 1.00,* section 140 General Austrian Civil Code, marg. No. 21.

[406] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 161.

[407] Judgment of 05.09.1990, Oberster Gerichtshof, 2 Ob 599/90; Judgment of 29.09.1995, Oberster Gerichtshof, *SZ* 68/146.

[408] *See* Question 80.

[409] Neuhauser, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 140 Austrian Marriage Act, marg. No. 4; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 176d; Stabentheiner; 'Scheidungsvergleich und pflegschaftsgerichtliche Genehmigung', *RZ* 1991, 250.

[410] Stabentheiner; 'Scheidungsvergleich und pflegschaftsgerichtliche Genehmigung', *RZ* 1991, 250.

[411] Stabentheiner, in: Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd Edition, 2007, section 46 Austrian Marriage Act, marg. No. 1.

[412] Schwimann & Kolmasch, *Unterhaltsrecht,* 6th Edition, 2012, p. 237; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 167.

regulating the financial consequences outside legal proceedings.[413] If divorce is requested pursuant to section 55a Austrian Marriage Act (divorce based on mutual consent) the spouses must compulsory reach an agreement regarding the spousal maintenance.[414] If the spouses cannot reach an agreement regarding the financial consequences of a divorce, but hesitate to submit the issue to the court they can also have recourse to alternative forms of dispute resolution such as mediation.

In terms of the personal consequences the mutual rights and duties resulting from a marriage automatically terminate when the divorce decision becomes legally binding.[415] Regarding further personal consequences the possibility of the divorced spouses to adopt their former names should be mentioned: Generally, spouses maintain their common married name,[416] but through an official certificate or an officially recognized document to be made before the civil registrar they may adopt their former names.[417] Accordingly, as far as the personal effects of a divorce on the spouses' name are concerned the issue will be settled before the civil registrar.[418]

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

A marriage may only be dissolved by a judicial decision.[419] In other words a divorce requires a court order and may not be obtained through an admistrative procedure. However, as explained in the answer to question 82 some consequences of a divorce may be settled by agreement. If the spouses cannot reach an agreement, but concurrently hesitate to file a respective claim at the competent court they may have recourse to alternative forms of dispute resolution such as mediation.[420] If the enforceability of the mediated settlement – which is qualified as a civil law contract under Austrian law – has been confirmed either by notary or court the mediation may be considered as an alternative to legal court proceedings.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

District courts *(Bezirksgerichte)* have jurisdiction over divorce proceedings, under sections 49 (2) No. 2a and 104a Austrian Jurisdiction Act *(Jurisdiktionsnorm).*[421] Divorce by consent takes place in so-called 'non-contentious proceedings', under sections 93-96 Austrian Non-contentious Proceedings Act *(Außerstreitgesetz),* while divorces on all other grounds are heard in 'contentious proceedings' according to section 460 Austrian Code of Civil

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[413] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 98.
[414] Deixler-Hübner & Xell-Skreiner, *Scheidung kompakt. Ein Trennungsratgeber für Frauen und Männer,* 3rd Edition, 2010, p. 98; Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 501.
[415] Koziol & Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th Edition, 2006, p. 496.
[416] Section 62 Austrian Marriage Act.
[417] Section 93a General Austrian Civil Code.
[418] *See* Question 49.
[419] Section 46 (1) Austrian Marriage Act.
[420] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 166.
[421] Roth, Zivilprozessrecht, 2012, p. 93; Kerschner, *Familienrecht*, 4th Edition, 2010, marg. No. 2/128.

Procedure *(Zivilprozessordnung)*.[422] The district court responsible for the divorce proceedings is also competent to decide upon claims arising from the marital relationship between the spouses, e.g. maintenance claims or claims relating to the marital home.[423] If, however, the claim does not result from the matrimonial relationship the judge has to decide whether the consolidation of claims is economically reasonable.[424] Foreign requests for divorce also fall in the jurisdiction of district courts, even if the national substantive law is not familiar with these claims.[425] Usually, the claim must be submitted at the district court in whose jurisdiction the spouses are habitually resident. If neither the applicant nor the respondent are habitually resident in Austria, but the international jurisdiction of Austria was affirmed the district court 'Innere Stadt Wien' is competent.[426]

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

Under Austrian law spouses are not obliged to respect a cooling-off period. However, if the spouses want to reconsider the divorce the proceedings may be suspended by mutual agreement for a minimum duration of three months.[427] If a reconciliation could not be reached each party may request the continuation of the proceedings after the expiration of the three months.[428] The proceedings are also suspended if the parties fail to appear at the oral hearing.[429]

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

According to section 460 (7) Austrian Code of Civil Procedure the judge should try to achieve a reconciliation between the spouses at the beginning and in the course of the divorce proceedings.[430] If the judge is of the view that a reconciliation is not possible, but an amicable settlement may be reached he/she has to recommend mediation or other forms of alternative dispute resolution.[431] Further, the judge has to make a party – who is not represented by a lawyer – aware of the respective information centres.[432] Accordingly, the

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[422] Roth, Zivilprozessrecht, 2012, p. 93.
[423] Sections 76a and 100 Austrian Jurisdiction Act; Mayr, in: Rechberger, Zivilprozessrecht, 3rd Edition, 2006, section 76a Austrian Jurisdiction Act, marg. No. 1; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 119.
[424] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 119.
[425] Simotta, in: Fasching, *Zivilprozessgesetze,* 2nd Edition, 1999, Section 49 Austrian Jurisdiction Act, marg. No. 36.
[426] Section 76 (1) Austrian Jurisdiction Act; Kodek & Mayr, *Zivilprozessrecht*, 2011, marg. No. 156.
[427] Section 168 Austrian Code of Civil Procedure; Roth, Zivilprozessrecht, 2012, p. 78; Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 316.
[428] Section 168 Austrian Code of Civil Procedure.
[429] Section 170 Austrian Code of Civil Proceudre; Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 317; Simotta, in: Fasching & Konecny, *Zivilprozessgesetze*, 2nd Edition, 2002, Section 170 Austrian Code of Civil Procedure, marg. No. 1.
[430] Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 869; Simotta, in: Fasching & Konecny, *Zivilprozessgesetze*, 2nd Edition, 2004, Section 460 Austrian Code of Civil Procedure, marg. No. 92.
[431] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 121; Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 869.
[432] Section 460 (6) Austrian Code of Civil Procedure; Simotta, in: Fasching & Konecny, *Zivilprozessgesetze*, 2nd Edition, 2004, Section 460 Austrian Code of Civil Procedure, marg. No. 90.

spouses are not obliged to turn to alternative dispute resolution, rather the judge may invite them to do so.

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

Family home: In the course of divorce proceedings the court may issue interim orders regarding the temporary use and protection of the marital property and savings;[433] the need to regulate the use of the marital property and savings may result from different circumstances, such as when the spouse who already left the family home wants to return because otherwise he/she would be homeless.[434] Further, section 382h Austrian Enforcement Act *(Exekutionsordnung)* provides for interim orders to secure the claim regarding urgent accommodation needs of one spouse, e.g. interim orders to secure raising objections against the cancellation of a rental agreement.[435]

Children: Section 176 Austrian Civil Code sets forth that the court can issue interim orders if a minor's welfare is at risk regardless of the origin of the request. Similarly, an interim order may be issued in absence of the parent's consent in an important matter regarding the child.[436]

Maintenance between the spouses: According to section 382 (1) No. 8a Austrian Enforcement Act the judge may issue an order obliging one spouse to pay temporary maintenance to the other spouse or to the child during pending maintenance proceedings.[437] In case of spousal maintenance the order may also be granted during divorce proceedings, marriage annulment and nullification proceedings.[438]

Consequences of marital abuse: Interim orders for the protection against domestic violence may be sought by persons under section 382b (1) Austrian Enforcement Act when there have been physical attacks, threats of physical attacks or any conduct that severely affects the mental health of the victim and when the home fulfills the urgent accommodation needs of the applicant. The perpetrator may be ordered to leave the home and the immediate surroundings and is prohibited from returning. Interim orders can be issued during divorce proceedings, marriage annulment and nullification proceedings, during proceedings to determine the division of matrimonial property or the right to use the home.[439] Besides,

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[433] Section 382 (1) No. 8c Austrian Enforcement Act.
[434] König, *Einstweilige Verfügungen im Zivilverfahren*, 4th Edition, 2012, marg. No. 4/35; Deixler-Hübner, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 382 (1) No. 8c Austrian Enforcement Act, marg. No. 17.
[435] Kodek, in: Angst, *Exekutionsordnung,* 2nd Edition, 2008, section 382e Austrian Enforcement Act, marg. No. 1; Schwimann & Ferrari, in: Schwimann, *ABGB Praxiskommentar*, vol. I, 3rd Edition, 2005, section 97 General Austrian Civil Code, marg. No. 17.
[436] König, *Einstweilige Verfügungen im Zivilverfahren*, 4th Edition, 2012, marg. No. 11/6.
[437] See König, *Einstweilige Verfügungen im Zivilverfahren*, 4th Edition, 2012, marg. No. 4/1 *et seq*.
[438] Gitschthaler, in: Gitschthaler & Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, 2011, section 382 (1) No. 8a Austrian Enforcement Act, marg. No. 12.
[439] Section 382b (1) Austrian Enforcement Act.

section 382e (1) Austrian Enforcement Act stipulates that a perpetrator may be banned from specifically defined places and that interim orders may be issued to avoid encounters as well as contact with the applicant if further encounters become unacceptable for the applicant.

88. Is appeal available against the divorce order or against an out of court divorce decision?

Each party has the possibility to appeal against the divorce decision if he/she is not satisfied with the decision or when an error in the decision making process has occurred.[440] The submission of an appeal necessarily requires the representation of a lawyer, who has to file the appeal at the district court within four weeks after the delivery of the written divorce decision.[441] If the divorce is ordered in non-contentious proceedings on the ground of divorce by mutual consent according to section 55a Austrian Marriage Act the parties also have the right to appeal.[442] The recourse must be submitted within fourteen days after the delivery of the written divorce decree.[443]

89. Does a third-party (public prosecutor, child's sollicitor, social services, institution aiming at protecting children…) have the right to intervene

- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**

If yes, on which grounds?

The public prosecutor is entitled to file submissions and an appeal in proceedings concerning the annulment of a marriage; a nullity suit aimed to annul a marriage which was concluded for the sole purpose to provide one spouse with the other spouse's name or nationality can only be submitted by a public prosecutor.[444] However, in divorce proceedings or proceedings on parental responsibility no public prosecutor is involved. Generally, the court can hear the public youth welfare organisation before it renders a decision or approves an agreement regarding parental responsibility.[445] Before the provision was amended in 2009 the hearing of the public youth welfare organisation constituted a mandatory obligation; in practice, however, the public youth welfare organisation is still requested to express its opinion in most cases.[446] In order to secure the child's welfare the public youth welfare organisation is entitled to request court orders if the parents' behaviour endangers the wellbeing of the child.[447] If the public youth welfare organisation submits a request to the court it is also a party to the proceedings on parental responsibility.[448] Besides, the court

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[440] The applicability of this provision is not dependent upon the provision under which maintenance is awarded; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 135.

[441] Roth, *Zivilprozessrecht*, 2012, p. 11.

[442] Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 146.

[443] Holzhammer, *Außerstreitverfahrensrecht*, 2nd Edition, 2010, p. 85.

[444] Section 28 Austrian Marriage Act; Kodek & Mayr, *Zivilprozessrecht,* 2011, marg. No. 866.

[445] Section 106 Austrian Non-contentious Proceedings Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 208; Fucik & Kloiber, *Außerstreitgesetz,* 2005, section 106 Austrian Non-contentious Proceedings Act, marg. No. 2.

[446] Gröger & Thoma-Twaroch, 'Kinderbeistand und Jugendwohlfahrtsträger – eine Aufgabenabgrenzung', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 168.

[447] Gröger & Thoma-Twaroch, 'Kinderbeistand und Jugendwohlfahrtsträger – eine Aufgabenabgrenzung', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 124.

[448] Rechberger, in: Rechberger, *Außerstreitgesetz*, 2006, section 2 Austrian Non-Contentious Proceedings Act, marg. No 2.

should appoint a so-called child's support *(Kinderbeistand)* if the intensity of the dispute so requires and an appropriately qualified person is at the court's disposal.[449] Once appointed the child's support has the right to access to the file, must be informed about all appointments and the progress of the proceedings. Further, he/she is entitled to participate at all oral hearings and all requests must be transmitted to him/her.[450] However, the child's support has no additional rights hence he/she cannot submit requests to the court or appeal against a decision.[451] The child's support is neither the child's legal representative nor a party to the proceedings; in absence of a similar legal institution the Austrian lawmaker described it as an institution *sui generis*.[452]

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

In proceedings concerning the care, education and the right to contact to the parent, who is not living with the child, it is crucial for the court to hear the child's perspective.[453] Thus, section 105 Austrian Non-contentious Proceedings Act stipulates that minors must be heard in such proceedings. The examination can be conducted through public youth welfare organisations, juvenile court's offices or by other appropriate means if the child has not reached the age of ten or the child's development or health condition so requires, or if it cannot be expected that the child will otherwise express his/her sincere and uninfluenced opinion.[454] However, the examination can be omitted in urgent matters or when a reasoned statement cannot be expected from the child.[455] As a matter of principle the public youth welfare organisation should be heard before the court issues orders or approves agreements regarding parental responsibility.[456] Further, mature minors who have reached the age of fourteen are capable of representing themselves in such proceedings.[457] Nevertheless, the parents' right to represent the minor is not affected by the minor's procedural rights.[458]

Children below the age of fourteen and in exceptional circumstances minors below the age of sixteen may be granted a child's support *(Kinderbeistand)* in proceedings regarding the care, education and the right to contact if this seems necessary in terms of the intensity of

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[449] Section 104a Austrian Non-contentious Proceedings Act.
[450] Section 104a (3) Austrian Non-contentious Proceedings Act.
[451] Deixler-Hübner, 'Verfahrensrechtliche Stellung des Kinderbeistandes', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 124.
[452] RV 486 BlgNr 24. GP 6; Deixler-Hübner, 'Verfahrensrechtliche Stellung des Kinderbeistandes', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 121.
[453] Huber, *Streit um das Kind,* 2010, p. 72.
[454] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 211; Fucik, Kinderbeistand und Kindesangehörige, *iFamZ* 2010, p. 229 *et seq*; Fucik & Kloiber, *Außerstreitgesetz,* 2005, section 105 Austrian Non-Contentious Proceedings Act, marg. No. 2.
[455] Section 105 (2) Austrian Non-contentious Proceedings Act; Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 211.
[456] Section 106 Austrian Non-contentious Proceedings Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 10th Edition, 2009, marg. No. 208; Fucik & Kloiber, *Außerstreitgesetz,* 2005, section 106 Austrian Non-contentious Proceedings Act, marg. No. 2.
[457] Section 104 Austrian Non-contentious Proceedings Act.
[458] Hinteregger, *Familienrecht,* 5th Edition, 2011, p. 211.

the dispute between the involved parties and in order to support the minor.[459] In consultation with the minor the child support is obliged to present the minor's opinion in front of court.[460] The presentation of the minor's opinion through the child support does not, however, replace the hearing of the child pursuant to section 105 Non-contentious Proceedings Act.[461]

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

f) the termination of marriage,
g) financial consequences of divorce,
h) the settlement of matrimonial assets,
i) parental responsibility,
j) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

Termination of marriage: The Brussels IIa Regulation[462] – which entered into force on 1 March 2005 – sets forth the rules for the recognition of judgments dealing with the dissolution of a marriage and parental responsibility within the member states of the European Union.[463] It prescribes an automatic recognition of all judgments issued in one member state without any intermediary procedure being required.[464] However, the scope of application of the regulation is restricted to 'positive decisions'; judgments refusing a request must not be recognized.[465] Besides, the recognition of a judgment may be denied if a ground for refusal exists pursuant to Art 22 Brussels IIa Regulation.[466]

The recognition of foreign decisions rendered outside the European Union is primarily governed by international treaties according to section 100 Austrian Non-contentious Proceedings Act. In absence of such international treaties sections 97-99 Austrian Non-

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[459] Section 104a Austrian Non-Contentious Proceedings Act; See generally Barth & Deixler-Hübner, *Handbuch des Kinderbeistandsrechts,* 2011.

[460] Barth, 'Die Stellung des Kinderbeistands gegenüber dem Kind', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 131.

[461] Deixler-Hübner, 'Die Stellung des Kinderbeistandes gegenüber dem Gericht', in: Barth & Deixler-Hübner (eds.), *Handbuch des Kinderbeistandsrechts,* 2011, p. 147.

[462] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[463] Roth, *Zivilprozessrecht,* 2012, p. 162 *et seq*.

[464] Art 21 (1) 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; Roth, *Zivilprozessrecht,* 2012, p. 167; Mayr, *Europäisches Zivilprozessrecht*, 2011, marg. No IV/56.

[465] Mayr, *Europäisches Zivilprozessrecht*, 2011, marg. No IV/56; Nademleinsky & Neumayr, *Internationales Familienrecht,* 2007, marg. No. 05.55.

[466] Recognition is manifestly contrary to public policy of the Member State in which recognition is sought; Respondent was not served with the document that instituted the proceedings in sufficient time to arrange for his or her defense unless it is determined that the respondent has accepted the judgment unequivocally; Recognitition is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

contentious Proceedings Act regulate the recognition of foreign decisions. Foreign decisions relating to divorce, separation, marriage annulment, existence or non-existence of a marriage will be automatically recognized if they are legally binding and no ground for refusal exists.[467] The recognition of a decision is being dealt with in a separate procedure under section 98 Austrian Non-contentious Proceedings Act if the petitioner shows sufficient legal interest in having such proceedings.

Financial consequences of divorce (maintenance): The European Maintenance Regulation[468] contains two different procedures regarding the recognition of decisions in matters relating to maintenance obligations.[469] Decisions rendered in a member state which is bound by the Hague Maintenance Protocol[470] shall be recognized *ipso iure* in any other member state without the need of a special procedure and without any possibility of opposing the recognition.[471] If the decision is rendered in a member state which is not bound by the Hague Maintenance Protocol the recognition may be refused on certain grounds listed in Art 24 European Maintenance Regulation.[472] Outside the scope of application of the European Maintenance Regulation the recognition and enforcement of foreign decisions relating to maintenance is governed by section 79 *et seq* Austrian Enforcement Act.[473] However, these provisions do not provide rules for the recognition of foreign decisions.[474] According to consistent case-law foreign decisions will be recognized if they can be enforced in Austria.[475] The declaration of enforceability requires that the foreign decision is enforceable in the state where it was issued and reciprocity through treaties or regulations e.g. regulations based on the Austrian Act relating to Foreign Maintenance *(Auslandsunterhaltsgesetz)* is guaranteed.[476] Moreover, the declaration of enforceability is only granted if the following conditions are fulfilled: the foreign authority was competent to order the decision according to the Austrian Jurisdiction Act; the summons was delivered to respondent; the decision is final and binding and accordingly enforceable in the state where it was issued.[477]

Settlement of matrimonial assets: In absence of an European regulation sections 79 *et seq* Austrian Enforcement Act govern the recognition of decisions relating to the settlement of matrimonial assets *(for detailed explanation thereof please see above).*[478] However, it should be noted that a proposal for a regulation on jurisdiction, applicable law and the recognition and

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[467] Section 97 (1) Non-contentious Proceedings Act; Austrian Maurer & Schrott & Schütz, *Außerstreitgesetz Kommentar*, 2006, section 97 Austrian Non-contentious Proceedings Act, marg. No. 1 *et seq*. These grounds comprise: violation of the Austrian public order; the right to be heard was not granted to one of the spouses; incompatibility with a decision rendered in Austria or a prior rendered decisision which fulfils the conditions for recognition in Austria; the authority was not competent to issue a decision according to Austrian law.

[468] 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.

[469] Roth, *Zivilprozessrecht,* 2012, p. 176; Mayr, *Europäisches Zivilprozessrecht*, 2011, marg. No IV/100.

[470] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

[471] Art 17 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

[472] *See* footnote 465; The grounds for refusal are identical with those set forth in Art 22 Brussels IIa Regulation.

[473] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 10.59; Egglmeier-Schmolke, *Einf ührung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 152.

[474] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 10.67.

[475] Judgment of 28.07.1998, Oberster Gerichtshof, *EFSlg* 87.846; Judgment of 10.08.1998, Oberster Gerichtshof, 7 Ob 307/97s; Judgment of 23.06.1999, Oberster Gerichtshof, 7 Ob 139/99p.

[476] Section 79 (2) Austrian Enforcement Act.

[477] Section 80 Austrian Enforcement Act.

[478] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 04.30.

enforcement of decisions in matters of matrimonial property regimes is currently under consideration.[479]

Parental responsibility: The Brussels IIa Regulation governs the recognition of judgments relating to parental responsibility in the member states of the European Union.[480] A judgment issued in a member state shall be recognised in all other member states without any special procedure being required according to section 21 (1) Brussels IIa Regulation. The grounds for refusing enforcement are exhaustively listed in Art 23 Brussels IIa Regulation.[481]

The recognition rules of the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants merley apply in relation to Switzerland, Turkey and Macao.[482] Measures taken by the competent authorities shall be recognized *ipso iur*e in all contracting states.[483] However, if a measure also needs to be enforced in another state than in which it has been issued the recognition and enforcement shall be governed either by the domestic law of the state in which enforcement is sought or by relevant international conventions.[484] Similarly, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children contains respective recognition provisions and provides that measures taken by the authorities of a contracting state shall be recognized *ipso iur*e in all other contracting states.[485]

Outside the scope of the Brussels IIa Regulation and the two mentioned conventions the recognition of foreign decisions must be determined according to section 112 *et seq* Austrian Non-contentious Proceedings Act.[486] A decision will be recognized if the decision is enforceable in the state where it was rendered and if no ground for refusal exists pursuant to section 113 Austrian Non-contentious Proceedings Act.[487]

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[479] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, http://ec.europa.eu/justice/policies/civil/docs/com_2011_126_en.pdf (12.10.2012).

[480] Art 1 No. 1 lit. b 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.

[481] These grounds comprise: violation of the public order; the hearing of the child was omitted; the person who is affected by the parental responsibility was not granted the right to be heard; incompatibility with a later rendered decision; violation of Art 56 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.

[482] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 156.

[483] Art 7 Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 08.66.

[484] Art 7 Convention concerning the powers of authorities and the law applicable in respect of the protection of infants; Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 08.65.

[485] Art 23 of 19 October 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

[486] Egglmeier-Schmolke, *Einführung in das Internationale Privatrecht mit UN-Kaufrecht*, 2009, p. 156.

[487] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 08.73; These grounds comprise: the decision is contrary to the child's welfare or it violates the Austrian public order; respondent's right to be heard was not granted; incompatibility with a subsequently rendered decision in Austria or a subsequently rendered decisision abroad which fulfils the conditions for recognition in Austria; the authority was not competent to issue a decision according to Austrian law; the parent who has the parental responsibility has no possibility to participate in the proceedings.

Children's maintenance: The European Maintenance Regulation does not distinguish between spousal and child maintenance.[488] Accordingly, reference may be made to the above mentioned elaborations, please see *financial consequences of divorce*. Similarly, section 79 *et seq* Austrian Enforcement Act is applicable if no multilateral treaties governing the recognition of decisions relating to child maintenance prevail.[489]

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

The public order is violated if fundamental principles of the Austrian legal system have been infringed.[490] The recognition of a foreign divorce decision may be denied if it violates the Austrian public order according to Art 22 Brussels IIa Regulation or section 97 (2) No. 1 Austrian Non-Contentious Proceedings Act. The Austrian Supreme Court has established for instance that the repudiation of a wife pursuant to Islamic law *(talaq)* violates the national public order.[491] Generally, it can be said that the right to be heard is also of fundamental importance as regards the procedural public order.[492]

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Generally, a marriage – which was concluded in Austria – must be recorded in the register of births, deaths and marriages *ex officio* pursuant to the Austrian Personal Statute Law *(Personenstandsgesetz).* A marriage which was entered into abroad is only registered upon request of a person that has sufficient legal interest in being recorded in the register of births, deaths and marriages and if the case concerns either an Austrian national, a stateless person that has its habitual residence in Austria or a refugee.[493] However, once the marriage is registered and a process occurs that affects the marriage, such as a divorce, a written note must be made in the register of marriages, indicating the changed status.[494]

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

A divorce changes the civil status of the former spouses and is accordingly subject to registration.[495] Generally, records are made due to notification, request, declaration or *ex officio*.[496] Accordingly, the former spouses may request the registration of the divorce.

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[488] Zöchling-Jud & Aspöck, *Internationales Privatrecht,* 2nd Edition, 2011, p. 56.
[489] In relation to Liechtenstein and Turkey the recognition of decision relating to child's maintenance is governed by the Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children.
[490] Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 05.75.
[491] RS0121192; Judgment of 31.08.2006, Oberster Gerichtshof, 6 Ob189/06x.
[492] Accordingly, problems might arise regarding the recognition of Japanese divorces, which were obtained by fraud; Nademleinsky & Neumayr*, Internationales Familienrecht,* 2007, marg. No. 05.76; Urano, 'Das japanische Scheidungsrecht', *FamRZ* 2004/16, p. 1253, footnote 6.
[493] Section 2 Austrian Personal Statute Act.
[494] Section 25 Austrian Personal Statute Act.
[495] Michel & Weitzenböck & Lenhard, *Personenstandsrecht,* 2nd Edition, 2010, section 96 Austrian Non-Contentinius Proceedings Act, marg. No. 5.
[496] Section 9 (1) Austrian Personal Statute Act.

Besides, section 38 (3) Austrian Personal Statute Law obliges administrative authorities and courts to inform the competent personal statute authority in writing about any supplements or amendments concerning a person's personal statute. Further, any doubts as to the accuracy of a record should be communicated.[497] The Austrian Personal Statute Regulation *(Personenstandsverordnung)* specifies these duties and stipulates that the court should inform the personal statute authority about the recognition of foreign divorces.[498] Hence, the courts are also required to forward the necessary information to the responsible authority.[499]

95. What are the consequences of registration or lack of registration?

As long as a divorce is not registered the marriage still exists for the civil registrar according to its records, meaning that a new marriage cannot be concluded. Thus, the lack of registration precludes a remarriage.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

Currently, a draft amending the law on family matters and the law relating to the use of names is under consideration.[500] In several answers reference is made to the provisions proposed in the draft. However, it should be noted that at the time of answering this questionnaire the Austrian parliament has not yet adopted this draft. Accordingly, the draft may still be subject to alterations and amendments.

[497] Section 38 (4) Austrian Personal Statute Act.
[498] Section 20 (2) No. 1a Austrian Personal Statute Regulation.
[499] Michel & Weitzenböck & Lenhard, *Personenstandsrecht,* 2nd Edition, 2010, section 96 Austrian Non-Contentinius Proceedings Act, marg. No. 5.
[500] *See* *h*ttp://www.justiz.gv.at/internet/html/default/2c948485398b9b2a013a4a270f9f072b.de.html;jsessionid=74864A23A313FE50DC78D3695208C580 (23.10.2012).

BELGIUM

Belgium

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

Art. 229-302 Civil Code (CC); Art. 1254-1304 Civil Procedure Code (CPC); Art. 55-56 Code Private international law (CPIL).

2. Give a brief history of the main developments of your national divorce law

From 1804 until 1974, no major changes occurred in Belgian divorce law. The Belgian Civil Code was the major source of law. It provided the possibility of divorce on the ground of fault as well as divorce by mutual consent, although the latter was restrictively applied. Until the 1970s, Belgium was one of the very few European countries that offered the possibility of a divorce by mutual consent.

The Act of 1 July 1974 instituted an additional non-fault based divorce ground. From then onwards divorce could be obtained after ten years of separation, even against the will of an "innocent" spouse. The notion of fault, however, continued to rule the patrimonial consequences of the divorce. The Act of 1974 made it also possible for the spouse of a mentally ill person to obtain a divorce after ten years of separation, although without any referral to fault. The Act of 2 December 1982 reduced both terms to five years. The Act of 16 April 2000 further reduced them to two years.

The Act of 30 June 1994 radically reformed the divorce procedure in three fields, but the grounds for divorce and the consequences remained unchanged. The divorce procedure on the ground of fault and separation was drastically simplified and made more humane. Before, the *ratio legis* had been to make the divorce procedure as long and as complicated as possible, to discourage divorce. This approach was abandoned for a more realistic one. Secondly, the divorce procedure by consent was fundamentally reformed. The procedure was also simplified, with a reduction of the number of appearances before the court and of the probationary period. Also, the court was given the possibility to intervene in the

agreement concerning the children. Finally, a general regulation was introduced concerning the rights of minors to be heard by the court when their interests are at stake. Finally, the Act of 20 May 1997 introduced some minor changes in the divorce procedure and the preliminary measures.

The Act of 27 April 2007 abolished fault divorce. Divorce on the basis of irretrievable breakdown of the marriage is the first ground, consent divorce the second. The procedure of the last one is simplified.

3. Are prospective reforms currently under consideration?
No.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

A marriage can be nullified. Belgian law knows also the legal separation, but this does not terminate the marriage but weakens the marital bound.

5. If any, provide statistical data regarding divorce and legal separation?

In 2009 32.606 divorces were transcribed in the civil status registers (SPE Economie – Dir. Gén. Statistiques)

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

The Act of 13 February 2003 has opened marriage for same-sex persons. The grounds for divorce and divorce proceedings are identical as those for h heterosexual couples.

The Act of 23 November 1998 has introduced a rather weak system of registered partnership for heterosexuals and homosexuals and even for family members (wettelijke samenwoning / legal cohabitation). Divorce ground and divorce proceedings do not apply. The registerd partnership can be dissolved by a unilateral declaration.

B. Conflict of Laws

7. How is marriage defined in your national law?

The Civil Code does not define marriage but only states that two persons of different or of same sex can enter into marriage.

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

The spouses may choose the applicable law. They can only designate the law of the State of both spouses' nationality when the action is introduced or Belgian law. The choice has to be expressed at the time of the first appearance in court (Art. 53 § 2 CPIL). The judge will register the choice. There are no further formal requirements.

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

11. Is parties' will taken into account in order to determine the applicable law for divorce?

12. If parties may choose the applicable law, how shall this choice be expressed and when?

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

Hague Protocol 2007

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

CPIL (English translation from ww.ipr.be):

Art. 49. Choice of law applicable to the matrimonial property regime

§1. The matrimonial property regime is governed by the law chosen by the spouses.

§2. The spouses can only designate one of the following legal systems:

1. the law of the State on the territory of which they will establish their first habitual residence after the celebration of the marriage;
2. the law of the State on the territory of which one of the spouses has his habitual residence at the time of the choice;
3. the law of the State of one spouse's nationality at the time of the choice.

Art. 50. Specific rules regarding the choice of law

§1. The choice of law may be made before the marriage celebration or in the course of the marriage. It may modify a previous choice.

§2. The choice must be in accordance with article 52, part 1. It shall relate to all the goods of the spouses.

§3. The change of applicable law resulting from a choice by the spouses will only have effect for the future. The spouses may depart from this rule by agreement without adversely affecting third parties' rights.

Art. 51. Applicable law in the absence of choice of law

In the absence of a choice of law of the spouses, the matrimonial property regime is governed by:

1. the law of the State on the territory of which both spouses establish their first habitual residence after the celebration of the marriage;
2. in the absence of a habitual residence on the territory of a same State, by the law of the State of which both spouses have the nationality at the time of the celebration of the marriage;
3. in the other cases, by the law of the State on the territory of which the marriage was celebrated.

Art. 52. Law applicable to the formal validity of the choice of matrimonial property regime

The choice of the matrimonial property regime is valid as to the form if it satisfies the requirements of the law applicable to the matrimonial regime at the time a choice was made or the law of the State of the place where the choice was made. The choice has to be at least expressed in written form, dated and signed by both spouses.

The modification of the matrimonial property regime has to be made in accordance with formal requirements of the law of the State of the place where the modification is made.

Art. 53. Scope of the law applicable to the matrimonial property regime

§1. Without prejudice to article 52, the law applicable to the matrimonial property regime determines notably:
    1. the validity of the consent to the choice of law;
    2. the admissibility and validity of the marital agreement;
    3. the possibility and the scope of the choice of a matrimonial property regime;
    4. if and to which extent the spouses can change the matrimonial property regime, and whether the new regime has retroactive effect or whether the spouses can give it such effect;
    5. the composition of the properties and the attribution of the administration powers;
    6. the dissolution and the liquidation of the matrimonial property regime, as well as the distribution rules.

§2. The manner of composition and attribution of the shares are governed by the law of the State on the territory of which the assets are located during the distribution.

Art. 54. Protection of third parties

§1. The law applicable to the matrimonial property regime governs the question whether or not the matrimonial property regime is opposable to third parties.

However, if at the time a debt is created, the spouse and his third-party creditor have their habitual residence on the territory of the same State, the law of that State will be applicable, unless:

    1. the publicity or registration requirements under the law applicable to the matrimonial property were fulfilled; or
    2. the third party either knew, at the time the debt was created, the matrimonial property regime or was unaware of it solely through his own negligence, or

3. the publicity rules in relation to rights in property required under the law of the State on whose territory the immovable property is located were fulfilled.

§2. § 2. The law applicable to the matrimonial property regime determines if and to which extent a debt contracted by one of the spouses for the needs of the household or the education of the children engages the other.
However, if at the time a debt is created, the spouse and his third-party creditor have their habitual residence on the territory of the same State, the law of that State will apply.

15. What is the applicable law for parental responsibility?

CPIL:
Art. 35. Law applicable to parental authority, guardianship and protection of incapable persons

§1. The parental authority and guardianship, the establishment of the incapacity of an adult and the protection of incapable persons or their assets are governed by the law of the State on the territory of which the person has his habitual residence when the facts giving rise to the determination of the parental authority, the guardianship, or the approval of protective measures occur. In case of change of the habitual residence, the determination of the parental authority or the guardianship to the advantage of a person who does not carry the responsibility yet, is governed by the law of the State of the new habitual residence.
The exercise of the parental authority or the guardianship is governed by the law of the State on the territory of which the child has its habitual residence when the exercise is invoked.

§2. In the event that the law designated by §1 does not provide the possibility to safeguard the protection required by the person or the assets, the protection is governed by the law of the State of which the person has the nationality.

Belgian law applies if it turns out to be materially or legally impossible to take the measures provided for by the applicable foreign law.

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

Hague Protocol 2007

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

Yes

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

CPIL:
Art. 15. Application of foreign law

§1. The judge establishes the content of the foreign law designated by the present statute. That law is applied in accordance with the interpretation given to it in the foreign country.
§2. The judge may require the cooperation of the parties if he cannot establish the content. When it is clear that the content of the foreign law cannot be established timely, Belgian law is applied.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

No

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

The lack of legal capacity prevents a spouse to introduce divorce proceedings. The other spouse can introduce divorce proceedings based on the irretrievable breakdown of the marriage. The spouse with incapacity will be represented by his or her guardian, provisional administrator or an administrator ad hoc appointed by the court.

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

Multiple grounds.
If national law provides for sole ground for divorce (irretrievable breakdown of marriage) answer part A1, if not answer part A2 only

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

e) Is separation sufficient to establish irretrievable breakdown?
f) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

Autonomous ground.

31. Must the spouses be separated before introducing the claim? If yes, for how long?

No.

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

Mutual consent and joint request.

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

General consent on all consequences (Art. 1287 and 1288 CPC).

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

The breakdown of the marriage is irretrievable when the cohabitation between the spouses is reasonably impossible. The irretrievable breakdown is established by (Art. 1255 CPC):

a. If both spouses apply:
   - Six months of factual separation;
   - Three months after the first appearance in court.

b. If one spouse applies:
   - One year of factual separation;
   - One year after the first appearance in court;
   - Proof of the irretrievable breakdown by all legal means.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

See Q 34.

36. How is separation between spouses taken into account regarding irretrievable breakdown?
e) Is separation sufficient to establish irretrievable breakdown?
f) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

See Q 34.
The separation period may be interrupted for a short reconciliation period.

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

A unilateral petition on the ground of irretrievable breakdown can be converted in an application by both spouses.
Divorce by consent proceedings can be converted in a unilateral application for divorce on the ground of irretrievable breakdown.

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

The spouses have to settle the consequences in case of a divorce by consent by an agreement made before the start of proceedings (Art. 1287-1288 CPC). In a divorce on the ground of irretrievable breakdown spouses can agree on maintenance (Art. 301 § 9 CC).

44. If yes, may the judge scrutinize the spousal agreement?

The judge has to scrutinise the agreement concerning the children on the beasis of the interests of the children (Art. 1290 CPC). He can only scrutinise the formal validity of the agreement concerning the spouses.

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

See Q 44.

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

The matrimonial property regime is converted into a regime of pure separation. Parental responsibility is not affected.

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

Between the spouses: when the judgment becomes final; property consequences retroact until the date of the application.
Against third persons: date of transcription of the judgment in the civil status registers.

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

No.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

No. the marriage has no legal influence on the name of the spouses but custom allows them to use each other's name. After divorce the use is not possible anymore.

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

Citizenship: No.
Residence permit: Yes, but under certain conditions a permit for further residence can be obtained.

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

No.

52. Does divorce produce automatic effects regarding parental responsibility?

No.

53. Can the exercise of parental responsibility be subject to a parental agreement?

Yes, but only the exercise not the attribution.

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The judge can directly modify the agreement;

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

Yes.

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

The interests of the child.
No.

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

In principle a complete deprivation concerns all parental rights (Art. 33 Act Youth protection). In practice visiting rights can be obtained, if this is in the interests of the children.

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

Parents can freely agree on the residence of the children.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Yes, but the judge can scrutinise.

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

If one parent oppose the relationship between the other parent and the child, the judge can impose a default fine; he can allow a bailiff to take the child to the parent (seldom used); he can modify the residence order.
There are no sanctions provided if a parent does not fulfil his or her duty to maintain relationship with the child.

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

Consent divorce: full agreement is necessary before the start of proceedings.
Irretrievable breakdown: normally a subsequent procedure, if necessary. Parental responsibilities continue.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

Maintenance.

Basic pension benefits are a matter of social law; other benefits are dealt with in the liquidation of the matrimonial property regime.

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

No; also after proceedings.

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

Yes. No specific period.

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

Consent divorce: spouses can agree freely (Art. 1288 CPC).
Irretrievable breakdown: Yes, if it is proved that the financial status of the creditor spouse is due to his own choice (Art. 301 § 5 CC), in case of partner violence or a serious fault that makes cohabitation impossible (Art. 301 § 2 CC).

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

See Q 65.

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

No, the judge can only take needs and standard of living into account.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

No.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

No. See Q 65.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

None.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

Yes for property (Art. 1447 CC).

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Yes (Art. 301 § 1 CC).

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

No, but he can modify the agreement on the basis of new circumstances. The spouses can exclude this possibility (Art. 301 § 7 CC).

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets

The spouse have to provide all necessary information but there are no rules on full disclosure.

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

The judge can impose a default file. He can order third persons (e.g. the employer) to provide the information.

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

In principle the amount is based on the basic needs of the creditor spouse and not on the needs in accordance with the standard of living during the marriage. But since the judge has also to take into account an important economical setback other factors such as the duration of the marriage and the age of the creditor spouse will be taken into account (Art. 301 § 3 CC)/

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

Yes, if new circumstances arise (Art. 301 § 7 CC).

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

No, it derives from filiation.

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

Maintenance.

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

Yes.

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

Yes, he can scrutinise in accordance with the interests of the child.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

No.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

Not applicable.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

Court of first instance is competent to grant divorce. This court can settle the consequences. But after the divorce the youth tribunal is competent for parental responsibilities and the justice of the peace for maintenance.
The same rules apply to transnational proceedings. There is no competence of a particular court.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

See Q. 34.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

They are invited but not obliged (Art. 1254 § 4/1 CPC).

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

Yes , but only in case of divorce proceedings on the ground of irretrievable breakdown (Art. 1280 CPC). In case of consent divorce proceedings the spouses have to agree on interim measures (Art. 1288 CPC).

88. Is appeal available against the divorce order or against an out of court divorce decision?

Yes.

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene

- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**
    - **If yes, on which grounds?**

In case of a divorce by consent the public prosecutor has to give his advice. The child can be heard. See Q. 90.

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

The judge can hear a child that has enough discernment on request or ex officio in all proceedings (Art. 931 CPC). The child can be assisted by a person of his choice, but this person can only give a certain comfort to the child and encourage him to speak. He cannot intervene in the answers.

The youth tribunal has the obligation to hear a child that has reached the age of twelve in matters of parental responsibilities (Art. 56 Youth protection act).

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

k) the termination of marriage,

l) financial consequences of divorce,

m) the settlement of matrimonial assets,
n) parental responsibility,
o) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

Brussels IIbis applies to a) and d, the Maintenance Regulation applies to e).
For decision from a third state or decisions not covered by both regulations the following rules apply:

CPIL:

Art. 22. Recognition and enforcement of foreign judgments

§1. A foreign judgment, which is enforceable in the State in which it was rendered, will be declared enforceable in whole or in part in Belgium, in accordance with the procedure set out in article 23.
A foreign judgment will be recognized in Belgium, in whole or in part, without there being a need for the application of the procedure set out in article 23.
If the recognition issue is brought incidentally before a Belgian court, the latter has jurisdiction to hear it.

The judgment may only be recognized or declared enforceable if it does not violate the conditions of article 25. §2.

§2. Any interested party, and in matters regarding the status of natural persons also the advocate-general, can in accordance with the procedure set out in article 23 request that the judgment be recognized or declared enforceable, in whole or in part, or that it be declared not recognizable or not enforceable, in whole or in part.

§3. For the purpose of the present statute:
1. the term judgment means any decision rendered by an authority exercising judicial power;
2. the recognition gives legal power to the foreign judgment.

Art. 23. Jurisdiction and procedure for recognition and enforcement

§1. Except in the cases provided for in article 121, the court of first instance has jurisdiction to hear actions for recognition and enforcement of a foreign judgment.

§2. Except in the case provided for in article 31, the court with territorial jurisdiction, is the court of the domicile or habitual residence of the defendant; in the absence of such domicile or habitual residence, it is the court of the place of execution.
When an action for recognition cannot be introduced before the court referred to in the first part, the plaintiff may seize the judge of its domicile or residence in Belgium. In the absence of such domicile or residence in Belgium, the plaintiff can seize the court of the district of Brussels.

§3. The action is introduced and treated in accordance with the procedure referred to in articles 1025 to 1034 of the Code of Civil Procedure. The petitioner has to elect domicile within the district of the court. The judge decides within a short delay.

§4. The foreign judgment subject or open to an ordinary recourse can be enforced provisionally. The judge may make the enforcement subject to the provision of a guarantee.

§5. Contrary to articles 1029 of the Code of Civil Procedure, only conservatory measures can be taken with respect to the property of the party against whom the enforcement is sought during the period provided for an appeal against the decision

that allows enforcement, and until a decision with respect to the appeal is taken. The decision, which allows the enforcement, contains the permission to take these measures.

Art. 24. Documents to be submitted with a view to the recognition and enforcement

§1. The party that invokes the recognition of or seeks to declare a foreign judgment enforceable must produce the following documents:

1. a certified copy of the decision, which according to the law of the State where it was rendered meets the conditions required for the authenticity thereof;
2. if it concerns a decision by default, the original or a certified copy of the document establishing that the act that introduced the proceeding or the equivalent document was served or brought to the notice of the defaulting party in accordance with the law of the State where the decision was rendered;
3. any document on the basis of which it can be established that, according to the law of the State where the decision was rendered, the decision is enforceable and has been served or brought to notice.

§2. In the absence of the production of the documents mentioned in §1, the judge may impose a delay in which they are to be produced or accept equivalent documents or, if he believes to be sufficiently informed, grant an exemption.

Art. 25. Grounds for refusal of recognition and enforcement

§ 1. A foreign judgment shall not be recognized or declared enforceable if:

1. the result of the recognition or enforceability would be manifestly incompatible with public policy; upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby.
2. the rights of the defense were violated;
3. in a matter in which parties cannot freely dispose of their rights, the judgment is only obtained to evade the application of the law designated by the present statute;
4. according to the law of the State where the judgment was rendered and without prejudice to article 23, §4, the judgment would still be subject to an ordinary recourse in the said State;
5. the judgment is irreconcilable with a Belgian judgment or an earlier foreign judgment that is amenable to recognition in Belgium;
6. the claim was brought abroad after a claim which is still pending between the same parties and with the same cause of action was brought in Belgium;
7. the Belgian courts had exclusive jurisdiction to hear the claim;
8. the jurisdiction of the foreign court was based exclusively on the presence of the defendant or the assets located in the state of such court, but without any direct relation with the dispute; or;
9. the recognition or enforceability would be contrary to the grounds for refusal provided for in articles 39, 57, 72, 95, 115 and 121.

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

Yes see Q. 91. Art. 25 CPIL.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Art. 48 CC and Art. 31 CPIL provide the transcription in the civil status registers.

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

Facultative requirement.

95. What are the consequences of registration or lack of registration?

By registration the foreign decision is recognised.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

BULGARIA

Bulgaria

Pr. Velina TODOROVA
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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The current statutory sources of law for divorce in Bulgaria are the:

a. **Family Law Code** (FC) of 2009 (last amended in 2010), providing for the substantive regulation of divorce.
b. **Civil Procedure Law Code** (CPC) of 2008 (last amended in 2012), providing for the procedures for divorce.
c. **International Private Law Code** (IPC) of 2005 (last amended in 2010),

2. Give a brief history of the main developments of your national divorce law

The first secular divorce law in Bulgaria dates of 1945 when the Marriage Ordinance was passed. Until 1945, matrimonial canon law applied in Bulgaria and no secular law existed. The matrimonial rules for Orthodox Christians were adopted from the Exarchic Statute, whereas, those for other religious denominations (Catholics, Evangelicals, Muslims, Jews and Armenian Christians) were based on their respective denominational statutes and by-laws.

The Exarchic Statute was drafted by the Church Council held in Constantinople in 1871 as a special statute regulating the governance of the Church. Articles 94 (e) and 98 (g) and (h), invested in the clergy the power to deal with matters concerning the cancellation of Bulgaria engagements and the ending and dissolution of marriages, which it treated as spiritual matters. This solution was in keeping with the spirit of the then Turkish law, which also treated these matters as spiritual. The Exarchic Statute did not contain any substantive provisions regarding matrimonial law. Canon law was therefore implemented in accordance with other Church literature as well as local customary law.[501]

[501] See Dikov, L. A Course in Bulgarian Civil Law, Volume II, Family Law, Sofia, 1937, pp. 11-12.

This situation was preserved even after the liberation from the Ottoman Empire and the restoration of the independent Bulgarian State in 1878. Under the temporary rules, which regulated the organisation of the judiciary from 1878 onwards, spiritual (church) courts were legitimised and given authority over the matters referred to in Article 94(e) and Article 98(g) and (h) of the Exarchic Statute. In 1892, the Exarchic Statute was approved by the National Assembly and entered into force as a law. It was not until 1897 that a new sixth section was added to the revised Exarchic Statute in which matrimonial law was regulated on a purely ecclesiastical basis. It contained only procedural rules on engagement and the conclusion and dissolution of marriage, and no substantive provisions. The relations between spouses were regulated by neither canon law nor secular law.

Bulgarian canon law recognised more grounds for divorce than did the secular matrimonial law of Western countries. This prompted some commentators to claim that Orthodox Church was more liberal than the Catholic Church.[502] Article 187 of the Exarchic Statute specified ten grounds for divorce. These involved either a breach of matrimonial obligations (i.e. fault) or an objective reason for the failure to perform such obligations. Objective reasons for a failure to perform matrimonial obligations constituted grounds for dissolution of marriage only in exceptional cases, which were expressly set out in Article 187, § 6 and § 7. The grounds for dissolution of marriage were expressly defined in the Exarchic Statute, which did not allow divorce by mutual consent. Nor was actual separation deemed to be a ground for divorce under the Exarchic Statute since it was reasoned that a spouse should not be able to take advantage of his or her own misconduct by simply relying on the ground of separation. Article 187 of the Exarchic Statute provided only absolute grounds for divorce, which amounted to a total of twelve.[503]

1945 saw the adoption of a Marriage Ordinance, under which matrimonial matters were regulated under secular law for the first time: this covered relations between spouses, introduced civil marriage and recognised all church weddings as being effective for the time being. The combined effect of the Gender Equality Ordinance (1944) and the Marriage Ordinance was to give equal rights to legitimate and illegitimate children (although this issue was hardly a matter for regulation under a law on marriage). The Marriage Ordinance introduced a mixed system of divorce grounds: divorce by mutual consent (Article 30), six grounds for divorce (Articles 31-36), namely: adultery, threats against the other spouse's life, criminal conviction, absence, illness and sexual impotence and infertility. There was also one last ground (Articles 37 and 38), which needed a ruling by the court: namely severe breach of matrimonial obligations and marriage breakdown (fault was irrelevant).

The Persons and Family Act of 1949 was an attempt was to codify family law. However, it only repeated the grounds introduced by the Marriage Ordinance (Articles 44 and 45). Only the ground of 'sexual impotence and infertility' was dropped. In 1952, the Bulgarian Code of Civil Procedure made important changes to divorce legislation. Following the new ideology of 'preserving the marriage', it introduced a ban on divorce by mutual consent. It also barred divorce in cases where the breakdown was attributable solely to the behaviour of the petitioner and the other spouse wished to preserve the marriage (Article 263). For the first time, a conciliation session was introduced as a necessary component of divorce proceedings (Article 259). The aim was to reconcile the parties by discussing the reasons for the divorce

[502] See Dikov, L. 'The Need for Reform in Bulgarian Matrimonial Law' in: V. Boyadjiev, (ed.) Reports and Resolutions of the Third Council of Bulgarian Lawyers, Sofia, 1926, p. 87.
[503] Nenova, L. Family Law of the Peoples Republic of Bulgaria, Sofia, 1977, p. 237.

before the judge and identifying opportunities to avoid it. Both parties were required to appear in person before the judge and take part in the discussion. Many commentators argued that this procedure did not play the role for which it was originally intended, but simply delayed the divorce and thus caused additional harm to both parties. The conciliation stage was followed by a waiting period of 2-3 months.

The 1953 revision of the Persons and Family Act dropped all grounds for divorce except one: marriage breakdown (Article 45). The former grounds were interpreted as reasons for the marriage breakdown (Article 47). The prohibition on granting divorce against the will of one of the spouses was limited to cases complying with the following wording: 'by exception, where there is serious public concern on this account'.

The first Bulgarian Family Code was adopted in 1968 and finalised the codification of family law. The Code provided for two grounds for divorce: mutual consent (restored) and 'serious and irretrievable breakdown of the marriage'. The issue of matrimonial fault could be considered only if this was raised by the petitioner. The Second Bulgarian Family Code of 1985 preserved these two grounds for divorce and increased the significance of fault under the serious and irretrievable breakdown of the marriage'. In 2009 a new Family Code was passed, which introduced several important changes in the substantive divorce law. The grounds for divorce remain: mutual consent and 'serious and irretrievable breakdown of the marriage' under which the court should examine the fault only if spouse/s claim it. The new law increased the importance of spousal agreement not only for the consensual divorce and its consequences but also for the effects of contested divorce on the parental responsibility.

3. Are prospective reforms currently under consideration?

No, they are not, in view of the current reform of the family law.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

According to the Bulgarian family law, the divorce is the only ground for marriage dissolution to enforce marriage breakdown.

5. If any, provide statistical data regarding divorce and legal separation?

Year	**2008**	**2009**	**2010**	**2011**
Number of marriages	27 722	25 923	24 286	21 448
Crude marriage rate	3.6‰	3.4‰	3.2‰	2.9‰
Number of divorces	14 104	11 662	11 012	10 581
Crude divorce rate	1.9‰	1.5‰	1.5‰	1.3‰
Divorce – irretrievable breakdown		44%	36%	
Divorce by consent		56%	64%	

Source: National Statistics Institute www.nsi.bg

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

The Bulgarian law admits neither marriage nor registered partnership for same-sex couples. The family legislation in Bulgaria still does not attach consequences to *de facto* families.[504]

B. Conflict of Laws

7. How is marriage defined in your national law?

There is no express legal definition of the marriage. The interpretation of article 46, para 1 of the Constitution in connection with articles 4 and 5 of the Family Code allows to define the marriage as a voluntary union based on the mutual, free and explicit consent of a man and a woman given in person and simultaneously before a registrar. Only the civil marriage entered into in the prescribed form shall generate legal effects.

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

The national law has not yet set out any formal requirements for the choice of the applicable law for divorce.

Therefore, the Italian discipline not only meets the uniform rules set up by Art. 5 of the Rome III Regulation, but also expands its range of application by providing the spouses the

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

Neither of these is considered valid.

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

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[504] The same in the judicial practice: Judgments No 459/1990-II and No 371/ 2.05.1997 of the Supreme Court of Cassation (case No 1165/1996/I).

11. Is parties' will taken into account in order to determine the applicable law for divorce?

12. If parties may choose the applicable law, how shall this choice be expressed and when?

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations as per article 15 of the Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, as of 18.06.2011.

The national law – the Code for International Private Law – stipulates that where maintenance obligations between former spouses arise by reason of divorce, the applicable law shall be the law which applied to the divorce (Article 87, para 4). With regard to the application of Rome III Regulation, the law, applicable for the maintenance will be the law chosen by spouses under Article 5 of Rome III or the applicable law under Article 8 of the same Regulation.

The applicable law regarding other financial effects of the divorce could be established on the basis of the regulations of the Code of International Private Law. It stipulates that the financial relationships as well as the personal ones shall be governed by the common national law of the spouses (Article 79, para 1 and para 3). If the spouses are holding different nationalities the law of their common habitual residence or, in the absence of such habitual residence, the law of the State with which both spouses are most closely connected will apply (Article 79, para 2 and para 3). Spouses may select an applicable law to govern their financial relationships if the applicable law allows it (Article 79, para 4). The choice of applicable law must be evidenced in writing, dated and signed by the spouses. The entry into and the validity of the agreement on choice shall be governed by the selected law. The choice may be made before or after entry into the marriage. The spouses may change or revoke the choice of applicable law. Where the choice has been made after entry into the marriage, the said choice shall take effect as from the time of entry into the marriage unless otherwise agreed between the parties (Article 80).

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

The national law – the Code for International Private Law – stipulates that: "(1) Possession, ownership and other rights in rem in movable and immovable property shall be governed by the law of the State in which the property is situated (*lex loci rei sitae*). (2) The evaluation as to whether a corporeal object is movable or immovable, as well as the type of the rights in rem, shall be determined by the law specified in Paragraph (1) (Article 64).

The acquisition and termination of proprietary and possessory rights shall be governed by the law of the State in which the corporeal object is situated during performance of the act or occurrence of the circumstance justifying the acquisition or termination. The acquisition of ownership and other rights in rem on the grounds of acquisitive prescription shall be governed by the law of the State in which the corporeal object was situated at the time of lapse of the period of acquisitive prescription. The time of possession in another State shall be assimilated to the said period (Article 65).

15. What is the applicable law for parental responsibility?

The law applicable to parental responsibility is the law of the state, in which the parents and children have a common habitual residence. The law of the state where the child has a habitual residence or the national law of the child if more favourable to the child shall apply to parental responsibility if parents and child have no common habitual residence (Article 85 of the Code of International Private Law).

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations as per article 15 of the Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, as of 18.06.2011.

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

The judge is not under compulsory obligation to look for international private element in the case that requires a conflict of law rule to be applied. It is a fact among others that is supposed to be referred to and proved by the party.[505] The judge, however, is not completely freed of the duty to identify the international private elements in the case (e.g. foreign nationality, habitual residence abroad etc.).

The judge is under compulsory obligation to look for the applicable conflict of law rule.

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

The judge must *ex officio* research and establish the foreign law: "the court …. shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions. The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or

[505] Stancheva-Mincheva, V. Commentary on the Code of the International Private Law. Sofia, 2010, pp. 77-78.

another authority applying the law. Upon choice of applicable law, the court may order the parties to assist in the establishment of the content of the said law" (Article 43 of the Code of Private International Law).

The foreign law shall be interpreted and applied as it is interpreted and applied in the State which created the said law. Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal (Article 44 of the Code of Private International Law).

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

No, it has not. The divorce can be validly claimed at any time after the marriage has been contracted.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

The Code of Civil Procedure establishes *procedural capacity to any spouse* notwithstanding his/her legal capacity. To introduce a divorce claim or to defend to the proceedings validly it is sufficient for the spouse not to be a subject of a *full incapacity order*. The Bulgarian Code of Civil Procedure provides that persons who are not of full age or have restricted legal capacity can file matrimonial claims on their own (Article 319 of the Bulgarian Code of Civil Procedure).

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

The ground for divorce set out by the Bulgarian Family Code is *irretrievable breakdown of the marriage*. In addition the marriage dissolution may be claimed on the basis of *mutual consent* of spouses.

If national law provides for sole ground for divorce (irretrievable breakdown of marriage) answer part A1, if not answer part A2 only

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

According to the Bulgarian Family Code, Article 49:

"Divorce due to Breakdown of Marriage

Article 49. *:*

(1) ***Either spouse may request divorce in the case of deep and irremediable breakdown of marriage.***

(2) The court shall guide spouses to reconcile through mediation or another voluntary dispute resolution mechanism.

(3) ***In its judgment on granting a divorce, the court shall rule also on the fault for the breakdown of marriage, where either spouse has requested this.***

(4) In all stages of the proceedings, the spouses may submit to court an agreement on all or some effects of their divorce.

(5) The court shall approve the agreement under paragraph 4, having verified the protection of the interests of the children. The court may request an opinion from the Social Welfare Directorate."

The "*irretrievable breakdown*" is established as a sole legal ground for divorce. It is a legal conclusion reached by the court based on all the facts presented and proved before it. Facts must provide evidence that the marriage has broken down irretrievably. In case law and theory, the concept of 'serious and irretrievable breakdown' is defined as follows: "The term 'irretrievable breakdown' is a legal concept and depicts a state of matrimonial relations which is incompatible with the further existence of the marriage. In one of its leading decisions, the Supreme Court, construed the concept of irretrievable breakdown as: 'a breakdown, which has resulted in the disjunction of family relations, and in lack of mutuality, respect, trust and companionship between the spouses, as a result of which the matrimonial union is of formal content only and does not correspond to the law', and has held that 'a breakdown is irretrievable if it cannot be overcome in such a way that normal marital relations are restored'.[506]

Legislation does not identify any specific facts which may cause irretrievable breakdown, but, according to legal theory, 'causes are not important, it is the result which matters'. It follows that in each particular case the court is required first to identify the reasons for marriage breakdown, second to draw a conclusion about the state of marital relations, and third to dissolve the marriage if it draws the legal conclusion that the marriage has broken down irretrievably. According to the Supreme Court, 'Matrimonial offences do not in themselves constitute a reason for the serious breakdown of a marriage. This will be deemed to be the case only where the matrimonial offences have resulted in the disintegration of the marriage. The court has to be governed not by the significance of the reason, but only by its impact on matrimonial relations'.[507] Various reasons such as adultery, separation, violence and alcoholism are not deemed to be autonomous grounds for divorce. They have to be presented and proven in court. The court draws its conclusions based on the presentation and evidence of facts and assesses the influence and impact of each fact, which also functions as a reason for the breakdown, within that particular marriage. In judicial practice, the major facts that have to be proved are the existence of a serious breakdown and its causes.[508] The facts and statements of parties need to be proved. Otherwise, the petition is rejected.

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

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[506] Supreme Court, Decision -10-1971 – II Civil division.

[507] Supreme Court, Decision -22-64-1974-II Civil division.

[508] Supreme Court, Decision -1893-1968-II Civil division.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

If the spouses have reached a consensus following a claim for divorce **due to irretrievable breakdown** of the marriage, the court has to take it into consideration in two ways:

- the spouses may submit their agreement *on all or some effects of their divorce* at any stage of the proceedings to the judge (Article 59, para 4 of the Family Code). The court shall scrutinise the agreement and approve it if satisfied by the arrangements regarding the interests of children. The court may request an opinion from the Social Welfare Directorate in this respect (Article 59, para 5 of the Family Code).
- if the spouses agree on the termination of the marriage, the divorce proceeding shall be converted into divorce proceedings by mutual consent (Article 321, para 5 of the Code of Civil Procedure.
- At any stage of the proceedings the court shall guide spouses to reconcile through mediation or another voluntary dispute resolution mechanism (Article 49, para 4 of the Family Code or Article 321, para 2 of the Code of Civil Procedure).

In case of consensual divorce, the agreement both on the marriage dissolution and consequences is decisive.

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

It is not possible for one spouse to 'join' the divorce application on mutual consent after it has been lodged with the court. Both spouses *must* apply *together* for divorce. This is the strict interpretation of the law both of the doctrine and courts. It follows from the requirement of mutual consent in article 50 of the Bulgarian Family Code: '*In case of serious and unswerving consent of the spouses to divorce, the court shall grant divorce without seeking their grounds for the dissolution of marriage.'* The mutuality of consent is part of the ground for the divorce. Proceedings for divorce by mutual consent therefore follow the procedure for unilateral applications, since both spouses are petitioners. No dispute exists between them and they have a common will to terminate their marriage.[509]

Mutual consent has to be expressed once when the divorce petition is filed and once during the court hearing. Thus the spouses must appear in person before the court as per the requirement of the Code of Civil Procedure: 'Article 330. (1) Upon a motion for divorce by mutual consent, the spouses shall appear in person during the court hearing. (2) Where any of the spouses fails to appear without reasonable excuse, the case shall be dismissed.'

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

[509] See Stalev, J. Bulgarian Law of Civil Procedure, Sofia, 1994. p. 527.

Divorce by mutual consent is regulated in advance by an agreement which is reached and drawn up by the spouses and covers *not all but some of the consequences* of the divorce. The Family Code of 1985 that was abolished by the new Code of 2009 required all the consequences of the divorce to be covered by the agreement. The agreement under the *current law* should not be exhaustive. The mandatory contents of the agreement involves only: 1) the place of residence of the children, 2) the exercise of parental rights, 3) personal relations, 4) the maintenance of children, as well as 5) the use of the marital home, the maintenance of spouses and the family name (Article 51, para 1 of the Family Code). The spouses may agree also on other effects of the divorce if it is possible.

The court has no power to decide on divorce consequences. The court scrutinises two aspects of the agreement: its completeness (does it cover all issues provided for by the law) and its adequacy (does it cover the children's interests). Where the agreement does not meet the above requirements, the court sends it back to the spouses for its deficiencies to be remedied. Where the defects are not remedied within the prescribed term, the divorce petition is dismissed (Article 51, para 3 of the Family Code and Article 330, para 2-3 of the Code of Civil Procedure).

The *agreement*, even if confirmed by the divorce order, may be amended in so far as it relates to the arrangements for the children, provided that there has been a change of circumstances: 'Applications concerning child custody and child maintenance after termination of the marriage by mutual consent are admissible where there has been a change of circumstances' (Article 51, para 4 of the Family Code).

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

The new Family Code *lowered the significance of fault* in granting of divorce on the ground of serious and irretrievable breakdown of marriage. Divorce could always be granted where the marriage had broken down seriously and irretrievably. A ruling on fault could be given only *at the express request* of the petitioner (or of the defendant) (Article 49, para 3 of the Family Code). The fault of the petitioner does not any more constitute an obligatory ground for dismissing his/her divorce petition in the case of the respondent insisting in preserving the marriage.

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

g) Is separation sufficient to establish irretrievable breakdown?

h) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

a) Is separation sufficient to establish irretrievable breakdown?

Under the Bulgarian Family Code, separation between the spouses may be deemed either to be a cause – like all other causes – of the breakdown or to be mere evidence of the existence of such a breakdown. Separation is not deemed to be an autonomous ground and is considered jointly with the other circumstances in the case.

Separation is always assessed in the light of all the facts and evidence in the case. According to the Supreme Court, it may be either a cause or an indication of serious and irretrievable breakdown of marriage: 'A lasting separation may bring about a serious and irretrievable breakdown of the marriage. Its impact on the condition of marital relations is assessed in each particular case. Separation is not in itself a ground for dissolution of marriage. The court must examine whether it is the cause or simply an indication of serious and irretrievable marriage breakdown. Its impact on marital relations is assessed in the light of all the evidence in the case'.[510]

b) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

The court has to find that the separation is 'lasting' or 'lengthy' if it is to be taken as an indication or cause of an existing breakdown of the marriage. The concept of (a) 'lasting' (separation) is construed by the court on the facts of each case. The Supreme Court has thus held, for example, that 'A one-year separation may not be deemed the cause of a serious and irretrievable breakdown of marriage'.[511] Other decisions of the Supreme Court reflect on lengthy separation of 14 or 8 years and consider it as a cause for breaking all spiritual, physical and other bonds between spouses '… and constitutes a ground for petitioning for and obtaining a divorce'.[512] Or 'The lasting separation may prove to be only an external symptom of the alienation between the spouses, but, in all cases other than for the purpose of the separation, the internal condition of the marital relations needs to be specified'.[513] It is possible, however, for the fact of separation itself to be a sufficient argument in support of the conclusion of serious and irretrievable breakdown of marriage. 'Where the spouses have been living separately for ten or more years, albeit under the same roof, and have each looked after their own wants (cooking, hygiene, etc.), without showing any interest in the other, this constitutes an irretrievable breakdown of the marriage'.[514] Or: 'The duration of the actual separation (more than 3 years in this case) may have some impact on the condition of the marriage'.[515]

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

Please, see the answer to the Q 5.

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

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[510] Supreme Court decision 10 / 1971, point 4.
[511] Supreme Court, decision - 612-1955 II Civil division.
[512] Supreme Court, Decision 912-1991- II Civil division (14 years of separation), decision - 587-1956- II Civil division.
[513] Supreme Court, Decision -2010-1968 - II Civil division.
[514] Supreme Court, Decision - 453-1992- II Civil division.
[515] Supreme Court, Decision - 33787-1981- II Civil division.

Divorce by mutual consent exists as an autonomous ground for divorce and is separate from the ground of 'serious and irretrievable breakdown'. As per Article 50 of the Family Code: 'In case of serious and unswerving consent of the spouses to divorce, the court shall grant divorce without seeking their grounds for the dissolution of marriage.'

31. Must the spouses be separated before introducing the claim? If yes, for how long?

No, the law does not contain such a requirement.

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

The divorce by consent implies mutual consent and *joint request* by spouses. It is not possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings. As per Article 50 of the Family Code, "in case of serious and unswerving consent of the spouses to divorce, the court shall grant divorce without seeking their grounds for the dissolution of marriage."

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

Divorce by consent implies general consent on every of its aspects and on the major consequences included in the mandatory contents of the agreement. This follows from the requirement of mutual consent in Article 50 of the Family Code. The mutuality of consent is part of the ground for the divorce. Proceedings for divorce by mutual consent therefore follow the procedure for unilateral applications, since both spouses are petitioners. No dispute exists between them and they have a common will to terminate their marriage.

The law does not give a power to the judge to intervene in the arrangement of its consequences. Divorce by mutual consent is regulated in advance by an agreement, which is reached and drawn up by the spouses and covers the consequences of the divorce related to parent – child relationship as well as to the family name (Article 51, para 1 of the Family Code: 'In a divorce by mutual consent the spouses shall submit an agreement on the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children, as well as the use of the marital home, the maintenance of spouses and the family name. They may agree also on other effects of the divorce.')

The court has the power only to approve this agreement after it is satisfied that the interests of the children have been protected. If this is not the case, the court provides time to the divorcing parents to improve the agreement in light of the interests. If the new agreement does not satisfy the court the application for divorce is to be dismissed.

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

See answer to the Q 22.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

See answer to the Q 24.

36. How is separation between spouses taken into account regarding irretrievable breakdown?

g) Is separation sufficient to establish irretrievable breakdown?

h) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

See answer to the Q 28.

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

The initial claim on the ground of irretrievable breakdown can be converted into a divorce by consent if the spouses are able to reach an agreement. As article 321, para 5 of the Code of Civil Procedure stipulates: 'Where agreement is reached, depending on the content of the said agreement the case (*contested divorce, note is mine*) shall be dismissed or a *proceeding for divorce by mutual consent shall be proceeded with*.' The bridge between these proceedings is a successful mediation that *resulted in agreement on the marriage dissolution as well as on the divorce consequences*. The mediation starts after the court examines the preliminary issues of the claim for divorce. At this stage, as per article 321, para 2 of the Code of Civil Procedure: "… the court shall be *obligated to redirect the parties* to mediation or another procedure for voluntary resolution of the dispute."

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement
- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

Yes, the spouses under the Family Code have the possibility to settle the consequences of divorce (but not the date at which the divorce will be effective) by an agreement reached before or during the marriage or during the divorce proceedings. There is one important point that should be noted, however. The marital agreement, concluded before or during the marriage, may settle only the financial and property effects of the divorce, but not the child care, residence and contact matters (Article 38, para 1 of the Family Code). The child care, residence and contact matters should be part of a specific agreement between parents reached in the course (contested divorce) or at the start (consensual divorce) of the divorce proceedings.

The new Family Law Code in force in Bulgaria from 1 October 2009 introduced a reform in the *matrimonial property regime*. The compulsory regulation of matrimonial property regime was dismissed. The spouses are now free to choose a regime out of three options: separation, common ownership and matrimonial contract (Article 18, para 1 of the Family Code). The three regimes are also available to spouses, which marriage has been contracted before the new law to enter into force (para 4 of the Transitory and Concluding provisions). The new regulation applies only to persons that are married - that is within a civil marriage since the family legislation in Bulgaria still does not attach consequences to *de facto* families.[516]
The (future) spouses have three options to choose as matrimonial property regime – two statutory and one contractual. The first statutory regime is the community of property. It is the regime in force till 2009 and being set forth by the Family Code of 1985 but with some modifications. It is not a full community but rather a combination between community and separation. This regime is applied (as a legal regime) if neither of the other options is selected by the spouses. The separation of property is the second statutory regime available for opting in. The complete separation of property of spouses during the marriage is the regime in force in Bulgaria till 1968.

The third regime is contractual. The spouses can choose it either prior to contracting the marriage or during the marriage. The agreement should be concluded in a written form registered by a notary. It could cover the whole range of property and financial relationship including maintenance between spouses during the marriage or after its dissolution, i.e. property acquired before the marriage (including its transfer); acquisitions during the marriage; shares of either spouse on the termination of marriage; spouses' debts; maintenance between spouses and child support; other property and financial matters.

There are no limits for the spouses to opt for and opt out of the regime during the marriage (Article 18, para 4 of the Family Code). In order to do that however, the spouses have to be

[516] The same in the judicial practice: Judgments No 459/1990-II Civil division and No 371/ 2.05.1997 of the Supreme Court of Cassation (case No 1165/1996/I Civil division.

in full legal capacity and to make the necessary steps to register the regime chosen by them in the Marriage Certificate as well as in a special Registry laid down by the Family Code (Article 18, paras 3-4 of the Family Code).

- **Before marriage;**

Yes, they have the possibility to settle the financial and property consequences of divorce (but not the date at which the divorce will be effective) by an agreement. The agreement will be valid only if a marriage has been subsequently contracted (Article 40, para 1 of the Family Code).

- **During marriage;**

Yes, the spouses are able to settle the financial and property consequences of divorce (but not the date at which the divorce will be effective) by an agreement concluded during the marriage (Article 40, para 1 of the Family Code).

- **During the divorce proceedings?**

Yes, the spouses are able to settle *all the consequences* of divorce by an agreement reached prior the divorce petition being submitted to the court in the case of *consensual divorce* (Article 51, para 1 of the Family Code) or during the divorce proceedings on *contested divorce* (grounded on irretrievable breakdown).

The Family Code encourages agreements to settle the effects of divorce at any stage of the proceedings (Article 49, para 4). The law particularly pushes the spouses to agree on *consequences related to children*: "Article 59. (1) In the case of divorce, the spouses shall reach mutual consent on the issues related to the upbringing and education of minor children from the marriage in the best interests of the children." The court shall approve the agreement after satisfied by the way the interests of children are protected.

44. If yes, may the judge scrutinize the spousal agreement?

Yes, the judge is obliged to scrutinize the spousal agreement.

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

The judge has a power to scrutinize the spousal agreement on *its conformity both with the law and with the best interests of the children*. The mandatory contents of the agreement both in consensual and contested divorce includes:

- in consensual divorce: "an agreement on the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children, as well as the use of the marital home, the maintenance of spouses and the family name" (Article 51, para 1of the Family Code). Optional contents relates to the other effects of the divorce.
- In contested divorce: "…..the spouses shall reach mutual consent on the issues related to the upbringing and education of minor children from the marriage in the best interests of the children" (Article 59 para 1 of the Family Code).

The agreement must be in compliance with the law regarding:

- *its contents* – all the elements set out in article 51, para 1of the Family Code should be present. There is no such stipulation in regard with the contested divorce. The parents are free to agree on any aspect of parental responsibility. If the agreement is partial, the court will arrange the other aspects.

- *Conformity with the imperative regulations* of the Family Code concerning the:
    - minimum amount of child maintenance (shall be equal to one quarter of the minimum wage) - Article 142, para 2 of the Family Code;
    - prohibition of the rejection of maintenance for future periods - Article 147 of the Family Code;
    - prohibition of the netting of debt against maintenance - Article 148 of the Family Code.

The judge *has no power* to modify the agreement. In case of consensual divorce the judge may only require the spouses to reconsider the agreement (Article 51, para 3 of the Family Code).

There is no such express regulation in the case of divorce due to the irretrievable breakdown. However, both case law and theory indicate that the court has the *same powers* in assessing the agreement as it does in the case of divorce by mutual consent. Since the agreement settles all the consequences of the divorce, it has to guarantee the interests of children and to be complete and not contradictory to the law. Agreement that does not meet these requirements is to be returned to the parties for the purpose of remedying any identified deficiencies. The Supreme Court has held that 'the court, as provided by law, has no authority to transform the agreement or to replace it by any terms of its own, and may instead only instruct the parties as to the remedying of deficiencies ...'.[517] In contrast with the consensual divorce where the court should dismiss the divorce petition if not satisfactory, in contested divorce the court: 1/ approves the partial agreement, if any, and provides judgment on the others or 2/ provides *ex officio* judgment on issues related to child residence, care and contact as well as on child maintenance and the use of the family dwelling: Article 59, para 2 '(2) Failing to reach an agreement under paragraph 1, the court shall rule *ex officio* on which parent the children will live with, on which parent will exercise parental rights, on the measures for the exercise of these rights, as well as on the regime of personal relations between children and parents and the maintenance of the children.' In addition, the Code of Civil Procedure lays down that the: Article 322 '(2) All matrimonial actions may be joined there between. The demands for exercise of parental rights, contact with children and child maintenance, use of the matrimonial home, interspousal maintenance and the surname shall mandatory be brought and examined by such actions.'

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

No, proceeding of legal separation (without dissolution of marriage) does not exist in Bulgarian system.

a. The personal consequences of divorce

[517] Supreme Court, Decision - 60-1987.

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

The marriage is dissolved as soon as the court issues the divorce order (at the date of the court order). No appeal lies against the order granting a divorce by mutual consent (Article 330 (5) Code of Civil Procedure: 'The judgment whereby divorce by mutual consent is granted shall be unappealable'), since the court decree merely ratifies the mutual consent. An agreement regulating the consequences of divorce, which is also confirmed by a court judgment, does not have the same effect and may be modified under another court procedure.

The divorce order based on the irretrievable breakdown of the marriage also takes immediate effect: 'The divorce order shall enter into force even if it has been appealed, provided that the appeal relates only to the issue of fault' (Article 325 of the Code of Civil Procedure).

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

The matrimonial freedom of the ex-spouses is not subject to any limitations.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

The Family Code stipulates that in concluding the marriage, each spouse shall declare if s/he shall keep her/his family name or accept the family name of the other spouse, or add the family name of the spouse to his/her own (Article 12). At the divorce the spouse that has modified his/her name (only) may restore his or her name before marriage (Article 53 of the Family Code) based on a claim before the divorce court (Article 326 of the Code of Civil Procedure).

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

- Residence permit granted to the foreign spouse by marriage?

Two types of residence permit could be granted to the *foreign spouse* by marriage (Articles 24 and 25 of the Foreigners in the Republic of Bulgaria Act). *Long term residence permit* (with duration of one year and possibility to be re issued up till the fifth year of residence) is granted on the basis of article 24, para 1-13 of the Foreigners in the Republic of Bulgaria Act. A *permanent residence permit* could be granted to the foreign spouse if s/he has permanently resided in the territory of Bulgaria for the last 5 years (Article 25, para 1-11 of the Foreigners in the Republic of Bulgaria Act).

The residence permit granted to the foreign spouse *could be revoked* if the marriage has been dissolved prior to the elapse of 5 years after its contracting (Article 40, para 10 of the Foreigners in the Republic of Bulgaria Act).

- Citizenship eventually granted to the foreign spouse by marriage;

Marriage could serve as a ground for acquisition of Bulgarian citizenship to foreign spouse *if complemented by other pre-requisites*. The Citizenship Act of 1998 requires that by the time of application for citizenship *the marriage should have lasted at least three years and should not have been dissolved* (Article 13, para 1 of the Citizenship Act). In addition:

- prior to the date of submission of the application for naturalization, the foreign spouse should have been granted a *permanent or long-term residence permit for the Republic of Bulgaria not less than three years (interpreted in connection with the provisions of the Foreigners in the Republic of Bulgaria Act, it means that prior to the submission of application, the foreign spouse should have resided in Bulgaria for at least 8 years and the marriage should not have been dissolved by this time);*
- the applicant spouse shall meet other requirements set out in Article 12 (i.e. shall be of full age, shall not have been sentenced by a Bulgarian court for a premeditated offence at public law, and not subject to criminal proceedings for such an offence, unless the person has been rehabilitated; shall possess an income and occupation allowing him/her to subsist in the Republic of Bulgaria; shall have a command of the Bulgarian language subject to verification according to a procedure established by an ordinance of the Minister of Education, Youth and Science, and shall have been released from his/her previous citizenship or will be released therefrom at the time of acquisition of Bulgarian citizenship).

The interpretation of the above cited provisions suggests that the divorce has no effect on the citizenship being obtained prior to it.

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

The new Family Code for the first time divided the issues of *residence* and exercise *of parental responsibility (PR)*.[518] This is a step toward accepting the concept of shared exercise of PR after divorce. The former laws were speaking only about the "exercise of parental rights" by one of the parents. Still the position of sole exercise dominates but the law does not prevent the parents divorcing on mutual consent to agree on shared exercise of PR. The approval of the agreement will depend on the view of the judge if in that way the interests of children are met. The same would apply in the case of contested divorce if agreement could be reached and approved by the judge.

The common case, however, is the residence and the exercise of PR to be vested on the one parent. This does not mean that the parent is entitled to relocate the child to other jurisdiction on its own motion. The consent of the other parent is required and if not obtained, the court should decide (Article 127a of the Family Code).

[518] The term used by the statutes, legal theory and case law is 'parental rights and obligations' but not 'parental responsibility'. The concept and the contents are one and the same.

52. Does divorce produce automatic effects regarding parental responsibility?

The divorce does not automatically affect the PR. Both parents continue to be holders of PR, however, only one of them will continue to exercise the PR, whilst for the other a contact regime should be established. This arrangement, including the one of the child residence, should be part of the divorce order. Therefore the effects of the divorce on the PR should be attributed to the divorce order.

53. Can the exercise of parental responsibility be subject to a parental agreement?

Yes, the exercise of parental responsibility can be a subject to a parental agreement no matter if the divorce is consensual or contested. It is so requested by article 51, para 1 of the Family Code as far as the *consensual* divorce is concerned: 'In case of divorce on mutual consent, the spouses shall produce an agreement about the place of residence of the children, exercising the parental rights, the personal relations and the children's support, as well as about using the family home, the spouse's alimony and the family name. They may agree about other consequences of the divorce.' Without such agreement in fact, this divorce is not possible.
As far as the contested divorce is concerned, the law encourages the parents to agree on the exercise of parental responsibility. As per article 59 of the Family Code: 'In case of divorce (*due to irretrievable breakdown*), the spouses *shall decide by mutual agreement* on the issues of upbringing and education of the minor children from the matrimony in their interest. The court shall confirm the agreement after being satisfied if the interests of the children have been protected. The court may request an opinion from the Social Assistance Directorate (Article 49, para 5).

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Both in consensual and contested divorce the judge is vested with the power to scrutinize this agreement. Briefly, the judge has no power to modify the agreement in both divorces. *See more in the answer to Q 45.*

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

Yes, in contested divorce, if parents can not agree on the exercise of parental responsibility or can agree partially, the court is obliged to hold on this issue *no matter if being requested* by parent/s or not. As stipulated by article 59, para 2 of the Family Code: 'failing to reach an agreement …., the court shall rule *ex officio* on the residence of children, on the exercise parental rights, on the measures for the exercise of these rights, as well as on the regime of personal relations between children and parents and the maintenance of the children.' The same is envisaged by article 322, para 2 of the Code on Civil Procedure).

The arrangement of the exercise of parental responsibility is entirely a matter for agreement of both parents in the divorce based on mutual consent (Article 51, para 1 of the Family Code).

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

Deciding on the exercise of parental responsibility (PR), the judge shall estimate all the circumstances in the interest of the children taking into consideration the following factors:

- the educational qualities of the parents,
- the care provided to this moment,
- the attitude towards the children,
- the will of the parents,
- the children's attachment to the parents,
- the sex and age of the children,
- the possibilities for help from third persons – close people to the parents,
- the social environment and the material opportunities of parents (Article 59, para 4 of the Family Code).

The Bulgarian legal system does not recognize the concept of deprivation of exercise of PR but rather the concept of deprivation of parental rights. The system still applies the sole exercise of PR after the divorce that means that the other parent is not deprived but is not vested with the exercise. S/he continues to be a holder of parental rights notwithstanding not exercising them.

The misbehaviour of the parent toward the other parent – i.e. parental alienation behaviour or domestic violence, should be taken into consideration, though not explicitly stated in the law.[519]

The Family Code provides for two types of discharge of parental rights: restriction and deprivation. Both are subject of different proceedings and can not be adjudicated within the divorce proceedings. The restriction or deprivation of parental rights is based on the parent's behaviour towards the child and not on the behaviour of one parent against the other. The grounds for modification of parental rights are two types of parental behaviour, which affects the interests of children. In the first place, this is the faulty behaviour of the parent - "…where the behaviour of the parent jeopardizes the personality, upbringing, health or property of the child" (Article 131, para1 of the Family Code). In the second place comes non-faulty behaviour, which, however, also generates a risk for the child – "...where the parent, due to long physical or mental illness or to prolonged absence or other objective reasons is unable to exercise his or her parental rights' (Article 131, para2). Under such assumptions the court "decrees appropriate measures in the interest of the child: discharges some rights or conditions them, or transfers some rights to third person and where necessary places the child in a suitable place". The restriction of parental rights constitutes a temporary seizure of some parental authorities in the interest of the child.

[519] Supreme Court of Cassation Decision No 26-2010-IV Civil division.

As per article 132 of the Family Code: "The parent may be **deprived** of parental rights: 1. In exceptionally severe cases under the Article 131 and 2.Where, without a valid reason, s/he continuously does not provide care and maintenance to the child."

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

The parent that does not exercise PR is vested with the contact with child/ren. The regime of personal relations between the children and the parent is a mandatory part of the court order bearing in mind that the law applies the concept of sole exercise of PR (Article 59, para 2 of the Family Code). The new Family Code raises the significance of the issue of contact by improving the statutory regime for its arrangement. The law stipulates that: 'the determination of the regime of the personal relations between the parents and the children shall include determination of a period or days, in which the parent may see and take the children, including the school holidays, official holidays and personal holidays of the child, as well as during some other time (Article 59, para 3).

In all cases of restriction or deprivation of parental rights the court also arranges the contact between the parent and the child. The legal theory suggests that the court should make the contact arrangements if it is in the interests of the child.[520] The contact arrangements could be modified subject to the change of circumstances.

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

The following arrangements are legally available to parents in order to organise residence of children after divorce:

- usual residence with visit and contact – it is almost the universal arrangement;
- shared residence – available in theory, most probable if parents could reach an agreement on the exercise of PR;
- residence granted to a third party – it is possible. As per Article 59, para 7 of the Family Code: 'Exceptionally, if the children's interests impose this, the court may order that they should live with grand parents, or the family of other relatives or close people, with their agreement. In case, that this is not possible, the child shall be placed in a foster family or in a specialized institution, indicated by the Social Assistance Directorate. In any case, the court shall determine an appropriate regime of personal relations between the child and the parents.'

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

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[520] Nenova, L. (1994) *Family Law*, p. 443.

The arrangements regarding the residence of the child can be decided by parental agreement. It is a mandatory part of the agreement within the consensual divorce. It is so requested by article 51, para 1 of the Family Code: 'In case of divorce on mutual consent, the spouses shall produce an agreement about the place of residence of the children, exercising the parental rights, the personal relations and the children's support, as well as about using the family home, the spouse's alimony and the family name."

As far as the contested divorce is concerned, the parents may agree on every aspect of PR after the divorce (Article 59, para 1 of the Family Code). If they have agreed only on residence and the judge approves such an arrangement, the agreement will become part of the divorce order dealing with consequences of divorce.

Both in consensual and contested divorce the judge is vested with the power to scrutinize this agreement. Briefly, the judge has no power to modify the agreement in both divorces. *See more in the answers to Q 45, 53 and 55.*

The parent with residence has no power to decide on child relocation abroad. The consent of the other parent (if s/he is not deprived by parental rights) is required and if not obtained, the court should decide (Article 127a of the Family Code).

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

The following guarantees are provided by the Family Code: 'if this is needed, the court shall determine appropriate protection measures to provide implementation of the contact order, as:
1. personal relations to take place at the presence of a certain person;
2. personal relations to take place at a certain place;
3. taking the costs for the child's trip, if this is necessary, also of the person, accompanying him/her (Article 59, para 8).

If the circumstances change, the court, upon a request of one of the parents, upon request of the Social Assistance Directorate, or by right of office, may amend the measures, ordered before and determine new ones (Article 59, para 9).

No explicit sanctions are provided if one parent does not fulfil his/her duty to maintain relationship with his/her child. However, such behaviour could ground a case for modification of PR.

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

The settlement of only one financial consequence of marriage breakdown should be made in the procedure for granting of the divorce. It is the decision on maintenance obligations of the former spouses – it should be part of the divorce order.

The maintenance could be decided by the divorce court if no agreement has been reached by the spouses in divorce due to irretrievable breakdown. The maintenance arrangements could be part of the agreement, if any, of spouses on the consequences of divorce. The only requirement is the agreement to correspond to the statutory provisions (see more in the answer to the Q 45). The judge is obliged to scrutinize this part of the agreement. In consensual divorce – if the judge is not satisfied by its compliance with the law the parties should revise it in the proposed time limit.

The provision of maintenance after divorce may be a subject of the marital contract, if any. Such an agreement must be in compliance with the imperative provisions of the law (i.e. that prohibit refusal of maintenance for the future) but may contain better protection of the creditor spouse (i.e. maintenance for an able-bodied or 'guilty' spouse, for a longer term)(Article 38, para 1 – 6 of the Family Code). The spouses that had concluded a marital contract are free to modify it in the agreement within a consensual divorce.

The settlement of the other financial consequences of marriage breakdown – i.e. compensation claims to personal assets of the spouse, redistribution of shares of common property is made in either within the divorce proceedings – subject to agreement between spouses or to the judge's opinion (*because this is not a mandatory part of the divorce order*) or in a distinct proceedings subsequent to divorce.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :

- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

- **Compensation:**

Yes, the ex- spouses are entitled to compensation. The entitlement depends on the *regime of property relations* that is in force during the marriage.

Under the **community of property regime**, either spouse is entitled to receive a *portion of the value of the personal belongings (property)* acquired during the marriage necessary for the professional needs of the other spouse, his/her trade / enterprise and of his/her takings, if they are of a considerable value and s/he has *contributed* to their acquisition with his/her labour, means or work at the household. The action may also be brought before the divorce proceedings where the behaviour of the spouse who has acquired the property puts in jeopardy the interests of the other spouse or the children (Article 30 of the Family Code).

If personal assets have been used for investments in the *community property*, the husband that has invested his/her personal property is also entitled to compensation but only after the divorce. The judicial practice considers that in such case the spouse has acted within the common duty of the spouses to ensure the welfare of the family and to take care for the rearing up, bringing and support of children by reciprocal goodwill and mutual efforts and according to each other's capabilities, property and income (Article 17 of the Family Code). The Supreme Court of Cassation has also an established practice (cases where a spouse has invested personal money to pay a common debt) to acknowledge the compensation right to the level of the proved injustice enrichment of the other spouse (Re: judgments No 209/1988-I; no 88/1992-II; No 495/1992-II; No 799/1992-I; No 674/2000-II, No 603/2002-I, and others).[521] The Supreme Court of Cassation (i.e. decision No 59/2010-IV) also admits compensation claims based on the common statutory grounds for unjust enrichment of the Obligations and Contracts Law (Articles 55 and 59). The compensation in this case will be nominal.

Any spouse can also be compensated by redistribution of shares of the common property after the divorce (Article 29 of the Family Code). In principle, shares are established equal after the termination of the community of property following the divorce (Article 28 of the Family Code). The spouses can not agree on different shares after the marriage dissolution[522] but difference in shares could be established based on a court judgment if only the statutory grounds are satisfied. Difference in shares could be established based on two grounds stipulated by article 29 of the Family Code. In case of termination of the matrimonial community property by divorce the court may assign a larger share to the ex-spouse that will exercise the parental responsibility, if this imposes on him/her serious hardship (Article 29, para1 of the Family Code). The judicial practice is firm that the sole exercise of the PR does not establish a claim for a larger share. The exercise needs to impose a serious hardship for the parent in cases for instance – children have special needs, health problems etc.[523] Secondly, the court may adjudge a larger share of the common property to one of the spouses where his/her contribution to its acquisition is considerably larger than the one of the other spouse (Article 29, para 3 of the Family Code). The judicial practice is firm that the plaintiff should prove a considerably larger contribution in to the community of property in order to have a successful claim. The larger income is not enough.[524]

Under the regime of *separation*, each of the spouses shall have the right to receive part of the *value of the all acquired property* by the other one during the matrimony, as far as s/he has contributed by labour, by his/her means, care after the children, by work in the household or any other way (Article 33, para 2 of the Family Code). Compensation claim may arise also on the ground of personal investment in common debt (Article 36, para 2 of the Family Code).

In the case property relations during the marriage are governed by a marital contract, any compensation rights could be agreed by the spouses.

The law allows for one more option for compensation. Donations made in relation or during the matrimony of a spouse, may be repealed after the divorce in cases, indicated in the civil

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[521] See: Venedikov, P. (2000). Issues of the Matrimonial Community of Property. Pp. 39-40.
[522] It could be done only if the spouses have chosen the contractual regime.
[523] Re: judgment of the Supreme Court No 908/1995-I Civil division.
[524] Re: judgment 1065/1998-II of the Supreme Court of Cassation.

laws (Article 227 of the Obligations and Contracts Law), or if the repeal has been envisaged in the donation agreement or the matrimony contract (Article 55 of the Family Code).

- **Maintenance:**

Following the divorce the former spouse is entitled to maintenance if he/she is not able to work or to support him/herself from the own assets (Article 139 of the Family Code). The law contains no provision regulating the situation where employment disability occurs during the marriage or is in relation of causality to marriage.[525] The court interprets employment disability as an objective condition, i.e. a position where an individual is unable to work, usually for reasons of ill-health. Employment disabilities may be continuous or temporary. Pregnancy and maternity are considered to be a temporary disability coinciding within the respective periods of leave set out in the Labour Code (for pregnancy and delivery 410 calendar days, 45 of them prior to delivery).[526] Where a mother used unpaid maternity leave to raise a child of 2-3 years of age, the Supreme Court held that 'the mother is able-bodied, although she may have difficulty in supporting herself during this period. However, this does not entitle her to seek maintenance from her former husband'.[527]

The former spouse will owe maintenance only if there are no children or parents able to provide it – the ex spouse comes after these relatives as per article 140, para 1 of the Family Code.[528] The right to maintenance is acquired only by the 'innocent' party in a divorce. Under Article 145, pare 1 of the Family Code: 'Only the spouse who has not been guilty for the divorce is entitled to maintenance'. If the issue of marital fault has not been addressed, the maintenance will be arranged on the basis of needs. Where both spouses are found responsible for the marriage breakdown they do not owe maintenance to each other. The right to maintenance of the former spouse shall be terminated, when he/she contracts a matrimony (Article 145, para 3 of the Family Code).

The provision of maintenance after divorce may be a subject of the marital contract. Such an agreement must be in compliance with the imperative provisions of the law (i.e. that prohibit refusal of maintenance for the future) but may contain better protection of the creditor spouse (i.e. maintenance for an able-bodied or 'guilty' spouse, for a longer term)(Article 38, para 1 – 6 of the Family Code).

- **Compensation of rights to pension benefits:**

Pension rights are individual. The post-divorce distribution of spousal property, pension rights and social security benefits is of only indirect relevance, namely as an indication of a spouse's ability to provide for himself/herself from his/her own property and, in this sense, his/her need of maintenance. The absence of pension rights (or other social security benefits) related to marriage is bound to constitute a ground for maintenance since this will provide substantiation of the right: employment disability and inability to support oneself from the property.

- **Damages:**

[525] Supreme Court Decision No-2914-1972- II, No-2585-1973-II.
[526] Supreme Court, Decision No -5-1970.
[527] Supreme Court, Decision No -13-1979-II, No-77-1980-II.
[528] See also: Ruling of the Supreme Court of Cassation 127 - 31.01.2012 on the claim 174/2011 – III.

Only if agreed in the marital contract.

- **Any other payment or property rights?**

N/A.

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

Both are possible.

The *maintenance* claim in divorce based on *irretrievable breakdown* is among the **compulsory** issues (*ex officio* if the spouses have failed to claim) that are dealt with by the divorce court: Article 322 (2) All matrimonial actions may be joined there between. The demands for exercise of parental rights, interspousal personal relations and child maintenance, use of the matrimonial home, interspousal maintenance and the surname shall mandatorily be brought and examined by such actions (Code of the Civil Procedure).

The maintenance between spouses is part of the **mandatory** contents of the agreement in consensual divorce (Article 51, para 1 of the Family Code).

During the marriage the spouses share the obligation 'through mutual understanding and common efforts and according to their abilities, property and incomes to provide the family welfare and to take care of the upbringing, fostering and education and support of the children' (Article 17 of the Family Code). In addition the Family Code places the spouse at the first line in the lists of persons obliged to provide and entitled to family maintenance (Articles 140-1 and 141-1 of the Family Code). Therefore, either spouse, may claim *maintenance during the marriage* if the other spouse does not provide it on his/her own motion and the petitioner is not able to work or to support him/herself from the own assets (Article 139 of the Family Code).

Similar is the philosophy behind another provision that stipulates for a *compensation claim* to be made *during the marriage.* Either spouse shall have the right to receive *part of the value of the objects for exercising profession or trade and of the receiving of the other spouse, acquired during the matrimony,* if they have significant value and he/she has contributed for their acquiring by his/her labour, by his/her means, by the care after the children or by his/her work in the household. This claim may be demanded before the divorce, if the behaviour of the spouse, who has acquired the property, puts in danger the interests of the other spouse and the children (Article 30, para 1 of the Family Code).

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

The maintenance claim should be introduced *during the divorce proceeding* since it is one of the mandatory issues to be dealt with by the divorce court. See also the answer to Q 61 -

63.[529] Any claim for revision of the maintenance is admissible afterwards. Where no provision for maintenance has been made but an employment disability occurs within the time limit prescribed by law (3 years after divorce), maintenance is due only where such disability is related to the marriage. The court may extend the term for the provision of maintenance, if the ex-spouse creditor is in an extremely difficult situation and the debtor ex-spouse may provide it without special difficulties (Article 145, para 2 of the Family Code). The claim should be submitted within the time limit of 3 years after the divorce.

A compensation claim to receive *part of the value of the objects for exercising profession or trade and of the receiving of the other spouse, acquired during the matrimony,* if they have significant value and he/she has contributed for their acquiring by his/her labour, by his/her means, by the care after the children or by his/her work in the household, may be made after the divorce being granted but within the time limit of one year after marriage dissolution (Article 31 of the Family Code).

Redistribution of shares of the common property may be claimed *only* after the divorce but *within the time limit of one year* starting from:

- the marriage dissolution in the case of contribution to its acquisition is considerably larger than the one of the other spouse (Article 29, para 3 of the Family Code)
- after granting the exercise of the parental responsibility, if this imposes serious hardship on the parent in question (Article 29, para1 of the Family Code).

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

The former spouse owes maintenance only if s/he is able to provide it and limited to his/her ability (Article 142, para 1 of the Family Code: "The amount of maintenance is determined according to the needs of the person entitled to it and the means of the person liable to provide it"). In case of change in the circumstances, the adjudicated support or the supplement to it may be amended or terminated (Article 150 of the Family Code).

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

If the applicant spouse is found guilty for the marriage breakdown, s/he will be deprived from obtaining maintenance from the other spouse. Deprivation could occur also in the following circumstances: if the creditor has committed an offence against the debtor, against his/her spouse, descendent or ascendant persons (Article 151, para 1 of the Family Code) and if the creditor contracts matrimony (Article 145, para 3 of the Family Code).

Deprivation of compensation could be based on the lack of contribution to the personal assets / finances of the other spouse.

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

[529] See also: Ruling of the Supreme Court of Cassation N118 -16.02.2012 on the case N 536/2011 – III.

Yes, the related provisions of the Family Code seek to establish a balance between the two ex-spouses personal assets. Under the each of the three matrimonial property regimes: common ownership, separation and contractual, spouses can acquire personal assets. The law seeks balance based on the following criteria:

- respect and protection of private property,
- respect of the contribution/participation of the non–owner spouse to the acquisition,
- any means of participation are relevant: labour, money, care after the children or by work in the household.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

The rules organising compensation entitlement are part of *regime of property relations* that is in force during the marriage as stipulated by the Family Code. The specific rules in regard with the liquidation of matrimonial assets are placed in the Family Code. See more details in the answer to Q 62.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

There is no such a statistics or survey – to show the correlation between the ground for divorce and the incidence on compensation.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

The shape of the compensation is fixed in the law. Multiply shapes are available (cash in lump sum and monthly payments as well a share in real property). These do not depend on the grounds for divorce. In consensual divorce the compensation/maintenance or other financial obligations between the spouses may be fixed in the agreement and thus their shape and value depend on the negotiation power of the spouses. It is always possible, however, in both types of divorce, these issues to be settled by the judge in a separate proceeding subsequent to the one of divorce.

The shape of compensation depends on the type of the matrimonial property regime chosen by the spouses. If compensation is ordered from the personal assets of the other spouse it is in a form of money (cash). Under the community of property regime (Article 30 of the Family Code) the non owner spouse is entitled to receive a *portion of the value of the personal belongings (property).*

This portion is calculated on the basis of the value of particular personal assets only:

- that are necessary for the professional needs of the other spouse and
- that are for his/her trade and included in his/her / enterprise and
- of his/her takings.

Pre-conditionals for the compensation are:

- the personal assets are acquired during the marriage, and,
- they are of a considerable value and

- the other spouse has *contributed* to their acquisition with his/her labour, means or work at the household.

Under the regime of *separation*, each of the spouses shall have the right to receive part of the *value of the all acquired property* by the other one during the marriage, as far as s/he has contributed by labour, by his/her means, care after the children, by work in the household or any other way (Article 33, para 2 of the Family Code).

The compensation is shaped in cash also where granted on the basis of unjust enrichment.

The compensation may be order in a shape of share of real property only if the applicable matrimonial property regime chosen by the spouses is community of property. The court may order re-distribution of the shares of spouses in common property acquired during the marriage after its termination following the divorce. See more in the answer to the Q 62.

The amount of maintenance should be fixed in accordance with the needs of the claimant and the means of the indebted party. No model for the calculation of maintenance is prescribed by law. The amount is fixed by the court (if no agreement has been reached), not by formal mathematical criteria or percentages, but by reference to the specifically identified needs of the claimant and the capacity of the debtor (needs/capacity ratio). "The needs of individuals are determined on the basis of their typical living conditions, taking into account age, education and the other circumstances of the case. Maintenance has to be fixed in such a way as not to encourage an extravagant lifestyle or provide opportunities for expenditure for purposes other than maintenance".[530] As for the capacity of debtor the Supreme Court says: "The criterion for the amount of the maintenance, i.e. the average monthly earned income during the last 12 months before the court decision, is in fact a measure (an indicator) of the capacity of the party owing maintenance …".[531] Moreover, the Supreme Court stipulates that: 'the capability of persons owing maintenance is determined by their income, financial position and professional qualifications. The income generated from assets, bank deposits and property itself is taken into account in identifying a specific capability'.[532] And: 'The amount of the maintenance is determined by the needs of the party claiming maintenance, but may not exceed the capacity and capability of the debtor'.[533]

The amount of maintenance is fixed in cash (in majority of cases) and provided on monthly basis (Article 146, para 1 of the Family Code).

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

The Family Law allows **the court** to allocate the family home to one spouse for property/ use or renting. This ruling is applied only in cases of divorce due to irretrievable breakdown where there is no agreement on the issue because the consequences of the divorce based on mutual consent are to be agreed by the spouses.

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[530] Supreme Court, Decision No-5-1970- § 4.
[531] Supreme Court, Decision No -548-1980.
[532] Supreme Court, Decision No-5-1970- § 5.
[533] Supreme Court, Decision No -464-1986.

First of all, the divorce court orders *ex officio* *the use* (but not the ownership) of the matrimonial home where there are children of the marriage below the age of 18. The parent with the exercise of the parental responsibility (PR) after the divorce has the preferential right to use the matrimonial home.[534] The law specifically governs three situations. Where the matrimonial home belongs to one of the ex-spouses, the court may assign the use of it to the other spouse, to whom the exercise of parental rights has been granted, until s/he continues to do so. Usually, the use will last till children reach the age of majority (18 years) (Article 56 para 2 of the Family Code). In case the matrimonial home belongs to close relatives of one of the spouses, the court may assign the use of it to the other spouse to whom the exercise of the parental rights has been granted but only for up to one year time (Article 56 para 3 of the Family Code). In both cases the parent (ex-spouse) non-owner of the home should pay a rent for her/his part of the home (Article 57 of the Family Code).[535] The use of the matrimonial home may be terminated before the expiry of the term, where the beneficiary enters into a new marriage (Article 56 para 4 of the Family Code). If the matrimonial home is community of property the interests of minor children will guide the distribution of its use (Article 56 para 5 of the Family Code).

If there are no children of the marriage below the age of 18, the use of family home will be allocated based on the 3 criteria: indivisibility of the use of the matrimonial home, housing need and specific claim for the allocation of the use (Article 56 para 1 of the Family Code). Where the family home is common property other issues should also be considered such as: the fault for the marriage breakdown (if any), health status of spouses and others (Article 56 para 5 of the Family Code).[536]

As far as the ownership of the family home is concerned, there is a specific regulation of the Code of Civil Procedure (article 349/1) on the allocation of the matrimonial home to a spouse during the proceedings for the division of the community or property (converted to joint property after the divorce or a death of a spouse). The statutory preconditions for the ex- (or survived) spouse to receive the matrimonial home into his/her share are as follows: 1/ s/he to be assigned with the exercise of PR, 2/ not to own lodging, 3/ the home to be indivisible.

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Yes, the provision of maintenance or other financial obligations after divorce may be a subject of the marital contract. Such an agreement must be in compliance with the imperative provisions of the law (i.e. that prohibit refusal of maintenance for the future) but may contain better protection of the creditor spouse (i.e. maintenance for an able-bodied or 'guilty' spouse, for a longer term etc.)(Article 38, para 1 – 6 of the Family Code).

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

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[534] Re: rulings of the Supreme Court No 12/1971 and No 5/1976.
[535] Re: judgment of the Supreme Court of Cassation No 1813/2002-IV.
[536] Re: judgments of the Supreme Court No 1327/1994-II, No 1205/1995-II, No 921-1996-II.

The judge is vested with the power to scrutinize the agreement on maintenance in both consensual and contested divorce. The compensation claims should not be part of mandatory contents of the agreement. As in all cases illustrated so far, the judge may ask the spouses to reconsider the agreement if it is contrary to the law. If the spouses do not modify the agreement, the judge dismisses the claim for consensual divorce but decides on the maintenance in contested divorce.

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets

No, there is no such explicit obligation for the spouses. The petitioner should produce evidence about his/her own income and that of their former spouse. The respondent has no obligation to produce evidence of his or her income. The court may, at the request of the applicant, instruct the respondent to produce evidence of his or her income and assets.

The court may issue the applicant with a certificate enabling him or her to obtain indirect information about the income of the debtor by checking tax declaration, social security contributions (if any) and others. In maintenance claims, the evidence presented in divorce proceedings about the property of spouses (which was provided in order to determine the scope of the matrimonial community of property) can also be regarded as of a circumstantial nature.

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

For the statutory criteria to evaluate the amount of the due compensation, please see the answer to Q 62.

There are no statutory criteria in order to evaluate the amount of the due maintenance. The general stipulation of the Family Code is that:"The amount of maintenance is determined according to the needs of the person entitled to it and the means of the person liable to provide it"(Article 142, para 1). Criteria are established within the case law. For instance, age and health are of importance only inasmuch as they constitute factors indirectly determining the need for maintenance. According to the Supreme Court, 'an individual's needs are determined in accordance with his/her normal (typical) living conditions, bearing in mind his/her age, educational background and other circumstances in the case. Needs are always specific'.[537] The duration of marriage and the raising of children are also of relevance: 'Where a wife finds it impossible to maintain herself from income and assets because she is bringing up children and this circumstance is found to have been of relevance even before the de facto separation, her husband will be liable to maintain both her and the children after separation. In such cases, the entitlement to maintenance is based on the legal circumstances

[537] Supreme Court decision No -5-1970.

of the family, which made it impossible for the wife to maintain herself because she was fulfilling her duty to care for the children.'[538]

See more in the answer to the Q 70.

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

Two grounds are laid down by the Family Code for the revision of the maintenance amount:

- The court may extend the term for the provision of maintenance, if the ex-spouse creditor is in an extremely difficult situation and the debtor ex-spouse may provide it without special difficulties (Article 145, para 2 of the Family Code). The claim should be submitted within the time limit of 3 years after the divorce.
- In case of change in the circumstances, the adjudicated support or the supplement to it may be amended or terminated (Article 150 of the Family Code).

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

The obligation to maintain the child is linked to *the parental responsibility but the residence of the child is also meaningful*. The holder of PR / parental rights is obliged to provide child support. If the court orders (in the case of no agreement) the child support, it calculates the amount that satisfies the needs of the child, first ('The amount of the support must provide conditions of life for the child, which s/he has had before the divorce, unless this would create special difficulties of the parent, owing the support' (Article 59, para 5 of the Family Code). The judge then divides the amount between both parents. The parent with residence is considered to provide his/her share in kind – by the care, education and supervision of the child. The parent not living with the child should pay his/her share in cash.

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

The major instrument to arrange the maintenance of the child is the maintenance order.

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

The question is not quite clear.

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

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[538] Supreme Court decision No.-891-1976.

The judge is vested with the power to scrutinize the agreement on child maintenance both consensual and contested divorce. It is be part of mandatory contents of the agreement. As in all cases illustrated so far, the judge may ask the spouses to reconsider the agreement if it is contrary to the law or against the best interests of the child. If the spouses do not modify the agreement, the judge dismisses the claim for consensual divorce but decides on the maintenance in contested divorce.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

No, it may not.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

The common district courts have jurisdiction over divorce proceedings (Article 103 of the Code of Procedure Code). Specialised panels (matrimonial sections) have been established in the courts of some regional centres and also in Sofia with sole jurisdiction to hear matrimonial cases.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

No, the cooling period was abolished by the Code on Civil Procedure of 2008.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

As article 321 of the Code on Civil Procedure reads: at the first hearing the court shall be obligated to redirect the parties to mediation or another procedure for voluntary resolution of the dispute. If the parties reach agreement on commencement of mediation or another procedure for voluntary resolution of the dispute, the case shall be stayed. Each of the parties may move for a resumption of the proceeding in the case within six months. Unless such a motion is made, the case shall be dismissed. Where agreement is reached, depending on the content of the said agreement the case shall be dismissed or a proceeding for divorce by mutual consent shall be proceeded with. If the parties fail to reach agreement on a mediation procedure or another procedure for voluntary resolution of the dispute, the examination of the case shall continue.

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

The Code on Civil Procedure (article 323) provides for such option. The court seized by claim for divorce due to irretrievable breakdown shall rule on interim measures regarding the maintenance of spouses and children, the matrimonial home and the use of the property acquired during the marriage, as well as regarding the care of the children if addressed by such a petition. The court shall pronounce on any such petition during the hearing during which the said petition is submitted, unless additional evidence has to be taken. In such case, a new hearing shall be scheduled within two weeks. The ruling on interim orders shall be unappealable but may be modified by the same court.

88. Is appeal available against the divorce order or against an out of court divorce decision?

The divorce order shall enter into effect, even if it is appealed solely in its parts concerning the fault or the exercise of parental responsibility (Article 325 of the Code of Civil Procedure).

The divorce order on divorce by mutual consent can not be appealed (Article 330 of the Code of Civil Procedure).

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene
- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**

If yes, on which grounds?

The social services (Social Assistance Directorate) only can intervene in the divorce proceedings if invited by the judge to submit an opinion on the best interests of the child where: the judge examines the agreement on parental responsibility in both cases of divorce, the judge makes an order on PR if no agreement has been reached in the divorce due to irretrievable breakdown (Articles 49, para 5, 51, para 2, 59 para 5 of the Family Code).

The Social Assistance Directorate can submit a petition before the court to modify the measures regarding the exercise of parental responsibility in case of change in the circumstances (Article 59, para 9 of the Family Code).

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

The Child Protection Act (2000) introduced a general rule for participation of the child in judicial and administrative procedures. As Article 15 says: (1) In all cases of administrative or judicial proceedings affecting the rights and interests of a child should provide for an obligatory hearing of the child, provided s/he has reached the age of 10, unless that proves

harmful to his/her interests. (2) In cases where the child has not reached the age of 10, s/he may be given a hearing depending on the level of his/her development. The decision to hear the child shall be substantiated."
More specifically, the Family Code provides for hearing of the child in cases of divorce where the issue of parental responsibilities is decided (Article 59, para 6):

..... (6) The court shall hear the parents, as well as the children under the provisions of Art. 15 of the Child Protection Act take a statement from the Social Assistance Directorate and if it is appropriate, hear also other persons.

The views expressed by the child should be assessed by the judge and taken into consideration in the final judgment. There are no specific methods established for the court in order to assess the child views. The Child Protection Act requires for the presence of a social worker from the Social Assistance Directorate or another appropriate specialist in the child hearing. The judge may seek assistance from them in the formulation of questions or in assessing the child views (Article 15, para 4 of the Child Protection Act). Parent/s or the care provider to the child or the next of kin to the child may attend the hearing also if admitted by the judge if this is not against the interests of the child (Article 15, para 5 of the Child Protection Act).

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

- **p) the termination of marriage,**
- **q) financial consequences of divorce,**
- **r) the settlement of matrimonial assets,**
- **s) parental responsibility,**
- **t) children's maintenance?**

Foreign judgment on the **termination of marriage** and on **the parental responsibility** if pronounced in EU member state, will be recognised on the basis of the Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (articles 21-23).

Foreign judgment concerning the **financial consequences of divorce and children's maintenance** if pronounced in EU member state, will be recognised on the basis of the Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Foreign judgment concerning the **settlement of matrimonial assets** should be recognised on the basis of conditions set up in article 117 of the Code of the International Private Law (see below).

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

Please only mention the national general rules and not bilateral conventions signed by your country.

The conditions of recognition of divorce orders from a Third Country (non EU state) are established in the Code of the International Private Law: Article 117 of the CIPL: The judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

1. the foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seized was the only ground for the foreign jurisdiction over disputes in rem;
2. the defendant was served a copy of the statement of action, the parties were duly summonsed, and fundamental principles of Bulgarian law, related to the defence of the said parties, have not been prejudiced;
3. if no effective judgment has been given by a Bulgarian court based on the same facts, involving the same cause of action and between the same parties;
4. if no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought and the enforcement is applied for has been rendered;
5. the recognition or enforcement is not contrary to Bulgarian public policy.

If there is a bilateral convention signed between Bulgaria and the third country it shall **precede** the regulations of the Code of the International Private Law.

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

Yes, as para 5, article 117 of the Code of Private International Law stipulates, the foreign divorce decision be denied recognition in your country because of violation of public order.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Yes, the foreign divorce decisions are subject to registration in the population register and in the marriage certificate. The general rule of the Code of the International Private Law (2005) is that a foreign judgment shall be recognized by the authority whereto the said judgment is presented (Article 118, para of the Code of the International Private Law (CIPL).

The legal recognition of foreign decision about the termination of marriage is made by the Civil Registrar before which it is submitted for the registration of the divorce. The divorcee should submit an application as well as a true copy of the judgment, authenticated by the rendering court, and a certificate issued by the same court, to the effect that the said judgment has taken effect, shall be attached to the application. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria (Article 119, para 2 and 3 of the CIPL).

Should the conditions of recognition of the foreign judgment be raised as the issue in a dispute, an action for ascertainment may be brought before the Sofia City Court (Article 118, para 2 of the CIPL).

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

The registration is a mandatory requirement as far as the enforcement of divorce consequences is concerned. The divorced person is in charge of this procedure.

95. What are the consequences of registration or lack of registration?

The lack of registration may lead to uncertainty in the personal status of ex-spouses and their children. The lack of marriage impediments can not be proved, the changed family name can not appear in the personal documents, the parentage of the next children might be confused as well as the inheritance rights of the ex-spouses.

If the marriage abroad is not registered the divorce is not admissible.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

ENGLAND and WALES

ENGLAND and WALES

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Les auteurs tiennent à remercier David Hodson pour avoir accepté de traiter les questions 8 à 18 et 91 à 95 du rapport. David Hodson est solicitor spécialisé dans les contentieux familiaux internationaux, arbitre et médiateur associé au International Family Law Group LLP et Deputy District judge au Principal Registry of the High Court, Londres.

I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

Les principaux textes de nature législative (*statutes et statutory instruments*) applicable en matière de mariage et divorce sont :

Statutes :

✓ Marriage Act 1836
✓ Births and Deaths Registration Act of 1836
✓ Maintenance Agreement Act 1957
✓ Divorce Reform Act 1969
✓ Family Law reform Act 1969
✓ Matrimonial Proceedings and Property Act 1970
✓ Matrimonial Causes Act 1973
✓ Matrimonial Causes Rules 1977.
✓ Domestic proceedings and Magistrates' Courts Act 1978
✓ Family Proceeding Act 1984.
✓ Child abduction and custody Act 1985
✓ Family Law Act 1986
✓ Family Law Reform Act 1987
✓ Children Act 1989
✓ Child Support Act 1991
✓ Maintenance Enforcement Act 1991
✓ Family Law Act 1996
✓ Trust of Land and Appointment of Trustees Act 1996

✓ Criminal Justice and Court Service Act 2000.
✓ Adoption and Children Act 2002
✓ Nationality, Immigration and Asylum Act 2002.
✓ Divorce (religious) Marriage act 2002
✓ Civil partnership Act 2004
✓ Children Act 2004
✓ Mental Capacity Act 2005.
✓ Human Fertilization and Embryology Act 2008
✓ Child Maintenance and Other Payments Act 2008.

Statutory Instruments :

✓ Family Procedure Rules 1991, SI 1991/1247
✓ Family Proceedings Courts (Children Act) Rules 1991, SI 1991/ 1395
✓ Parental Responsibility Agreements Regulations 1994, SI 1994/3157
✓ Practice Direction (Family Proceedings: Case Management) [1995] 1 WLR 332
✓ Family Proceedings Rules 1999 SI 1999/3491
✓ Family Proceedings (Amendment) Rules 2003, SI 2003/184
✓ Marriage Act 1949 (Remedial) Order 2007, SI 2007/438
✓ Family Proceedings (Amendment) (No 2) Rules 2009, SI 2009/857
✓ Family Procedure Rules 2010, SI 2010/2955

Liste des arrêts cités dans le rapport :

- A v A (Minors) (Shared Residence Order) [2004] EWHC 142.
- A v B (Damages : Paternity) [2007]3 FCR 861.
- Bellinger v Bellinger [2001] 2 FLR 1048.
- Birch v Birch [1992] 1 FLR 564.
- Buffery v Buffery [1988] 2 FLR 365.
- C (A Child) [2006] EWCA Civ 235.
- Cleary v Cleary [1974] 1 All ER 498.
- Ghaidan v Godin-Mendoza [2004] UKHL 30.
- Hoffman v Kreig [1998] ECR 645.
- Hollens v Hollens (1971) SJ 327.
- Hyde v Hyde & Woodmansee LR 1 P & D 130.
- J v V (Disclosure : Offshore Corporations) [2001] 1 FLR 1042.
- Katz v Katz [1972] 3 All ER 219.
- Kelley v Corston [1998] QB 686.
- Lasala v de Lasala [1980] AC 546.
-Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47 CA.
- L-K v K [2006] EWHC 153 (Fam); [2006] 2 FLR 1113.
- MacLeod v MacLeod [2008] UKPC 64.
- Martin v Martin [1977] 3 All ER 762.
- McFarlane v Mc Farlane and Parlour v Parlour [2004] EWCA Civ 872.
- Mesher v Mesher and Hall [1980] 1 All ER 126.
- Miller v Miller; McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618.
- Nottingham CC v P [1993] 2 FLR 134, [1994] 1 FCR 624.
- Offord v Offord (1982) 3 FLR 309.
- Quoraishi v Quoraishi [1985] FLR 780.
- R v Secretary of State for Transport Ex p Factortame (No.4) [1996] ECJ.
- Radmacher v Granatino [2010] UKSC 427.
- Re A (Child of the family) [1998] 1 FLR 347.

- *Re F [2003] EWCA Civ 592.*
- *Re G (Children) (Residence : Same-Sex partners) 2006 FCR 681.*
- *Re H (Shared Residence : Parental Responsibility)[1995] 2 FLR 883.*
- *Re L (A Child) (Contact : Domestic Violence) [2000] 2 FCR 404.*
- *Re M (A minor)(Care Order : Threshold Conditions) [1994] 2 FLR 577, [1994] 2 FCR 871.*
- *Re M (Freezing Order) [2006] 1 FLR 103.*
- *Re P (Section 91(14) Guidelines (Residence and Religious Heritage)[1999]2 FLR 573.*
- *Re P (Terminating Parental responsibility) [1995] 1 FLR 1048, [1995] 3 FCR 753.*
- *SC (A Minor) (Leave to Seek Section 8 Orders) [1994] 1 FLR 96.*
- *Tee v Tee Hillman [1999] 2 FLR 613.*
- *Thyssen-Bornemisza v Thyssen-Bornemisza (No2) [1985] FLR 1069.*
- *Twiname v Twiname [1992] 1 FLR 29.*
- *White v White [2001] 1 AC 596.*
- *Xydhias v Xydhias [1999] 2 All ER 386.*

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

Les principes applicables en la matière avant le *Matrimonial Causes Act 1857* étaient ceux du droit canon. Il est à noter que l'Eglise anglicane restait fermement opposée à l'idée d'une dissolution du mariage par opposition avec la position adoptée par l'Eglise réformée continentale, laquelle avait autorisé le divorce en cas d'adultère, d'abandon d'un des époux ou de violences à l'égard de l'épouse. Seul le divorce *a mensa et thoro* était possible, lequel ne rompait pas le lien et s'apparentait à une séparation de corps.

Le *Matrimonial Causes Act 1857* introduit donc le divorce en droit anglais et abolit le divorce *a mensa et thoro* ainsi que la compétence des juridictions ecclésiastiques en ce domaine. Une juridiction spécifique est crée : la Cour du divorce et des affaires matrimoniales (*Court for Divorce and Matrimonial Causes*), cette compétence sera par la suite transférée à la Chambre de la famille de la *High Court* (*High Court Family Division*). Les causes de divorce qui sont créés par cette loi distinguent la situation de l'époux et de l'épouse. Le mari pouvait obtenir le divorce sur le fondement de l'adultère de sa femme. L'épouse pouvait obtenir le divorce sur le fondement d'un adultère aggravé (par l'inceste ou la bigamie, ou par le fait qu'il soit accompagné soit de violences physiques ou sexuelles commises sur l'épouse soit de l'abandon de cette dernière depuis plus de deux années).

Le *Matrimonial Causes Act 1923* a aligné la situation de l'épouse sur celle du mari, en lui ouvrant la possibilité d'invoquer un adultère simple pour fonder sa demande en divorce.

Le *Matrimonial Causes Act 1937* crée de nouvelles causes de divorce toutes fondées sur l'existence d'une faute conjugale, et la désignation d'un époux fautif (*guilty spouse*). Les nouvelles causes de divorces sont notamment l'abandon d'un époux depuis plus de trois ans, la cruauté ou encore le caractère incurable de l'insanité d'esprit affectant l'un des époux depuis plus de cinq ans.

Après l'échec en 1951 d'une tentative visant à instaurer le divorce sans faute, la réforme majeure en droit du divorce a eu lieu avec le *Divorce Reform Act 1969* et le *Matrimonial Causes Act 1973* qui ont remis à plat tout le droit du divorce. La Loi de 1969 a en apparence

supprimé la faute dans le mariage en instaurant une cause unique de divorce : la rupture irrémédiable du lien matrimonial (*irretrievable breakdown of marriage*)[539]. La loi de 1973 est venue consolider le dispositif mis en place. Il est à noter cependant qu'entre 1937 et 1973 la jurisprudence avait eu l'occasion d'apprécier la notion de faute dans le mariage de manière « souple » contribuant à rendre plus floue la distinction entre époux fautif et époux sans reproche (*innocent spouse*) élaborée par la doctrine fondée sur la faute conjugale (*matrimonial offences doctrine*). La réforme n'a cependant pas permis, en pratique, d'évincer totalement la faute, dans la mesure où, nous le verrons plus loin, celle-ci est débattue au regard des causes invoquées pour prouver la rupture irrémédiable du mariage[540]. Aussi, vingt ans après la réforme la question de la faute dans le divorce s'est à nouveau posée en droit anglais. L'objectif du *Family Law reform Act de 1996*, en supprimant le renvoi systématique à des causes de rupture, était de pacifier la procédure de divorce. Les époux était invité à faire une déclaration de rupture irrémédiable après avoir pris un temps de réflexion au cours duquel la médiation familiale était promue. Cependant les conditions de ce recours à la médiation n'ont pas été définies par le législateur et le coût de cette réforme a eu un effet dissuasif quant à sa mise en œuvre. En 2001 les textes de nature réglementaires qui auraient permis l'entière mise application de cette loi n'avaient toujours pas été adoptés et le Gouvernement a émis le souhait que certaines parties de cette loi soient abrogées par le Parlement afin de faciliter sa mise en application. Aujourd'hui cette loi n'a toujours pas été retravaillée, et la partie II de la loi relative au divorce n'est jamais entrée en vigueur. Certains auteurs considèrent cette loi comme ayant été « abandonnée »[541]. Le droit anglais du divorce est donc toujours régit à l'heure actuelle par les lois de 1969 et 1973.

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

Deux projets de réforme des dispositions applicables aux conventions matrimoniales sont actuellement à l'étude. Les deux ont donné lieu à la réalisation d'un rapport par la *Law Commision* qui est en charge de proposer des réformes au Gouvernement.

Le premier : *Marital Property Agreements* remis le 11 avril 2011 fait un certain nombre de propositions en vue d'une réforme des conventions matrimoniales qu'elles soient anté nuptiales, passées durant le mariage ou au moment de la séparation. Le rapport est disponible en ligne : http://lawcommission.justice.gov.uk/consultations/marital-property-agreements.htm

Le second : *Matrimonial Property, Needs and Agreements* remis le 11 décembre 2012 vient compléter le premier rapport en ajoutant des propositions relatives aux biens propres des époux. Le rapport est disponible en ligne :
http://lawcommission.justice.gov.uk/consultations/matrimonial_property.htm

Par ailleurs, le 24 juillet 2012, David Cameron a annoncé aux médias son intention d'ouvrir le mariage aux couples homosexuels d'ici 2015.

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

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[539] *Family Law reform Act 1969* section 1.
[540] *Family Law reform Act 1969* section 2(1).
[541] J. Herring, *Family law*, Longman Law series, Pearson, 5e éd. 2011, p. 147. Nous retrouvons l'usage du même terme chez A. Bainham, *Children. The Modern Law*, 3e éd. 2005, p. 143.

En Angleterre, le mariage prend fin par le divorce et le *civil partnership* homosexuel par une ordonnance de rupture (*order for dissolution* dit *Final Order*). Pour ces deux formes d'union un assouplissement du lien sans le rompre est organisé.

Il est possible pour des époux qui seraient opposé divorce pour des raisons religieuses ou personnelles d'obtenir une ordonnance de séparation (*Judicial Separation Order*)[542].

Cette ordonnance peut également être obtenue par un couple homosexuel uni par un partenariat civil.

Cette ordonnance est demandée sur le même fondement que le divorce ou le *Final order* : la rupture irrémédiable du lien matrimonial. Elle a pour effet de mettre un terme à l'obligation de cohabitation entre époux/partenaires et permet au juge de rendre des ordonnances visant à organiser la situation patrimoniale du couple séparé.

Cette ordonnance de séparation n'affecte pas les droits successoraux entre conjoints/partenaires, ni les droits à pension de retraite après décès de l'un ou de l'autre.

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

Selon les statistiques 2009 du ministère de la justice, 214 ordonnances de séparation (*Judicial Separation orders*) ont été rendues en 2008, ce qui en fait un mode d'organisation de la séparation conjugale très peu utilisé en Angleterre et Pays de Galles.

Selon les statistiques du Bureau des statistiques nationales (*Office for National Statistics*)[543], 119589 divorces ont été prononcés en 2010, ce qui établit le taux de divorce parmi la population des couples mariés à 11,1 pour 1000.

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

Le mariage n'est pas ouvert aux couples homosexuels, cependant le *Civil Partnership Act 2004*, qui est entré en vigueur le 5 décembre 2005, a offert à ces couples la possibilité d'enregistrer un partenariat (*civil partnership*). Le partenariat civil produit quasiment tous les effets du mariage[544]. À la différence du Pacs en droit français, cette union est exclusivement réservée aux couples homosexuels.

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[542] Sections 17 et 18 du *Matrimonial Causes Act 1973*.
[543] http://www.ons.gov.uk.
[544] La Cour d'Appel (*Court of Appeal*) dans un arrêt *Re G (Children) (Residence : Same-Sex partners) 2006 FCR 681*, a jugé que le partenariat civil ne permettait pas à la partenaire d'une femme ayant bénéficié d'une assistance médicale à la procréation d'être déclarée parent légal de l'enfant, à la différence de l'époux dans les mêmes circonstances.

Tout comme le mariage le partenariat civil peut être annulé[545]. La procédure d'annulation est identique à celle applicable au mariage, cependant la non consommation du partenariat ainsi que l'affection par une maladie sexuelle transmissible ne sont pas des causes de nullité du partenariat, alors qu'elles le sont pour le mariage.
Le partenariat civil prend également fin au décès de l'un ou l'autre des partenaires ou par une ordonnance de présomption de décès[546].

Le partenariat civil peut également être dissout par une ordonnance de dissolution (*order for dissolution* dit *Final order*)[547] qui produit des effets identiques au divorce. Une cause unique de dissolution existe, la rupture irrémédiable du lien. Cependant, à la différence du divorce, l'adultère ne peut être invoqué comme cause de rupture irrémédiable. Cette cause ne figure pas au titre des motifs de rupture[548].

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

Selon l'arrêt de principe en la matière *Hyde v Hyde & Woodmansee (1866)*[549] : « le mariage est l'union pour la vie volontairement consentie par un homme et une femme, à l'exclusion de tout autre »[550]. Cette définition légale du mariage, renvoie au caractère hétérosexuel de l'institution et fonde l'interdiction du mariage homosexuel en Angleterre.

Plus récemment, dans l'arrêt *Bellinger v Bellinger [2001]*[551] le mariage a été définit par Lord Justice Thorpe comme « un contrat choisi par les parties mais réglementé par l'État tant dans sa formation que dans sa dissolution par le divorce, parce qu'il produit des effets sur l'état de la personne duquel dépendent différentes prétentions, avantages et obligations »[552]. Si la référence à la différence de sexes entre époux n'a pas été reprise dans cette affaire, elle a néanmoins été récemment encore réaffirmée dans l'arrêt *Ghaidan v Godin-Mendoza*[553] où il a été jugé que « le mariage est l'union au regard du droit d'un homme et d'une femme. (…) Il est une relation légale entre personnes de sexe opposé »[554]. Le débat entre mariage-contrat et mariage-institution existe également Outre-Manche et dans une très importante affaire *Radmacher v Granatino*[555], Lady Hale a synthétisé la position du droit anglais de la manière suivante : « *le mariage est évidemment un contrat, dans le sens ou chacune des parties doit être d'accord pour le conclure et une fois conclu les deux sont liées par des obligations légales. Mais il est aussi un état ce qui signifie deux choses. Premièrement, les parties ne sont pas*

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[545] Sections 49 et 50 du *Civil Partnership Act 2004*.
[546] Section 55 du *Civil Partnership Act 2004*.
[547] Section 44 du *Civil Partnership Act 2004.*
[548] Section 44(5) du *Civil Partnership Act 2004*.
[549] *Hyde v Hyde & Woodmansee LR 1 P & D 130.*
[550] « *Marriage is the voluntary union for life of one man and one woman to the exclusion of all others* », *Hyde v Hyde & Woodmansee (1866) LR 1 P & D 130* Lord Penzance p. 133.
[551] *Bellinger v Bellinger [2001] 2 FLR 1048.*
[552] « *A contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations* » *Bellinger v Bellinger [2001] 2 FLR 1048* para. 128.
[553] *Ghaidan v Godin-Mendoza [2004] UKHL 30.*
[554] « *Marriage is the lawful union of a man and a woman. (…) It is legal relationship between persons of opposite sex* » *Ghaidan v Godin-Mendoza [2004] UKHL 30.*
[555] *Radmacher v Granatino [2010] UKSC 427.*

entièrement libres de déterminer quelles seront ses conséquences légales à leur égard. Elles contractent dans le cadre légal déterminé par l'État. Deuxièmement, leur mariage produit aussi des conséquences légales à l'égard des tiers et de l'État »[556].

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

b). Rome 3 n'est pas applicable

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

L'Angleterre applique toujours la loi du For. Cependant, lorsqu'un conflit apparaît entre le droit anglais et le droit de l'Union européenne, le droit européen l'emportera sur l'application du droit anglais et ce y compris si la norme de droit anglais a été adoptée après la norme européenne[557].

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

Les parties ne peuvent déterminer la loi applicable au divorce.

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

Les parties ne peuvent déterminer la loi applicable au divorce.

B2. Effets du divorce

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[556] « *Marriage is of course a contract, in a sense that each party must agree to enter it and once entered both are bound by its legal consequences. But it is also a status, this means two things. First the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the State*» *Radmacher v Granatino [2010] UKSC 427* paragraphe 132.

[557] *R v Secretary of State for Transport Ex p Factortame (No.4) [1996] ECJ.*

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

Les principes de droit européen sont applicables en droit anglais. Sont notamment applicables le Règlement (CE) n° 2201/2003 Bruxelles II bis relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et de responsabilité parentale ainsi que le Règlement (CE) n° 4/2009 relatif aux obligations alimentaires.
Le droit interne applicable est contenu principalement dans le *Matrimonial Causes Act 1973* le *Children Act 1989*, et la jurisprudence nationale (*case law*).

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

La partie II du *Matrimonial Causes Act 1973*.

15. Quelle est la loi applicable à la responsabilité parentale ?

Le *Children Act 1989*.

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

Les principales dispositions applicables aux pensions alimentaires en faveur de l'enfant sont organisées par le *Child Support Act 1991*. Celles applicables aux pensions alimentaires et réallocation des biens dans les procédures familiales sont organisées par le *Matrimonial Causes Act 1973*. Celles applicables aux pensions et versements en capital (*lump sum*) ordonnés en cours de mariage sont organisées par le *Domestic Proceedings and Magistrates Courts Act 1978* et celles relatives aux aides financières (*financial relief*) sont organisées par la section 15 et du Schedule 1 du *Children Act 1989*.

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

Non le juge n'est pas tenu de le faire

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

Les instances familiales en droit anglais, comme l'ensemble des procédures, reposent sur un mode de fonctionnement accusatoire. Le juge ne procédera que très rarement à des investigations. Il s'en remet aux avocats des parties pour soulever, constater ou faire valoir l'application ou le contenu d'une disposition de droit étranger.

II. LE DROIT MATERIEL

C. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

En vertu de la section 3 du *Matrimonial Causes Act 1973*[558], une demande en divorce ne peut être introduite durant la première année du mariage, cependant les événements qui se sont déroulés pendant cette période de temps pourront être invoqués pour soutenir une demande ultérieure.

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

Le *Mental Capacity Act 2005* organise les modalités de la représentation d'une personne qui se trouverait de manière temporaire ou permanente dans l'incapacité de prendre certaines décisions pour elle-même[559]. Cette loi prévoit dans ce cas la possibilité pour un tiers, membre de la famille ou professionnel désigné, de se voit nommer représentant de la personne (*deputy*) pour la réalisation ponctuelle d'actes que cette personne ne serait plus en capacité de faire. Cette personne ne perd pas corrélativement sa capacité juridique dans la mesure où elle reste capable de réaliser tous les autres actes. L'ordonnance rendue par la *Court of Protection*, exclusivement compétente en la matière, désignera les actes ou le type d'actes pour lesquels le *deputy* est investi d'un pouvoir de représentation.

Si aucun proche de la personne ne peut assurer cette représentation les services de l'*Official solicitor*[560] prendront le relais et organiseront la désignation d'un *litigation friend* chargé de représenter la personne protégée.

En effet, dans le cadre d'une instance la personne qui souffre d'une altération de ses facultés mentales devient une partie protégée (*protected party*) dont la représentation en justice est assurée en vertu de la Partie 21 du *Civil Procedure Rules*. En vertu de la règle de procédure 21.2 (1) une partie protégée doit être représentée en justice en demande et en défense par un *litigation friend*. A la différence de l'*Official solicitor* qui par nature est compétent pour représenter l'incapable à l'instance, le représentant du majeur protégé (*deputy*) peut exercer les fonctions de *litigation friend* si l'ordonnance qui le désigne le prévoit[561]. A défaut, il devra demander spécifiquement au juge à être désigné par ordonnance judiciaire. Si le *deputy* est le conjoint actuel de la partie protégée, en raison de l'opposition d'intérêts qui existe entre eux, il ne peut être désigné en qualité de *litigation friend*[562], un tiers devra donc être désigné par ordonnance judiciaire selon les modalités prévues par la règle 21.6 des règles de procédure civile (*Civil procedure rules*).

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[558] Tel qu'amendé par le *Family Proceeding Act 1984*.

[559] Les conditions dans lesquelles une personne est considérée comme relevant de cette loi sont visées aux sections 2(1) et 3 du *Mental Capacity Act 2005*.

[560] L'*Official Solicitor* est rattaché au Ministère de la justice. Il a pour mission d'assurer la représentation en justice des personnes les plus vulnérables du royaume laissées sans représentation et donc sans accès au juge. Il intervient principalement pour le compte de majeurs protégés isolés et de mineurs isolés.

[561] Règle 21.5(2) *Civil Procedure Rule*.

[562] Règle 21.4(3)(b) *Civil Procedure Rule*.

En vertu de la règle de procédure 21.3(2), la partie demanderesse ne peut, sauf autorisation judiciaire, introduire une action en justice à l'encontre d'une partie protégée, et pour ce qui nous intéresse une demande de divorce, avant qu'un *litigation friend* ait pu être désigné[563].

Le *Mental Capacity Act 2005* exclut expressément le divorce pour cause de séparation depuis plus de deux ans[564], des décisions qu'un *deputy* peut être autorisé à prendre à l'égard d'une personne qui se trouve, au regard de cette loi, dans l'incapacité de prendre des décisions pour elle-même.

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

Il n'existe qu'une seule cause de divorce (*ground for divorce*) en Angleterre. En vertu de la section 1(1) du *Matrimonial Causes Act 1973* une demande en divorce peut être présentée par l'une ou l'autre des parties au motif de la rupture irrémédiable du lien matrimonial.

Si le droit de l'État ne connaît qu'une seule cause de divorce (rupture irrémédiable du lien matrimonial) répondre aux questions en A1, si le droit de l'État connaît des causes multiples de divorce répondre aux questions en A2

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

Les raisons pour lesquelles un mariage est considéré comme irrémédiablement rompu ont été posées par la section 1(2) du *Matrimonial Causes Act 1973*.
En vertu de cette disposition le juge saisi d'une demande en divorce ne doit pas considérer que le lien matrimonial est irrémédiablement rompu à moins que ne soit établit de manière alternative :

a. que le défendeur a commis un adultère et qu'il est intolérable pour le demandeur de continuer à vivre avec le défendeur. Les conditions posées ici sont cumulatives et l'appréciation du caractère intolérable de la vie commune est d'appréciation subjective. Depuis l'affaire *Cleary v Cleary [1974]*[565], il est cependant établi que les raisons pour lesquelles la vie commune est devenue intolérable pour le demandeur peuvent êtres distinctes de l'adultère. En tout état de cause si les parties ont continué à vivre ensemble pendant six mois après les faits, la preuve de la rupture ne peut plus être rapportée sur le fondement de l'adultère[566]

b. que le défendeur a eu un comportement tel qu'il ne peut raisonnablement pas être attendu du demandeur qu'il continue à vivre avec le défendeur. C'est la cause de rupture qui est la plus souvent soulevée en pratique (voir statistiques *infra*). Il appartient au demandeur d'établir que le défendeur a eu un comportement qui peut

[563] La désignation par ordonnance judiciaire doit être effectuée selon les modalités prévue par la règle de procédure 21.6 *Civil Procedure Rule*.
[564] Section 27(1)(c) du *Mental Capacity Act 2005*. Les conditions dans lesquelles une personne est considérée comme relevant de cette loi sont visées à la section 2(1).
[565] *Cleary v Cleary [1974] 1 All ER 498.*
[566] Section 2(1) du *Matrimonial Causes Act 1973*.

être objectivement considéré comme déraisonnable[567]. Le comportement de chacun est analysé et une réponse déraisonnable à un acte déraisonnable peut faire échec à la demande en divorce[568]. La jurisprudence est abondante et couvre les faits les plus futiles de la vie ordinaire[569] comme les actes les plus graves commis à l'encontre de l'autre époux[570]. Il n'est pas ici question de rechercher la faute de l'autre époux, et le fait que ce dernier n'ai pas conscience de son comportement en raison d'une maladie par exemple n'a aucune incidence[571]. Comme pour l'adultère, le fait que les parties aient continué de vivre ensemble sur une période de temps continu ou cumulé de plus de six mois après le fait reproché, fait obstacle à ce fait puisse être pris en considérations dans l'appréciation de cette cause de rupture[572].

c. que le défendeur a abandonné le domicile conjugal depuis une période continue d'au moins deux ans immédiatement précédent la demande. L'abandon d'un époux par l'autre consiste en une « rupture injustifiable de la vie commune » (*unjustifiable withdrawal from cohabitation*)[573], permanente et imposée à l'autre époux. Cette cause est l'une des plus rarement invoquée en pratique (voir statistiques *infra*).

d. que les parties vivent séparées depuis une période supérieure à deux ans immédiatement précédent la demande, et que le défendeur ne s'oppose pas au divorce. Cette cause de rupture irrémédiable du lien, sur le fondement de la séparation, est celle qui permet en droit anglais le divorce par consentement mutuel. Le comportement des époux n'est pas discuté devant le juge. Si la section 2(6) du *Matrimonial Causes Act 1973* prévoit l'exigence d'une séparation des foyers des époux, la jurisprudence a eu l'occasion de juger que la séparation était prouvée dès lors qu'il était établi que bien que vivant sous le même toit, les époux ne dormaient plus ensemble, ne mangeaient plus ensemble ni ne se parlaient[574]. Les périodes de reprise de la vie commune n'impactent pas la computation du délai de deux ans dans la mesure où elles couvrent, en temps continu ou cumulé, une période inférieure à six mois[575].
e. que les parties vivent séparés depuis une période supérieure à cinq ans immédiatement précédent la demande. La seule preuve de la durée de séparation est suffisante pour constater la rupture, le comportement des époux ne sera pas examiné par le juge. La rupture irrémédiable du lien matrimonial sera constatée et

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[567] Dans l'affaire *Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47 CA* Justice Dunn a posé le test suivant « Au vu des circonstances de l'affaire, du caractère et de la personnalité des parties, une personne raisonnable viendrait-elle à conclure que [en l'espèce] l'époux s'est comporté d'une manière telle qu'il ne peut raisonnablement pas être attendu de l'épouse qu'elle continue de vivre avec lui ». « *Would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the character and personalities of the parties?* ». La position a été reprise par la suite voir notamment *Birch v Birch [1992] 1 FLR 564*.
[568] J. Herring, op. cit, p. 112.
[569] *Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47 CA.*
[570] Il est communément admis que la violence conjugale permettra à l'époux victime de prouver la rupture du lien sur le fondement du comportement rendant impossible la continuation de la vie commune.
[571] *Katz v Katz [1972] 3 All ER 219*.
[572] Section 2(3) du *Matrimonial Causes Act 1973.*
[573] J. Herring, *op. cit.*, p. 113. Si l'abandon est justifié il ne peut être invoqué comme cause de divorce voir notamment *Quoraishi v Quoraishi [1985] FLR 780*, où l'abandon du domicile conjugal par l'épouse a été justifié par l'arrivée au foyer d'une seconde épouse.
[574] *Hollens v Hollens (1971) SJ 327.*
[575] Section 2(5) du *Matrimonial Causes Act 1973*.

permettra le prononcé du divorce, même si l'un des époux s'oppose au principe du divorce. Cette disposition fut l'une des plus controversées lors de la réforme. Cependant la section 5 de loi de 1973 prévoit que cette demande peut néanmoins être défendue en invoquant les importantes difficultés financières ou l'exceptionnelle dureté (*hardship*) que la rupture du mariage occasionnerait chez le défendeur.

Il appartient au juge d'apprécier la réalité des éléments avancés pour soutenir la preuve de rupture[576]. Si aucun de ces cinq motifs de rupture n'est établi, le juge ne pourra pas prononcer le divorce[577]. Cependant certains praticiens constatent que cette vérification par le juge n'est faite en pratique que si la demande en divorce est défendue. La demande en divorce peut être alors analysée comme une présomption simple de preuve de rupture. Si la demande est acquiescée par le défendeur la vérification de la réalité des faits allégués n'aura pas lieu[578]. Cette situation équivaut pour certains auteurs à ouvrir la voie à une forme de divorce à la demande, dans la mesure où en pratique une majorité de demande sont acquiescées par la partie adverse[579].

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre de demandes présentées sur chaque fondement.

Selon les chiffres 2010 du Bureau des Statistiques Nationales[580] le nombre de demandes en fonction des différentes causes permettant d'établir une rupture irrémédiable du lien matrimonial sont répartis comme suit :

Causes	Demande présentée par l'épouse	Demande présentée par l'époux	Total	Pourcentage
Total	79124	40301	119425	100
Adultère	12150	6595	18745	15,70
Comportement	43186	14516	57702	48,32
Abandon du domicile conjugal	276	274	490	0,41
Séparation consentie depuis plus de 2 ans	16966	12897	29863	25
Séparation depuis plus de 5 ans	6430	6016	12446	10,42
Autres	116	63	179	0,15

[576] Section 1(3) du *Matrimonial Cause Act 1973*.
[577] *Buffery v Buffery [1988] 2 FLR 365*.
[578] Voir en ce sens J. Herring , *op. cit.*, p.110.
[579] *Ibidem*
[580] Source « Divorce rates data, 1858 to now : why are divorces going up ? » *The guardian*. www.guardian.co.uk/news/datablog/2010/jan/28/divorces-rates-marriage-ons#data [page consultée le 21/07/2012].

Tableau établi au vu des données fournies par le site, le calcul du total et des pourcentages a été réalisé par le rapporteur

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

Le divorce par consentement mutuel n'existe pas en tant que tel en Angleterre. Cependant, le divorce pour cause de séparation de plus de deux ans avait été imaginé comme la forme de divorce par consentement mutuel au moment de la réforme.

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

En droit anglais le divorce est toujours demandé par l'un des époux contre l'autre. La possibilité d'une demande conjointe n'existe pas[581].

Cependant, la demande présentée peut être acquiescée par l'autre, et il est tout à fait possible en pratique que l'absence d'opposition à la demande soit un indicateur d'un consentement mutuel des époux au divorce.

Il est important de noter que le ministère d'avocat n'est pas obligatoire dans les procédures de divorce en Angleterre. Cependant si les parties font le choix d'être représentées par un avocat, la pratique refuse que ce par un avocat unique. En effet, les règles de déontologie applicables prévoient que si un conflit d'intérêts survient entre les clients en cours d'instance, leur avocat unique doit se dessaisir du dossier[582]. La spécificité de la procédure de divorce rend inévitable l'existence d'un tel conflit d'intérêts, aussi en pratique les avocats refusent la représentation unique lorsqu'elle leur est demandée par leurs clients. Les époux font donc indépendamment l'un de l'autre le choix de prendre ou non un avocat. En pratique il arrive que dans certaines procédures l'un des époux seulement soit représenté à l'instance en divorce.

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

Quel que soient les motifs invoqués pour prouver la rupture irrémédiable du lien matrimonial, les époux sont invités à s'entendre sur toutes les conséquences de la rupture, afin notamment d'accélérer la procédure. La médiation familiale est promue par le *Family Law Act 1996*[583].

En tout état de cause le juge dispose du pouvoir de statuer sur les conséquences du divorce, au mépris parfois des conventions matrimoniales antérieurement passées. Dans la très récente affaire *Radmacher v Granatino [2010]*[584], il a été réaffirmé « *qu'il appartenait à la Cour et non à un accord antérieur passé entre les parties de déterminer les mesures appropriées visant à*

[581] Voir Annexe 1 - Formulaire de demande en divorce (D8 form) et notamment la partie 5
[582] Chapitre 3 du *Solicitors Regulation Authority Code of Conduct 2011*.
[583] Voir notamment la section 13.
[584] *Radmacher v Granatino [2010] UKSC 427.*

organiser les conséquences financières du divorce, ce pouvoir ayant été conféré au juge par la Loi »[585]

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

Dans les motifs de la rupture une part très importante est laissée à la faute en droit anglais. En effet nous retrouvons la notion de faute dans les trois première causes de ruptures : l'adultère, le comportement du conjoint rendant irraisonnable la poursuite de la vie commune et l'abandon du domicile conjugal. Malgré l'abandon de la faute au titre des motifs du divorce cette notion est présente dans l'examen des motifs de rupture irrémédiable du lien matrimonial. Toutes causes confondues, la notion de faute intervient aujourd'hui dans 64,43 % des demandes en divorce.

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?

La séparation des époux constitue la seconde cause permettant d'établir la rupture irrémédiable du lien matrimonial. Toute durée confondue elle représente 35,42 % des demandes.

c) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?

La séparation est suffisante pour établir la rupture irrémédiable du lien matrimonial.

d) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

Si les deux époux sont d'accord pour divorcer la séparation doit avoir duré au minimum deux années. Si les deux époux s'opposent sur le principe du divorce la durée minimum de la séparation est portée à cinq années. La période de séparation doit immédiatement précéder la demande en divorce.

La computation de la durée de ces deux périodes n'est pas interrompue par un ou des temps de reprise de la vie commune dès lors que ceux-ci n'excèdent pas six mois en temps continu ou cumulés. Les périodes de réconciliation d'une durée supérieure à six mois reportent d'autant le délai avant lequel le divorce pourra être prononcé au vu de la séparation des époux.

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

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[585] « *It is the Court and not any prior agreement between the parties, that will determine the appropriate ancillary relief when a marriage comes to an end, for that principle is embodied in the legislation*» *Radmacher v Granatino [2010] UKSC 427*, para. 7.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

36. Dans cette procédure, quelle place est laissée la séparation des époux ?
- **La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**
- **Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit elle être continue ?**

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui

s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

D. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
- **avant le mariage ;**
- **pendant le mariage ;**
- **pendant la procédure de divorce ?**

Il existe quatre types de conventions matrimoniales en Angleterre (*nuptial* ou *matrimonial agreements*) :
- La convention matrimoniale en vue du mariage (*ante-nuptial* ou *pre-nuptial agreement*) ;
- La convention matrimoniale passée en cours de mariage (*post-nuptial agreement*);
- La convention matrimoniale passée en vue de la séparation du couple ou de l'organisation de ses conséquences (*separation agreement*) ;
- La convention matrimoniale en vue d'organiser les conséquences financières du divorce (*draft consent order*).

Ces conventions n'ont pas toutes pour effets direct de régler les effets du divorce mais seront toutes prises en compte par le juge au moment de statuer sur les conséquences du divorce en vertu de la section *25(1) du Matrimonial Causes Act 1973*. Elles ont donc un impact direct ou indirect sur ses effets :

- Avant le mariage, les futurs époux ont la possibilité de conclure une convention matrimoniale (*ante-nuptial agreement* ou *pre-nuptial agreement*, les deux termes s'emploient indistinctement). Cette convention permet notamment de limiter les droits et prétentions du futur conjoint, dont la situation patrimoniale est moins avantageuse, sur le patrimoine de l'autre au moment du divorce.

La question de savoir si ces conventions anté-nuptiales peuvent avoir pour effet de limiter les droits des créanciers éventuels de l'un des membres du couple est posée en droit anglais et n'a pas été résolue dans l'arrêt de principe *Radmacher v Granatino [2010]*[586].

- Pendant le mariage, les époux peuvent passer une convention matrimoniale (*post nuptial agreement*). Cette convention peut également être passée au moment d'une séparation conjugale, hors procédure de divorce (*Deed of separation*). Aucune disposition ne vient limiter la capacité des époux unis ou séparés de passer une convention organisant leur patrimoine et leurs obligations financières respectives. Le *Deed of separation* peut être conclu en vue de la séparation ou postérieurement, il a généralement pour objectif d'organiser les moyens de subsistance de l'époux qui se trouve dans une situation financière moins avantageuse. Le *Deed of separation* est un acte réalisé devant témoin et contresigné par ce dernie, cependant il ne prend pas la forme d'un acte authentique. Le témoin sera choisi par les époux. Le *Deed of separation* permet également de constater la date de séparation du couple et permet d'ouvrir la période de deux ans, à l'issue de laquelle l'un des époux initiera une

[586] *Radmacher v Granatino [2010] UKSC 427.*

procédure de divorce pour rupture irrémédiable en raison d'une séparation de deux ans. Le *Deed of separation* permet également aux époux de convenir de celui d'entre eux qui initiera la procédure. Il est possible de joindre au *Deed of separation* le projet d'ordonnance organisant les conséquences du divorce, qui sera présenté au tribunal au commencement de la procédure pour homologation.

- Pendant la procédure de divorce, les époux peuvent mettre en application le *Deed of separation* qu'ils peuvent avoir déjà signé (voir *supra*). Si ce n'est pas le cas les époux peuvent organiser les conséquences financières du divorce au moyen d'une convention qui sera présentée au tribunal pour homologation (*Draft consent order*) au plus tôt après la délivrance du *Decree Nisi*. Le *Draft consent order* permet de régler à l'amiable les conséquences patrimoniales et financière du divorce et d'éviter la procédure contentieuse d'*ancillary relief*.

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

Le juge dispose d'un pouvoir de contrôle sur l'ensemble des conventions entre époux, qu'elles soient conclues avant le mariage, pendant le mariage, au moment de la séparation ou au moment du divorce. Aucun de ces accords entre époux ne permet de limiter le pouvoir discrétionnaire du juge d'en modifier les termes au moment de la séparation ou du divorce.
Le juge est dans l'obligation de contrôler ces accords et de les évaluer au regard des directives légales posées par la section 25 du *Matrimonial Causes Act 1973*.

L'affaire *Mcleod v Mcleod*[587], a unifié les différentes méthodes d'appréciation et de contrôle judiciaire de ces différentes formes de conventions (à l'exception du *Draft consent order*). Désormais, le juge en appréciera le contenu au regard de critères identiques en lien direct avec les dispositions de la section 25 du *Matrimonail Causes Act 1973*.

Dans la récente affaire *Radmacher v Granatino*[588] la majorité de la Cour Suprême a confirmé que ce pouvoir de contrôle et de modification s'appliquait tant à l'égard des conventions ante-nuptiales que des conventions post-nuptiales[589].

Le pouvoir de contrôle du juge des conventions en vue d'organiser les conséquences financières du divorce (*draft consent order***)**, doit être distingué.

En effet, dans le cadre de ce type de convention les parties font une proposition d'ordonnance au juge et lui soumette pour conversion en ordonnance judiciaire. Dans le cadre des procédures familiales, à la différence des autres procédures civiles, la force obligatoire de ce projet émanera de la décision judiciaire consécutive et non du contrat entre époux qui l'a précédé[590]. Par conséquent, le juge dispose d'une obligation de vérifier l'équité du *Draft consent order* et de le convertir s'il est satisfait que ce dernier préserve l'intérêt des deux époux[591]. Dans l'affaire *Kelley v Corston*[592], Lady Justice Butler-Sloss retient :

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[587] *MacLeod v MacLeod [2008] UKPC 64.*
[588] *Radmacher v Granatino [2010] UKSC 427.*
[589] *Ibidem* para. 57 et 63.
[590] *Lasala v de Lasala [1980] AC 546*
[591] *Xydhias v Xydhias [1999] 2 All ER 386*, p.394.
[592] *Kelley v Corston [1998] QB 686.*

« *La Cour a le pouvoir de refuser de convertir le projet d'ordonnance en dépit de l'accord des parties. Le contenu du projet sera évidemment pris en considération mais ne sera pas nécessairement déterminant. La Cour n'est pas une machine à approuver*»[593].

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

Dans l'affaire *Radmacher*[594], la Cour suprême a identifié deux points qui doivent impérativement être examinés par le juge dans l'exercice de son pouvoir de contrôle :

1. L'existence éventuelle de contrainte, de fraude ou de tromperie. En fonction de l'ampleur de cette manœuvre l'accord peut être soit privé totalement d'effets soit limité dans les effets qu'il produira[595]. Ceci implique que la Cour examine les circonstances dans lesquelles les parties ont été amenées à signer la convention (sont entre autres pris en compte leur âge, leur discernement, la durée de la vie commune, l'impact de cette convention sur le projet de mariage, l'éventuelle influence indument subie par une partie en raison d'une position dominante de l'autre, la dissimulation éventuelle d'informations relatives aux actifs constituant le patrimoine de l'autre).
2. L'éventualité que cette convention produise des effets iniques au moment de la rupture du mariage au regard des circonstances qui entourent cette rupture[596]. Dans cette affaire une majorité des juges de la Cour suprême a retenu que « *la Cour devra faire produire ses effets à une convention entre époux librement contractée par eux et en toute connaissance de cause à moins qu'au vu des circonstances de l'espèce il apparaisse injuste de les lier par cet accord* »[597].

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

Cette procédure (*judicial separation*) existe[598].
Entre époux seule l'obligation de communauté de vie est limitée[599] et les conséquences financières de la séparation seront organisées. A l'égard des enfants leur temps de présence sera organisé entre les parents comme après un divorce[600].

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

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[593] « *The court has the power to refuse to make the order although the parties have agreed to it. The fact of the agreement will, of course, be likely to be an important consideration but would not necessarily be determinative. The court is not a rubber stamp* », Lady Justice Butler-Sloss dans l'affaire *Kelley v Corston [1998] QB 686*, p. 714
594 Radmacher v Granatino [2010] UKSC 427
595 *Ibidem,* para. 71.
596 *Ibidem* . para. 73.
[597] "*The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.*" *Ibidem* para. 75.
[598] Voir *supra*.
[599] Voir *supra.*
[600] Voir *infra.*

Le divorce est une procédure judiciaire en trois temps.

Premier temps, celui de la demande en divorce et la présentation des causes de rupture irrémédiable du lien matrimonial. Si la demande en divorce n'est pas défendue le passage a la seconde phase

Deuxième temps, celui de l'obtention d'un *Decree nisi*, en vertu duquel le principe de la séparation des époux est acté par la Cour[601]. Le *Decree nisi* met un terme à l'obligation de cohabitation mais ne rompt par le mariage[602]. La Cour par ce document fait savoir qu'elle ne s'oppose pas au principe du divorce, la question des causes de rupture sort du débat. Il est à noter que le formulaire à présenter est le même que celui qui permettra d'obtenir une ordonnance de séparation (*separation order*)[603].

Enfin, troisième temps, celui de l'obtention d'un *Decree absolute* qui est l'acte juridique par lequel me mariage est légalement dissout.

La conversion du *Decree nisi* en *Decree absolute* n'est pas automatique, les époux doivent en faire la demande[604]. Des délais doivent être respectés entre les deux phases. L'époux demandeur au divorce doit respecter un délai de six semaines après l'obtention du *Decree nisi* avant de pouvoirs solliciter un *Decree absolute*. S'il ne présente pas la demande à l'issue de ce délai, le défendeur ne pourra pas présenter la demande de *Decree absolute* avant l'expiration d'un délai supplémentaire de trois mois (soit quatre mois et deux semaines au total)[605]. En tout état de cause si la demande de *Decree absolute* est faite plus d'un an après l'obtention du *Decree nisi*, les parties devront justifier ce délai auprès de la Cour[606].

En vertu de la section 41 du *Matrimonial Causes Act 1973*, la délivrance par la juge du *Decree absolute* peut être retardée autant qu'il est nécessaire pour lui permettre d'exercer sa compétence [607] au regard de la protection du bien-être de l'enfant (*welfare*)[608].

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

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[601] Voir ANNEXE 2. Le *Decree nisi* est obtenu après présentation du formulaire D84.
[602] La personne est informée de l'obtention du *Decree nisi* par réception du formulaire D29, des modèles n'ont pas été trouvés par le rapporteur. Pour d'autres formulaires échangés au cours de la procédure de divorce voir le site internet http://www.divorce-forms.co.uk/[page consultée le 22/07/2012].
[603] Voir *supra*.
[604] Voir ANNEXE 3. Le *Decree absolute* est obtenu après présentation du formulaire D36.
[605] Voir sur ce point : http://www.direct.gov.uk/en/Governmentcitizensandrights/Divorceseparationandrelationshipbreakdown/Endingamarriageorcivilpartnership/Gettingadivorce/DG_191978 [page consultée le 22/07/2012].
[606] Voir la règle de procédure 7.32(4) du *Family Procedure Rule 2010, SI 2010/2955*. Il est à ce titre demandé aux parties de justifier auprès de la Cour d'une éventuelle reprise de la vie commune, ou de la naissance éventuelle d'un enfant dans l'intervalle.
[607] Compétence dont il est investit par le *Children Act 1989*.
[608] La notion de bien-être de l'enfant en tant que critère de décision pour le juge doit être comparée à celle d'intérêt de l'enfant en droit français. Cependant la notion de *welfare* est en droit anglais d'appréciation plus immédiate que celle du *best interest of the child* qui est utilisés dans les textes internationaux. Sur la distinction qu'il convient de faire entre les deux voir L. Francoz-Terminal, *La capacité juridique du mineur dans les droits français, anglais et écossais*, European Family Law series vol. 21, Stamplï-Intersentia 2008 n° 443 et s.

La liberté matrimoniale des époux est totale après l'obtention du *Decree absolute* qui rompt définitivement le mariage. Ils sont chacun libres de se remarier voire de se remarier entre eux

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

Le mariage en Angleterre comme en France ne produit pas d'effet impératif au regard du nom de famille des époux. Le fait que l'épouse prenne le nom de son mari après le mariage relève de la tradition et non de la loi qui ne prévoit aucune disposition à ce titre. Le changement de nom est fait sans forme et ne nécessite par de procédure légale (*deed of change of name*)[609]. La présentation d'un certificat de mariage est suffisante pour prouver le changement de nom de l'épouse ou l'adjonction du nom du mari au sien.

Si l'époux souhaite adjoindre le nom de son épouse au sien, il devra en revancher passer par la procédure légale de changement de nom, de même si les époux souhaitent mixer leur deux nom ensemble[610].

Au moment du divorce le parallélisme des formes est de mise. L'épouse peut réutiliser son nom de famille sans forme et au besoin peut faire la preuve de ce changement par présentation du *Decree absolute*. Si en revanche un changement légal de nom a été réalisé au moment du mariage, il ne pourra être remis en cause, à la demande de l'un ou l'autre des époux, que par une nouvelle procédure légale de changement de nom.

50. Le divorce produit-il des effets

- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;**

Le droit de la nationalité est principalement régit en Angleterre aujourd'hui par l'*Immigration Act 1971,* le *British Nationality Act 1981* et le *Nationality, Immigration and Asylum Act 2002*.

Le mariage d'un étranger n'a pas d'effet automatique sur la nationalité de ce dernier. L'acquisition de la nationalité britannique n'est possible à l'époux étranger d'un citoyen britannique que par la voie de la naturalisation[611]. Les conditions posées à la demande de naturalisation présentée par l'époux étranger sont détaillées dans la section 3 du Schedule 1 du *British Nationality Act 1981*[612]. Le divorce ne produit aucun effet sur la nationalité acquise par naturalisation, mais il a un impact sur le délai dans lequel la naturalisation peut être demandée. En effet, pour demander la naturalisation, tout étranger doit justifier d'une résidence sur le territoire d'au moins cinq années, cette durée est ramenée à trois années dans l'hypothèse où l'étranger est marié à un citoyen britannique ou lié à lui par un partenariat civil. Si le *Decree absolute,* ou l'ordonnance de dissolution (*order for dissolution*) dans le cas d'un partenariat civil, est obtenu avant la fin du délai de trois ans, l'ex-époux

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[609] Egalement appelée *Deed poll*, c'est la procédure légale de changement de nom en Angleterre, attention cependant, à la différence du droit français, il ne s'agit pas dans ce système d'une procédure judiciaire.

[610] Sur l'ensemble de possibilité offertes en drojt anglais voir le site http://www.deedpoll.org.uk/

[611] La possibilité pour un étranger marié à un britannique d'acquérir la nationalité par la procédure simplifiée de l'enregistrement (*registration*) a été abrogée par le *Nationality, Immigration and Asylum Act 2002*.

[612] Il s'agit notamment de conditions de résidence légale sur le territoire, de connaissance tant d'une des langues du territoire (anglaise ou gaélique) que de la culture du pays, de bonne moralité (*good character*).

redevient un demandeur lambda à la naturalisation, devant justifier, en plus d'autres conditions, de cinq années de résidence sur le territoire.

- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

Le mariage avec un citoyen britannique permet à l'époux étranger d'obtenir un visa d'établissement dans le pays (*settlement visa*). A l'issue d'une période de cinq années après l'obtention de ce visa spécifique, l'époux étranger peut solliciter l'obtention d'une autorisation permanente de rester sur le territoire (*Indefinite Leave to Remain - ILR*)[613], qui confère à sa situation un caractère définitif dans la mesure où il ne sera plus soumis aux différents contrôles des services de l'immigration. Une fois obtenue l'autorisation permanente de rester sur le territoire est déconnectée du statut de son bénéficiaire. Un éventuel divorce n'aura pas d'impact sur ce titre de séjour permanent.

ii. Les effets du divorce à l'égard des enfants

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

En l'absence de décision judiciaire sur la question l'autorité parentale et la résidence de l'enfant peuvent être distinctes. En effet, les parents sont libre de confier leur enfant à un tiers sans que ce tiers ne soit pour autant investit de l'autorité parentale sur la personne de l'enfant.

En revanche, lorsque la résidence de l'enfant est fixée par décision de justice, elle emporte automatiquement l'exercice de l'autorité parentale. En effet, en vertu de la section 8 du *Children Act 1989*, la résidence habituelle d'un enfant peut être fixée au moyen d'une ordonnance judiciaire de résidence (*residence order)*, laquelle est prise dans l'intérêt de l'enfant quel que soit le contexte familial. Elle peut tout à fait être ordonnée en dehors d'un contexte de séparation parentale.

En vertu de la section 12(2) du *Children Act 1989*, toute personne (membre de la famille ou tiers) se voyant octroyer la résidence d'un enfant au moyen de cette ordonnance, se trouve automatiquement investit de l'autorité parentale à son égard, pendant toute la durée de l'ordonnance.

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

Avant d'envisager les effets du divorce sur l'exercice de l'autorité parentale en droit anglais, il nous faut d'abord considérer quel sont les effets produits par le mariage sur l'exercice de cette autorité. Il est à noter que le droit anglais ne distingue pas le fait d'être titulaire de l'autorité parentale et celui d'en avoir l'exercice. A la différence du droit français, le mariage des parents postérieur à la naissance de l'enfant produit des effets sur l'autorité parentale. En droit anglais la mère est automatiquement investie de l'autorité parentale sur son enfant au

[613] D'autres conditions que la résidence sont également posées, notamment comme pour la naturalisation une condition de connaissance de la langue et de la culture du pays.

moment de sa naissance quelle que soit sa situation matrimoniale[614]. La mère divorcée continue donc d'exercer l'autorité parentale.

En vertu de la section 2(1) du *Children Act 1989* si le père est marié à la mère de l'enfant au moment de sa naissance, il exercera automatiquement et conjointement avec elle l'autorité parentale[615]. S'il se marie à la mère postérieurement à la naissance il se verra investit de l'autorité parentale en raison du mariage. En effet, en vertu de la section 1 du *Family Law reform Act 1987*, et par renvoi aux dispositions des sections 1 à 10 du *Legitimacy Act 1976*, un enfant est légitimé par le mariage consécutif de ses parents, celui-ci ayant pour effet d'investir le père de l'autorité parentale sur l'enfant.

Le divorce n'a pas d'effet automatique sur l'exercice de l'autorité sur l'enfant. Si l'exercice était conjoint en raison du mariage des parents, qu'il soit antérieur ou postérieur à la naissance de l'enfant il reste conjoint après divorce.

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

L'exercice de l'autorité parentale peut être déterminé par une convention d'autorité parentale (*parental responsibility agreement*) uniquement dans l'hypothèse où les parents ne sont pas mariés ensembles. Cette convention a pour effet de permettre au père d'être investit conjointement avec la mère de l'autorité parentale. Celle-ci doit être enregistrée auprès du tribunal territorialement compétent, selon des modalités spécifiques et notamment en présence d'un témoin, officier de justice (*court official*)[616]. Elle continuera de produire tous ses effets après le divorce des parents.

Si les parents étaient mariés ensemble au moment de la naissance de l'enfant, il n'est pas possible de remettre en cause l'exercice conjoint de l'autorité parentale qui en découle, par une convention d'autorité parentale au moment du divorce.

Depuis la réforme de 2002, de la même manière un tiers marié au parent peut être investit de l'autorité parentale sur l'enfant[617]. Si l'autorité parentale est conjointe, les deux parents devront être d'accord pour en investir le beau parent. Le titre qui lui est conféré à la même force que celui conféré au père non marié en vertu d'une convention d'autorité parentale, il ne peut être remis en cause que par une ordonnance judiciaire[618].

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

L'arrêt *Re X (Parental responsibility Agreement) [2000]*[619] a établit que le bien fondé de cette convention d'autorité parentale, qui investit le père non marié au moment de la naissance de

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[614] Inféré de la section 2 du *Children Act 1989*.
[615] La section 2(1)A du *Children Act 1989* tel qu'amendé par le *Human Fertilisation and Embryology Act 2008*, donne automatiquement l'exercice de l'autorité parentale à l'homme marié à la femme ayant bénéficié de techniques d'assistance médicale à la procréation.
[616] Voir Parental *Responsibility Agreement Regulation 1994, SI 1994/3157*.
[617] Section 4A(1)(a) du *Children Act 1989* tel qu'amendé par *l'Adoption and Children Act 2002*.
[618] Section 4A(3) du *Children Act 1989* tel qu'amendé par l'*Adoption and Children Act 2002*.
[619] *Re X (Parental responsibility Agreement) [2000] 1 FLR 517*.

l'autorité parentale conjointement avec la mère, n'était soumise à aucun contrôle judiciaire, seules les modalités de son enregistrement ont été fixées par la loi.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

Le droit anglais ne fait pas de distinction entre le droit d'autorité parentale et son exercice. L'autorité parentale peut être aménagée lorsque l'enfant est pris en charge par les services sociaux dans le cadre des mesures de protection de l'enfance, mais cet aménagement n'est pas possible dans le cadre d'une séparation parentale ou d'un divorce. Ainsi, hormis les hypothèses relatives à la protection de l'enfant un parent, en droit anglais, a ou n'a pas l'autorité parentale.

La mère de l'enfant et le père marié au moment de la naissance ne peuvent se voir privés de leur autorité parentale que par l'effet d'une adoption de l'enfant (*Adoption order*).

Le père non marié au moment de la naissance peut perdre l'autorité parentale sur l'enfant par l'effet d'une décision de justice[620]. Cette demande de retrait peut être introduite par tout titulaire de l'autorité parentale (mère ou tiers, le père lui-même peut également être à l'initiative de la demande[621]) ou par l'enfant lui-même, après autorisation judiciaire d'agir en justice (*leave of the court*)[622]. Il est à noter que l'autorisation judiciaire d'agir en justice n'est donnée à l'enfant par le juge qu'après appréciation de sa capacité de discernement au regard de la procédure envisagée[623]. La demande de retrait de l'autorité parentale du père sera appréciée au regard de l'intérêt de l'enfant (*welfare*).

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

Si le père et la mère exercent conjointement l'autorité parentale en raison de leur mariage ce retrait n'est pas possible, seule l'adoption de l'enfant permet de leur retirer l'autorité parentale.

Seul le père non marié à la mère à la naissance peut se voir retirer l'autorité parentale par une ordonnance judiciaire de retrait (*discharge of parental reponsibility order*). La décision est prise dans l'intérêt de l'enfant (w*elfare*).

Les conditions qui justifieraient une telle décision sont toujours appréciées au regard du comportement de ce parent à l'égard de l'enfant et non à l'égard de l'autre parent. Dans une affaire *Re M (A minor)(Care Order : Threshold Conditions)[1994]*[624], le retrait de l'autorité parentale n'a pas été prononcé à l'encontre du père qui avait assassiné la mère sous les yeux

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[620] Voir section 4(2A) du *Children Act 1989* tel qu'amendé par l'*Adoption and Children Act 2002*.
[621] Voir en ce sens J. Herring, *op. cit*., p. 367.
[622] Section 4(3) du *Children Act 1989*.
[623] Section 4(4) du *Children Act 1989*.
[624] *Re M (A minor)(Care Order : Threshold Conditions) [1994] 2 FLR 577, [1994] 2 FCR 871*.

de ses enfants. Dans une autre affaire *Re P (Terminating Parental responsibility) [1995]*[625], en revanche un père (non marié) s'est vu retirer l'autorité parentale en raison des violences qu'il avait infligées à sa petite fille et qui avaient laissé celle-ci avec un handicap physique et mental.

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

Cette question ne concerne que les pères qui n'ont pas été mariés avec la mère dans la mesure où la mère et le père mariés ou divorcés ne peuvent se voir privés de l'autorité parentale.

Un père qui n'aurait pas acquis l'autorité parentale peut, tout comme un tiers autorisé par le juge[626], solliciter une ordonnance de contact (*contact order*) ou une ordonnance de résidence (*residence order*) à l'égard de l'enfant[627]. Il est à noter que sauf circonstance exceptionnelle une ordonnance de contact prendra fin au seizième anniversaire de l'enfant, l'ordonnance de résidence peut quant à elle continuer de s'appliquer jusqu'à la majorité de l'enfant[628].

Un père qui aurait été privé de l'autorité parentale par une ordonnance judiciaire peut obtenir une ordonnance judiciaire de contact avec l'enfant si cette décision apparaît conforme à l'intérêt de l'enfant (*welfare*). Les modalités de l'exercice de ce contact seront déterminées par l'ordonnance en fonction de ce que requiert la protection de l'intérêt de l'enfant. En revanche l'octroi d'une ordonnance de résidence semble contradictoire avec le retrait dans la mesure où celle-ci aura pour effet automatique d'investir le père de l'autorité parentale. Cependant la possibilité légale n'est pas fermée. A ce titre, dans l'affaire *Re P (Terminating Parental responsibility) [1995]*[629], afin de limiter la possibilité pour le père privé de l'autorité parentale de demander à l'avenir sur sa fille un droit de visite ou un droit de résidence, le juge a ordonné, sur le fondement de la section 91(4) du *Children Act 1989*, que toute future demande en ce sens qui serait formulée par le père soit soumise à l'autorisation judiciaire à agir (*leave of the court*)[630].

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

Si les parents s'entendent sur les modalités de répartition du temps de présence de l'enfant auprès d'eux ils sont libres d'organiser cette répartition comme bon leur semble en

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[625] *Re P (Terminating Parental responsibility) [1995] 1 FLR 1048, [1995] 3 FCR 753*

[626] Le tiers doit pour pouvoir introduire la demande être autorité à agir en justice par le juge (*leave of the court*) voir section 10(1)(a)(ii) du *Children Act 1989*.

[627] Section 10(1)(a)(i) et 10(4)(a) du *Children Act 1989*.

[628] Section 9(6) et 9(7) du *Children Act 1989*.

[629] Re *P (Terminating Parental responsibility) [1995] 1 FLR 1048, [1995] 3 FCR 753.*

[630] La conformité de l'article 91(4) du *Children Act 1989* qui permet de soumettre la possibilité d'agir en justice à une autorisation judiciaire a été jugé conforme à l'article 6 de la Convention Européenne des Droits de l'Homme dans l'affaire *Re P (Section 91(14) Guidelines (Residence and Religious Heritage)[1999]2 FLR 573*. Le demandeur ne se trouve pas privé d'un droit d'agir, il doit simplement faire la preuve d'un intérêt à agir au regard d'une situation de fait donné. Cette limitation a principalement été utilisée par les juges dans un contexte de demandes intempestives de modifications des conditions de résidence ou de contact avec l'enfant.

conformité avec l'intérêt de l'enfant. En vertu de la section 41 du *Matrimonial Causes Act 1973* cette décision est soumise au contrôle du juge[631]. Si les parents s'entendent sur le principe d'une résidence alternée, le principe de non intervention judiciaire (*no order principle*) n'autorise pas le juge à statuer sur la question[632].

La section 8(1) du *Children Act 1989* dispose que le juge peut organiser les modalités de la résidence d'un enfant au moyen d'une ordonnance de résidence (*residence order*). Cette ordonnance investit la personne désignée dans l'acte de l'autorité parentale sur l'enfant et lui confie la résidence habituelle de l'enfant (*resident parent*).

Il n'existe pas de restriction légale quant la qualité de la personne qui peut solliciter cette ordonnance, elle peut investir soit l'un ou l'autre des parents de la résidence habituelle, soit des membres de la famille[633] ou encore des tiers.

En vertu de la section 11(4) du *Children Act 1989*, la résidence d'un enfant peut être confiée à deux personnes qui n'habitent pas ensemble ou à plus de deux personnes (*shared residence order*). Dans ces circonstances l'ordonnance doit spécifier comment le temps de présence de l'enfant se répartit auprès de chacun. Cette ordonnance de résidence partagée doit être distinguée de la possibilité qu'utilisent parfois les juges d'ordonner un droit de contact élargi avec l'enfant. L'objectif des ces deux ordonnances est distinct. En tout état de cause une ordonnance de contact ne permettra pas d'investir son titulaire de l'autorité parentale s'il ne l'a pas déjà, à la différence de l'ordonnance de résidence partagée.

Les conditions dans lesquelles une ordonnance de résidence partagée est susceptible d'être adoptée on été mises en évidence dans l'arrêt *C (A Child) [2006]*[634]. La distance entre les deux maisons n'est pas en tant que tel un obstacle dès lors que la répartition du temps de présence de l'enfant auprès de ses deux parents n'est pas contraire à son intérêt (*welfare*) et que des arrangements étaient possibles. En effet, dans l'affaires *Re F [2003]*[635], le partage du temps des enfants auprès de leurs deux parents, résidant respectivement en Angleterre et en Ecosse a été organisé sur une base annuelle de 140 jours pour l'un et 225 pour l'autre. L'ordonnance résidence partagé est parfois ordonnée avec le principal objectif d'investir un tiers de l'autorité parentale. Dans l'affaire *Re H (Shared Residence : Parental Responsibility)[1995]*[636], une femme avait deux enfants, un hors mariage et un autre qu'elle avait eu avec son époux. Au moment du divorce une ordonnance de résidence partagée a été ordonnée à l'égard des deux enfants. La mère a par la suite tenté d'obtenir la remise en cause de cette ordonnance et sa demande fut rejetée au motif qu'elle contribuerait à priver l'ex-époux de l'autorité parentale sur le premier enfant (acquise par l'effet de la première ordonnance) alors qu'il élevait cet enfant comme le sien.

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[631] Voir *infra* question 59.
[632] Dans l'affaire *A v A (Minors) (Shared Residence Order) [2004] EWHC 142*, Justice Wall dit très clairement que si les parents avaient réussi à trouver un accord sur la question il n'aurait pas rendu une ordonnance de résidence partagée (*shared residence order*), voir para. 124.
[633] Le juge Booth dans l'affaire *Re SC (A Minor) (Leave to Seek Section 8 Orders) [1994]* a cependant estimé en *obiter dictum* qu'il n'était pas possible qu'une telle ordonnance puisse investir un mineur de la résidence habituelle d'un frère ou d'une sœur plus jeune. *SC (A Minor) (Leave to Seek Section 8 Orders) [1994] 1 FLR 96*, p. 100.
[634] *C (A Child) [2006] EWCA Civ 235.*
[635] *Re F [2003] EWCA Civ 592.*
[636] *Re H (Shared Residence : Parental Responsibility)[1995]* 2 FLR 883.

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

La recherche d'un accord parental sur le sort, tant personnel que financier, des enfants après divorce est encouragé en droit anglais.
Il existe deux types d'accord parental envisageable :

- Le *statement of arrangement* qui est présentée au moment de l'ouverture de la procédure[637]. Ce document peut être le constat d'un accord mais pas seulement, il peut être une proposition faite par le demandeur au divorce.
- Le *consent order* (projet d'ordonnance judiciaire *cf supra*).

La médiation est promue et depuis 2006 un numéro téléphonique d'information des familles sur la médiation a été mise en place[638]. Bien souvent, le temps gagné dans la procédure est mis en avant pour inciter les parents à trouver un point d'entente. Cette préférence a été inscrite dans la loi au titre des quatre principes qui gouvernent les instances concernant des enfants[639]. En effet il est posé au titre de ces principes qu'une ordonnance judiciaire ne doit pas être rendue à moins qu'il ne soit préférable pour l'enfant qu'elle le soit (*no order principle*). Le principe de non intervention judiciaire contribue à renforcer la force de l'accord parental, lequel liera les parents sans qu'il ait à être homologué par le juge. La section *1.12 du Children Act Guidance and Regulation* fait de ce principe un moyen d'apaisement du conflit et de promotion de l'accord parental[640]. Ainsi, si les parents trouvent un point d'entente sur toute question relative à l'enfant tant au cours du mariage qu'au moment du divorce le juge ne rendra pas d'ordonnance à moins que cela ne soit nécessaire et positif pour l'enfant lui-même et notamment s'il n'est pas possible d'obtenir le bénéfice recherché autrement qu'au moyen d'une ordonnance judiciaire. Ce principe s'applique à toutes les procédures familiales.

Cependant, un certain nombre de critiques ont pu être formulées en doctrine au regard de l'application sans partage du *no order principle* par les juges anglais[641], lequel conduit notamment à un allongement significatif des procédures en contravention avec le *no delay principle*. Certains commentateur ont également pointé le risque, au regard de l'impératif de protection de l'intérêt de l'enfant qu'il y avait à considérer qu'un accord parental était forcément meilleur qu'une décision de justice, notamment dans la mesure où nombre de ces accords étaient obtenus à l'usure ou à la suite de négociation musclées entre les avocats des

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[637] Section 2.2 *FPR 1991*.
[638] Her Majesty Court Service, « Children and family proceedings how to make an application», document CB1, p. 1. Document disponible en ligne http://www.familylaw.co.uk/system/uploads/attachments/0000/2078/CB1_1108.pdf[page consulté le 23 juillet 2012].
[639] En vertu de ces principes contenus dans la section 1 du *Children Act 1989* : l'intérêt de l'enfant est la considération supérieure dans toutes les instances le concernant (*paramountcy principle*) section 1(1). Tout délai de procédure est préjudiciable à l'enfant (*no delay principle*) section 1(2). En statuant les juges doivent apprécier l'intérêt de l'enfant au vu de la liste de critères déterminés par la loi (*welfare checklist*), section 1(4). Enfin, le principe de non intervention judiciaire (*no order principle*), section 1(5).
[640] « *This should reduce conflict and promote parental agreement and cooperation* », Department of Health publication, *The Children Act 1989 Guidance and Regulation volume 1 Court Orders, Londres HMSO 1991*.
[641] Sur ce regard critique voir notamment L. Francoz-Terminal, *op. cit.* n° 516-523.

parties[642]. Aujourd'hui, après un déclin très net du nombre d'ordonnances judiciaires rendues au début des années 90, il semble que ce nombre soit en augmentation si l'on compare avec des chiffres de 2001[643].

Par ailleurs, en vertu de la section 41 du *Matrimonial Causes Act 1973*, lorsqu'il y a des enfants au foyer du couple (*Children of the family*)[644], le juge qui statue sur le divorce est tenu d'exercer la compétence de protection de l'intérêt de l'enfant (*welfare*) dont l'investit le *Children Act 1989* « au regard des arrangements convenus, ou proposés, pour organiser son éducation et son bien-être (*welfare*) »[645]. La loi impose donc le principe d'un contrôle judiciaire sur l'accord parental. Il semble cependant qu'en pratique ce contrôle judiciaire soit réalisé *a minima*[646].

Les pouvoirs du juge de « contrôler » le contenu de l'accord parental lui permettent de retarder la conversion d'un *Decree nisi* en *Decree absolute*[647].

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

Après divorce si les époux ne se sont pas entendus sur la résidence de l'enfant le juge dispose de la possibilité de statuer sur les relations de l'enfant avec ses parents ou des tiers au moyen des ordonnances de résidence ou de contact.

Si l'ordonnance de résidence est une ordonnance de résidence partagée entre les deux parents (*shared residence order*) la question du maintien des liens de l'enfant avec ses deux parents ne se pose pas.

En revanche si l'ordonnance de résidence est une ordonnance de résidence habituelle (*residence order*) le maintien des liens de l'enfant avec l'autre parent sera assuré au moyen d'une ordonnance de contact (*contact order*), organisant un droit de visite et d'hébergement au bénéfice de l'autre. Le divorce, et la séparation parentale de manière générale, ne doit pas affecter les relations de l'enfant avec ses parents.

Une ordonnance de contact ne peut être prise indépendamment d'une ordonnance de résidence, les deux sont liées[648].

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[642] *Ibidem*.
[643] Voir notamment sur ces chiffres A. Bainham, *op. cit*., p. 142.
[644] Le droit anglais couvre par cette notion tous les enfants élevés au foyer par le couple : enfant commun, enfant d'un seul des deux membres du couple ou enfant confié au couple, en dehors du cas spécifique de l'exercice d'une mesure de protection de l'enfance. En effet, il est expressément prévu par le texte que les enfants confiés à une famille d'accueil (*foster family*) n'entrent pas dans le cadre de cette définition, voir la section 105 du *Matrimonial Causes Act 1973*.. Dans l'affaire *Re A (Child of the family) [1998] 1 FLR 347*, il a été jugé que cette notion s'appliquait aux petits-enfants des parties, qui vivaient à leur foyer et étaient élevés par eux.
[645] « *In the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare* », section 41(b) du *Matrimonial Causes Act 1973*.
[646] Sur ce point voir notamment L. Francoz-Terminal, *op. cit.* n° 516-523.
[647] Section 41(2) du *Matrimonial Causes Act 1973*.
[648] Voir J. Herring *op.cit*, p. 481.

Par cette ordonnance le juge enjoint au bénéficiaire de la résidence de mettre en œuvre un droit de visite et d'hébergement conforme à la lettre de l'ordonnance. Ce droit peut être plus ou moins large, l'ordonnance de contact est rédigée à la carte selon les spécificités de la famille et l'intérêt de l'enfant[649]. L'ordonnance de contact est celle qui est la plus demandée en pratique. En 2001 il y a eu 55030 ordonnances de contact rendu contre 29546 ordonnances de résidence[650]. Ne pas respecter les termes d'une ordonnance judiciaire fait encourir à celui qui l'enfreint une sanction pénale (*contempt of Court*).

Il a été jugé que l'ordonnance de contact pouvait avoir pour effet de poser une interdiction de contact (*no contact order*) visant à interdire à la personne investie de la résidence de mettre l'enfant en lien avec la personne désignée dans l'ordonnance[651]. L'interdiction faite à l'autre parent d'entrer en relation avec l'enfant sera traitée au moyen de l'injonction de ne pas faire (*Prohibited Step Order*) prévue à la section 8(1) du *Children Act 1989*.

Comme en droit français l'ordonnance de contact n'a pas été interprétée comme faisant obligation à la personne désignée dans l'ordonnance d'avoir des relations avec l'enfant, bien que le maintien des liens de l'enfant avec ses deux parents soit promu. Dans l'affaire *Re L (A Child) (Contact : Domestic Violence) [2000]*[652] il a été expressément jugé que l'ordonnance de contact ne permettait pas d'obliger un parent, non désireux de maintenir du lien avec l'enfant, à le recevoir.

Toutefois, certains auteurs s'interrogent sur la possible utilisation dans un contexte familial où cela serai opportun, d'une ordonnance visant à régler une question spécifique (*Specific issue order*)[653] afin de faire pression sur en parent pour qu'il maintienne du lien avec l'enfant[654]. Cette ordonnance a un champ d'application extrêmement vaste qui lui permet de couvrir l'ensemble des questions relatives à l'enfant durant sa minorité, entre par conséquent dans son champs la question du maintien du lien avec le parent qui n'a pas la résidence habituelle.

c. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

En droit anglais les conséquences patrimoniales du divorce se règlent au moyen d'une procédure spécifique et distincte de la procédure de divorce la procédure pour *ancillary relief*. Cette procédure peut être déclenchée après l'obtention du *Decree Nisi*, sans limite de temps dès lors que les conséquences financières du divorce n'ont pas déjà fait l'objet d'un règlement. Dans l'affaire *Twiname v Twiname [1992]*[655] le versement d'un capital

[649] Cette ordonnance peut organiser un droit de visite et d'hébergement plus ou moins étendu, tout comme des contacts indirects entre l'enfant et le bénéficiaire de l'ordonnance : par téléphone, courrier postal ou électronique, chat ou encore des appels vidéo (via Skype ou autre mode de communication).
[650] Voir A. Bainham *op.cit*, p. 156. L'auteur s'appuie sur les statistiques 2001 du Ministère de la justice (*judicial statistics 2001*).
[651] *Nottingham CC v P [1993] 2 FLR 134, [1994] 1 FCR 624.*
[652] *Re L (A Child) (Contact : Domestic Violence) [2000] 2 FCR 404.*
[653] Section 8(1) du *Children Act 1989*.
[654] Voir en ce sens J. Herring, *op.cit*., p. 482.
[655] *Twiname v Twiname [1992] 1 FLR 29*

compensatoire (*lump sum*) a été ordonné quinze ans après le *Decree Absolute* prononçant le divorce entre les époux.

La procédure pour *ancillary relief* peut également être introduite après une ordonnance de séparation judiciaire (*Decree of judicial separation*) ainsi qu'après la dissolution d'un partenariat civil.

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre

6. une compensation financière,

Oui, en vertu des dispositions suivantes un droit à compensation est ouvert au moment de la rupture du mariage sur le fondement de plusieurs ordonnances judiciaires.

Premièrement, le *Matrimonial Causes Act 1973* organise dans sa section 24 la possibilité d'obtenir une ordonnance visant à la réallocation des biens entre ex-époux ou au bénéfice des enfants mineurs (*Property adjustment orders*). Tous les biens, quelle que soit leur nature, sont couverts par cette ordonnance, à condition qu'ils aient pu être identifiés avec suffisament de précision pour pouvoir faire l'objet d'une telle ordonnance.
Les *Property adjusment orders* peuvent prendre diverses formes :

- Une ordonnance visant au transfert de propriété d'un bien (*Transfer of property orders*).
- Une ordonnance visant à la vente de biens (*Sale of property order*) au bénéfice de l'un des ex-époux, ou en vertu de la section 23(1)(c) au bénéfice des enfants.
- Une ordonnance visant à la modification d'une convention matrimoniale anté ou post-nuptiale.
- Une ordonnance visant à limiter les droits et intérêts d'un conjoint tirés de l'exécution d'une convention matrimoniale anté ou post-nuptiale.
- Les *Property adjustment orders* ne peuvent produire leurs effets qu'après le prononcé du divorce (*Decree Absolute*), de l'ordonnance de séparation judiciaire (*Decree of Judicial Separation*) ou de l'ordonnance de dissolution d'un partenariat civil (*Final Order*). Ces ordonnances ne peuvent être prises à titre provisoire.

Deuxièmement, les sections 23(1)(c) et 31(7A) à (7F) du *Matrimonial Causes Act 1973* organisent quant à elles la possibilité d'ordonner le versement d'un capital compensatoire (*Lump sum order*) ou de tout autre somme d'argent selon les circonstances de l'espèce.

Le paiement de ce capital compensatoire est en principe réalisé en une fois (*clean break*) mais peut également être fractionné (*Lump sum by instalments*). Le paiement différé des échéances peut être reporté à une/des date(s) ultérieure(s) spécifiquement fixée(s) ou à la réalisation d'un événement extérieur. Ce report peut être justifié par la nécessité de laisser un peu de temps au débiteur pour liquider ses biens en vue du paiement.

Une ordonnance visant au versement en une fois du capital compensatoire (*lump sum order*) ne peut être révisée. Cependant une même ordonnance dont le paiement est fractionné

(*lump sum by instalments*) peut l'être[656]. Cette modification de l'ordonnance initiale peut porter sur le calendrier des échéances ainsi que sur la manière dont les versements ultérieurs seront exécutés. La Cour dispose également du pouvoir de remette en cause (*discharge*) le paiement de l'une des échéances programmée. Ce pouvoir du juge peut être limité au moyen d'une demande d'ordonnance visant à imposer le payement d'un nombre spécifique d'échéances au débiteur, laquelle si elle est ordonnée ne sera pas révisable sur le fondement de la section 31 du *Matrimonial Causes Act 1973*. Le paiement des échéances futures peut également être sécurisé par une forme d'hypothèque sur l'un des biens du débiteur.

7. une créance alimentaire,

Oui, en vertu des sections 23(1)(a) et 23(1)(b) du *Matrimonial Causes Act 1973* il est possible pour l'un des époux d'obtenir une rente payée directement par l'ex-époux (*Periodical payments*), cette rente est souvent désignée en pratique par le terme *maintenance*. Ce paiement peut être sécurisé au moyen d'une forme d'hypothèque sur les biens du débiteur (*secured periodical payments*), cependant cette dernière forme de rente est rarement ordonnée en pratique.

Les paiements s'effectuent en référence à une période de temps qui très souvent est mensuelle. L'un des époux peut être investi d'un droit à pension alimentaire pour lui-même ou pour les enfants mineurs qu'il élève. Le montant minimum de la rente n'est pas fixé par le droit et en pratique il peut être minime (par exemple 5 pence par an). Le versement peut être ordonné pour un temps donné ou tant que les deux époux vivront[657]. Son montant peut également être indexé sur l'inflation.

Le droit à pension alimentaire de l'ex-époux prend fin avec son remariage ou s'il conclue un partenariat civil. Le droit à pension peut être révisé tant dans son montant que pour sa durée, si les situations respectives des parties viennent à changer de manière significative. La demande de révision de la pension peut viser à sa conversion en capital compensatoire (*lump sum*), qui si elle est ordonnée mettra un terme au droit à pension alimentaire.

8. une compensation de droits à pension de retraite,

Oui, différents droits sont ouverts à ce titre au moment du divorce.
Premièrement une ordonnance visant au partage des droits à pension de retraite peut être ordonnée (*Pension sharing order*)[658]. Cette ordonnance n'est ouverte que pour les divorces dont la demande a été introduite après le 1er décembre 2000. Le pourcentage ordonné du droit à pension sera octroyé une fois pour toute au bénéfice de l'ex-époux qui ne dispose pas de pension de retraite ; à charge pour lui/elle de réinvestir les sommes obtenues en conséquence dans un nouveau plan de retraite (soit au sein du même organisme soit dans un organisme extérieur). En pratique, en raison des coûts engendrés par ce processus de réinvestissement les organismes débiteurs insistent pour les sommes soient transférées à un

[656] Section 31(2)(d) *du Matrimonial Causes Act 1973*.
[657] Dans cette hypothèse les effets de l'ordonnance cesseront automatiquement au décès de l'un ou de l'autre des époux. A la différence de l'obligation viagère, le décès du créancier éteint l'obligation qui ne se transmet pas à ses descendants (*joint live order*).
[658] Section 24B du *Matrimonical CausesAct 1973*.

autre organisme de retraite qui les administrera et supportera les charges corrélatives de réinvestissement[659].

Deuxièmement une ordonnance visant au partage du montant de la pension de retraite peut être ordonnées (*Pension attachment orders*)[660]. Cette ordonnance n'est ouverte que pour les divorces dont la demande a été introduite après le 1er juillet 1996. En vertu de cette ordonnance l'organisme débiteur de la pension est tenu, au moment où le bénéficiaire de celle-ci peut prétendre à son versement, de verser un pourcentage du montant dû à l'ex-époux qui ne bénéficie pas de droits à pension. Ce versement peut prendre la forme d'une rente ou d'un capital dont le montant sera déterminé en fonction du pourcentage octroyé. Le capital peut être payé au moment du départ en retraite du débiteur ou encore au décès de ce dernier. Si le bénéficiaire de la pension dispose du droit de la convertir en capital, la Cour pourra lui demander de solliciter cette conversion.

Cette ordonnance peut également prendre la forme d'un paiement périodique effectué en faveur de l'ex-époux créancier.
Ce type d'ordonnance ne préservent pas toujours complètement les droits du créancier dans la mesure où ceux-ci sont liés au fait que le débiteur prenne effectivement sa retraite or ce dernier n'est pas tenu de la prendre en droit anglais. Cette ordonnance est en pratique souvent utilisée pour sécuriser la situation lorsqu'il apparaît que la pension alimentaire ne pourra pas être honorée par le débiteur avant sa retraire.

Quelle que soit la forme du paiement organisé par l'ordonnance, capital ou rente, celle-ci peut-être révisée[661]. Lorsque le paiement prend la forme d'une rente, l'ordonnance prend fin avec le décès ou le remariage du créancier.

Il est à noter que les deux types d'ordonnances, ordonnance visant au partage des droits à pension de retraite et ordonnance visant au partage du montant de la pension de retraite sont incompatibles entre elles[662].

Enfin, un rachat compensatoire des droits à pension perdus peut également être ordonné (*buy out*). Cela implique que les droits à pension évalués soient intégrés à l'ensemble des biens devant être partagés entre eux par les ex-époux en vertu de la section 25 du *Matrimonial Causes Act 1973*. A la suite de ce rachat, l'époux bénéficiaire du plan de retraire en bénéficiera dans son intégralité sous réserve d'une compensation octroyée à l'autre au moment du divorce. Cette compensation peut prendre diverses formes et notamment l'attribution de biens.

9. des dommages-intérêts

En tant que tel l'octroi de dommages et intérêt n'est pas prévu en droit anglais, cependant le comportement de l'un des ex-époux peut être pris en compte et produire des conséquences. En effet le juge à la possibilité de condamner l'un des ex-époux au paiement des dépends : *Cost order*. En effet, en vertu de la section 28(5) des *Family Proceeding Rules*

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[659] *Nota Bene* ces organismes sont organisés sur le fondement d'un *Trust*.
[660] Sections 25B et 25C du *Matrimonial Causes Act 1973*. Ces ordonnances étaient autrefois désignées par le terme de *earmarking orders*
[661] Section 31(2) (dd) du *Matrimonial Causes Act 1973*.
[662] Section 24(B)(5) du *Matrimonial Causes Act 1973*.

2010, la condamnation au paiement des dépends n'est pas possible dans les instances familiales. Toutefois, la section 28(6) ouvre néanmoins cette possibilité au juge lorsqu'il estime approprié de le faire à titre de sanction de l'une des parties pour son comportement tant au cours de l'instance qu'avant l'introduction de l'instante.

10. ou d'autres sommes ou droits patrimoniaux ?

En vert de la section 24 du *Matrimonial Causes Act 1973*, le juge peut réviser l'ensemble des différentes conventions matrimoniales passées entre époux[663], et à ce titre octroyer certaines sommes d'argent à l'un des ex-époux.

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

Cette demande peut être faite dès l'introduction de l'instance ou à n'importe quel moment en cours d'instance. Cependant, le juge ne peut ordonner ces mesures qu'après le *Decree nisi* et elles ne pourront prendre effet qu'après le *Decree absolute*. Ces mesures ne peuvent être ordonnées au titre des mesures provisoires.

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

La demande n'est enfermée dans aucun délai. Elle peut être introduite après le prononcé du divorce, à moins que dans le document contenant ses prétentions au moment de la requête (*prayer*) le demandeur au divorce déclare renoncer à une demande de compensation financière (*ancillary relief*) et se remarie par la suite. De même, après divorce, cette demande ne peut plus être introduite par le défendeur au divorce si lui-même se remarie par la suite[664].

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

Le comportement des parties sera pris en compte pour évaluer une éventuelle dispense de compensation. En effet, l'octroi d'une compensation financière au moment du divorce ou postérieurement à celui-ci n'est pas automatique. En vertu de la section 25 du *Matrimonial Causes Act 1973*, pour qu'une telle compensation soit ordonnée le juge doit être convaincu qu'elle doit l'être au regard des besoins de celui qui la réclame et du patrimoine et des revenus de celui à qui elle est réclamée[665].

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

Le comportement des parties sera pris en compte pour évaluer une éventuelle restriction des droits à compensation, en vertu de la section 25 du *Matrimonial Causes Act 1973*[666].

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[663] Voir *supra* questions 42, 43 et 44 du questionnaire.
[664] Section 28(3) du *Matrimonial Causes Act 1973* et *Tee v Tee Hillman [1999] 2 FLR 613*.
[665] Voir *infra* question 76.
[666] Voir *infra* question 76.

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

Le rétablissement d'un équilibre financier est recherché même si aucune disposition légale ne l'impose. Des arrêts de principe ont jugé qu'il ne pouvait être dérogé principe directeur de division égalitaire du patrimoine entre ex-époux que pour de bonnes raisons[667].

68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

En l'absence de règles spécifiques organisant la liquidation de régimes matrimoniaux en droit anglais, les règles applicables sont celles liées au partage équitable des biens entre époux.

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

Si le comportement de l'un des époux est invoqué au titre des motifs de rupture irrémédiable du lien matrimonial, celui-ci en fonction de sa gravité peut être pris en compte pour le calcul du montant de la compensation ordonnée au moment du divorce[668].Cependant l'importance que le juge accordera à cet élément sera appréciée au regard de l'ensemble des éléments qui sont pris en considération dans le calcul de cette compensation sur le fondement de la section 25 du *Matrimonial Causes Act 1973*.

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

Voir *supra* question 62 du questionnaire.

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

En effet, il est possible en droit anglais d'obtenir au moment du divorce des droits spécifiques relatifs à l'occupation du logement familial.
A la suite de l'arrêt *Mesher v Mesher and Hall*[669], il est possible à l'époux vivant avec les enfants d'obtenir, au moyen d'un *Mesher order*, le report de la vente du logement familial afin de pouvoir rester avec eux dans les lieux[670]. L'autre époux voyant en conséquence reporter d'autant le moment où il peut prétendre à faire valoir ses intérêts dans la vente de ce bien. Pendant la période de report, le logement peut rester la propriété commune des époux en

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[667] *White v White [2001] 1 AC 596*, dans cette affaire Lord Nicholls a jugé que « l'objectif d'égalité est un guide et non une règle », « *The yardstick of equality is a guide and not a rule* » *White v White [2001] 1 AC 596* p. 605. Cette position a été reprise par la suite voir notamment : *Miller v Miller; McFarlane v McFarlane [2006] UKHL 24; [2006] 2 AC 618.*

[668] Section 25(2)(g) du *Matrimonial Causes Act 1973*.

[669] *Mesher v Mesher and Hall [1980] 1 All ER 126.*

[670] Cette ordonnance s'applique au logement familial quelle que soit sa nature, bien acquis en commun par les époux ou bien propre de l'un d'eux.

vue de sa vente future et de l'administration en vertu d'un trust des fruits de cette vente (*hold in joint names on trust for sale*). Durant cette même période, la propriété du logement familial peut également être transférée à l'autre époux contre récompense.
A la suite de l'arrêt *Martin v Martin*[671], l'un des époux peut obtenir au moyen d'un *Martin order* le report de la vente du logement conjugal pour une durée indéterminée, ce qui lui permet, en l'absence d'enfants communs, de rester dans les lieux pour le reste de sa vie où jusqu'à la survenance d'un événement spécifique comme le remariage ou son départ volontaire.

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

Oui, les époux peuvent déterminer entre eux le montant et les modalités d'exécution de ces obligations patrimoniales dans le cadre d'une convention. Toutes les conventions anté ou post nuptiale, ou encore en vue d'un divorce peuvent contenir leur accord sur ce point.

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Le juge dispose d'un droit de regard sur le contenu de ces conventions et dispose du pouvoir de les réviser au vu des éléments contenu dans la section 25(2) du *Matrimonial Causes Act 1973*[672].

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

Les époux sont tenus de révéler l'intégralité de la composition de leur patrimoine et de leurs revenus (*full and frank disclosure*) dans les procédures relatives aux conséquences financières du divorce tant entre époux qu'à l'égard des enfants[673].

Un époux peut cependant être relevé de cette obligation s'il déclare sous serment être en mesure d'honorer toute les mesures de compensation qui seraient ordonnées par la Cour. La dispense de révélation au moyen de ce serment (*Millionnaire's defence*) a été instaurée par un arrêt *Thyssen-Bornemisza v Thyssen-Bornemisza (No2) [1985]*[674].

Cependant, un débat existe en doctrine sur le fait de savoir si cette dispense peut encore être invoquée aujourd'hui. En effet dans l'affaire *J v V (Disclosure : Offshore Corporations) [2001]*[675], le juge Coleridge retient qu'il existe des situations dans lesquelles il peut être approprié de libérer l'époux de son obligation de révélation par l'effet de ce serment.

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[671] *Martin v Martin [1977] 3 All ER 762.*
[672] Pour plus de détail voir les questions 42, 43 et 44 du questionnaire.
[673] Dans les directives relatives à la conduite des instances familliales : *Practice Direction (Family Proceedings: Case Management) [1995] 1 WLR 332*, Sir Stephen Brown P à mis en avant le fait que cette révélation était une obligation des parties envers la Cour : « *It is a duty owed to the court both by the parties and by legal representatives to give full and frank disclosure in ancillary relief applications and also in respect of children* ».
[674] *Thyssen-Bornemisza v Thyssen-Bornemisza (No2) [1985] FLR 1069.*
[675] *J v V (Disclosure : Offshore Corporations) [2001] 1 FLR 1042.*

Toutefois, dans une affaire plus récente *McFarlane v Mc Farlane and Parlour v Parlour [2004]*[676], Lord Thorpe a retenu, mais en *obiter dictum* (partie de l'arrêt n'ayant pas force obligatoire), qu'il devait être mis fin à la pratique de cette dispense. Toutefois dans cette dernière affaire il apparaissait que la Cour n'avait pas confiance dans le fait que le débiteur, qui avait eu une attitude assez cavalière pendant l'instance, soit effectivement en mesure d'honorer toute mesure de compensation ordonnée. Pour une partie de la doctrine, la richesse du débiteur doit être particulièrement importante pour qu'il puisse être libéré de son obligation de révélation, au point qu'aujourd'hui certains font référence à la *Billionnaire's ou Milliardaire's defence.*

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

En cas de refus des parties de se soumettre à cette obligation de révélation, le juge peut en tirer des conséquences.

Ainsi, au vu des éléments qui ont pu être rapportés et du contexte familial (train de vie de la famille, la taille d'une entreprise éventuelle ou la nature des activités professionnelles) le juge estimera la valeur des biens ou du patrimoine dissimulé. Cette estimation sera prise en compte dans l'évaluation du montant de la compensation ordonnée.

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

Les éléments devant impérativement être examiné par le juge et ses pouvoirs dans le cadre d'une procédure relative aux conséquences patrimoniales du divorce ont été posés dans la section 25 du *Matrimonial Causes Act 1973*.
En vertu de ces dispositions, le juge doit prendre en considération tous éléments de l'affaire et en présence d'enfants mineurs au sein de la famille, il doit accorder la considération première à leur bien-être[677].
Une liste d'éléments devant être appréciés est ensuite dressée par la section 25(2) du *Matrimonial Causes Act 1973*[678] :

a) les revenus et salaires, les biens et tout autres ressources financières dont chacune des parties au mariage dispose ou est en mesure de disposer dans un futur proche ; toute perspective d'accroissement futur de la capacité financière d'un époux doit également être prise en compte au regard de ce que la Cour peut raisonnablement attendre de celui-ci et de ses capacités.
b) les besoins financiers des époux, les obligations et responsabilités alimentaires auxquelles ils sont tenus où sont susceptible d'être tenus dans un futur proche.
c) le train de vie de la famille avant la rupture du mariage
d) l'âge des époux et la durée du mariage

[676] *McFarlane v Mc Farlane and Parlour v Parlour [2004] EWCA Civ 872*
[677] Section 25(1) du *Matrimonial Causes Act 1973*. Cette section renvoie aux pouvoirs du juge dans le cadre des demandes fondées sur les sections 23, 24 [F2, 24A ou 24B] de la même loi.
[678] Cette section renvoie aux pouvoirs du juge dans le cadre des demandes fondées sur les sections 23(1) [(a), (b) ou (c)] et 24 [F3, 24A ou 24B] de la même loi.

e) tout handicap physique ou mental dont seraient affectées les parties au mariage.
f) Les contributions au bien-être de la famille apportées par chacun des époux, ou susceptibles d'être apportées par eux dans un futur proche, incluant le fait d'élever les enfants et de prendre en charge l'organisation de la vie familiale.
g) le comportement de chacun des époux, si selon les circonstances la Cour estime injuste que ce comportement ne soit pas pris en considération.
h) dans l'hypothèse d'un divorce ou d'une demande en nullité, les intérêts que l'une ou l'autre des parties perdrait la chance d'acquérir en raison de la dissolution du mariage.

Au regard des décisions qui peuvent être prisent en faveur d'un enfant, une autre liste d'élément s'ajoute à la première en vertu de la section 25(3) du. *Matrimonial Causes Act 1973*[679]

a) les besoins financier de l'enfant
b) les revenus et salaires, les biens et tout autres ressources financières dont l'enfant dispose, s'il en dispose.
c) tout handicap physique ou mental affectant l'enfant.
d) l'éducation qui a été donnée à l'enfant, et la manière dont les parties au mariage envisagent qu'il soit éduqué ou formé.
e) les éléments visés *supra* par la section 25(2)(a), (b) et (c) applicables aux parties au mariage.

Dans l'hypothèse où des mesures doivent être ordonnées à l'encontre d'une des parties au mariage au bénéficie d'un enfant qui n'est pas le sien, la section 25(4) du *Matrimonial Causes Act 1973* ajoute des éléments devant être pris en compte par la Cour[680].

a) le fait que le débiteur ait auparavant assumé financièrement la charge de cet enfant, et le cas échéant dans quelle mesure, pour quels motifs et sur quelle période de temps.
b) le fait qu'en assumant la charge de cet enfant, le débiteur avait ou n'avait pas connaissance du fait que celui-ci n'était pas le sien.
c) le fait qu'une autre personne soit également tenue d'une obligation d'entretien à l'égard de cet enfant.

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

Le montant de cette compensation peut être modifié si la situation des parties évolue après l'ordonnance. Le fait que le débiteur perde son emploi ou que le créancier arrive difficilement à boucler le mois avec les sommes allouées justifient une demande de révision de la compensation octroyée par la Cour.

Le montant de la compensation peut varier en plus ou en moins, la durée de paiement peut être modifiée, certaines échéances peuvent être supprimées, l'exécution de l'obligation peut

[679] Cette section renvoie aux pouvoirs du juge dans le cadre des demandes fondées sur les sections 23(1)[(d), (e) ou (f)], 23(2) ou 23(4), 24 ou 24A de la même loi.
[680] Cette section renvoie aux pouvoirs du juge dans le cadre des demandes fondées sur les sections 23(1)[(d), (e) ou (f)], 23(2) ou 23(4), 24 ou 24A de la même loi.

être momentanément suspendue, les sommes restant dues peuvent être converties en capital.

La demande de révision peut être introduite tant par le débiteur que par le créancier de l'obligation[681]

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

La question de l'entretien de l'enfant est organisée par le *Children Support Act 1991*, le *Child Support, Pension and Social Security Act 2000* et le *Child Maintenance and Other Payments Act 2008*[682]. En droit anglais l'obligation d'entretien à l'égard de l'enfant n'est pas liée à l'autorité parentale mais à la filiation[683], l'obligation pèse sur les parents biologiques de l'enfant[684]. Les dispositions légales organisent la manière dont cette obligation est mise en œuvre lorsque l'enfant ne vit pas avec son ou ses parents. Les dispositions s'appliquent donc tant aux situations de divorce et séparation parentale, qu'à celles de prise en charge de l'enfant dans le cadre de mesures de protection de l'enfance.

Cette obligation d'entretien est également liée à l'âge de l'enfant pour le compte duquel son exécution est réclamée. En effet, elle est due à l'enfant jusqu'à sont seizième anniversaire sans condition et jusqu'à son dix-neuvième, s'il justifie être scolarisé à temps complet (*full-time education*) [685]. A compter de l'âge de 16 ans, à défaut d'être scolarisé il faudra à l'enfant justifier de circonstances particulières pour continuer à bénéficier d'un soutien financier jusqu'à son dix-huitième anniversaire[686]. En tout état de clause l'obligation d'entretien n'est pas due aux enfants qui poursuivent des études supérieures.

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

Tout parent qui ne vit pas avec l'enfant se trouve en conséquence soumis à l'obligation de subvenir au besoin de ses enfants, dans les conditions posées ci-dessus, au moyen de paiements périodiques dont la somme et les échéances sont déterminées par décision d'un organisme d'Etat[687]: le *Child Support Agency* (*CSA*), qui dépend directement du Gouvernement, et est rattaché au Ministre du travail et des pensions : *Secretary of State for Work and Pensions*. Le parent résidant avec l'enfant peut solliciter l'intervention du *CSA* aux fins d'évaluer le

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[681] Section 31 du *Matrimonial Causes Act 1973*.
[682] Cette Loi est entrée en vigueur en 2011.
[683] Section 1 du *Child Support Act 1991*.
[684] Dans l'affaire *A v B (Damages : Paternity) [2007]3 FCR 861*, un père a engagé la responsabilité civile de la mère pour tromperie quant à sa paternité (*tort of deceit*) et s'est vu octroyer des dommages et intérêts dont le montant visait à le dédommager des sommes d'argent qu'il avait versé pour l'entretien de l'enfant.
[685] Cette notion implique que l'enfant soit scolarisé dans un établissement du second degré (en effet le dispositif ne vise que la scolarité jusqu'au A-Level, l'équivalent du baccalauréat en France). L'enfant doit également être scolarisé dans un cursus qui lui assure un minimum de douze heures de cours par semaine pour remplir cette condition légale. www.sfla.co.uk/endmaintenance.html[page consultée le 3 août 2012].
[686] Section 55(1) du *Child Support Act 1991*.
[687] Section 1(2) du *Child Support Act 1991*.

montant de l'obligation due à l'enfant (*maintenance assessment*) et de mettre en œuvre, en son nom, le recouvrement de cette somme à l'encontre du parent qui ne vit pas avec l'enfant[688]. La saisine du *CSA* est laissée à l'appréciation du parent résidant avec l'enfant, en effet depuis la réforme de 2008 celui-ci n'est plus tenu de saisir les instances étatiques. Le *CSA* est également compétent lorsqu'il s'agit de demandes visant à modifier les modalités d'exécution de l'obligation d'entretien.

Lorsque le *CSA* intervient auprès des familles l'obligation est remplie systématiquement par l'octroi d'une pension alimentaire. Il semble que dans le cadre d'un accord parental sur la question les parents bénéficient d'une plus grande marge de manœuvre quant aux modalités d'exécution de cette obligation. En effet, il peut être convenu que le parent qui ne réside pas avec l'enfant prendra en charge directement certains frais liés au quotidien de l'enfant[689].

Cependant l'utilisation systématique par les différents textes applicable du terme « *periodical payment* » associé à cette obligation nous laisse penser qu'un accord parental ne saurait envisager le versement d'un capital ou la mise à disposition d'un bien, en exécution de cette obligation. Cette dernière possibilité semble cependant pouvoir être mise en œuvre à la demande du CSA, en cas de non paiement par le parent débiteur. En effet, le CSA peut ordonner la vente d'un bien appartenant au parent pour honorer la pension alimentaire ou encore peut déclencher des poursuites pénales à son encontre

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

Les modalités de mise en œuvre de l'obligation d'entretien à l'égard de l'enfant peuvent être décidées par accord parental au moyen d'un *maintenance agreement*[690]. Une réforme du système visant à garantir l'exécution des obligations alimentaires à l'égard de l'enfant est en cours[691] et le nouveau schéma incite très fortement les parents à s'entendre sur les modalités d'exécution de l'obligation d'entretien plutôt que de recourir aux services du *CSA*. Le Ministère dans ses propositions de réforme prévoit que le recours au *CSA* pourrait devenir payante, à hauteur de £20 par requête[692], afin d'inciter les parents à réfléchir sur la nécessité de recourir au dispositif plutôt et à trouver un accord en dehors de ce cadre[693]. Par ailleurs, si le dispositif de recouvrement est mis en œuvre par le *CSA*, le parent contraint au versement de l'obligation alimentaire verra le montant de la contribution majorée de 20%.

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[688] Section 6(5) du *Child Support Act 1991* tel qu'amendé par le *Child Maintenance and Other Payments Act 2008*.

[689] Les documents informatifs à destination des familles donnent quelques précisions indicatives quant à ces modalités spécifiques. En effet revient fréquemment l'exemple du paiement direct d'habits ou celui des uniformes scolaires des enfants, le payement de vacances ou encore de frais de scolarité. Rien ne semble interdire aux parents d'envisager des payements directs d'autre nature par exemples fournitures scolaires, abonnements, adhésions www.cmoptions.org/en/pdfs/Family%20Arrangement%20Form.pdf[page consultée le 8 août 2012].

[690] Section 9 du *Child Support Act 1991*.

[691] *Public Consultation : Supporting separated families ; securing children's future* Cm 8399, Juillet 2012, Ministère du Travail et des pensions. Disponible en ligne sur le site : www.dwp.gov.uk/docs/childrens-futures-consultation.pdf

[692] Le dispositif proposé libère néanmoins le parent demandeur victime de violence conjugale, de cette obligation de payer 20£

[693] *Public Consultation : Supporting separated families ; securing children's future* Cm 8399, Juillet 2012, Ministère du Travail et des pensions. para. 17, p. 6. Disponible en ligne sur le site : www.dwp.gov.uk/docs/childrens-futures-consultation.pdf

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

En vertu de la section 35 du *Matrimonial Causes Act 1973* le juge dispose du pouvoir de réviser toutes les conventions relatives à l'exécution d'une obligation alimentaire (maintenance agreement), tant entre époux qu'au bénéfice des enfants. La Cour peut révoquer cet accord ou le réviser en ajoutant certaines clauses à cet accord[694].

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

Le divorce est obligatoirement prononcé par un juge mais le règlement de ses conséquences financières peut être déterminé par convention, en dehors de toute instance.

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

Les seuls organes compétents sont les tribunaux, il n'en existe pas d'autre. Les parties peuvent cependant s'entendre directement sur cette question sans qu'un juge n'en soit saisi.

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

La procédure peut être initiée dans toutes les *County courts* du Royaume, devant le juge spécialisé pour connaître des procédures familiale (*private law ticket*). Si une question de droit international privé voit le jour, les directives relatives à la conduite de ces instances (*practice direction*)[695] prévoient dans certaines circonstances le renvoi de l'affaire à la *High Court.* En effet le *Principle Registry of the Family Division on the High Court* (basé à Londres) est également compétent pour connaître des divorces en première instance.
Cette juridiction sera compétente pour connaître tant des causes que des effets du divorce.

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

Une période de réflexion a été prévue cependant elle n'intervient pas au stade de l'introduction de l'instance. En effet, une période de réflexion de six semaines et un jour est

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[694] Section 35(2)(i) et (ii) du Matrimonial Causes Act 1973.
[695] *Practice Direction* du 3 Novembre 2008 relative à la compétence juridictionnelle et à la délocalisation des affaires (*practice direction on the Allocation and Transfer of Proceedings*), voir notamment le paragraphe 5 de ces directives. Il est à noter que le caractère transnational de la procédure n'est qu'un motif parmi d'autres qui justifient également le renvoi de l'affaire devant la *High Court*.

imposée entre l'obtention du *Decree nisi* et l'introduction de la demande de conversion en *Decree absolute*.

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

En vertu des directives relatives à la conduite des instances familiale[696], toute personne qui saisit la Cour d'une demande relative soit à l'organisation de la vie de l'enfant (*contact, residence, specific issue orders*) soit aux conséquences financières du divorce et tenu d'avoir assisté à une réunion d'information relative à la médiation (*Mediation information and Assessment meeting* ou *MIAM*). Les parties à la procédure assistent séparément à ces réunions qui ont pour but d'expliquer l'objectif de la médiation, la manière dont elle se déroule et d'évaluer si la médiation semble appropriée au contentieux en question. Cette information porte également sur tous les modes alternatifs de règlement des conflits et notamment les techniques de droit collaboratif. Cette information vise à donner au justiciable un tableau d'ensemble de toutes les alternatives qui s'offrent à lui pour régler le litige. Si à l'issue des réunions d'information les parties souhaitent s'engager dans une médiation, elles seront convoquées à une réunion commune.

Il existe quelques exceptions à cette obligation préalable à la saisine du juge mais elles sont limitativement énumérées par la directive (Practice direction). Sont notamment visées les situations dans lesquelles la médiation semble inappropriée aux yeux du médiateur qui anime la réunion auquel et l'autre partie a refusé d'assister à cette séance d'information. Les situations dans lesquelles des violences conjugales ont été alléguées. Lorsque l'une des parties se trouve en situation de faillite, ou si l'une des parties n'a pas de domicile connu et ne peut être joint. Les situations dans lesquelles les services de protection de l'enfance interviennent auprès de la famille ou si un enfant souhaite être partie à la procédure envisagée. Enfin, les parties sont libérées de cette obligation si après avoir contactés trois médiateurs du ressort territorial, aucun d'entre eux n'a été en mesure de proposer un rendez-vous dans les quinze jours qui ont suivi cette prise de contact.

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- **au logement familial,**

Oui, mais uniquement en cas de violences conjugales (toutes les formes de violences physiques, sexuelles, morales, ou financières sont couvertes)[697].

En vertu des dispositions du *Family Law Act 1996*[698], dans ce contexte la Cour peut rendre une ordonnance d'occupation du logement familial (*occupation order*). Cette ordonnance est rendue à l'encontre de la personne liée au demandeur soit par un mariage, soit par un partenariat civil. Cette ordonnance aura pour effet d'expulser l'auteur des violences du logement familial.

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[696] Practice direction 3A relative à la Partie 3 des *Family Procedure Rules 2010* (entré en vigueur le 6 avril 2011)
[697] http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/
[698] Section 33, partie IV du *Family Law Act 1996*.

La Cour est tenue de prendre cette mesure « s'il apparaît que le demandeur ou tout enfant vivant au foyer, est susceptible de subir un préjudice significatif en raison du comportement du défendeur, à défaut d'ordonnance d'occupation »[699].

Il n'existe pas de possibilité pour le juge de statuer sur le logement familial à titre provisoire en dehors des situations de violences conjugales.

- **aux enfants,**

Il est possible pour le juge de statuer à titre provisoire sur la résidence de l'enfant (*interim residence order*) et le droit de visite et d'hébergement (*interim contact order*) du parent qui ne vit pas avec lui.
Les demandes relatives à l'exécution d'une obligation alimentaire au bénéfice de l'enfant (*maintenance*) seront traitées par le *Child Support Agency*[700]. Les demandes peuvent viser des frais financiers tout à fait spécifiques tels que la prise en charge des frais de scolarité des enfants, ou encore les besoins spécifiques liés à l'accueil et à la scolarité d'en enfant en situation de handicap. Le montant des sommes alloués après évaluation par le CSA est plafonné et si les ressources du parent débiteur permettraient d'obtenir au bénéfice de l'enfant une pension d'un montant supérieur au plafond, le parent créancier peut saisir la Cour d'une demande de pension complémentaire (*top up order*). Le recours au juge est très exceptionnel sur ces questions, et il ne sera recevable que dans l'hypothèse où la compétence du CSA est écartée ou si une demande de complément est faite. Dans ces circonstances seulement la Cour dispose de la compétence de prendre des mesures (*maintenance order*) qui peuvent être prises à titre provisoire (*interim maintenance order*).

- **à l'obligation alimentaire entre époux,**

En vertu de la section 22 du *Matrimonial Causes Act 1973*, la Cour peut ordonner le versement d'une pension alimentaire à titre provisoire durant le temps de l'instance (*maintenance pending suit*). Celle-ci produira ses effets jusqu'au prononcé du *Decree absolute.*
Il est à noter qu'après le prononcé du *Decree absolute*, cette demande reste recevable et sera désignée par le terme *Interim Maintenance order.* Le montant de la pension est déterminé en fonction de ce que la Cour estime raisonnable. En conséquence, le pouvoir d'appréciation des juges est très largement ouvert sur ce point[701]. Cette obligation peut rétroagir à la date de l'introduction de l'instance[702], et le juge peut exercer ce pouvoir discrétionnaire y compris si la compétence de la juridiction anglaise est contestée[703].
Cette demande peut être introduite à tout moment au cours de l'instance[704]. Cependant cette mesure ne peut être ordonnée en urgence ou au titre des injonctions dont la Cour peut user[705].

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[699] Section 33(7) du *Family Law Act 1996*.
[700] Voir *supra* questions 79 et 80 du questionnaire.
[701] Dans l'affaire *Offord v Offord (1982) 3 FLR 309*, le juge French a retenu que le pouvoir d'appréciation du juge s'exerçait sans entrave en ce domaine (*unfettered discretion*), *Offord v Offord (1982) 3 FLR 309*, p. 312
[702] Ce pouvoir s'exerce dans les procédures de divorce, de nullité du mariage, de séparation ou de rupture d'un partenariat civil. Voir notamment Schedule 5, Part 8 du *Civil Partnership Act 2004.*
[703] *L-K v K [2006] EWHC 153 (Fam); [2006] 2 FLR 1113.*
[704] Règle 9.7 des *Family Procedure Rules 2010*.
[705] *Re M (Freezing Order) [2006] 1 FLR 103*, et tout particulièrement la position de Stephen Bellamy QC, para. [35] et [39].

- **aux conséquences de violences conjugales ?**

En effet, l'existence de violences conjugales permet au juge de prendre un certain nombre de mesures provisoires notamment relatives au logement[706]. La Cour peut également ordonner des injonctions (*non-molestation order*) au bénéfice du conjoint victime ou des enfants victimes de ces violences, qui tendent à limiter les contacts possibles du défendeur à l'injonction avec les victimes.

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

L'appel n'est pas ouvert contre la décision définitive de divorce : *decree absolute*. Toutefois la possibilité d'une action en rescision du *Decree absolute* est une éventualité[707] dans l'hypothèse d'une tromperie ou d'une fraude, mais c'est extrêmement rare en pratique.
En revanche l'appel d'une décision relative aux conséquences du divorce : *ancillary relief,* est ouvert selon les conditions légales du recours.

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir
- **à l'instance en divorce ;**
- **à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?**

Si oui, sur quels fondements ?

En droit anglais, l'enfant dispose de la possibilité d'intervenir dans une procédure judiciaire de divorce ou de séparation parentale. Il sera en revanche automatiquement partie à une instance sur le fondement de la section 8 du *Children Act 1989* relative à sa résidence (*residence order*), au droit de visite et d'hébergement (*contact order*), à la résolution d'une question spécifique le concernant (*specific issue order*) ou à la demande d'injonction de ne pas faire à son égard (*prohibited step order*). Dans le cadre de ces procédures l'enfant peut bénéficier du statut de partie autonome (sans représentant) sur autorisation judiciaire (*leave of the court*)
La possibilité de donner à l'enfant le statut de partie dans les procédures familiales (*private law proceedings*), procédures dans lesquelles il n'est initialement que concerné est une disposition innovante du droit anglais. Les dispositions applicables aux modalités de cette intervention sont anciennes[708] et ont encore été récemment réaménagées dans le cadre des règles de procédures applicables aux instances familiales de 2010 (*family Proceedings Rules 2010*)[709].
Un enfant se verra octroyer la qualité de partie à une instance familiale s'il apparaît dans sont intérêt qu'il bénéficie de cette qualité[710]. Les directives relatives à la conduite des instances familiales prévoient que cette intervention n'est souhaitable que dans les affaires d'une

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[706] Voir *supra*.
[707] Règle 7.32(2)(a) *FPR* 2010.
[708] *Matrimonial Causes Rules 1977.*
[709] Les modalités de cette intervention sont prévues par la règle 16.2 de la Partie 16 des *Family proccedure Rules* 2010, complétées par des directives relatives à la conduite des instances familiales (*practice direction 16A Representation of children*)
[710] « *The Court may make the child a party to proceedings if it considers it is in the best interests of the child to do so* », règle 16.2(1) *FPR* 2010.

particulière difficulté, et par conséquent dans une minorité de cas[711]. L'éventualité de demander la réalisation d'un rapport sur la situation de l'enfant à un rapporteur judiciaire, de demander une enquête sociale aux services compétents ou la réalisation d'une expertise doit être envisagée avant toute décision d'octroyer à l'enfant la qualité de partie à la procédure[712]. Ces directives poursuivent en établissant une liste d'éléments qui justifieraient que cette qualité soit donnée à l'enfant par la Cour[713]. Au titre de ces éléments figurent notamment le fait qu'un rapporteur judiciaire ai fait cette recommandation à la Cour, que la position tenue par l'enfant au regard de sa situation n'est rapportée par aucun des adultes parties, l'existence d'un contentieux complexe relatif à la résidence de l'enfant, le fait que les souhaits et sentiments de l'enfant ne pourraient pas être rapportés à la Cour de manière satisfaisante au moyen d'un rapport, l'existence de questions psychiatrique ou médicales complexes dans la procédure, le règlements de questions liées au caractère transnational de la procédure, lorsque l'intérêt de l'un des enfants est en opposition avec celui de sa fratrie, l'existence d'un contentieux relatif à sa filiation, ou encore des allégation de mise en danger de l'enfant dans sa famille.

Les délais occasionnés par une représentation autonome de l'enfant dans la procédure devront être pris en compte au regard du principe de célérité (no delay principle) qui s'applique aux instances concernant des mineur[714].
Si la qualité de partie à la procédure est octroyée à l'enfant, celui-ci bénéficiera d'une représentation autonome de son intérêt par un *Children guardian*, membre du CAFCASS (*Children And Family Court Advisory and Support Service*) en charge de conduite en son nom la procédure et de faire désigner un avocat à l'enfant. Cette représentation peut également être assurée par des organismes extérieurs habilités[715].

Toute fois la règle 16.6 des règles de procédures familiales de 2010 (*FPR 2010*) organise la possibilité pour l'enfant d'être partie autonome à l'instance, sans représentation du *Children's guardian.* Pour ce faire l'enfant doit avoir obtenu une autorisation judiciaire en ce sens (*leave of the court*), et le juge dans son examen de la demande d'autorisation judiciaire sera tenu d'apprécier le discernement de l'enfant au regard de sa capacité « *à participer en tant que partie à la procédure* »[716]. La Cour peut revenir en cours d'instance sur l'autorisation ainsi donnée si cela est nécessaire à la protection de son intérêt[717]. L'enfant peut également se voir octroyer le statut de partie autonome sans autorisation judiciaire si un avocat contacté par lui l'a jugé suffisamment discernant pour accepter de recevoir des instructions de sa part relativement à la procédure en cours[718].

Si l'instance implique un majeur protégé qui ne bénéficie pas d'un représentant, les services de *l'Official solicitor* ont le pouvoir d'intervenir à l'instance en vue de garantir l'effectivement de la représentation de ses intérêts en justice[719].

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[711] Règle 7.1 *Practice Direction part 16A*.
[712] *Ibidem*.
[713] Règle 7.2 *Practice Direction part 16A*.
[714] Règle 7.3 *Practice Direction part 16A*.
[715] Voir notamment l'intervention du *National Youth Advocacy Sevice* ou *NYAS*, qui est une organisation caritative spécialisée dans la représentation d'enfants dans le cadre des instances judiciaires.
[716] Règle 16.6(7) *FPR 2010*.
[717] Règle 16.6(8) *FPR 2010*.
[718] Règle 16.6(3) *FPR 2010*. Le droit anglais s'en remet ici à l'appréciation de l'avocat au regard du discernement de l'enfant.
[719] Voir *supra*, question 20.

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

En droit anglais, le recueil des souhaits et sentiments de l'enfant n'est une obligation pour le juge que dans le cadre des procédures qui ont pour but d'organiser la situation personnelle de celui-ci[720]. Les procédures en question sont celles qui visent à obtenir la mise en œuvre, la modification ou la caducité de l'une des quatre ordonnances prévues par la section 8 du *Children Act 1989*, à savoir l'ordonnance de résidence habituelle de l'enfant (*residence order*), l'ordonnance de contact et droit de visite (*contact order*), la demande d'injonction de ne pas faire à l'encontre de la partie adverse (*prohibited step order*), et enfin l'ordonnance visant à la résolution d'une question spécifique relative à l'enfant (*specific issue order*).

Toutefois, lorsque dans le cadre d'une procédure judiciaire le juge est amené à évaluer l'intérêt de l'enfant (*welfare of the child*) il est tenu de se conformer à une liste de contrôle qui fixe les critères qu'il doit impérativement examiner : la *welfare checklist*[721]. Les souhaits et sentiments de l'enfant dont il est possible de s'assurer (*ascertainable wishes and feeling of the child concerned*) estle premier des éléments visés par cette liste de contrôle[722]. Si la question de l'intérêt de l'enfant vient au cœur de la procédure de divorce, le recueil des souhaits et sentiments de l'enfant va devoir être organisé.

L'audition de l'enfant directe, si elle a pu être réalisée par certains juges, n'est pas organisée en droit anglais. Ce système a, en revanche, organisé le recueil des souhaits et sentiments de l'enfant par un rapporteur spécialement désigné. En effet, Lorsqu'une juridiction est amenée à se déterminer sur la question de l'intérêt de l'enfant deux possibilités s'offrent à elle. En vertu de la section 7 du *Children Act 1989*, le juge peut demander qu'un rapport sur ce que requiert le bien-être de l'enfant (*welfare*) lui soit présenté soit par un rapporteur membre du *CAFCASS* (*children and family reporter*)[723], soit par un rapporteur (*welfare officer*), qui aura été désigné pour cette mission par la collectivité territoriale. La mission de ces deux rapporteurs est identique, seuls leurs statuts diffèrent car ils ne dépendent pas de la même administration. Les *children and family reporters* sont des *officers* qui sont rattachés aux tribunaux, alors que les *welfare officers* sont des travailleurs sociaux rattachés aux services sociaux des collectivités territoriales. Comme les enquêteurs sociaux dans le système français, ces derniers ont pour mission d'apporter au tribunal une image de la situation familiale.

Comme en droit français, la fonction des rapporteurs consiste à donner au juge des indications sur les origines de l'enfant, ses conditions matérielles de vie, ses rapports avec les membres de sa famille et ceux avec les tiers proches de lui. Dans le rapport qui sera transmis au juge, le *children and family reporter* doit faire des recommandations au tribunal sur

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[720] Section 1(4) du *Children Act 1989*.
[721] Section 1(3) du *Children Act 1989*.
[722] Section 1(3)(a) du *Children Act 1989*.
[723] L'entrée en vigueur du *Criminal Justice and Court Service Act 2000* en droit anglais a eu pour effet de regrouper au sein d'un seul organisme : le *Child And Family Court Advisory and Support Service* (CAFCASS), les missions relatives à la représentation de l'enfant en justice et au rapport de ses souhaits et sentiments au juge.

ce que requiert le bien-être de l'enfant. Les *welfare reports* peuvent être présentés au tribunal oralement ou par écrit[724]. Le rapporteur peut également être entendu par le juge le jour de l'audience. Au cours de cette dernière, il pourra éventuellement être mis à la disposition des avocats des parties dans le cadre de l'interrogatoire croisé des experts et témoins (*cross-examination*). La section 7(1) du *Children Act 1989* dispose très clairement que la mission de ces rapporteurs est « d'apporter au juge des éléments relatifs au bien-être de l'enfant en cause…». Ils ont également tous deux pour mission de donner un avis au juge quant à la possibilité de donner à l'enfant le statut de partie à la procédure (*voir supra*).

Ils ont pour fonction d'assister le juge dans sa prise de décision mais en aucun cas leur mission première ne consiste à être la voix de l'enfant dans la procédure. Il est toutefois établi que dans l'exercice de ses fonctions, le *children and family reporter* doit respecter les principes du *Children Act 1989*, parmi lesquels figure celui « *de prendre plus particulièrement en considération : les souhaits et les sentiments de l'enfant dont il est possible de s'assurer (à la lumière de son âge et de son discernement)* »[725]. Le recueil des souhaits et sentiments du mineur, ainsi que leur transmission au juge est une obligation légale imposée au *children and family reporter*. Le seul moyen dont dispose l'enfant pour obtenir la possibilité d'être entendu directement par le juge est de demander à bénéficier du statut de partie à la procédure[726].

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives

- **f) à la rupture du lien matrimonial ?**
- **g) aux effets pécuniaires du divorce ?**
- **h) à la liquidation des intérêts patrimoniaux des époux ?**
- **i) à la responsabilité parentale ?**
- **j) aux obligations alimentaires entre parents et enfants ?**

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

a) la rupture du lien matrimonial :

La question de la reconnaissance en droit anglais des divorces prononcés à l'étranger est réglée par le *Family Law Act 1986* et par le Règlement (CE) n° 2201/2003 Bruxelles II bis. Il existe deux types de critères applicables à cette reconnaissance selon que les divorces ont été prononcés dans l'un des États de l'Union européenne ou en dehors.

1. Les divorces prononcés dans l'un des États de l'Union européenne

En vertu de l'article 21(1) du Règlement (CE) n° 2201/2003, les divorces, les séparations de corps ou les décisions d'annulation du mariage, prononcés dans l'un des États de l'Union européenne sont automatiquement reconnus en Angleterre. Aucune procédure spécifique n'est requise pour cette reconnaissance[727]. Cette reconnaissance ne peut être refusée au

[724] Section 7(3) du *Children Act 1989*.
[725] Voir notamment les sections 1(2) 8 et 1(3)(a) à 1(3)(f) 9 du *Children Acr 1989*.
[726] Voir supra question 89 du questionnaire.
[727] *Cf* la position d'autres États de l'Union européenne qui insistent sur l'exigence du certificat prévu à l'article 34 du Règlement Bruxelles II bis.

seul motif que le droit anglais n'autorise pas le divorce sur la ou les causes visées dans la décision étrangère[728]. Cependant, sur le fondement de l'article 22 du règlement (CE) n° 2201/2003 certaines causes justifient le refus de reconnaître la décision étrangère, à savoir :

a) le fait que la reconnaissance soit manifestement contraire à l'ordre public. Cette raison ne s'applique que dans des circonstances exceptionnelles ;
b) le fait que le divorce ait été prononcé sans comparution du défendeur, ou si ce dernier ne s'est pas vu signifier la demande en divorce en temps utile, de sorte qu'il n'a pu préparer sa défense.
c) le fait que la décision étrangère soit inconciliable avec une décision du juge national ou d'un autre juge d'un État de l'Union européenne dans une instance opposant les mêmes parties.

2. Les divorces prononcés dans un État non membre de l'Union européenne.

La reconnaissance de ces décisions dépend de la manière dont elles ont été rendues. Le droit anglais distingue les décisions rendues à l'issue d'une « procédure » (judiciaires ou devant un autre organe que les juridictions), de celles qui sont obtenues hors cadre d'une procédure spécifique (comme le seraient par exemple des décisions rendues à l'issues de cérémonies purement religieuses)

i- Les décisions rendues à l'issue d'une « procédure » (section 46(1) du *Family Law Act 1986*)

Les décisions étrangères de divorce, séparation de corps ou d'annulation du mariage seront reconnues en droit anglais si elles ont été rendues conformément à la loi du pays et si à la date de l'ouverture de la procédure en question, les parties au mariage résidaient habituellement dans l'État où la décision a été rendue ou en étaient citoyens.

ii- Les décisions rendues hors cadre d'une « procédure » (section 46(2) du *Family Law Act 1986*)

Les exigences relatives à la reconnaissance de ces décisions sont plus rigoureuses. Ces décisions seront reconnues en droit anglais si le divorce, la séparation de corps ou la décision d'annulation du mariage :

a) si elles ont été rendues conformément au droit de l'État et
b) si à la date de la décision, soit les deux parties au mariage étaient domiciliées dans l'État, soit l'une d'entre elle seulement l'était et l'autre résidait dans un État qui reconnaissait comme valable la décision de divorce ainsi rendue et
c) Aucune des parties au mariage ne résidait habituellement au Royaume-Uni dans l'année immédiatement précédent la date de la décision étrangère.

Quelle que soit la manière dont la décision a été rendue, dans le cadre ou hors cadre d'une « procédure », le droit anglais peut néanmoins refuser de reconnaitre et d'enregistrer la décision de divorce étrangère. Cette question est fondamentale.

b) Les effets pécuniaires du divorce :

[728] Art. 25 du Règlement Bruxelles II bis

En vertu du Règlement (CE) n° 4/2009 relatifs aux obligations alimentaires, les décisions relatives aux conséquences financières du divorce, rendues dans l'un des États membre de l'Union européenne sont automatiquement reconnues en droit anglais.

Ces décisions seront reconnues si elles sont définitives et insusceptibles d'appel. L'Angleterre a signé un nombre important de conventions multilatérales ou bilatérales avec un grand nombre de pays à travers le monde, lesquelles contiennent des exigences de formes multiples au regard des conditions de reconnaissances de ces décisions. Comme le droit anglais ne connait pas la distinction continentale entre les obligations alimentaires et les autres formes d'obligation financières, les exigences relatives à la reconnaissance des décisions s'articulent autour de la distinction entre les celles qui ordonnent le versement d'une pension et celles qui organisent les autres conséquences financières du divorce.

c) à la liquidation des intérêts patrimoniaux des époux :

Les décisions relatives au patrimoine des ex-époux et tout particulièrement à leur patrimoine immobilier peuvent bien souvent être exécutées en application des dispositions légale organisant le droit de la propriété foncière.

Des difficultés sont fréquentes cependant, relativement à la mise à exécution des décisions relatives au partage entre les ex-époux des droits à pension de retraite. Habituellement, les ressortissants britanniques liés par ce type de décisions à l'étranger demandent une décision de justice en Angleterre. Les demandes sont traitées en vertu d'une procédure particulière : *Reciprocal Enforcement of Maintenance Orders* (REMO) qui a été mis en place afin de garantir l'exécution de ces décisions au niveau international.

d) à la responsabilité parentale :

Ces questions sont bien souvent abordées dans le cadre de procédures liées à l'enlèvement international d'enfant. Les juridictions anglaises donnent une définition très large de la notion de responsabilité parentale.

(e) Aux obligations alimentaires entre parents et enfants :

Si l'un des parents de l'enfant est à l'étranger la procédure devant le *Child Support Agency* est inapplicable[729]. Dans ces circonstances les juridictions anglaises restent compétentes pour statuer malgré l'existence de décisions de justice étrangères.

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

Une décision de divorce étrangère peut ne pas être reconnue en droit anglais en raison de sa contrariété à l'ordre public[730].
Les conditions qui justifient ce refus ont été posées dans l'article 22 du Règlement Bruxelles II bis[731] et dans les sections 46(1) et 46(2) du *Family Law Act 1986*[732]. Les causes sont diverses

[729] Section 44(2)(a) *Child Support Act 1991*.
[730] *Hoffman v Kreig [1998] ECR 645*.
[731] Voir *supra*.
[732] Voir *supra*.

et incluent notamment le défaut de notification à la partie adverse, la fraude ou la tromperie, ou d'autres situations extrêmes.
Il est à noter que l'Angleterre ne reconnaît pas les divorces prononcés en application du droit religieux (par exemple sur le fondement de la *sharia* islamique)

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

Les décisions de *Decree absolute* rendues par les juridictions anglaises sont systématiquement enregistrées (public record) et détenues par le *Central Index*. Le Central Index archive les décisions de *Decree absolute* ainsi que les dissolutions de partenariat civil sur le territoire de l'Angleterre et du Pays de Galles depuis 1858. Ces archives sont consultables et accessibles au public. Les demandes en ce sens sont à adresser au *Principal Registry of the Family Division* de la *High Court*. Les actes relatifs à la naissance et aux décès des personnes sont archivés et accessibles au public dans les mêmes conditions.

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

L'enregistrement est obligatoire pour les naissances et les décès[733]. Il appartient à la juridiction qui a rendu le *Decree absolute* de faire procéder à son enregistrement auprès du *Central Index*.

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

Cette question ne s'applique pas au divorce dans la mesure où l'enregistrement est assuré directement par la juridiction.

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

Nous n'avons pas de remarques additionnelles

Liste des abréviations citées en référence

AC	Law Reports - Appeal Cases
All ER	All England Reports
ECR	European Court Reports
ECJ	European Court of Justice
EWHC	High Court (citation de référence neutre)
EWCA civ	Court of Appeal civil dividion (citation de référence neutre)
Fam	Law Reports - Family Division
FCR	Family Courts Reports
FLR	Family Law Reports

[733] *Marriage Act 1836* et *Births and Deaths Registration Act of 1836* entrés en vigueur au 1er juillet 1837

QB	High Court - Queen's Bench division
UKHL	UK House of Lords (citation de référence neutre)
UKPC	UK Privy Council
UKSC	UK Supreme Court (citation de référence neutre)
LR 1 P&D	Law Reports - Probate and Divorce cases (*ante* 1875)
SJ	Sollicitor's Journal

GERMANY

Germany

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The rules relating to the law of divorce can be found in §§ 1564-1568 of the Civil Code (CC; "Bürgerliches Gesetzbuch). The same is true for the effects of divorce (e.g. in the area of parental care, contact, equalisation of accrued gains, distribution of household effects and of the family home). Pension rights equalisation ("Versorgungsausgleich") is provided for in the new Law on Pension Rights Equalisation (LPRE; "Versorgungsausgleichsgesetz")[734]. Details of the court proceedings governing divorce are laid down in §§ 133 – 150 of the Family Proceedings Act of 2008 (FPA) ("Familienverfahrensgesetz")[735]. Furthermore, it has to be kept in mind, that the German constitution, the Basic Law ("Grundgesetz") places marriage and family under the special protection of the State (Article 6). The Federal Constitutional Court ("Bundesverfassungsgericht") has deducted that therefore certain characteristics of marriage are not at the disposition of Parliament. Accordingly, the law of divorce is formed by conditions set by the constitution. The legal rules described above are interpreted and shaped in detail by the case law of the competent courts.

2. Give a brief history of the main developments of your national divorce law

Only from 1 January 1900 onwards was the German Reich governed by a uniform law of divorce contained in the Civil Code. The grounds for divorce followed the principle of fault. During the Third Reich the law of divorce was fundamentally altered by a separate 'Marriage Act' introduced in 1938. The grounds for divorce included therein were in part fault-based and in part not. The 'First Marriage Law and Family Law Reform Act 1976' placed the law of divorce back within the Civil Code and put it on a completely new footing. The law of divorce was now based on the principle of broken marriage. Apart from some amendments mandated by a ruling of the Constitutional Court, the system of divorce law as stipulated by

[734] Gesetz über den Versorgungsausgleich (VersAusglG) vom 3. April 2009, BGBl. 2009 I S. 700 (Nr. 18).
[735] Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) vom 17. Dezember 2008 (BGBl. I S. 2586, 2587).

the 1976 Reform Act is still in place today. There were, however, several reforms concerning matrimonial property law (2009)[736], the law on equalisation of pension rights (2009)[737] and spousal maintenance after divorce (2007)[738].

3. Are prospective reforms currently under consideration?

There is no reform in divorce law currently under consideration.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

Either spouse may live separately, if he or she wishes, without any particular formalities. There is no provision for any judicial determination and no "legal separation". Annulment ("Aufhebung der Ehe") can occur only in a very restricted manner. A marriage can only be annulled by a court judgment following an application (§§ 1313 ff. Civil Code). There is no declaration of nullity.

5. If any, provide statistical data regarding divorce and legal separation?

Eheschließungen und Ehescheidungen[739]				
Bevölkerungsbewegung	2008	2009	2010	2011
Eheschließungen	377 055	378 439	382 047	377 816
je 1 000 Einwohner	4,6	4,6	4,7	4,6
Ehescheidungen	191 948	185 817	187 027	187 640
je 1 000 Einwohner	2,3	2,3	2,3	2,3

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

a) Full marriage for same-sex couples is not possible under German law. However, the Act on Registered Life Partnerships enables two persons of the same sex to register

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[736] Gesetz zur Änderung des Zugewinnausgleichs- und Vormundschaftsrechts vom 6. Juli 2009, Bundesgesetzblatt 2009, Nr. 39, S. 1696 ff.
[737] Gesetz zur Strukturreform des Versorgungsausgleichs (VAStrRefG) vom 3. April 2009, BGBl. 2009 I S. 700 (Nr. 18).
[738] Gesetz zur Änderung des Unterhaltsrechts (UÄndG) vom 21. Dezember 2007, BGBl. 2007 I S. 3189.
[739] https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Eheschliessungen/Tabellen/EheschliessungenScheidungen.html
See detailed statistical data under Scheidungsstatistik:
https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsbewegung/Scheidungsstatistik2010140107004.pdf?__blob=publicationFile

their partnership[740]. The consequence of such a registration ("Eintragung") is a legal status very similar to marriage. A partnership will end by judgment of the family court on an application for dissolution ("Aufhebung") which is the equivalent of a divorce (§ 15 LPartG) and can also lead to a maintenance claim ("nachpartnerschaftlicher Unterhalt"; § 16 LPartG), an equalisation of accrued gains (§ 6 LPartG) and to an equalisation of pension rights (§ 20 LPartG).

b) The grounds for a dissolution of the life partnership ("Aufhebung der Lebenspartnerschaft") are identical to the ones for divorce according to § 15 Life Partnership Act. There are special provisions for dissolution proceedings in §§ 269, 270 FPA which declare, however, the rules on divorce proceedings applicable.

B. Conflict of Laws

7. How is marriage defined in your national law?

Marriage is used in Article 6 Basic Law and in the Civil code. There is, however, no statutory definition of marriage. According to the established case law of the Federal Constitutional Court, marriage under Article 6 Basic Law is the union of a man and a woman to an all-embracing and, in principle, indissoluble companionship for life[741]. This is also the view of the dominant legal literature[742].

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

The formal requirement for a choice of the applicable law under Art. 5 Rome III is notarial recording (Art. 46d para. 1 Introductory Law to the Civil Code[743]). A choice of law may also take place until the end of the last oral hearing in the first instance of the divorce proceedings. § 127a CC is applied by analogy (Art. 46d para. 2 Introductory Law[744]). According to § 127a CC in the event of a court settlement, the recording of declarations in a court record drawn up in accordance with the provisions under the Code of Civil Procedure replaces notarial recording.

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[740] Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz - LPartG) vom 16. Februar 2001 (BGBl. I S. 266) as amended.

[741] See Federal Constitutional Court 29 July 1959, BVerfGE 10, 59, 66; 28 Feb. 1980, BVerfGE 53 224, 245. See in more detail Sanders, Marriage, Same-Sex Partnership, and the German Constitution, German Law Journal 13 (2012) 912 ff.

[742] Dethloff, Familienrecht, 30th. ed. 2012, Munich, no. 73; Schwab, Familienrecht, 20th Edition, Munich, 2012, § 2 no.15.

[743] Entwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts, Deutscher Bundestag Drucksache 17/11049 of 17 October 2012.
http://dipbt.bundestag.de/dip21/btd/17/110/1711049.pdf

[744] Draft of 17 October 2012.

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

1. A full marriage between persons of the same sex is not allowed and not valid under German law. A foreign same sex marriage is treated according to the dominant view in the same way as a registered life partnership (according to Art. 17b Introductory Law). One could imagine that this approach will also be applied under Art. 13 Rome Regulation[745]. However, in legal literature there is also a proposal not to apply Art. 13 Rome Regulation and to consider such a marriage as a valid one[746].

2. A marriage within Germany may only be celebrated subject to the form provided for under German law. A marriage between two persons engaged to be married, neither of whom is a German national, may, however, be celebrated before a person properly authorized by the government of the country of which one of the persons engaged to be married is a national, according to the formalities prescribed by the law of that country. This may be a priest or an official of a foreign consulate. A certified copy of the registration of the marriage in the Register of Births, Deaths and Marriages, kept by the person properly authorized therefore, furnishes conclusive evidence of the marriage celebrated in that manner (Art. 13 para. 3 Introductory Law). Apart from that a private marriage is only accepted if entered into according to foreign law abroad (according to Art. 11 para. 1 Introductory Law).

3. Polygamous marriages cannot entered into in Germany[747]. A polygamous marriage entered abroad according to the applicable foreign law is, however, in principle valid in Germany[748]. German public policy may prevent the application of foreign law (Art. 6 Introductory Law). But this depends on the single legal issue and the individual circumstances. A divorce of a polygamous marriage should be possible in Germany[749].

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

11. Is parties' will taken into account in order to determine the applicable law for divorce?

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[745] Helms, Reform des internationalen Scheidungsrechts durch die Rom III-Verordnung, FamRZ 2011, 1765 (1766).

[746] Gruber, Scheidung auf Europäisch - die Rom III-Verordnung, IPRax 2012, 381 (390); Makowsky, Europäisierung des Internationalen Ehescheidungsrechts durch die Rom III-Verordnung, GPR 2012, 266 (267 f.).

[747] Coester, in: Münchener Kommentar zum BGB, Vol. 10, 5th. ed. 2010, Art. 13 EGBGB No. 68.

[748] Thorn, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, Art. 6 EGBGB no. 20 with references.

[749] Cf. Coester, in: Münchener Kommentar zum BGB, Vol. 10, 5th. ed. 2010, Art. 13 EGBGB No. 69.

12. If parties may choose the applicable law, how shall this choice be expressed and when?

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

a) The applicable law for maintenance is determined by the Hague Maintenance Protocol 2007 in conjunction with Art. 15 EU Maintenance Regulation. There are no longer national conflict-of-laws rules.

b) If compensation and damage claims can be qualified as a matter of matrimonial property law then they are treated in the same way as a matrimonial assets settlement (see Q 14). If not they are a consequence of divorce and follow the rules on divorce (new version of Art. 17 para. 1 Introductory Law[750]). The applicable law on divorce is determined by the Rome III Regulation.

c) There is a special national conflict-of-laws rule for the equalisation of pension rights ("Versorgungsausgleich), see Q 14.

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

a. The matrimonial property regime is subject to the law governing the general effects of the marriage upon conclusion of the marriage (Art. 15 para. 1 in conjunction with Art. 14 Introductory Law). According to Art. 14 Introductory Law the general effects of the marriage are governed by (1) the law of the country of shared nationality of the spouses or last shared nationality during the marriage if one of them is still the national of that country, otherwise (2) the law of the country in which both spouses have their habitual residence or lastly had it during the marriage, if one of them still has his or her habitual residence there, (3) otherwise, the law of the country with which the spouses are jointly most closely connected (Art. 14 para. 1 Introductory Law). Under certain circumstances a choice of law for the general effects of marriage is possible (Art. 14 para. 2, 3 Introductory Law).

   However, also apart from that the spouses may choose for their matrimonial property regime. The choice of law may be by an explicit or implied designation of the applicable law. Limits to party autonomy exist with regard to the range of laws that can be chosen. The possible choice is limited to (1) the law of the nationality of one of the spouses, (2) the law of the state where at least one of them has his or her habitual residence or (3) for immovables the lex rei sitae (Art. 15 para. 2 Introductory Law). With regard to the last choice the spouses may choose different laws for different immovables situated in different states.

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[750] Entwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts, Deutscher Bundestag Drucksache 17/11049 of 17 October 2012.

b. There is a special national conflict-of-laws rule for the equalisation of pension rights ("Versorgungsausgleich"). According to Art. 17 para. 3 Introductory Law (new version[751]) the equalisation of future pensions of husband and wife is governed by the law applicable under the Rome III Regulation; it shall only be carried out if accordingly German law is applicable and if such equalisation is recognized by the law of one of the countries of which the spouses were nationals at the time when the divorce application was served. Otherwise the equalisation of future pensions of husband and wife shall be carried out pursuant to German law on application of a spouse if one of the spouse has acquired during the subsistence of the marriage an inland future pension right insofar as carrying out the equalisation of future pensions would not be inconsistent with equity in light of the economic circumstances of both during the subsistence of the marriage.

15. What is the applicable law for parental responsibility?

Germany is a party to the Hague Child Protection Convention 1996 which takes precedence and applies generally. Under national conflict-of-laws rules Art. 21 Introductory Law deals with the effects of parent-child-relationship. The legal relationship between a child and her parents is governed by the law of the country in which the child has her habitual residence.

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The Hague Maintenance Protocol 2007 is universally applicable in conjunction with Art. 15 Maintenance Regulation. There are no longer national conflict rules on maintenance.

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

The judge has to apply European and national conflict-of-laws rules of his own motion (ex officio)[752]. This applies also to international conventions.

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

a. The application of foreign law is not a question of fact but a question of law[753]. The judge has to know the law, and if he has not a sufficient knowledge of the law, as is normally the case when he has to apply foreign law, he is under an obligation to investigate, interpret and apply such law on his own motion. However, foreign law may be subject to proof in case that it is unknown to the court (§ 293 CCP). There is also a duty of the parties to cooperate with the court.

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[751] Entwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts, Deutscher Bundestag Drucksache 17/11049 of 17 October 2012.

[752] Sonnenberger, in: Münchener Kommentar zum BGB, Vol. 10, 5th. ed. 2010, Einl. IPR No. 617 ff.

[753] Sonnenberger, in: Münchener Kommentar zum BGB, Vol. 10, 5th. ed. 2010, Einl. IPR No. 624.

b. The extent and intensity of the court's obligation to investigate into foreign law depends on the circumstances of the individual case. The judge has a certain discretion to decide whether a formal or an informal procedure of proof shall be initiated. He may informally request information from private persons, domestic or foreign authorities, embassies, consulates, university institutes and the like.

c. The most common method of ascertaining foreign law in Germany is the consultation of an expert directly by the court. To this effect the trial judge normally will call for an expert opinion by a comparative law institute of a German university or by the Max-Planck-Institute for Foreign Law and International Private Law in Hamburg. Then the procedural rules on expert evidence apply.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

There is no period of time for the length of a marriage before divorce can validly be claimed. However, in principle, separation of the spouses for one year is a precondition to divorce. By way of exception, a marriage may be dissolved if the continuation of the marriage would result in 'unbearable hardship' for the petitioner (§ 1565 para. 2 CC).

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

A divorce application needs an applicant. Also a mentally handicapped person can be a party (cf. § 8 no. 1 FPA). However, this person lacks the capacity to act in family proceedings. Instead persons representing the party under the provisions of civil law must act (§ 9 para. 2 FPA). Representation of a mentally handicapped spouse under custodianship ("Betreuung") is possible. In his group of tasks, the custodian ("Betreuer") represents the person under custodianship in court and from court (§ 1902 Civil Code). Custodianship is also possible for divorce proceedings[754]. The custodian may make an application for divorce with the authorisation of the custodianship court ("Betreuungsgericht"; § 125 para. 2 sent. 2 FPA)[755]. A court case widely discussed was one of the Federal Supreme Court where the custodian of a mentally ill spouse tried to get a divorce against the will of the other spouse, however, without success[756].

In matrimonial matters a person with limited capacity (minor) may act for himself (§ 125 para. 1 FPA). However, if the person is mentally incapable ("geschäftsunfähig") his legal representative must act (§ 125 para. 2 sent. 1 FPA). For a divorce application the

[754] Schwab, in: Münchener Kommentar BGB, 5th ed 2008, § 1896 BGB no. 101, § 1902 BGB no. 30.
[755] Schwab, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. II 27.
[756] Federal Supreme Court (BGH) 07.11.2001, NJW 2002, 671 = FamRZ 2002, 316.

representative must be authorized by the family court or the custodianship court (§ 125 para. 2 sent. 2 FPA)[757].

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

Since the German Civil Code follows the doctrine of irretrievable breakdown, there is only one ground for divorce: failure of the marriage (§ 1565 para. 1 CC). A marriage has failed if the community of the spouses no longer exists and if its restoration cannot be expected. Marital fault as such is to play no role in the availability of divorce.

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

a. The Civil Code only recognises one ground for divorce: that the marriage has failed, § 1565 Civil Code. Such failure is considered to have occurred where the marital community of the spouses no longer exists and there can be no expectation that the spouses will restore it, i.e. in the case of the irretrievable breakdown of the marriage. Each of the spouses may petition for a divorce, fault is no longer decisive.

b. The 'marital community' referred to in § 1565 para. 1 sent. 2 CC does not relate mainly to the cohabitation of the spouses, but refers to an inner attitude. The court has to be convinced of the irretrievable breakdown. It is therefore under a duty to analyse the state of the marriage and to arrive at a prediction as to the possibilities of reconciliation. The Court will look at external factors such as the length of the separation period, consent, major marital offences or the presence of new partners[758].
In § 1566 CC, the Code provides for two conclusive presumptions for the failure of a marriage: According to § 1566 para. 1 CC there is a conclusive presumption of the failure of a marriage if the spouses have been separated for a year and both spouses petition for a divorce or the opposing party consents to the divorce. The same presumption will apply when the spouses have been separated for three years, § 1565 para. 2 CC.

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

[757] See more in detail Hilbig, in: Münchener Kommentar ZPO, vol. 4, 2010, § 125 FamFG no. 13 ff.
[758] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 4 with references.

Geschiedene Ehen 2010 nach Entscheidungen in der Ehesache[759]				
Insgesamt	§1565 Abs. 1 i.V.m. §1565 Abs.2 BGB (Scheidung vor einjähriger Trennung)	§ 1565 Abs.1 BGB (Scheidung nach einjähriger Trennung)	§1565 Abs. 1 i.V.m. §1566 Abs.2 BGB (Scheidung nach dreijähriger Trennung)	aufgrund anderer Vorschriften
187 027	3 093 (1,65 %)	151 108 (80,70 %)	31 589 (16,87 %)	1 237 (0,66 %)

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

There must be irretrievable breakdown in the sense of the law. The consent of the spouses that their marriage should come to an end indicates that there is such a breakdown[760], but is as such not sufficient[761].

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

A consensual divorce may be sought in a twofold way: either both spouses apply jointly for the divorce order or the other spouse joins the application which has already been made by the other party. This may be done at any point during the proceedings and is freely revocable until the end of the final hearing (§ 134 para. 2 sent. 1 FPA). The advantage of this is that only one lawyer is required, as only the application of the divorce order has to be made by a lawyer, but not the declaration of consent. Other than this aspect, both forms of consensual divorce follow the same set of rules.

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

It must be declared already in the initial application for divorce if the spouses made an arrangement ("Regelung") for child and/or spousal maintenance, the allotment of the family home and of household goods (§ 133 para. 1 No. 2 FPA). It is, however, not necessary for the success of the divorce claim or the admissibility of the application that an agreement has been reached[762]. It can also be made in the course of divorce proceeding. Failing that the court will decide on a respective application. A decision on the equalisation of pension rights is mandatory. Cf. Q 63.

[759] Statistisches Bundesamt, Fachserie 1, Reihe 1.4, 2010, p. 15.
[760] Schwab, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. II 35.
[761] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 2, 4.
[762] Streicher, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. I 234.

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

Fault or possible marital offences are not conditions for granting the divorce order. These questions may play a certain role, though.

They may prevent a speedy divorce (in cases of separation for less than one year). According to § 1565 para. 2 CC the spouses are required to have lived apart for a period of at least one year. This separation period is intended to prevent any hasty decisions and to facilitate attempts at reconciliation. Where the spouses have lived apart for less than a year, a divorce may only be granted under special circumstances. Such a 'quick divorce' is possible if the continuation of the marriage would result in unreasonable hardship to the petitioner owing to factors attributable to the other spouse.

Among such factors which have been recognized by the courts to be 'attributable to the other spouse' major marital offences play a significant role, thus introducing an element of fault. Not every marital injustice will render the continuation of the marriage unbearable, but major offences against the basis of the marriage will. The courts are also in agreement in including such offences within the range of § 1565 para. 2 CC, which are directed against basic values of human interaction and respect, such as e.g. physical maltreatment, but also other insupportable forms of misdemeanour such as threats, severe verbal abuse, excessive use of alcohol[763]. Those offences may render the continuation of the marriage unreasonably difficult for the other spouse, as well as wilful desertion of the spouse or the children or major offences within the duty to maintain[764].

There is no clear line as regards the approach towards marital fidelity. Most court rulings agree, though, that not every marital infidelity will render the continuation of the marriage unreasonably difficult for the other party, but only such offences which clearly symbolise that the offending spouse has no further intention to continue the marriage (e.g. taking up work as a prostitute, desertion of the wife in order to live with a new male partner or inviting the new partner to live in the family home) [765].

Even though the reasons referred to above do not necessarily have to be fault-based, they will usually include an element of fault. The important difference is, though, that these faults are not the basis for the divorce as such, but only for the special 'quick divorce'. The ground for the divorce remains the irretrievable breakdown of the marriage, while the special causes attributable to the other spouse only facilitate the enquiry into the state of the marriage, as the Federal Supreme Court has pointed out[766].

They may prevent a divorce from being awarded at all. According to § 1568 Alt. 2 CC, a marriage shall not be severed, even though it has failed, if the other partner opposes the

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[763] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 10 with references.
[764] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 10 with references.
[765] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 11 with references.
[766] BGH 05.11.1980, FamRZ 1981, 127, 129.

divorce and if a divorce because of the special circumstances of the case would result in such exceptional hardship that the continuation of the marriage is more advisable.

The wording does not allude to fault on the side of one of the spouses, and objective reasons such as the serious illness of the other partner will suffice. The courts have refused to accept a direct relationship between fault on the one side and unreasonable hardship on the other. Moral offences alone, such as desertion will not justify the continuation of the marriage. On the other side, the psychological situation of the deserted spouse will in most cases reflect how the other spouse has acted. But even in this narrow sense, fault does not play a significant role. The courts have been very cautious in applying § 1568 Alt. 2 CC, regarding it as a means of protection from exceptional hardship resulting specifically from the act of divorce. As described above, these have mostly been cases of severe illnesses relating to a spouse who opposes the divorce. This does not prevent a divorce for all time, however, as a new application can be made whenever circumstances will have changed[767].

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

i) Is separation sufficient to establish irretrievable breakdown?
j) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

a. Separation as such is not sufficient to establish irretrievable breakdown. Even after one year of separation, the court has to be convinced that the marriage has failed. The separation is a presumption, but not complete proof. An irrefutable presumption of the failure of a marriage only applies where the spouses have lived apart for three years, or after one year in the case of a consensual application for divorce by both spouses.

b. Generally, the spouses have to have lived apart for one year before an application for divorce may be made (§ 1565 para. 2 CC). According to the case law, this also applies where both spouses consent to the divorce[768]. The separation needs to be a continuous period of time. However, living together for a short period which is intended to reconcile the spouses does not interrupt or suspend the periods laid down in § 1566 (§ 1565 para. 2 CC). This may also occur several times[769]. A 'short period' may last approximately three month[770].

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

a.Divorce by consent

[767] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1568 no. 1.
[768] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1565 no. 4 with references.
[769] Schwab, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. II 163.
[770] Schwab, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. II 163.

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

31. Must the spouses be separated before introducing the claim? If yes, for how long?

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

35. How is consent between spouses taken into account regarding irretrievable breakdown?

36. How is separation between spouses taken into account regarding irretrievable breakdown?

i) Is separation sufficient to establish irretrievable breakdown?

j) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for

damages on the ground of fault between spouses distinct from a 'classical' tort law action?

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement
- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

a. The spouses do not have the possibility to fix the date at which the divorce will be effective by an agreement. The marriage is dissolved when the judicial decision becomes final and absolute (§ 1564 sent. 2 CC).

b. The Code allows the spouses to settle the consequences of divorce by an agreement. § 1408 CC allows the spouses to contractually determine the applicable matrimonial property regime. They are entitled not only to choose one of the statutory property regimes, but also to modify it. A pre-nuptial agreement is possible, but becomes effective, however, only with the entering of marriage. Spouses have also the possibility to settle the consequences of divorce by an agreement already before marriage[771]; see Q 72. This is also permitted for maintenance and the equalisation of pensions rights (§ 1408 para. 2 CC; §§ 6 ff. LPRE). For an agreement on equalisation of pension rights the form of a marital agreement must be observed (§ 7 para. 3 LPRE). The marriage agreement must be recorded by a notary, and both parties must be present (§ 1410 CC).

c. Spouses have also the possibility to settle the consequences of divorce by an agreement during marriage; see Q 72.

d. It is permitted to settle the consequences of divorce by an agreement during the divorce proceedings, see Q 72. This is also possible for maintenance and the equalisation of pensions rights. An agreement concluded before the finality of the decision of divorce must be made in notarial form (§ 7 para. 1 LPRE), but can also be made during the trial (§ 7 para. 2 LPRE).

44. If yes, may the judge scrutinize the spousal agreement?

There is no general requirement of a formal judicial control of spousal agreements. However, the judge may scrutinize the spousal agreement by applying the general standards of civil and matrimonial law and according to special provisions.

According to case law and court practice there is now a control regarding the substance and the performance ("Inhalts- und Ausübungskontrolle") for marital agreements on matrimonial property and spousal maintenance[772]. The standard to be applied for this control is the same

[771] Borth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. IV 1426.
[772] See Borth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. IV 1426, 1476 ff.

for agreements before entering a marriage and during the marriage[773]. The result may be that a maintenance agreement is null and void[774].

The spouses may enter into an agreement relating to the equalisation of pensions rights in the course of the divorce proceedings. The Family Court is bound by the agreement of the parties if there are no obstacles to validity and enforcement ("Wirksamkeits- und Durchsetzungshindernisse") (§ 6 para. 2 LPRE). The agreement has to be in conformity to a review of subject-matter ("Inhaltskontrolle") and a control of performance ("Ausübungskontrolle") (§ 8 para. 1 LPRE)[775]. A waiver of the right for equalisation of pensions rights may be null and void[776].

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

The judge has a power of scrutiny in applying the control regarding the substance and the performance ("Inhalts- und Ausübungskontrolle"). The decisive elements are the nature of the agreement and the obligations in the individual case[777]. Particularly the situation of a pregnant woman who has no individual economic basis but makes a full waiver of her rights ("Globalverzicht") regarding spousal maintenance, equalisation of gains and equalisation of pension rights may lead to the nullity of the agreement[778]. However, generally there is a careful evaluation not only of the facts of the individual case, but also of the different claims and obligations of both spouses at the moment of making the agreement[779] (cf. Q 73). Factors taken into account are particularly exploitation of the predicament, inexperience and lack of sound judgment of the other spouse, unequal bargaining power and the interests of the children.

Whereas the control regarding the substance may lead to total nullity of the agreement the control of performance on the basis of performance in good faith (§ 242 CC) only leads to a modification of the agreement by the judge[780]. Therefore, particularly in the cases of control of performance, an equalisation is possible. The result has to conform to the requirements of equity. Factors that are considered are mainly the future development of the marital life, the division of labour and household tasks[781].

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

A specific proceeding of legal separation without dissolution of marriage does not exist under German law.

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[773] Jült, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 2 no. 2843, 2914 with references.
[774] BGH 5.7.2006, FamRZ 2006, 1359.
[775] Hahne/Holzwarth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. VI 542 ff.; Jült, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 2 no. 2996 ff. with references.
[776] BGH 18.3.2009, FamRZ 2009, 1041.
[777] Jült, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 2 no. 2911 ff. with references.
[778] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1408 no. 8 ff.
[779] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1408 no. 8.
[780] Jült, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 2 no. 2864 with references.
[781] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1408 no 11.

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

The marriage is dissolved when the decision becomes final and absolute (§ 1564 sent. 2 CC). Finality ("formelle Rechtskraft) occurs where there is no longer an appeal possible.

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

Matrimonial freedom of the ex-spouses is no longer subjected to limitations. The ex-spouses are free to remarry. There is no waiting period. The ex-spouses can remarry each other.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

Under German law spouses are to have a common 'matrimonial name' ("Ehename") which they are free to determine by agreement (§ 1355 para. 1 CC). They may choose either the original name of the husband or that of the wife as their matrimonial name. Names not so chosen may be added to or placed in front of the chosen name, unless the name is already a double name. If the name of a spouse is a double name, only one element of the name may be added. However, in the absence of such an agreement, the spouses will continue to use the names they had before their marriage (§ 1355 1 CC). Declarations as to the use of a matrimonial name may be made at the marriage ceremony or later.

A divorced spouse retains his or her matrimonial name, unless he or she declares the intention to revert to his or her pre-marital name. An ex-spouse may also decide to put his or her name by birth ("Geburtsname") in front of the matrimonial name (§ 1355 para. 5 CC).

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

a) There is no loss of German nationality as a consequence of divorce (cf. § 17 et seq. Nationality Act).

b) There is an independent right of residence of the spouse according to § 31 para. 1 no. 1 sent. 1 Residence Act ("Aufenthaltsgesetz"). In the event of termination of marital cohabitation, the spouse's residence permit shall be extended by one year as an independent right of residence unrelated to the purpose of the subsequent immigration of dependents if marital cohabitation has lawfully existed in the Federal territory for at least three years and the foreigner was in possession of a residence permit, settlement permit or EC long-term residence permit up to this point in time, unless he or she was unable to apply for an extension in due time for reasons beyond his or her control. Sentence 1 shall not be applicable if no extension of the foreigner's residence permit is permissible or if it is not permissible to issue the foreigner with a residence permit or EC long-term residence permit because this is

precluded by a rule of law on account of the purpose of residence or by a subsidiary provision attaching to the residence permit pursuant to § 8 para. 2.

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

The determination of the residence of the child is generally not a separate issue under German law. The obligation and the right to determine the child's place of abode ("Aufenthaltsbestimmungsrecht") form part of the responsibility for the person of the child in accordance with § 1626 para. 1 sent. 2 CC. Therefore the determination of residence is generally a part of personal care of the custodian (§ 1631 para. 1 CC.). This applies also for the domicile in the sense of § 11 CC. There can be, however, restrictions by the family court and a custodian may lose the right to determine the place of residence of the child.

If the father and mother hold joint parental responsibility, it is generally not possible for a court to make a decision regarding a change in the child's place of residence against the will of one of the persons holding parental responsibility. A unilateral decision by one parent regarding the child's place of residence is generally only possible if this parent has been attributed, by the court, sole responsibility for the child or the sole right to determine the child's place of residence.[782]

If a parent changes the child's place of residence against the will of the other parent, who is entitled to determine the same, the latter is, in the case of wrongful retention of the child, entitled to claim return as a result of § 1632 para. 1 CC. The decision as to whether or not such an illegal act has been committed is guided, in relations where parents hold joint parental responsibility, exclusively by the best interest of the child.[783] If the best interest of the child demands it, the family court may, in exceptional cases, even where the parents hold joint parental responsibility, refuse the parent filing the application his or her claim for return of the child. Although the right to return of the child serves the enforcement of responsibility for the child, it cannot automatically be derived – of its own and without the need for a factual examination – from the attribution of parental responsibility.[784]

52. Does divorce produce automatic effects regarding parental responsibility?

Joint parental custody is generally maintained despite divorce. No court ruling is required. A parental divorce no longer means that family courts are obliged to deal with the future arrangements regarding parental responsibilities. A court decision on parental responsibility is now only made following an application by one parent. Such an application can always be made if the parents live apart, § 1671 CC.

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[782] BGH, 27.05.1992, NJW-RR 1992, 1154.
[783] OLG Düsseldorf, 06.09.1973, FamRZ 1974, 99; Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1632 no. 6.
[784] BayObLG, 01.07.1976, FamRZ 1977, 137, 139; Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1632 no. 6.

At the same time, the state of living apart which results from divorce does change the joint parental responsibility as such, as the child will usually either live with the mother or the father on account of their spatial separation. The law takes account of this circumstance by means of the special provision in § 1687 CC. Under the umbrella of the continuance of joint parental responsibility after divorce issues regarding contact with the child, § 1684 para. 3 CC, maintenance and upbringing, § 1628 CC, must be clarified between the parents, pursuant to § 1687 para. 1 CC. If the child's permanent residence is with one of the parents, as opposed to any other possible arrangement for the sharing of responsibility, § 1687 para 1 sent. 1 CC stipulates that the parents' mutual consent is in general no longer required, as otherwise is the case when the parents hold joint responsibility, but only in matters the regulation of which is of considerable importance for the child. In matters relating to everyday life, the decisions are made solely by the parent with whom the child habitually resides, the habitual residence resulting either from the consent of the other parent or from a court decision. The term "matters relating to everyday life" refers to frequently occurring situations requiring a decision by the parents, but whose effects on the child's development can be modified without a great deal of difficulty (e.g. § 1687 para. 1 sent. 3 CC).[785] By contrast, any decisions regarding matters which have an effect on the child's development that can either not be modified or be modified only with difficulty, are of "considerable importance" for the child.[786]

53. Can the exercise of parental responsibility be subject to a parental agreement?

Despite the fact that there is no comprehensive statutory regulation it is recognised that the exercise of parental responsibility can be subject to a parental agreement[787]. It is argued, however, that the determination of the residence of the child and parental custody as such are provided for by mandatory law and are not open for a disposition of the parents[788].

The statute only mentions a court-approved settlement for contact (§ 156 para. 2 FPA). It is argued by some authors that this could applied in analogy also to custody[789]. The same standard as under § 1696 CC – the best interests of the child – could be applied[790]. The agreement has then the same binding force as a court-approved settlement. If the court will not approve the content of a parental agreement it may render a court decision on the issues of custody and contact.

Usually, joint parental care continues even after divorce. Each of the parents may apply for sole parental care, however. Where the other spouse consents to this application, it should be granted in most cases. (§ 1671 para. 2 No. 1 CC). The parental agreement is not binding on the Court, if other legal provisions demand an order which differs from this agreement, e.g. if the welfare of the child would be endangered (§ 1671 para. 3, § 1666 para. 1 CC). The same is true where the child has reached the age of 14 and contests the parental agreement.

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[785] BT-Drucks. 13/8511 p. 74 f.; Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1687 no. 11.
[786] Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1687 no. 7.
[787] Coester, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch (2009) § 1671 BGB no. 59 ff.
[788] Olzen, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1626 BGB no. 13, § 1696 BGB no. 17.
[789] Coester, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch (2009) § 1671 BGB no. 61.
[790] Coester, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch (2009) § 1671 BGB no. 62.

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The court will try to persuade the parents to make an agreement according to the welfare of the child and the circumstances of the case. If no such agreement can be reached the court will decide directly based on the legal standards.

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

Regulations of custody and of contact belong to the ancillary matters which have to be clarified in the framework of divorce proceedings (cf. §§ 133 para. 1 no. 2, 137 para. 3 FPA). The family court will help the parents to come to an arrangement which may be included in a court-approved settlement. According to § 1696 para. 1 CC a later amendment of judicial decisions and of court-approved settlements is possible. The decision on the right of custody or of contact or a court-approved settlement must be amended if this is appropriate for sound reasons which affect the interests of the child in the long term (§ 1696 para. 1 CC).

Generally there will be an application of one or both of the parents if they do not agree. However, the court may also act on its own motion if the welfare of the child is endangered.

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

The family court may intervene whether there is no arrangement by the parents but also in cases where there is an agreement. The family court has also to modify its own orders any time it holds that doing so serves the interests of the child. However, serious reasons must exist which affect the interests of the child (§ 1696 para. 1 CC). Paramount consideration is always the interests of the child. The specific facts and circumstances of each individual case are decisive. Serious reasons for a modification can be an alteration of the underlying facts, for example a serious deterioration of the situation of the caring parent[791].

A parent may be deprived of his/her exercise of parental custody in a proceeding under § 1666 CC (jeopardy to the welfare of the child). Misbehaviour toward the other parent is relevant as far as it endangers the child[792].
The family court can also restrict the right of contact or the execution of a former contact decision, insofar as this is in accordance with the welfare of the child, § 1684 para. 2 sent. 1 CC. The circumstances of the individual case are decisive. The appropriate place for contact is generally the home of the parent (or person) with the contact right. Often even the details of taking and returning the child have to be regulated. The court can also try to prevent a jeopardy to the welfare of the child (§ 1666 CC) by appointing a special curator ("Ergänzungspfleger") for the regulation of the details of contact.

Among other things, the family court may determine that contact shall only occur when a third person prepared to collaborate is present, § 1684 para. 4 sent. 3 CC ("betreuter" or

[791] Olzen, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1696 BGB no. 24 ff.
[792] Olzen, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1666 BGB no. 102, 114.

"begleiteter Umgang"). This third party can be a natural person, but may also be a youth welfare institution or an association. The association then determines which single person fulfils the task, § 1684 para. 4 sent. 4 CC. Supervised contact generally means that the non-custodial parent may visit the child at a particular time and in a particular place. This is particularly used in cases where there was previous domestic violence.

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

Since contact and parental care concern different rights, as a rule rights of contact may be exercised between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental care[793]. However, the holder of the right of contact can also be discharged of this right in the interest of the child (§ 1684 para. 4 sent. 1 CC). A decision restricting or excluding the right to contact for a longer period of time or which excludes it totally can only be ordered if otherwise the welfare of the child would be endangered (§ 1684 para. 4 sent. 2 CC). Therefore it is important whether the ground for the discharge of parental custody still persists and would influence also contact to the child and its welfare. Existence of a contagious disease or violent behaviour, e.g., may well lead also to an exclusion of contact.[794] In other cases different kinds of restrictions and measures of control are possible.[795] E.g., the family court can order that a third person is present when there is contact ("begleiteter Umgang"; § 1684 para. 4 sent. 3 CC). Such a third person can be a youth welfare institution or an association. The association then determines which single person fulfils the task of being present (§ 1684 para. 4 sent. 4 CC).

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

Parents may organise the residence of children after divorce in a different manner. If one of the parents has sole parental custody this includes the care of the child ("Personensorge") which includes the determination of residence ("Aufenthaltsbestimmungsrecht"; § 1631 para. 1 CC). The parent with sole parental custody then determines the residence of the child. The other parent generally has a contact right. It is also possible to split custody as such and the determination of residence.

The law assumes the so-called residence model, but it may, subject to the parents' consent, allow a dual-residence or alternating model. In the framework of such an arrangement the parents may determine how long, in which intervals and where the child lives with one of the parents. However, a lack of cooperation of the parents may lead to an end of the joint parental custody[796].

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[793] Cf. Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, München, 2012, § 1684 Civil Code no. 4.

[794] See in more detail Peschel-Gutzeit, Die Regelung des Umgangs nach der Herausnahme des Kindes aus dem Elternhaus, §§ 1666, 1666a BGB, FPR 2003, 290 ff.

[795] See Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, München, 2012, § 1684 Civil Code no. 26 ff.

[796] Coester, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch (2009) § 1671 BGB no. 259.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Arrangements regarding the residence of the child are often determined by a parental agreement particularly in the framework of a divorce. It is argued, however, that the determination of the residence of the child is provided for by mandatory law and is not open for a disposition of the parents[797]. Within a divorce proceeding there will regularly be a court decision.

The judge is vested with the power to scrutinize the parental agreement in the framework of divorce proceedings. The judge has a margin of appreciation either to ask the spouses to reconsider the agreement or can directly modify it. It is also possible to leave parental custody to both parents and fix the residence (the right to determine the residence) by judicial decision[798].

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

Today it is accepted that there exists not only a right of the parent, but also a duty of the parent to contact, § 1684 para. 1 CC. Contact is also a right of the child. The statute, however, does not mention a duty to contact of the child, cf. § 1684 para. 1 CC. As a rule the rights and duties to contact exist irrespective of who actually holds parental care. A parent who is not entitled to personal custody nevertheless retains the right to personal contact ("persönlicher Umgang") with his or her child (§ 1684 para. 1 CC).

There can be proceedings in the case of obstruction of contact by the parent holding custody. There is a provision for mediation in court by § 165 FPA. As a sanction there an enforcement of the order which follows §§ 86 ff FPA is possible. The court can determine a payment by way of a penalty ("Ordungsgeld"; § 89 para. 1 sent. 1 FPA). There can also be an arrest order ("Ordungshaft"; § para. 1 sent. 2 FPA), and as an ultima ratio the use of force is admissible ("unmittelbarer Zwang"; § 90 para. 1 FPA). In a contact proceeding, an order to surrender the child to the other parent for the purpose of enforceable contact is also possible. However, for the enforcement of a contact order no direct use of force against the child is allowed, § 90 para 2 FPA. In a proceeding for the surrender ("Herausgabe") of a child, the use of force is, in principle, admitted. The family court, however, has to take the will of the child into account.

If the parent having parental custody consistently and without reason denies the other parent contact with the child, a partial or even a total termination of parental custody can be ordered. In such a situation, it is argued, the behaviour of the parent is against the best interests of the child. However, if the holder of parental custody has used all reasonable

[797] Olzen, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1696 BGB no. 17.
[798] Coester, in: Staudinger, BGB - Kommentar zum Bürgerlichen Gesetzbuch (2009) § 1671 BGB no. 259 with references; Hennemann, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1671 BGB no. 18.

efforts to persuade the child to grant contact, it is no longer reasonable for the parent to follow the contact order. It cannot be expected for the parent to use force against the child[799].

There is no express statutory provision dealing with cases where a contact order against the parent with the obligation to contact his or her child is not followed. In cases where the person having the right and the obligation to contact, usually the father, does not perform this duty it was contested whether a penalty can be determined. However, according to the Federal Constitution Court there is no enforceability of the obligation against the father[800]. The main argument for this position is that an amelioration of the relationship between the child and an unwilling parent cannot be expected by such an enforcement.

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

In principle there is a mandatory combination of divorce and certain ancillary proceedings. Certain matters concerning the consequences ("Folgesachen") have to be dealt with together with the divorce ("Verbund"; § 137 FPA). These matters are enumerated in the statute: equalisation of pension rights (§ 137 para. 2 No. 1 FPA), post-marital maintenance § 137 para. 2 No. 2 FPA), allotment of the matrimonial home and of household goods (§ 137 para. 2 No. 3 FPA) and matrimonial property matters (§ 137 para. 2 No. 4 FPA). With the exception of the equalisation of pension rights an application an application of one of the spouses is necessary. However, the ancillary proceedings may, under certain circumstances, be separated from the divorce proceedings.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

a) At the time of marital breakdown ex-spouses may claim maintenance after divorce according to §§ 1569 ff. CC.

b) There can be claims for an equalisation of gains under the statutory matrimonial property regime (§§ 1372 ff. CC). Compensation claims also may exist if another matrimonial property regime has been agreed (for community property see §§ 1471 ff. CC).

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[799] Cf. Diederichsen, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1666 no. 21, § 1684 no. 8.

[800] Federal Constitutional Court 01.04.2008, BVerfGE 121, 69 = FamRZ 2008, 845.

c) An equalisation of pension rights is in principle necessary (§ 1587 CC). In accordance with the Pension Equalisation Act, an equalisation takes place between the divorced spouses of rights existing in Germany or elsewhere, in particular of the statutory pensions insurance, from other standard security systems such as civil servants pensions or pensions of a professional group, from company pensions or from private old-age and invalidity pensions.

d) Other payments or an allocation of property rights may be based in application of the general rules of the law of obligations and property law. This may happen if there are common debts or common property[801].

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

It must be declared already in the initial application for divorce if the spouses made an arrangement ("Regelung") for child and/or spousal maintenance (§ 133 para. 1 No. 2 FPA). It is, however, not necessary that an agreement has been reached. It can also be made in the course of the divorce proceeding.

The equalisation of gains can be claimed after divorce.

The equalisation of future pension rights according to §§ 9 ff. LPRE is a matter of combination divorce and ancillary proceedings ("Verbund"; § 137 para. 2 No. 1 FPA). But it can also be claimed later.

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

The maintenance claim can be introduced by one or the other spouse after the divorce being granted. This action is not enclosed in a specific period of time. However, some of the grounds for maintenance depend on the situation at the moment of divorce (cf. Q 76). The general rules on limitation apply. The limitation period for maintenance claims is three years beginning with the end of the year (§§ 195, 197 para. 2, 199 CC)[802].

An equalisation of gains may be asked after the divorce. The general rules on limitation apply[803].

A claim for an equalisation of future pension rights may be introduced after the divorce being granted. This is particularly the case if the equalisation takes the form of an obligation ("schuldrechtlicher Ausgleich", §§ 20 ff. LPRE).

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

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[801] Heiß, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1372 BGB no. 27 ff.
[802] Fränken, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, §§ 1569 ff. BGB no. 57, 58.
[803] Heiß, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1378 BGB no. 22.

As a consequence of the principle of irretrievable breakdown the existence of a maintenance obligation is, in principle, independent of any form of behaviour. However, according to the 'negative hardship clause' ("negative Härteklausel") of § 1579 CC maintenance can be denied, reduced or granted only for a limited period if it would be grossly unfair to claim maintenance, see Q 69. One of the spouse may be discharged from providing for maintenance to the other if the general conditions of maintenance law, need an ability to pay, are not fulfilled.

A claim for an equalisation of gains in matrimonial property law may be excluded in cases of gross inequity, see Q 69.

An equalisation of future pension rights may also be excluded in cases of gross inequity, see Q 69.

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

See Q 65, 69.

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

According to legal provisions or case law a certain balance between the two ex-spouses personal assets can be sought via the equalisation of accrued gains in matrimonial property law and a claim for equalisation of pension rights.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

The provisions relating to maintenance upon divorce are not directly connected with the rules relating to other post-marital financial consequences such as the equalization of accrued gains and the equalisation of pension rights[804]. Matrimonial property law does not fulfil a function of maintenance. Its purpose is to equalize accrued gains and to compensate for losses due to marital arrangements but not to satisfy the needs of a spouse after divorce. Therefore the dissolution of the matrimonial property regime as such does not affect the attribution of maintenance. However, the maintenance debtor's ability to pay and the needs of the maintenance claimant may be influenced by actually existing claims and money received under matrimonial property law[805].

According to recent case law it must also be avoided that the value of the same asset is taken into account twice as a part of the maintenance debtor's ability to pay and also as an asset of the debtor spouse in the context of the equalization of accrued gains[806]. The courts therefore try to draw a line between maintenance and the equalization of accrued gains. For

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[804] Schwab, Familienrecht, 20th Edition, Munich, 2012, No. 254.
[805] See Kroll, The Reform of German Maintenance Law , in: Atkin (ed.), The International Survey of Family Law, 2007 Edition, Bristol, 2007, p. 85 et seq.
[806] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1577 No. 10.

example, the existing goodwill of a veterinary practice may be taken into account as a final asset whereas future income is taken into account for maintenance after divorce[807]. It is controversial how a double utilization of debts for maintenance and the equalization of accrued gains can be avoided[808]. The mere fact that such an obligation also plays a role in the ability to pay in maintenance law is not a convincing argument in respect of the calculation of the final assets[809].

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

The grounds for divorce do not have a direct incidence on an award of maintenance after marital breakdown. However, according to § 1579 CC there can be a restriction or refusal of maintenance for gross inequity. A maintenance claim is to be refused, reduced or restricted in time to the extent that it would be grossly inequitable for the person obliged to be claimed on, even if the concerns of a child of the spouses entrusted to the person entitled in order to be cared for or brought up were observed, because one of the eight grounds set forth in § 1579 CC is given.

Maintenance claim may be refused, reduced or restricted if because the person entitled lives in a stable long-term relationship (§ 1579 No. 2 CC). There will be no maintenance if the person entitled has committed a major criminal offence or a serious intentional minor offence against the person obliged or against a close relative of the person obliged (§ 1579 No. 3 CC). There is also no maintenance claim if the person entitled frivolously induced his own indigence (§ 1579 No. 4). Maintenance can also be excluded if the person entitled frivolously disregarded serious property interests of the person obliged, (§ 1579 No. 5 CC).

An objection against a maintenance claim can also be made if the person entitled, before the parties lived apart, for a long period grossly violated his duty to contribute to the family maintenance (§ 1579 No. 6 CC). Another reason is if the person entitled is clearly responsible for manifestly serious misconduct towards the person obliged (§ 1579 No. 7 CC). No maintenance claim exists also if there is another reason that is just as serious as the reasons set out in nos. 1 to 7 (§ 1579 No. 8 CC).

There is also a restriction for the equalisation of gains. According to § 1381 there may be a refusal of satisfaction for gross inequity (§ 1381 para. 1 CC). The debtor may refuse to satisfy the equalisation claim to the extent that the equalisation of accrued gains in the circumstances of the case would be grossly inequitable.

Gross inequity may in particular be given if the spouse who made the smaller amount of accrued gains for a long period culpably failed to discharge his financial duties which arise from the marital relationship (§ 1381 para. 2 CC). According to case law the violation of marital duties in the personal sphere is not sufficient for such a gross inequity. Therefore, for example, adultery is not enough[810].

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[807] See Dethloff, Familienrecht, 30th. ed. 2012, Munich, § 5 No. 107
[808] See BGH, 06.02.2008, BGHZ, 175, 207 and FamRZ, 2008, 761, 763 f.
[809] See Dethloff, Familienrecht, 30th. ed. 2012, Munich, § 5 No. 107.
[810] Schwab, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. VII 245.

There is also a similar provision on gross inequity for the equalisation of pension rights § 27 LPRE.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

Since German law follows the doctrine of irretrievable breakdown, there is only one ground for divorce based on the 'failure' of a marriage (§ 1565 CC). The consequences of divorce are, in principle, always the same. Therefore there is no distinction between claims based on fault and claims based on other grounds. One of the principles of German maintenance law is that marital fault on the part of the housekeeping spouse - usually the maintenance claimant - as such shall not entail the loss of a maintenance claim.

However, there exist seven cases of grossly inequitable maintenance claims (§ 1579 CC). Some of these cases concern the behaviour of the claiming party and can lead to a total or partial loss of maintenance. Their effect is that in some cases the innocent party can refuse to pay maintenance, see Q 69.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

There are special provisions on the matrimonial home ("Ehewohnung") in §§ 1361b and 1568a CC. The term matrimonial home refers to all rooms that are or have been used by the spouses as living accommodation or which were according to the circumstances meant to be used in that way. The term is to be broadly construed[811].

The allotment of the matrimonial home in the case of separation is dealt with in § 1361b CC. According to this rule the matrimonial home can be allotted to a spouse to avoid undue hardship. Pursuant to § 1361b para. 1 sentence 2 CC undue hardship is defined as the state when the welfare of the children living in the family household is endangered. Furthermore, undue hardship includes cases in which a spouse has intentionally and unlawfully injured the other spouse, so that a shared home is not an option (§ 1361b para. 2 sent. 1 CC).

In the event of a divorce the allotment of the matrimonial home is dealt with under § 1568a CC. This jurisdiction lies with the family court and the procedure follows the rules for non-contentious matters in §§ 200 ff. FPA. The rules applies irrespective of the property regime, as it is not meant to protect financial interests, but rather to preserve the interest in the continuity of the existing property.

In the case of single ownership by one spouse (§ 1568a para. 2 CC) the allotment to the other spouse can only be made in order to avoid undue hardship. Due to the single ownership the owning spouse ranks above the other spouse.

If the spouses are joint owners or tenants the allotment can be made with the discretion of the court. According to § 1568a para. 1 CC the court has to take into account all the special circumstances of the case, especially the welfare and interests of the children.

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[811] Boden/Cremer, in: Nomos Kommentar BGB, vol. 4 Familienrecht, 2nd ed. 2010, § 1361b No. 3.

An allotment does not transfer ownership to the other spouse, but merely allots the right to use the matrimonial home. It is possible for the court to arrange a lease or appropriate compensation for the use in favour of the house-owning spouse[812]. In the case of a tenancy the court can decide that one spouse continues the former joint tenancy on his or her own or that one spouse substitutes for the other spouse in the tenancy contract (§ 1568a para. 1 CC).

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

The spouses are free to arrange the financial consequences of their divorce themselves. They may (before or after the divorce or during the divorce proceedings) enter into a binding agreement as to maintenance (§ 1585c CC). Such an agreement dealing with an eventual divorce is already possible as a prenuptial agreement or in connection with the celebration of marriage. The spouses may also make agreements on the obligation to maintain for the time after the divorce. An agreement that is entered into before the divorce becomes final and absolute must be notarially recorded (§ 1585c Sentence 2 CC). The agreement may exclude maintenance totally.

After initiating the divorce proceedings agreements regarding the consequences for matrimonial property may be made (§ 1378 para. 3 sent. 2 CC). Such an agreement is also possible before the start of the proceedings.[813] The amount and the modes of performance of obligations between spouses may for matrimonial property matters be determined by spousal agreement (§ 1408 para. 1 CC).

The amount and the modes of performance of obligations between spouses may for the equalisation of future pension rights be determined by spousal agreement (§ 1408 para. 2 CC; §§ 6 ff LPRE). The details of equalisation of future pension rights follow social security law. However, within these limits agreements are possible (§ 1408 para. 2 CC, § 8 para. 2 LPRE)[814]. However, there are some cases where only an equalisation in form of claims ("schuldrechtlicher Ausgleich") takes part.

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

No approval of the maintenance agreement by the court is necessary (§ 1585c CC). There are no explicit legal provisions which state that authorities and courts can modify or set aside marital agreements. Moreover, according to § 1408 CC the freedom of contract applies as a general rule. However, a certain control has been developed by case law. In a landmark decision dating from 2001[815], the German Federal Constitutional Court called for a judicial review of marital agreements, despite the existing freedom of contract. The Federal Supreme Court has since further specified the requirements to be placed on such a review

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[812] Rauscher, Familienrecht, 2nd Edition, Heidelberg: C.F. Müller, 2008, No. 719a.
[813] Zimmermann, in: Krenzler/Borth (ed.), Anwalts-Handbuch Familienrecht, 2nd ed. 2012, Ch. 9 No. 9, 14 ff.
[814] Fiederici, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1408 BGB no. 14 ff.
[815] BVerfG, 06.02.2001, FamRZ, 2001, 343.

of marital contracts[816]. Accordingly, the statutory provisions on post-marital maintenance, accrued gains and pension rights equalisations are, in principle, open to contractual regulation; there is no indispensable minimum content of consequences of divorce in favour of the entitled spouse. However, this general openness of the consequences of divorce to contractual regulation must not result in the protective purpose of the statutory provisions being undermined at will by contractual provisions, which would be the case if one spouse were to incur an unacceptable and clearly one-sided distribution of burdens. The burden on one spouse weighs all the more heavily the more immediately the contracting-out of statutory provisions encroaches on the so-called 'core area' ("Kernbereich") of the law on the consequences of divorce.

To determine this core area, the importance of the individual provisions on the consequences of divorce are decisive, and the Federal Supreme Court has established a ranking in this respect. On the first level are maintenance payments for looking after a dependent child[817]. On the second level is maintenance for old age and illness and the equalisation of pension rights. On the third level is maintenance for unemployment, and on the fourth level maintenance payments for healthcare and old-age provision. This is followed by maintenance for training as well as maintenance paid to supplement a creditor's insufficient level of income and subsequently by the equalisation of accrued gains on the last level. This means that whereas the spouses are the most restricted in their freedom to make contractual arrangements concerning maintenance for looking after children, the equalisation of accrued gains is the most accessible to contractual agreements.

The judge must examine whether an evidently one-sided distribution of burdens occurs as a result of a post-nuptial agreement which is unacceptable for the spouse suffering the burden[818]. In so doing, the judge must first of all carry out an 'effectiveness check' ("Wirksamkeitskontrolle") using § 138 para. 1 CC, which declares a legal transaction that is contrary to morality to be void. It is to be examined whether the agreement resulted in a one-sided distribution of burdens at the time it was concluded, so that a breach of morality is to be assumed. This type of breach is only assumed, however, if the agreement encroaches on the core area of the law on the consequences of divorce without this drawback being attenuated by other benefits to the spouse suffering as a result or by the particular circumstances of the spouses.

If the agreement remains valid thereafter, a 'performance check' ("Ausübungskontrolle") guided by § 242 CC takes place, according to which the debtor is obliged to bring about performance according to the requirements of good faith, taking into consideration customary practice[819]. The judge must use this general clause to examine whether and to what extent a spouse abuses the legal power he or she has been granted by agreement if in the event of a divorce he or she claims, in the face of a statutory consequence of divorce demanded by the other spouse, that this consequence has been effectively excluded by the agreement. Here it must be noted that the higher-ranking the contractually excluded, but now demanded, consequence of divorce, the more grave must be the reasons suggesting its exclusion. If the contractually agreed exclusion is pleaded and this violates § 242 CC, the

[816] See in more detail Jült, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 2 no. 2843 ff.
[817] Borth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. IV 1496.
[818] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1408 no. 9.
[819] Borth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. IV 1498.

judge must order the legal consequence which takes into account, in a balanced manner, the justified concerns of both parties in the situation that has now occurred.

What this means for the matrimonial property regime and, in particular, for the equalisation of accrued gains, is that the spouses are able to conclude very far-reaching agreements. With a view to the subordinate importance which the Federal Supreme Court attributes to the equalisation of accrued gains in the system of the law on the consequences of divorce, excluding the matrimonial property regime of the community of accrued gains and thus contracting the matrimonial property regime of separation of property will regularly pass judicial scrutiny and be both valid and enforceable[820].

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets (incomes, capital, assets, pension, benefit…) of can they be discharged from full and frank disclosure ?

There are similar rules in substantive and in procedural law.

Under maintenance law divorced spouses are obliged to provide information to each other on their income and assets (§ 1580 CC). The parties are mutually obliged to furnish information in respect of their income and wealth, to the extent that this is necessary for the determination of a maintenance claim or a maintenance obligation (§ 1605 para. 1 sent. 1 CC). This right to information is enforceable by an action by stages ("Stufenklage"), i.e., the amount of the claim will be based on the information received during the proceedings (§ 254 German Code of Civil Procedure). The making of a declaration in lieu of an oath can be required (§ 261 CC). It is also possible that the court follows unilateral statements by the maintenance claimant.

One consequence of a spouse's refusal to provide such information can be a claim in the form of damages by the other spouse based on delay (§ 280 CC) and/or tort law (§ 826 CC). If the maintenance claimant does not provide information this can also be a serious intentional offence against the debtor and therefore the payment of maintenance can be grossly inequitable so that he or she loses his or her maintenance claim (cf. § 1579 no. 2 CC).

There are specific provisions on the duty to give information in maintenance matters (§ 235 FPA). The court may also ask third parties, inter alia the employer, social security and fiscal authorities (§ 236 FPA). The reluctant spouse may also face higher costs in the proceedings (§ 243 Sent. 2 FPA)…

The rights of the spouses to information concerning the other spouse's property at the beginning and the end of the property regime of the community of accrued gains have been strengthened through a right to a presentation of documents (§ 1379 CC). Each spouse may (1) demand information from the other spouse regarding the assets at the time of suspension and (2) demand information on the assets insofar as they are material to the initial and final assets.

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[820] Cf. Fiederici, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1408 BGB no. 11.

For the equalisation of pension rights there is a claim for information of the spouse (§ 4 para. 1 LPRE). The spouse has also the right to get information from the pension fund or payer ("Versorgungsträger"; § 4 para. 2 LPRE). The courts have wide powers to get information from these institutions and the parties (§ 220 FPA).

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

See Q 74.

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

i. Spousal maintenance

1. § 1569 CC stresses the principle of self sufficiency. After divorce, each spouse is responsible for providing for his own maintenance. If he or she is not in a position to do this, he or she has a claim for maintenance against the other spouse only under the following provisions. The criteria taken into account in order to evaluate the amount of the due maintenance are dealt with extensively in §§ 1570 ff CC. The general conditions such as lack of means on the part of the claimant (§ 1577 CC) and ability to pay on the part of the debtor (§ 1581 CC) always form the basis for a successful maintenance claim. The first stage of the existence of a maintenance obligation is always that the claimant is not able to maintain himself or herself. It is also necessary that the debtor is able to provide maintenance.

   However, another important precondition is that the conditions of one of the legal provisions in §§ 1570 to 1576 CC are fulfilled. In these provisions the Civil Code lists a number of situations, which justify the granting of maintenance (the principle of enumeration). Each of them provides an independent basis for maintenance.

   If gainful employment is expected the income from part-time employment will be taken into account according to the rule under § 1577 para. 1 CC and will reduce the maintenance claim. However, when no gainful employment is expected but the claimant nevertheless works, his or her income will only be taken into account according to the more favourable rule of § 1577 para. 2 CC.

2. The most important claim in practice and also privileged by law is maintenance based on the care of a child (§ 1570 CC). A divorced spouse may demand maintenance from the other, for the care for or upbringing of a child of the spouses, for at least three years after the birth. The duration of the claim to maintenance is extended as long as and to the extent that this is equitable. Here, the concerns of the child and the existing possibilities of childcare are to be taken into account. The duration of the maintenance claim is further extended if, taking into account the arrangement of childcare and gainful employment in the marriage and the duration of the marriage, this is equitable (§ 1570 para. 2 CC).

3. There is also a maintenance claim for aged spouses. A divorced spouse can demand maintenance from the other insofar as he or she cannot be gainfully employed on account of his or her age (§ 1571 CC). This situation must be present at the date of the divorce (No. 1), the completion of the care or education of a common child (No. 2) or the cessation of the conditions for a maintenance claim pursuant to §§ 1572 to 1573 CC (No. 3). 'Age' means in principle the normal age limit when old-age social security pensions start, although there is no fixed age limit[821].

4. Maintenance can also be claimed in the case of the sickness or infirmity of the divorced spouse (§ 1572 CC). This will be taken into consideration if such a state of health prevents gainful employment on the date of the divorce (No. 1), the completion of the care or education of a common child (No. 2), the completion of the education, continuing education or retraining of the claimant (No. 3) or the cessation of the conditions of a maintenance claim pursuant to § 1573 CC (unemployment, No. 4). It is not important whether the illness is a consequence of the marriage. A maintenance claim is not excluded where the illness already existed at the time of the celebration of the marriage and this was known or unknown to the parties[822].

5. Maintenance can also be claimed until appropriate employment is found (§ 1573 CC). If the income from a suitable gainful employment is not sufficient for full support in the sense of § 1578 CC, the claimant can, insofar as he or she is not already entitled to a maintenance claim under §§ 1570 - 1572 Civil Code, demand the difference between his or her own income and the full maintenance ("Aufstockungsunterhalt", § 1573 para. 2 CC). This maintenance claim is generally of a subsidiary nature and may be limited in time (cf. § 1573 para. 5 CC).

6. There is another maintenance claim for the education, further education or retraining of the divorced spouse (§ 1575 CC). This applies to cases where the claimant in the expectation of marriage or during the marriage omitted to acquire or interrupted formal education or occupational training. This right continues only during the period which is customary for the completion of such education (§ 1573 para. 1 CC). There is also a maintenance claim if the divorced spouse undertakes further education or retraining for the elimination of disadvantages which have arisen by reason of the marriage (§ 1573 para. 2 CC).

7. Maintenance can also be claimed on the ground of equity (§ 1576 CC). Serious reasons may not be taken into account merely because they result in the failure of the marriage. A situation where a denial of maintenance would be grossly inequitable, is e.g., where the claimant cared for a disabled stepchild, i.e., a child of the maintenance debtor during the marriage.

ii. In matrimonial property law there is an extensive equalisation of accrued gains (§§ 1373 ff. CC). The accrued gains are equalised under the provisions of sections 1373 to 1390 CC. Accrued gains means the amount by which the final assets of a spouse exceed the initial assets (§ 1373 CC).

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[821] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1571 BGB no. 3.
[822] Brudermüller, in: Palandt, Bürgerliches Gesetzbuch, 71th Edition, Munich, 2012, § 1572 BGB no. 3.

iii. The main purpose of the equalisation of pension rights is an equalisation of different pensions rights of the spouses which often is caused by a unequal division of labour and different professional careers within the marriage.

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

There is no automatic indexation of maintenance after divorce. However, in the field of child support a simplified procedure for the adaptation of court orders and court settlements exists (cf. § 1612a CC, §§ 249 ff. FPA). The parties may also introduce into their maintenance agreement a stable value clause. Where there is no such clause the principle of rebus sic stantibus applies. The depreciation of the value of currency must be taken into account.

Insofar as there is no specific date as a precondition for maintenance a maintenance claim always reflects the actual situation of the parties. If there is a maintenance judgment either party is entitled to apply for a variation of the judgment if a substantial change has occurred in the facts on which the decision is based (§ 238 FPA). The change of circumstances may result from a change with respect to the preconditions for a specific claim or an increased ability to pay or from a decreased need.
The change must have taken place after the judgment sought to be modified was rendered. In principle the court is bound with respect to former findings of fact and also to conclusions of law. There is, however, some controversy as to the extent of any modification of maintenance in the new proceedings. Also a maintenance agreement in the form of a court settlement or an enforceable authentic instrument (cf. § 794 I no. 1, 5 Code of Civil Procedure) can be altered by a lawsuit for modification.

There is an equalisation claim under matrimonial property law. If the accrued gains of one spouse exceed the accrued gains of the other spouse, the half of the surplus is due to the other spouse as an equalisation claim (§ 1378 para. 1 CC). Such an equalisation of gains means that there is a final result. There will be no changes later[823].

For the equalisation of future pension rights under certain conditions a modification of court decisions is possible (§ 227 para. 1 FPA)[824]. This may occur if there are essential changes in facts or law. Also agreements may be modified under certain circumstances (§ 227 para. 2 FPA)[825].

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

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[823] Cf. Heiß, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1378 BGB no. 14.
[824] Götsche, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 3 no. 622 ff. – For the modification according to §§ 225, 226 FPA see Norpoth, in: Krenzler/Borth (ed.), Anwalts-Handbuch Familienrecht, 2nd ed. 2012, Ch. 11 No. 398 ff.
[825] Götsche, in: Klein (ed.), Handbuch Familienvermögensrecht, 2011, Chapter 3 no. 633.

There is no direct link between parental responsibility and child maintenance. However, where the child does not live with his or her parents, maintenance must be paid monthly in advance (§ 1612 para. 3 BGB). As a rule, a custodial parent fulfils his or her obligation to contribute to the support of an underage, unmarried child by caring for and bringing up the child (§ 1606 para. 3 BGB). This 'equal value rule' ("Gleichwertigkeitsgrundsatz") means that if, after a separation or divorce, the children live with their mother, her contribution is generally restricted to care ("Betreuungsunterhalt"); only the father has to pay child support ("Barunterhalt").

The division between personal care and maintenance payments may be altered if there is a dual-residence or alternating residence of the child. If there is an alternating residence of the child in the form of equal amounts of time spent with each parent then the income of both parents has to be taken into account for the calculation of maintenance[826]. However, if the child spends most of the time with one parent and the other has to pay child support then a reduction cannot take place in principle until the child spends approximately half of the time with the other parent[827].

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

Maintenance is to be rendered by making periodical payments (§ 1612 para. 1 CC). Periodical maintenance payments must be paid monthly in advance (§ 1612 para. 3 sent. 1 CC). Generally a bank account for the creditor is used[828]. Very often there will be a court order or an agreement of the parents. It is also possible to create further enforceable legal documents on which compulsory enforcement may be based on. These may be judicial settlements ("gerichtlicher Vergleich") concluded by the parties (§794 para. 1 No. 1 Code of Civil Procedure) and enforceable notarial deeds (§ 794 para. 1 No. 5 Code of Civil Procedure). The child has a right that such an enforceable title is established[829].

The maintenance obligation is a money obligation which has to be paid monthly. This means that a supply of assets for the benefit of the child or the supply of capital (lump sum payment) is not a performance of the legal obligation[830].

If the maintenance debtor fails to pay, a child under the age of twelve is entitled to State benefits under the scheme of the Maintenance Advancement Act (UVG; "Unterhaltsvorschussgesetz") of January 2, 2002 (as amended). However, these benefits are restricted to 72 months and are only subsidiary, i.e., there is a reimbursement claim against the debtor based on subrogation (cessio legis). Such a reimbursement claim can also arise under the general welfare scheme of 'social assistance' ("Sozialhilfe").

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[826] Born, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1606 BGB no. 35.
[827] Federal Supreme Court 28 February 2007, NJW 2007, 1882 = FamRZ 2007, 707 = FF 2007, 197 note by I. Rakete-Dombek.
[828] Saathoff, in: Nomos BGB Kommentar - Familienrecht, 2nd. ed. 2010, § 1612 BGB no. 2.
[829] Viefhues, in: juris PraxisKommentar BGB – Familienrecht vol. 4, 5th. 2012. § 1612 BGB no. 5.1. with references.
[830] Born, in: Münchener Kommentar BGB, vol. 8, 6th ed 2012, § 1612 BGB no. 98.

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

The amount and the performance of maintenance obligations regarding children may be determined by parental agreement. There is no form requirement. However, there is a mandatory minimum maintenance of minor children (§ 1612a CC) and child maintenance may not be waived for the future (§ 1614 para. 1 CC). The parents may make an agreement with an effect only between themselves that only one of them performs the obligation of child maintenance ("Freistellungsvereinbarung")[831].

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

There is no provision which vests the judge expressly with the power to scrutinize such an agreement. If the agreement does not comply with the legal standards the court can and will decide on this basis.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

According to Art. 17 para. 2 Introductory Law, within Germany a divorce may only be decreed by a court. This means a divorce by judicial decision is required. Under German family law a marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses (§ 1564 sent. 1 CC).

The financial consequences may be settled by agreement, see Q 72.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

Not relevant for divorce itself.

The consequences may be settled by agreement, see Q 73.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

The competent court for divorce proceedings ("Verfahren in Scheidungssachen") is the local court ("Amtsgericht"). Divorce proceedings are one category of matrimonial affairs ("Ehesachen"), § 121 no. 1 FPA. In the first line the court of the habitual residence of one the spouses with all of the common minor children of the couple is competent (§ 122 no. 1 FPA).

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[831] Borth, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, No. IV 187.

At the local court there is a division for family matters ("Familiensachen") in the form of a family court ("Familiengericht"), § 23a para. 1 no. 1, § 23b para. 1 Act on the Structure and Organisation of Courts ("Gerichtsverfassungsgesetz").

Affairs concerning the children belong to the exclusive competence of the divorce court (§ 152 para. 1 FPA). This court is also competent for the consequences of divorce ("Folgesachen"), § 137 FPA.

There is no special competence of a court only for transnational divorce proceedings. The local court must have jurisdiction according to Art. 3 ff. Brussels IIbis.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

After the petition for divorce is presented, there is no cooling-off period.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

There is no compulsory use of mediation. However, the family court may order that each of the spouses or both spouses together may take part in an information on mediation regarding the consequences of divorce (§ 135 FPA). The court may also propose in appropriate cases the use of mediation at an independent institution. Mediation may also be used in residence and contact matters concerning children (§ 156 para. 3 FPA).

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

a) The competent family court may make different interim orders according to the general rules (§§ 49 ff. FPA) in family matters (§ 111 FPA)[832]. These include inter alia divorce, matters concerning children, family home and domestic violence. During the course of divorce proceedings the divorce court decides (§ 202 FPA). In matters concerning the family home there can be an interim order (§§ 111 no. 5, 200 FPA),

b) There can be an interim order concerning the children. Particularly for child maintenance an interim decision is possible (§§ 111 no. 8, 246 para. 1 FPA). The same is true for custody and contract (§§ 111 no. 2, 151 no. 1, 2 FPA).

c) If the spouses are living apart, one spouse may demand from the other spousal maintenance according to § 1361 CC. There can be an interim order concerning maintenance between the spouses (§§ 111 no. 8, 246 para. 1 FPA),

[832] Rehme, in: Schulte-Bunert/Weinreich (ed.), FamFG Kommentar, 3rd. Ed. 2011 § 113 FamFG no. 9.

d) In matters of domestic violence ("Gewaltschutzsachen"; § 210 FPA) an interim order can be made (§§ 111 no. 6, 214 para. 1 FPA), for example an order prohibiting the respondent from entering the matrimonial home.

88. Is appeal available against the divorce order or against an out of court divorce decision ?

An appeal ("Beschwerde") may be lodged against the decision ("Beschluss"; § 116 FPA) of the local court ("Amtsgericht") in first instance (§§ 58 para. 1, 117 FPA). The Court of Appeal ("Oberlandesgericht) has to decide.

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene
a) in divorce proceeding,
b) in proceedings on parental responsibility if separated from the divorce proceeding?
If yes, on which grounds?

A special representative for the interests of the child ("Verfahrensbeistand) may be appointed by the court for minors if the family court thinks this is necessary (§ 158 para. 1 FPA). The youth office ("Jugendamt") with its social workers must be heard in the divorce proceedings (§ 158 para. 2 FPA). Very often there is only a written report.

In separate proceedings concerning parental responsibility the youth office must also be heard (§ 162 para. 1 FPA). The youth office may also make an application to become a party ("Beteiligter") in the proceedings (§ 162 para. 2 FPA). The only condition is that the person of the child is concerned.

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

The child has a constitutional right to be heard personally, generally orally.[833] As regards the hearing of children in custody proceedings the court shall hear a child personally in proceedings concerning the care of the person or the administration of the child's assets (§ 159 FPA). Where the child is over fourteen the court has in a proceeding on the care of the person always to hear the child personally (§ 159 para. 1 FPA). The residence of the child is an issue of care of the person. In proceedings concerning the child's assets the child has to be heard personally as far as this is indicated according to the nature of the affair (§ 159 para. 1 sent. 2 FPA).

For children under 14 years a personal hearing is obligatory where the inclination, the ties or the will of the child for the decision are of importance or where for the determination of the facts it is indicated that the court gets a direct impression of the child (§ 159 para. 2 FPA)

[833] BVerfG, 14.08.2001, FamRZ 2002, 229.

As far as no detriments for his development or education have to be feared the child has to be informed on the subject of the proceedings and the possible outcome of the proceedings; it has to be given an opportunity for expression, § 159 para. 4 FPA. Only for serious reasons the court may refrain from a hearing. This is indicated where already the hearing itself could harm the psychic balance of the child.[834] Where there was no hearing due to an imminent danger there has to be a later hearing, § 159 para. 3 FPA. Since there is no precise enumeration of cases where children are heard this should occur in almost all cases relevant for their personal welfare.

Where the child has to be heard personally this means that the court itself shall, as a rule, hear the child personally. Generally, the family judge will talk with the child.[835] As far as it is possible the child has to be informed about the subject and the possible results of the proceedings in an appropriate manner (§ 159 para. 4 FPA). If there is a curator ("Verfahrensbeistand") for the child appointed according to § 158 FPA, the curator has to be personally present in the hearing of the child (§ 159 para. 4 FPA).

The child himself is not a party in custody proceedings.[836] In order to prevent that the child is a simple object of the proceedings of other persons the legislator introduced the institution of a curator ("Verfahrensbeistand") who shall act as an "attorney of the child" ("Anwalt des Kindes"). The child can be legally represented in proceedings concerning parental responsibilities by appointment of such a curator, § 158 FPA. The court has to appoint a curator in proceedings concerning the "person" of the child where this is necessary to safeguard the interests of the child. Proceedings concerning the "person" is interpreted very broadly so that basically only proceedings concerning the assets of the child are not covered.[837]

The statute lists several different situations in a nonexclusive manner in § 158 para. 2 FPA. The first situation, formulated as a general clause is where there is a conflict of interests between the legal representative and the child (no. 1). In the cases of § 158 para. 2 no. 2 FPA the welfare of the child is in jeopardy (§§ 1666, 1666a CC)[838]. The third situation is where there are measures necessary which can lead to a separation of the child of his or her family or to a total deprivation of parental care (n°3). In the case of removal of the child from a foster person, the spouse, the registered partner or a person with a contact right there is also the question of the residence of the child to decide (no. 4). The appointment of curator is also possible in situations of a parental dispute where simply the residence of a child has to be determined.[839] A proceeding on contact concerns also the "person" of the child. Therefore the statutory provision on the appointment of a curator also here applies if there is an exclusion or substantial restriction of contact (§ 158 para. 2 No. 5 FPA).

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[834] Maurer, Das Verfahren der Familiengerichte, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, Part. I no. 477 ff.

[835] See Maurer, Das Verfahren der Familiengerichte, in: Schwab (ed.), Handbuch des Scheidungsrechts, 6th ed. 2010, Part. I no. 452 ff.

[836] BVerfG, 20.08.2004, FamRZ 2004, 86 = NJW 2003, 3544.

[837] See Hannemann/Kunkel, 'Der Verfahrenspfleger - das ‚unbekannte Wesen", FamRZ 2004, 1833, 1834 note 15; Proksch, Rechtstatsächliche Untersuchung zur Reform des Kindesrechts, Köln, 2002, p. 248.

[838] Coester, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, 13th Edition, Berlin, 2000, § 1666 Civil Code no. 210.

[839] Cf. Proksch, Rechtstatsächliche Untersuchung zur Reform des Kindesrechts, Köln: Bundesanzeiger Verlag, 2002, p. 247.

Where the court does not appoint a curator it has to give reasons in its decision concerning the person of the child (§ 158 para. 3 sent. 3 FPA). An appointment of a curator is not necessary or no longer necessary where the interests of the child can be represented reasonably by an attorney or another person in the proceedings (§ 153 para. 5 FPA).

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

u) the termination of marriage,
v) financial consequences of divorce,
w) the settlement of matrimonial assets,
x) parental responsibility,
y) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

a) A foreign decision about the termination of marriage will be recognized according to the general rules (§§ 108, 109 FPA). According to § 109 para 1 FPA (Impediments to Recognition) the recognition of a foreign decision is excluded:
   1. where the courts of the other state have no jurisdiction under German law;
   2. where the party, who has not appeared in the proceedings and relies on that fact, was not duly served with the document instituting the proceedings or was not served within sufficient time to enable him to arrange for his defence;
   3. where the decision is irreconcilable with a decision rendered here, or with an earlier foreign decision which is entitled to recognition, or where the proceeding which gave rise to the foreign decision is irreconcilable with a proceeding instituted earlier here;
   4. where the recognition of the decision would produce a result which would be manifestly irreconcilable with fundamental principles of German law, especially where the recognition is irreconcilable with basic constitutional rights.

   There is a special procedure for a formal recognition of divorce judgements in § 107 FPA. However, if the divorce was decreed by a court or authority of the state whose sole nationality the parties had at that date, and neither of them was subject to an alternative civil status regime (e.g. as a stateless alien, asylum seeker or foreign refugee), then formal recognition is unnecessary. Insofar as there is a particular legal interest in having a divorce recognized, formal recognition may be applied for. A legal interest is given if for example they need to submit a binding declaration of their civil status for a case arising from the divorce or for registration or taxation purposes.

   In all other cases formal recognition of foreign judgements in matrimonial matters must still be obtained pursuant § 107 FPA. The Land departments of justice are as a rule responsible for the recognition of such foreign judgements. Their duties may also be delegated to the Presidents of the Courts of Appeal. It is the department of justice of the Land where one of the spouses has his/her habitual abode that has jurisdiction. If neither of the parties is resident in Germany, but a new marriage is to be entered into here, the authorities of the Land where the marriage will take place have jurisdiction. If neither of the parties is resident in

Germany and the new marriage is to be entered into abroad, the Senate Department for Justice in Berlin has jurisdiction.

b) A foreign decision about the financial consequences of divorce will be recognized according to §§ 108, 109 FPA. However, according to § 109 para 4 no. 1 FPA a decision concerning a contentious family matter will not be recognised where reciprocity is not guaranteed. Maintenance is such a contentious family matter (§ 112 para. 1 no. 1 FPA).

c) The foreign decision about the settlement of matrimonial assets will be recognized according to §§ 108, 109 FPA. However, according to § 109 para 4 no. 1 FPA a decision concerning a contentious family matter ("Familienstreitsache") will not be recognised where reciprocity is not guaranteed. Matrimonial property matters are such contentious family matters (§ 112 para. 1 no. 2 FPA).

d) A foreign decision about the parental responsibility will be recognized according to the general rules of §§ 108, 109 FPA.

e) A foreign decision about the children's maintenance will be recognized according to §§ 108, 109 FPA. However, according to § 109 para 4 no. 1 FPA a decision concerning a contentious family matter will not be recognised where reciprocity with the State of origin is not guaranteed. Maintenance is such a contentious family matter (§ 112 para. 1 no. 1 FPA).

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

A foreign divorce decision may be denied recognition because of violation of public policy (§ 109 para. 1 no. 4 FPA). The public policy question may involve matters of substantive law or procedural deficiencies. That the foreign procedure is different from German law is as such not a ground for non-recognition[840]. The foreign decision may be disregarded if the underlying claim is contrary to German public policy, e.g., manifestly immoral or usurious. However, recognition cannot be denied merely because the foreign court applied a law which is different from the domestic law unless it is fundamentally inconsistent with the German legal and social system. The result must be intolerable in the individual case. Non-recognition of a foreign decision will only occur in very rare cases[841]. There are no recent examples for the divorce decision itself.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

A marriage is registered in Germany in the civil register ("Personenstandsregister"), in the category 'marriage register' ("Eheregister"), § 15 Act on Personal Status ("Personenstandsgesetz"). Divorce is registered in this register as a consecutive entry (§ 16

[840] BGH 30.03.2011, FamRZ 2011, 788.
[841] Henrich, Internationales Scheidungsrecht, 3rd. ed. 2012, no. 57.

para. 1 no. 2 Act on Personal Status). A foreign divorce decision related to Germans with such a registration is subject to these publicity measures[842]. There is, however, no special register for foreign divorce, only the formal recognition procedure for foreign (Non-EU) judgments according to § 107 FPA[843].

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

Registration is a facultative requirement. In charge of this necessary procedure is the Registrar of Births and Deeds ("Standesamt"). As long as there is no formal entry in a German register the former entry of a marriage will be considered as correct.

95. What are the consequences of registration or lack of registration?

The consequences of registration are that the persons involved are for example treated as divorced persons who may marry again. The consequences of a lack of registration depend on the former entry into the register. For a marriage in Germany the foreigner must present a Certificate of no-impediment to marriage ("Ehefähigkeitszeugnis"; § 1309 CC).

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

No.

[842] See No. 16.3.2 Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz of 29 March 2010.
[843] Gaaz, in: Gaaz/Bornhofen, Personenstandsgesetz, 2nd. ed., 2010, § 16 PStG no. 17.

GREECE

Greece

Prof. Pénélope Agallopoulou

I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

Les principales sources du droit hellénique actuellement applicable au divorce sont législatives. Spécifiquement : les articles 14-20 et 1438-1446 du Code Civil (CC), les articles 17, 592-613, 681 B du Code de Procédure Civile (CPrC), le règlement 2201/2003.

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

Le droit hellénique du divorce a connu les phases suivantes d'évolution (voir : *I.Deliyannis-A.Koutsouradis*, Droit de la famille, t. II, Thessaloniki 1987 (éd. Sakkoula), p. 234 et s.)

- La *première* avait duré depuis la fondation du nouvel État hellénique, c. à d. après la révolution de 1821 contre l'occupation Turque et jusqu'en 1920. Cette phase était caractérisée par l'application du Novelle 117 de Justinien sur le divorce, laquelle avait pour fondement l'idée de la faute. Il faut aussi noter que de cette époque le divorce était prononcé par décision judiciaire.

- La *deuxième* phase se situe après le vote de la loi 2228/1920. Ladite loi qui concerne le divorce, en plus des causes déterminées basées soit sur la faute, soit sur des faits non fautifs, avait aussi introduit une cause de divorce indéterminée et abstraite, fondée sur la notion générale de trouble violent du rapport conjugal dû à un comportement fautif du défendeur.

- La *troisième* phase est la réglementation du divorce par le Code Civil hellénique entrée en vigueur le 23.2.1946. Notre Code Civil avait adopté le régime de la loi 2228/1920 avec peu de différences. Selon les dispositions de notre Code Civil, les causes du divorce étaient basées soit sur la faute (bigamie, adultère, abandon malicieux d'un conjoint par l'autre pendant deux ans, attentat à la vie d'un conjoint par l'autre, ébranlement du rapport conjugal dû à la faute du défendeur, à tel point que le maintien de la vie conjugale devient à juste titre insupportable pour le demandeur) soit sur des faits non fautifs (absence, aliénation mentale, lèpre, impuissance de l'homme à accomplir l'acte sexuel, existante lors de la célébration du mariage à l'insu du demandeur, laquelle a duré trois ans depuis la célébration du mariage et continue d'exister au moment de l'introduction de l'instance).

Avant me référer aux dispositions concernant le divorce aujourd'hui en vigueur il faut noter que, puisque le Code Civil ne prévoyait pas « l'altération objectif du lien conjugal » comme cause de divorce, l'impossibilité de dissoudre des mariages profondément ébranlé a entraîné la formation de concubinages de longue durée et par conséquent la naissance d'enfants naturels. C'est alors qu'une *loi transitoire*, la loi 868/1979 sur le divorce pour rupture prolongée de la vie conjugale est entrée en vigueur le 17 février 1979. Sans modifications des dispositions du Code Civil concernant le divorce, cette loi prévoyait qu'un divorce peut être demandé en raison d'une rupture de la vie conjugale ayant duré au moins six ans, indépendamment de toute faute de la part de l'un des conjoints. Selon cette loi l'action en divorce devait être déposée dans un délai préfixé de six mois après l'entrée en vigueur de ladite loi.

-Le droit du divorce a été *radicalement modifié par la loi 1329/1983*, laquelle a apporté plusieurs réformes dans notre Code Civil, spécifiquement au droit de la famille. Le *divorce faillite* a été donc introduit dans notre Code Civil à la place du *divorce sanction*.

L'expression *divorce-faillite* signifie que chacun des époux peut demander le divorce quand, pour des motifs concernant la personne du défendeur ou des deux époux, les rapports entre eux ont été violemment altérés, à tel point que le maintien du rapport conjugal est, à juste titre, insupportable pour le demandeur (art. 1439 al.1 CC). L' altération est présumé de façon irréfragable, selon l'article 1439 al. 3 du Code Civil, lorsque les époux se trouvent en séparation de fait continuellement depuis deux ans au moins (la loi 1329/1983 prévoyait quatre ans au moins de séparation de fait, mais cela a été diminué en deux ans par l'art.14 de la loi 3719/2008).

En outre, le divorce par consentement mutuel est également prévu. Selon l'article 1441 du Code Civil, comme il a été modifié par l'article 3 de la loi 4055/2012, quand les époux sont d'accord pour divorcer, ils peuvent déposer une demande conjointe, qui est jugée selon la procédure de la juridiction gracieuse. Pour que le divorce par consentement mutuel puisse être prononcé il faut que le mariage ait duré, au moins six mois avant la présentation du demande (avant la modification de l'art. 1441 du Code Civil par l'art. 3 de la loi 4055/2012, la loi 1329/1983 prévoyait qu'il fallait que le mariage ait duré au moins un an et que l'accord des époux devait être déclaré en deux audiences séparées entre elles d'un intervalle d'au moins six mois, pour que le divorce par consentement mutuel puisse être prononcé).

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

Non

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

Le divorce est-il le seul moyen de rompre le mariage.

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

Selon les données du Service National de Statistiques de la Grèce, (http://www.statistics.gr/portal/page/portal/ESYE/PAGE-themes?p_param=A0602).
Ainsi que celles de l'Eurostat, on constate que les taux bruts des divorce en Grèce sont assez faibles en comparaison avec ceux des autres états-membres de l'Union Européenne (UE). En 2010, alors que les taux bruts des divorces en UE étaient de 2,0 pour 1000 habitants, en Grèce ils n'étaient que de 1,2 pour 1000 habitants.

Concernant les divorces prononcés en Grèce, on peut faire les remarques suivantes :

- On y note une importante augmentation des taux bruts des divorces entre les années 1960 et 2010 (en 1960, sur 1000 habitants ils étaient de 0,3 ; en 1970, de 0,4 ; en 1980 de 0,7 ; en 1990 de 0,6 ; en 2000 de 1,0).

- Depuis l'entrée en vigueur de la loi 1329/1983, qui a introduit le divorce par consentement mutuel, entre 65-70% des divorces prononcés sont des divorces par consentement mutuel.

- Le plus grand pourcentage de divorces (55-60%) sont prononcés pour dissoudre des mariages qui ont duré au moins 10 ans.

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

Le droit hellénique n'admet pas le mariage ni le partenariat enregistré entre personnes de même sexe.

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

Le mariage est un contrat entre un homme et une femme, formé par déclaration simultanée des futurs époux en exprimant leur accord soit devant l'organe compétent de l'état (mariage civil) soit par cérémonie religieuse (mariage religieux), qui crée une cohabitation permanente entre les époux. Le mariage est une institution et par conséquent est réglé par le droit.

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

b). Rome 3 n'est pas applicable

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

Par la combinaison des articles 16 et 14 du Code Civil le divorce et la séparation judiciaire (le terme « séparation judiciaire » n'est pas reconnu parce que, selon le droit hellénique, le seul cas où le mariage est dissous par décision judiciaire est le divorce) sont régis dans l'ordre suivant :

1. par le droit de leur dernière nationalité commune pendant le mariage, si l'un d'eux la conserve lors de l'ouverture de la procédure du divorce ou de la séparation ;

2. par le droit de leur dernière résidence habituelle commune lors de l'ouverture de la procédure du divorce ou de la séparation ;

3. par le droit auquel les époux sont le plus étroitement rattachés lors de l'ouverture de la procédure du divorce ou de la séparation.

D'habitude les tribunaux grecs prononcent le divorce dans les cas où les motifs prévues par le droit étranger sont prévue aussi par la lex fori ou ne sont pas contraire à l'ordre publique hellénique. (voir : *A.Grammatikaki-Alexiou* dans l'œuvre collectif : A.Grammatikaki-Alexiou, Z.Papasiopi-Pasia, E.Vasilakakis, Droit International Privé, 5ème éd, Athènes-Thessaloniki 2012, p. 215).

Bien sûr la règle de conflit nationale peut parfois désigner le droit étranger.

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

Aucune

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

Ils ne peuvent pas le choisir.

B2. Effets du divorce

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

Selon l'art. 15 du Code Civil, les rapports patrimoniaux des époux sont régis par le droit qui règle leurs rapports personnels immédiatement après la célébration du mariage.
Les rapports personnels des époux sont régis dans l'ordre suivant :

1. par leur droit de leur dernière nationalité commune durant le mariage, si l'un d'eux la conserve ;

2. par le droit de leur dernière résidence habituelle commune durant le mariage ;

3. par le droit auquel les époux sont plus étroitement rattachés.

À première vue on remarque donc que les rapports personnels et patrimoniaux des époux sont réglés de la même manière, mais cela n'est pas le cas, parce que l'art. 15 du Code Civil indique le droit qui règle leurs rapports personnels *immédiatement après la célébration du mariage***.** Cela signifie qu'une modification ultérieure de droit qui règle les rapports personnels ne modifie pas les rapports patrimoniaux**.** On voit donc que les époux ne disposent pas d'autonomie en ce qui concerne le choix de droit à appliquer (voir : *Grammatikaki-Alexiou*, op.cit., p.207).

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

La réponse est la même que celle qui est donnée à la question précédente, c. à d. à la question 13. La Convention de la Haye de 1978, concernant le droit applicable aux régimes matrimoniaux n'est pas ratifiée par la Grèce. Cette Convention donne la priorité à la volonté autonome des époux (voir : *Grammatikaki-Alexiou*, op.cit., p.207).

15. Quelle est la loi applicable à la responsabilité parentale ?

Concernant les rapports entre parents et enfants il faut distinguer : Enfants nés pendant le mariage et enfants nés sans mariage de leur parents.

A. Enfants nés pendant le mariage

Selon l'art. 18 du Code Civil les rapports entre parents et enfant sont régis dans l'ordre suivant :
1. par le droit de leur dernière nationalité commune ;
2. par le droit de leur résidence habituelle commune ;
3. par le droit de la nationalité de l'enfant.

B. Enfants nés sans mariage de leur parents

a. Selon l'art.19 du Code Civil, les rapports entre *la mère et l'enfant* né sans mariage de ses parents sont régis dans l'ordre suivant :

1. par le droit de leur dernière nationalité commune ;
2. par le droit de leur dernière résidence habituelle commune ;
3. par le droit de la nationalité de la mère.

Concernant le droit de la nationalité de la mère il faut remarquer qu'il pose quelques problèmes parce que dans l'art. 19 du Code Civil, il n'est pas précisé de quel espace de temps il faut prendre en considération pour la nationalité. En réalité il en résulte un problème de *conflit mobile* et c'est au juge qu'incombe de décider chaque fois en visant l'intérêt de l'enfant (voir *: Papasiopi-Pasia*, dans l'œuvre collectif : A.Grammatikaki-Alexiou, Z.Papasiopi-Pasia, E.Vasilakakis, Droit International Privé op.cit., p 231).

b. Selon l'art.20 du Code Civil les rapports entre *le père et l'enfant* né sans mariage de ses parents sont régis dans l'ordre suivant :

   1. par le droit de leur dernière nationalité commune ;
   2. par le droit de leur dernière résidence habituelle commune ;
   3. par le droit de la nationalité du père.

c. Selon l'art. 21 du Code Civil les rapports entre *la mère et le père de l'enfant,* né sans mariage de ses parents, sont régis par ordre de priorité, par le droit de leur dernière, nationalité, résidence habituelle ou résidence simple communes, durant la grossesse.

d. Puisque la situation juridique des enfants nés hors mariage constitue un problème social aigu le Conseil de l'Europe a élaboré une Convention sur le statut juridique des enfants nés hors mariage, laquelle a été signé à Strasbourg le 15 octobre 1975. Ladite convention a été ratifiée par la Grèce par la loi 1702/1987 (en vigueur de 16.9.1988). Les règles énoncées par cette Convention ont pour but d'assimiler le statut juridique des enfants nés hors mariage à celui des enfants nés dans le mariage et de contribuer, par là même, à l'harmonisation des législations des parties dans le domaine dont il est question.

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

La Grèce, par sa loi 3137/2003 (entrée en vigueur le 1.9.2003) a ratifiée la Convention de la Haye de 1973 concernant la loi applicable aux obligations alimentaires entre parents et enfants. Selon l'art. 4 de ladite loi, applicable aux obligations alimentaires entre parents et enfants, c'est la loi interne de la résidence habituelle du créancier d'aliments. En cas de changement de la résidence habituelle du créancier, c'est la loi interne de la nouvelle résidence habituelle qui s'applique à partir du moment où le changement est survenu.

La plus récente réglementation sur le sujet est le règlement (CE) n° 4/2009 du Conseil du 18 décembre 2008 relatif aux obligations alimentaires qui vise à garantir le recouvrement effectif et rapide des créances alimentaires découlant de relations de famille, de parenté, de mariage ou d'alliance. Selon l'article 15 dudit règlement le droit applicable aux obligations alimentaires est déterminé par le Protocole de la Haye du 23 novembre 2007 sur la loi applicable aux obligations alimentaires pour les États membres liés par cet instrument (voir

A. Metallinos, art.14, n. 12 dans l'œuvre collectif « Bref Interprétation du Code Civil » (dir. Ap.Géorgiadès), Athènes (éd. Droit et Economie P.N.Sakkoulas), 2010), *Papasiopi-Passa*, op. cit., p.236.). Voir aussi réponse à la question 91.

Ce Protocole a été approuvé par l'Union Européenne (UE) le 8 avril 2010 et l'UE déclare, conformément à l'article 24 du Protocole, qu'elle a compétence pour toutes les matières régies par celui-ci.

L'art. 76 al. 3 du règlement 4/2009 dispose que, la plupart des dispositions dudit règlement, s'appliquera, à compter du 18 juin 2011, sous réserve que le protocole de La Haye de 2007 soit applicable dans la Communauté à cette date (voir *A. Metallinos*, op.cit., art. 14, n. 12). À défaut, le présent règlement s'appliquera à compter de la date d'application dudit Protocole dans la Communauté. Le Protocole de La Haye de 2007 n'est pas encore entré en vigueur (http://www.hcch.net/index_fr.php?act=conventions.status&cid=133).

Enfin il faut noter que dans les rapports entre les États contractants, le Protocole de La Haye de 2007 remplacera la Convention de La Haye de 1973 sur la loi applicable aux obligations alimentaires (art. 18 du Protocole).

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

Oui

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

Le juge tient en compte et applique le droit étranger ex officio, comme il le fait pour le droit interne. Qu'il connaisse ou non le droit étranger . Dans le cas où il ne le connaîtrait pas, il peut ordonner des preuves ou utiliser tout moyen approprié pour le connaître (art. 337 du Code de Procédure Civile). En Grèce, l'Institut Hellénique de Droit International et Étranger, dont le siège est à Athènes, fournie de précieuses informations juridiques aux juges, avocats et autorités publiques.

II. LE DROIT MATERIEL

E. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

Seulement pour le divorce par consentement mutuel : il faut que le mariage ait duré au moins six mois avant la présentation de la demande.

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

Le droit d'intenter une action de divorce est strictement personnelle. Dans le cas où l' époux qui demande le divorce est placé sous « assistance judiciaire privative », en tout ou en partie qui contient le divorce, il est admis par la doctrine (voir *F.Skorini-Paparrigopoulou*, art. 1438 n. 27 dans l'œuvre collectif « Code Civil Commenté » (dir. : Ap.Géorgiadès-M.Stathopoulos), t. VII, 2ème éd., Athènes (éd. Droit et Economie P.N.Sakkoulas), 2007; *E. Kounougéri-Manolédaki*, Droit de la famille, t. I, 5ème éd. Athènes-Thessaloniki, 2012,(éd. Sakkoula), p.400 ; *Th.Papachristou*, Manuel du droit de la famille, 3ème éd. (Athènes - Komotini, 2005 (éd Ant.N.sakkoulas, p. 166) que son administrateur légale a le droit d'intenter en son nom l'action de divorce, ayant l'autorisation du Conseil de surveillance (art. 1621 al.1 CC en combinaison avec l'art. 1682 al. 1 CC). Dans le cas où l'époux qui demande le divorce est mineur ou placé sous « assistance judiciaire auxiliaire », en tout ou en partie, il peut seul intenter l'action de divorce, sans demander le consentement de l'assistant judiciaire (art 598 du CPrC).

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre de demandes présentées sur chaque fondement.

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?

- **e) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**
- **f) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?**

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

En droit hellénique existent le divorce contentieux et le divorce par consentement des époux :
Concernant le divorce contentieux on distingue :

- divorce pour altération définitive du lien matrimonial et
- divorce pour absence, c. à d. chacun des époux peut demander le divorce lorsque l'autre a été déclaré absent.

Concernant les statistiques voir réponse à la question 5.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

Le divorce par consentement existe à titre autonome.

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

Non

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

L'article 1441 du Code Civil, comme il a été modifié par l'article 3 de la loi 4055/2012 (en vigueur depuis 2.4.2012) dispose que quand les époux sont d'accord pour le divorce, ils peuvent, avec un accord par écrit, résoudre leur mariage sous la condition que leur mariage ait duré au moins six mois avant la formation de leur accord. Cet accord est signé par les contractants et leurs avocats ou seulement par leurs avocats détenant des procurations spéciales.

S'il existe des enfants mineurs, il est nécessaire, que l'accord des époux soit accompagné par un autre accord écrit réglant la garde des enfants et leurs rapports avec leurs parents, laquelle est valable jusqu'à ce qu'une décision judiciaire concernant l'exercice des soins parentaux (*en droit hellénique on utilise la terminologie « soins parentaux » et non « autorité parentale »)* soit prononcée. L'accord écrit des époux réglant la garde des enfants, leur rapports avec ceux-ci et aussi leur pension alimentaire, si cela a été stipulé, sont soumis au tribunal d'instance, lequel par sa décision, rendu selon la procédure de la juridiction gracieuse, sanctionne, si les conditions légales concourent, les accords et prononce la dissolution du mariage. Le mariage est dissous du moment où la décision devient irrévocable (art 1438 al.2 CC).

La décision du tribunal d'instance qui concerne la garde des enfants mineurs, leur rapports avec leurs parents et leur pension alimentaire constitue un titre exécutif (art.1441 al.2 CC).

Il faut noter que la récente loi 4055/2012 a beaucoup simplifié la procédure du divorce par consentement mutuel. Auparavant pour que le divorce par consentement mutuel puisse être prononcé il fallait que le mariage ait duré au moins un an et l'accord des époux devait être déclaré au tribunal en personne ou par procuration spéciale en deux audiences séparées entre elles d'un intervalle d'au moins six mois.

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

Non. Dans le cadre de cette procédure, les époux n'ont pas à être également d'accord sur les effets du divorce. Après que la décision judiciaire du divorce devient irrévocable, le Code Civil prévoit les effets du divorce tant sur les relations personnelles que sur les relations pécuniaires. C'est au tribunal de décider si l'ex-époux doit octroyer une pension alimentaire à l'autre, si, bien sûr, les conditions prévues par l'art. 1442 du Code Civil concourent.

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

Selon l'art. 1439 al.1 du Code Civil chacun des époux peut demander le divorce quand pour des motifs concernant la personne du défendeur ou les deux époux, les rapports entre eux ont été violemment altérés, à tel point, que le maintien du rapport conjugal est à juste titre insupportable pour le demandeur. L'altération peut être fondé sur un fait fautif ou non-fautif.

Selon l'art. 1439 al. 2 du Code Civil lorsque le défendeur ne prouve pas le contraire, l'altération définitive du lien matrimonial est présumée en cas de bigamie ou d'adultère, d'abandon du demandeur, d'attentat à sa vie par le défendeur ou exercice de violence domestique contre le demandeur par le défendeur. Outre la présomption fondée sur l'exercice de violence domestique par le défendeur contre le demandeur qui a été ajouté à l'art. 1439 par l'art. 3 de la loi 3500/2006 , les autres présomptions, avant la modification de notre Code Civil par la loi 1329/1983, constituaient des motifs fautifs de divorce.

Selon l'art 1439 al. 3 du Code Civil lorsque les époux se trouvent en séparation de fait depuis deux ans au moins, l'altération est présumée de façon irréfragable, et le divorce peut être demandé même si le motif de l' altération concerne exclusivement la personne du demandeur (avant la modification de l'art. 1439 al.3 du Code Civil par l'art. 14 de la loi 3719/2008, pour que l' altération soit présumée de façon irréfragable il fallait que les époux se trouvent en séparation de fait depuis quatre ans au moins).

La doctrine ainsi que la jurisprudence soutiennent le point de vue dominant que « l'altération présumée de façon irréfragable » constitue un motif de divorce autonome , parce que dans ce cas, le tribunal n'est pas obligé de vérifier si le mariage a été altéré, il se limite à la constatation de la séparation de fait depuis deux ans (voir *Koumantos*, Droit de la famille, t. I, Athènes, 1988 (éd. A.P.Sakkoula), p. 270 ; *Skorini-Paparrigopoulou,* op.cit., art. 1438 n. 15; *Kounougéri- Manolédaki*, op.cit.,t. I, p. 343 et s.)

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

Le consentement mutuel des époux est toujours possible.

36. Dans cette procédure, quelle place est laissée la séparation des époux ?

- **La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**
- **Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?**

Lorsque les époux se trouvent en séparation de fait continuellement, depuis deux ans au moins, l'altération est présumée de façon irréfragable, et le divorce peut être demandé même si le motif de l'altération concerne exclusivement la personne du demandeur. L'accomplissement du temps de séparation de fait est calculé lors des débats de l'action en justice. La forclusion de délai de la séparation de fait n'est pas réduite par les brèves interruptions qui ont eu lieu dans l'effort de réconciliation entre les époux (art.1439 al.3 CC).

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

Une demande initiale de divorce pour altération définitive du lien matrimonial ne peut être convertie en divorce par consentement des époux. Cela parce que la demande de divorce pour altération définitive du lien matrimonial est jugé selon la procédure de juridiction contentieux, tandis que le divorce par consentement est jugé selon la procédure de juridiction gracieuse. Bien sûr si les époux ont changé d'avis et préfèrent obtenir un divorce par consentement, l'époux qui a déposé l'action de divorce peut démissionner de la requête (articles 294-295 CPrC). Le droit hellénique ne prévoit pas de divorce pour faute.

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

F. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
- **avant le mariage ;**
- **pendant le mariage ;**
- **pendant la procédure de divorce ?**

Concernant la date d'effet du divorce, il s'agit de celle où la décision judiciaire devient irrévocable (art. 1438 CC).

En ce qui concerne les effets du divorce, en cas de divorce par consentement des époux ils peuvent être réglés par accord déposé au tribunal, avec leur accord sur l'obtention du divorce, la garde des enfants, leurs rapports avec ceux-ci et aussi leur pension alimentaire.

Les époux disposent de la possibilité de régler la pension alimentaire après le divorce par un accord. Cela résulte de l'article 1443 du Code Civil qui contient droit dispositif (jus dispositivum) Voir *Skorini-Paparrigopoulou*, op.cit., art. 1442, n. 11).

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

Non

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

En droit hellénique, il n'existe pas de procédure de rupture *a minima* (séparation de corps).

A. En cas de séparation de fait, les effets entre les époux sont les suivants :

- *Entretien*: Lorsque l'un des époux a interrompu la vie commune pour une raison valable, l'entretien qui lui est dû de la part de l'autre est fourni en argent et payable au mois par anticipation (art. 1391 CC).

- *Réglementation de l'usage du logement familial* : Le tribunal peut, si cela est commandé par des raisons d'équité, en tenant compte des circonstances particulières de chacun des époux et de l'intérêt des enfants, octroyer à l'un des époux l'usage exclusif du tout ou d'une partie de l'immeuble qui leur sert de résidence familiale indépendamment de qui d'entre eux en est le propriétaire ou a le droit de son usage envers le propriétaire (art. 1393 CC).

- *Répartition des meubles* : Chacun des époux a le droit de prendre les biens et meubles qui lui appartiennent, même s'ils étaient utilisés par les deux ou seulement par l'autre époux (art. 1394 CC) ; les époux partagent des biens qui appartiennent à tous les deux conformément à leurs besoins personnelles (art. 1395 CC).

- *Prétention à la participation aux acquêts*: Dans le cas d'une séparation de fait qui a duré plus de trois ans, la disposition de l'art. 1400 du Code Civil qui concerne la prétention à la participation aux acquêts, en cas où le mariage est dissolu ou annulé, est applicable (voir aussi réponse à la question 62).

Sur ce point il faut noter qu'après la modification de l'art. 1439 al. 3 du Code Civil par l'art. 14 de la loi 3719/2008, où l'altération est présumée de façon irréfragable après une séparation de fait d'au moins deux ans au lieu de quatre comme auparavant, il est nécessaire, selon moi, de modifier aussi de l'art 1400 du Code Civil et de prévoir une séparation de fait d'un an au lieu de trois.

B. En cas de séparation de fait, les effets à l'égard des enfants sont les suivants :

Selon l'art. 1514 du Code Civil, concernant les soins parentaux (autorité parentale), les dispositions qui réglementent l'exercice des soins parentaux en cas de divorce ou d'annulation du mariage, sont appliquées (voir réponse à la question 51 et s.).

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

Le divorce est prononcé lors de la décision judiciaire irrévocable (art.1438 CC).

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

La liberté matrimoniale des ex-époux n'est pas soumise à conditions.

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

A. Avant l'entrée en vigueur de la loi 1329/1983, la femme prenait le nom de son conjoint par le mariage. Dans le cas donc d'un divorce prononcé pour résoudre un mariage célébré avant l'entrée en vigueur de la loi 1329/1983, la femme qui a pris le nom de son mari, recouvre le sien, sauf si elle souhaite le conserver parce qu'elle a acquis une réputation professionnelle ou artistique sous le nom de son époux.

B. Pour les mariages célébrés après l'entrée en vigueur de la loi 1329/1983, il faut noter que puisque le nom de famille des époux n'est pas modifié par le mariage (art. 1388 al.1 CC), quand à leurs rapports juridiques, le divorce ne produit d'effets sur le nom des époux quant à leurs rapports juridiques. Concernant les rapports sociaux puisque chaque époux peut, si l'autre est d'accord, employer le nom de famille de ce dernier ou l'ajouter au sien, après le divorce il faut cesser de l'utiliser (art. 1388 al. 2 CC).

C. La loi 3719/2008 a ajouté à l'art. 1388 du Code Civil un 3ème alinéa, selon laquelle les époux peuvent décider que l'un d'eux peut ajouter à son nom de famille le nom de famille de son époux, même pour les rapports juridiques. Cette décision, déclarée

devant l'officier de l'état civil, peut être révoquée à tout moment devant l'officier de l'état civil. Cette déclaration est considérée comme révoquée par le divorce.

50. Le divorce produit-il des effets
- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;**
- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

Non

ii. Les effets du divorce à l'égard des enfants

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

En cas de divorce, si les parents ne demandent pas la réglementation de l'exercice des soins parentaux (autorité parentale) par le tribunal, ils continuent de les exercer en commun, c.à.d. comme avant que le divorce soit prononcé par décision judiciaire irrévocable (voir *P.Agallopoulou*, art. 1513-1514 n. 2 dans l'œuvre collectif « Code Civil Commenté » (dir. : Ap.Géorgiadès-M.Stathopoulos), t. VIII, 2ème éd., Athènes (éd. Droit et Economie P.N.Sakkoulas), 2003,).

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

Non (voir réponse à la question précédente, c. à d. n.51).

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

En cas de divorce par consentement mutuel, l'accord écrit des époux pour résoudre leur mariage, ainsi que leur accord réglant la garde des enfants, leur rapports avec ceux-ci ou aussi leur pension alimentaire sont soumis au tribunal d'instance, lequel par sa décision, rendu selon la procédure de la juridiction gracieuse, sanctionne les accords et prononce la dissolution du mariage. Ces accords continuent à être valables jusqu'à ce qu'une décision soit prononcée, conformément à l'art. 1513 du Code Civil qui concerne la réglementation des soins parentaux en cas de divorce. Il faut aussi noter que ces accords continuent d'être valables même dans le cas où une décision conformément à l'art. 1513 du Code Civil n'aurait pas lieu (voir *Agallopoulou*, op.cit., art. 1513-1524, n. 5-7).

En cas de divorce pour altération définitive du lien matrimonial il est possible, pour les parents, de conclure une convention pour l'exercice des soins parentaux visant toujours l'intérêt de l'enfant. Dans les cas de désaccord entre eux c'est le tribunal qui doit décider (voir *Chr.Kousoulas*, Les soins parentaux en cas d'évolution anormale de la vie conjugale des parents, Thessaloniki, 1987, p.49-50).

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Voir réponse à la question précédente, c. à d. n.53.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

Oui, selon l'art. 1513 du Code Civil, le tribunal peut aménager l'exercice des soins parentaux (l'autorité parentale), mais il doit obligatoirement être saisi d'une telle demande par l'un ou l'autre des parents. L'exercice des soins parentaux peut être confié :

- à l'un des parents ;
- aux deux parents en commun si ceux–ci sont d'accord et fixent en même temps le lieu de la résidence de l'enfant ;
- aux deux parents qui partagent l'exercice des soins parentaux entre eux. Le partage peut être fonctionnel (par ex. à l'un parent est confié la garde de l'enfant et sa représentation et à l'autre l'administration de son patrimoine) ou temporel (par ex. pendant l'hiver les soins parentaux seront exercées par la mère et pendant l'été par le père)
- à une tierce personne, c. à d. à un tuteur (voir *Agallopoulou*, op.cit., nos 45-88).

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

La décision du tribunal doit viser l'intérêt de l'enfant. Les critères de spécialisation de l'intérêt de l'enfant sont les suivants : les liens que l'enfant a eu jusqu'alors avec ses parents et ses frères et sœurs et les accords éventuels que les parents de l'enfant ont conclus concernant la garde de l'enfant et l'administration de son patrimoine (art. 1513 al. 2 CC). Il faut aussi souligner que, selon l' art. 1511 al.3 du Code Civil l'opinion de l'enfant, selon l'état de sa maturité, doit être demandée et prise en considération (voir *Agallopoulou*, op. cit., art.1511, nos 22-42 et art 1513-1514 nos 34-44).

Un parent ne peut se voir privé de l'exercice des soins parentaux (l'autorité parentale) ou du droit des soins parentaux (d'autorité parentale) en raison d'un comportement conjugal (voir *Agallopoulou,* op. cit., articles 1513-14, nos. 56-57).

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

Celui des parents qui ne réside pas avec l'enfant (d'habitude c'est le parent qui n'a pas la garde de l'enfant) conserve le droit d'entretenir avec lui des rapports personnels (art. 1520 al. 1 CC). Il s'agit d'un droit personnel qui découle du lien du sang et du sentiment d'affection entre parent et enfant (voir *S. Koukouli-Spiliotopoulou*, Introduction aux articles

1505-1541, dans l'œuvre collectif « Code Civil Commenté » (dir. : Ap.Géorgiadès-M.Stathopoulos), t. VIII, 2ème éd., Athènes (éd. Droit et Economie P.N.Sakkoulas), 2003).

Il est soutenu que ce droit ne dispose pas seulement le parent a qui n'a pas été confié l'exercice des soins parentaux, mais même le parent qui a été déchu des soins parentaux (voir *Koukouli-Spiliotopoulou*, op. cit., n. 153 ; *Th.Pouliadis* , art. 1520, n. 84 dans l'œuvre collectif « Code Civil Commenté » (dir. : Ap.Géorgiadès-M.Stathopoulos), t. VIII, 2ème éd., Athènes (éd. Droit et Economie P. N. Sakkoulas), 2003). Il faut quand même noter que tout ce qui concerne les rapports personnels entre parents et enfant est réglé plus spécialement par le tribunal. Cela veut dire que le tribunal a le droit dans des cas extrêmes d'exclure l'un des parents de ce droit (voir *Pouliadis* , op. cit., n. 15).

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

Plusieurs possibilités sont prévues : Résidence habituelle, résidence alternée, enfant confié à un tiers, enfant confie à une institution appropriée.

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Oui. Le tribunal n'est pas lié à cette convention mais, visant l'intérêt de l'enfant, peut ordonner une réglementation différente (voir *Pouliadis,* op. cit., art. 1520, n. 37).Voir aussi la réponse à la question n. 57.

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

Dans les cas de mauvais exercice des soins parentaux, selon les articles 1532 -1533 du Code Civil, le tribunal peut ordonner toute mesure appropriée, si ceci est demandé par l'autre parent ou les parents les plus proches de l'enfant ou le procureur, ou d'office. Le tribunal a la possibilité de retirer à l'un des parents l'exercice des soins parentaux (l'autorité parentale), en tout ou en partie, et la confier à l'autre ou confier les soins réels ou même la garde de l'enfant, en tout ou en partie, à un tiers c. à d. à une famille nourricière, (voir *Pouliadis*, op. cit., art. 1532, n. 39) ou nommer un tuteur (voir *Kounougéri-Manolédaki*, op.cit., t. II, p.367).

En tout cas, il faut noter que si les circonstances ont changé depuis qu'une décision judiciaire concernant les soins parentaux a été rendue, le tribunal doit, selon l'article 1536 du Code Civil, après demande de l'un ou des deux parents, les parents les plus proches de l'enfant ou le procureur, adapter sa décision aux nouvelles circonstances en la révoquant ou la réformant, conformément à l'intérêt de l'enfant, et notamment rendre aux parents l'exercice des soins parentaux qui leur avait été retiré.

d. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

Les deux solutions sont possibles.

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre

11. une compensation financière,
12. une créance alimentaire,
13. une compensation de droits à pension de retraite,
14. des dommages-intérêts
15. ou d'autres sommes ou droits patrimoniaux ?

Selon le droit hellénique *le mariage n'entraîne pas de changement sur l'autonomie patrimonial des époux* (art. 1397 CC). En cas de divorce, les articles 1394-1395 du Code Civil concernant la répartition des meubles, ne sont plus appliqués (voir réponse à la question 46). Chacun des ex-époux dispose, sans restrictions, des droits réels ou d'obligation qu'ils avaient sur ces meubles. Aussi la disposition de l'article 1393 du Code Civil concernant l'usage du logement familial (voir réponse à la question 46) n'est pas applicable en cas de divorce.

Pour les éléments patrimoniaux qui ont été acquis par l'un des époux durant le mariage, naît une prétention de participation de l'autre, dans le cas, où il a contribué d'une manière quelconque à cet accroissement. Il est même prévue que cette contribution est présumée s'élever au tiers de l'accroissement (articles 1400-1401 CC). Il faut ici ajouter que, selon l'art. 1262 n. 4 du Code Civil, chaque époux a, en vertu de la loi, un titre pour obtenir une hypothèque pour sa créance dérivant de l'accroissement du patrimoine de l'autre, selon l'art. 1400 du Code Civil.

Les époux peuvent avant le mariage ou pendant sa durée *choisir* au lieu du régime de l'autonomie patrimonial, *un régime de communauté* par indivision à parts égales sur les éléments de leur patrimoine (art. 1403 al. 1CC). En cas de régime de communauté, celui-ci prend fin avec le divorce et chacun des époux prend ce qui lui correspond en vertu des dispositions sur la cessation de l'indivision et le partage des biens (art. 1411 en combinaison avec les articles 795 et s. CC).

Au moment de la rupture du mariage, les ex-époux bénéficient d'un droit à obtenir l'un de l'autre une créance alimentaire, sous certaines conditions. Voir réponses aux questions 65-77).

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

Cette demande doit être faite dès l'introduction de l'instance.

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

Cette demande peut se faire en même temps que l'action en divorce. Il s'agit des réunion d'actions (art. 592 al. 2 CPrC)

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

L'aisance financière de l'époux qui doit octroyer une pension alimentaire à l'autre, est la condition essentielle pour qu'il puisse la fournir (voir art. 1443 CC en combinaison avec art. 1487 CC).

Pour que l'autre époux puisse avoir le droit de réclamer une pension alimentaire, il faut que ses revenus ou son patrimoine ne lui permette pas d'assurer son entretien. En plus, pour avoir le droit de réclamer une pension alimentaire de son ex-époux il faut que certains critères concourent : Concernant les critères pris en compte pour évaluer le montant dû pour l'octroi de la pension alimentaire voir réponse à la question n. 76.

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

La pension alimentaire peut être exclue ou réduite, si cela est imposé pour des motifs graves, et notamment si le mariage avait été de courte durée ou si le bénéficiaire est responsable du divorce ou s'il a provoqué volontairement son indigence. Le droit à la pension alimentaire cesse si le bénéficiaire se remarie ou s'il vit en permanence avec une autre personne en concubinage, et avec la mort du bénéficiaire (art. 1444CC).

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

Oui

68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont connectées à celles de droit des biens.

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

Non

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

La pension alimentaire a un caractère moral, elle est indépendante de faute et joue le rôle de prévoyance pour l'ex-époux qui ne peut assurer son entretien à partir de ses revenus ou de son patrimoine

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

La disposition de l'art. 1393 du Code Civil concernant l'usage du logement familial (voir réponse à la question 46) n'est pas applicable en cas de divorce (voir réponse à la question 62). Cela veut dire que le conjoint a qui, pendant la séparation de fait l'autre conjoint avait octroyé l'usage exclusif du tout ou d'une partie de l'immeuble qui leur sert de résidence familiale, indépendamment de qui d'entre eux en est le propriétaire ou a le droit de son usage envers le propriétaire, est obligé de changer du logement. Selon mon avis puisque le logement familial, même après le divorce, est un lieu d'équilibre pour les enfants, qui d'habitude sont les plus affectés par le divorce, il fallait que notre droit prévoit une certaine protection, variable, si le parent qui n'a pas la garde des enfants est le locataire ou le propriétaire du logement familial.

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

Oui, les conventions conclu avant ou après le divorce qui concernent la pension alimentaire sont valables parce que les dispositions concernant le pension alimentaire après le divorce sont droit dispositif (jus dispositivum). (Voir *Skorini-Paparrigopoulou*, op.cit., art 1442, n.11 ; *Kounougéri- Manolédaki*, op.cit. t. I, p. 492 et s.).

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Non. Ces conventions peuvent être nulles si elles contiennent des termes contre les bonnes mœurs et peuvent même devenir nulles pour cause de défaut de la volonté des contractants (voir *Skorini-Paparrigopoulou*, op.cit., art. 1438, n.22).

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

Les époux sont tenus de révéler l'intégralité des éléments qui constituent leur patrimoine. Selon l'art. 1445 al. 1 du Code Civil chacun des ex-époux est obligé de fournir à l'autre des renseignements exacts sur son patrimoine et ses revenus lorsqu'ils sont utiles pour la fixation du montant de la pension alimentaire.

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

Sur demande de l'un des ex-époux, transmise par l'intermédiaire du procureur compétent, l'employer, le service compétent et l'inspecteur des finances compétent sont obligés de

fournir tout renseignements utiles sur la situation patrimoniale de l'autre époux et surtout sur ses revenus (art. 1445 al. 2 CC). Par « service compétent » est entendue tout service ou organisme publique ou personne juridique de droit public, auquel l'obligé ou le demandeur fournit ses services touchant des rémunérations. Ayant une décision judiciaire fixant une pension alimentaire, il est possible pour le demandeur d'en arriver à une saisie-arrêt contre le fisc, jusque un certain pourcentage du salaire ou de la pension de l'obligé ex-époux, pour que la pension alimentaire, due par l'obligé ex-époux soit payée (voir *Skorini-Paparrigopoulou*, op.cit., art. 1445, n. 5)

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

Les critères pris en compte pour évaluer le montant dû pour l'octroie de la pension alimentaire sont, selon l'art. 1442 du Code Civil, les suivants :

1. si, au moment de la prononciation du divorce et après celui-ci, l'ex-époux qui demande la pension alimentaire se trouve en âge ou en état de santé qui ne lui permettent pas d'être obligé à commencer ou à continuer l'exercice d'une profession adéquate, afin d'assurer son entretien ;
2. si, l' ex-époux qui demande la pension alimentaire a la garde d'un enfant mineur et de par ce fait est empêché d'exercer une profession adéquate ;
3. si l' ex-époux qui demande la pension alimentaire ne trouve pas une profession adéquate stable ou s'il a besoin de formation professionnelle, mais toutefois, dans les deux cas, pour une période qui ne peut pas dépasser trois ans, à dater de la prononciation du divorce ;
4. dans tout autre cas où il est considéré nécessaire d'allouer une pension alimentaire lors de la prononciation du divorce, pour des raisons d'équité.

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

Oui. Si les conditions de l'entretien ont changées, depuis qu'a été rendu la décision qui a fixé l'entretien, le tribunal peut modifier sa décision ou même ordonner la cessation de l'entretien (art. 1443 al. 1 en combinaison avec l'art. 1494 CC). (voir *Kounougéri-Manolédaki*,op. cit., p.482 et s.)

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

L'obligation d'entretenir financièrement l'enfant est liée aux soins parentaux (à l'autorité parentale). Les parents sont tenus à l'entretien de leur enfant en commun, chacun selon ses possibilités (art. 1489 al.2 CC).

L'enfant mineur même s'il possède un patrimoine a droit à l'entretien de la part de ses parents, lorsque les revenus de son patrimoine ou le produit de son travail ne suffisent pas à son entretien (art. 1486 al. 2 CC), c. à d l'enfant mineur n'est pas obligé de liquider son patrimoine (voir *I.Androulidaki-Dimitriadi*, art. 1486, n.7 dans l'œuvre collectif « Code Civil

Commenté » (dir. : Ap.Géorgiadès-M.Stathopoulos), t. VII, 2ème éd., Athènes (éd. Droit et Economie P.N.Sakkoulas), 2007). Cela ne concerne pas seulement les enfants non mariés mais aussi les enfants mariés (voir *Kounougéri-Manolédaki*, op.cit., t.II, p. 227).

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

Dans les cas d'interruption de la vie commune des parents ou de divorce, les prétentions à l'entretien que l'enfant a envers celui de ces parents qui n'a pas la garde de sa personne, peuvent, selon l'art. 1516 al 2 du Code Civil, être exercées par celui qui a la garde et, si aucun des deux n'a la garde, par celui avec qui l'enfant réside (voir Agallopoulou, op.cit., art. 1516, nos 19 et s.)

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

Oui. Il n'est pas nécessaire que ces conventions soient dressées par certaines formules d'écrit et peuvent être prouvé par tout moyen (voir *Androulidaki –Dimitriadi*, op. cit., Introduction aux articles 1485-1504, n. 66).

En plus il faut noter que bien que, selon l'art. 1496 du Code Civil, l'entretien est fourni en argent, l'art. 1497 du Code Civil pose une exception concernant l'entretien que les parents sont tenus d'assurer à leur enfant mineur non marié, c. à d. qu'ils ont le droit de régler la manière (par ex. versement en espèces) dont il l'obtiendra et les intervalles auxquelles seront effectués les versements par anticipation (art. 1497 al. 1 CC). Le parent qui ne possède pas les soins parentaux doit effectuer les versements en argent parce que il n'a pas le droit de déterminer la manière de vivre de l'enfant puisque il ne peut pas vivre avec l'enfant.

Le parent qui possède les soins parentaux, mais pas la garde de l'enfant, peut seulement fixer les intervalles auxquelles seront effectuées les versements, mais il ne peut pas verser l'entretien en espèces, parce que le parent qui a la garde de l'enfant a aussi le droit de déterminer les moyens par lesquels seront couverts les besoins de l'enfant (voir *Androulidaki-Dimitriadi*, op.cit., art. 1497, n. 7).

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

Le juge ne dispose pas d'un droit de regard sur cette convention, mais ces conventions peuvent, selon l'art. 1494 du Code Civil, être modifiées par décision judiciaire dans le cas où il y a changement des conditions de l'entretien (voir *Androulidaki-Dimitriadi*, op.cit ., Introduction aux articles 1485-1504, n. 71).

Dans le cas où les parents ont réglé la manière ou les intervalles auxquels seront effectuées les versements, le tribunal peut en décider autrement, à la demande de l'enfant, s'il existe des motifs particuliers (art.1497 CC).

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

Non

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

A. Pour le *divorce par consentement mutuel* est compétent le tribunal d'instance (art. 17 n.1 CPrC) de la dernière résidence commune les époux (art. 39 CPrC), en parallèle avec le tribunal d'instance de la compétence générale, c'est-à-dire du domicile du défendeur (art. 22 CPrC). Le tribunal juge selon la procédure de la juridiction gracieuse (art. 1441 al.2 CC).

Pour *le divorce contentieux* est également compétent le tribunal d'instance (art. 17 n.1 CPrC) de la dernière résidence commune les époux (art. 39 CPrC), en parallèle avec le tribunal d'instance de la compétence générale, c'est-à-dire du domicile du défendeur (art. 22 CPrC). Le tribunal d'instance juge selon la procédure de la juridiction contentieuse (art. 592 al.1 CPrC).

B. Pour les différends concernant la pension alimentaire après le divorce, est aussi compétent le tribunal d'instance (art. 17 n.1 CPrC) du dernière domicile ou de la résidence du bénéficiaire de la pension alimentaire (art. 39 A CPrC) en parallèle avec le tribunal d'instance de la compétence générale c.à d. du domicile du défendeur selon la procédure de la juridiction contentieuse (art. 681A CPrC).

Aux affaires urgentes, la procédure de mesures provisoire est suivie (articles 682 et s. et 728 al.1 a CPrC).

Pour les différends concernant l'entretien et la garde des enfants est aussi compétent le tribunal d'instance (art. 17 n.2 CPrC) et peuvent être jugé :

16. par le tribunal d'instance selon la procédure spéciale des articles 681B et 681Γ du Code de Procédure Civile, qui est une procédure relativement accélérée, dans laquelle la fixation de la date d'audience est plus brève par rapport à d'autres différends et la décision judiciaire est prononcée en général plus rapidement.
17. par le tribunal d'instance selon la procédure de divorce (art. 592 al.1 CPrC).

Aux affaires urgentes la procédure de mesures provisoires est suivie (articles 682 et s. et 735 CPrC).

C. Selon la clause générale de l'art 3 al.1 du CPrC « A la juridiction des tribunaux civiles grecs sont soumis grecs et étrangers, sous la condition que le tribunal hellénique soit compétent ».

Les tribunaux helléniques ne sont pas compétents pour juger les différends qui concernent le divorce dans le cas où les deux époux étaient étrangers au moment de la demande de divorce et selon les droits de leurs nationalités n'est pas reconnue aux tribunaux helléniques la compétence de juger leur différend. Quand même Les tribunaux helléniques sont compétents à juger des demandes de divorce quand le mariage est valable selon le droit hellénique, mais nul ou inexistant selon le droit de la nationalité du conjoint (art. 611 al.1 CPrC).

Quand même les tribunaux helléniques sont compétents à juger des différends qui concernent le divorce, si l'un des conjoints est Grec, même dans le cas où il n'a pas son domicile ou sa résidence en Grèce ou bien a perdu sa nationalité hellénique à cause du mariage mais était Grec au moment de la célébration du mariage (art. 612 al.1CPrC).

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

Non

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

Dans le cas où le tribunal en cours d'instance est persuadé que les époux se trouvant en séparation peuvent se réconcilier, il peut, après demande de l'un d'eux ou d'office, essayer de les concilier ou d'ajourner la poursuite du procès mais seulement pour une fois et pour un espace de temps qui ne dépasse pas les trois mois (art.602 CPrC)

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- **au logement familial,**
- **aux enfants,**
- **à l'obligation alimentaire entre époux,**
- **aux conséquences de violences conjugales ?**

Oui. Le tribunal peut, selon la procédure des mesures provisoires, prendre des mesures provisoires imposés par les cas concrets relatives au logement familial, aux relations entre époux, aux relations entre parents et enfants, aux conséquences de violences conjugales (art. 735 CPrC) et à l'obligation alimentaire entre époux (art. 728 al. 1 CPrC).

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

Un appel ou un recours en cassation peuvent être interjetés contre la décision judiciaire relative au divorce, dans un délai de trente jours de la signification du jugement. Dans le cas où le jugement ne serait pas signifié, le délai pour interjeter un appel ou un recours en cassation est de trois ans du moment où le jugement a été prononcé (articles 518 et 564 CPrC).

Les jugements rendus selon une procédure des mesures conservatoires ne peuvent être attaqués par aucun moyen de recours (art. 699 CPrC). Ces jugements peuvent seulement être révoqués par le tribunal qui les a rendus (art.696 CPrC).

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir
- **à l'instance en divorce ;**
- **à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?**

Si oui, sur quels fondements ?

Non

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

L'enfant n'a pas la possibilité de donner son avis dans le cadre de la procédure de divorce. Dans la procédure relative aux soins parentaux (à l'autorité parentale) l'opinion de l'enfant, selon l'état de sa maturité, doit être demandée et prise en considération avant toute décision relative aux soins parentaux, dans la mesure où la décision concerne ses intérêts (art. 1511 al.3 CC et art. 681Γ CPrC).

En ce qui concerne la manière dont le juge demande l'avis de l'enfant, deux stades sont prévus par l'article 681Γ du Code de Procédure Civile : Le stade de procédure préliminaire obligatoire et le stade principal de la procédure.

Le stade de procédure préliminaire comprend d'une part une enquête concernant les conditions de vie de l'enfant par le Service Social compétent et d'autre part un effort de la part du tribunal pour trouver une solution conciliatoire du différent. Pendant le principal stade le tribunal écoute les parties et tient compte l'opinion de l'enfant selon son degré de maturité. La communication du juge avec l'enfant se fait en particulier sans rédiger de compte rendu sur le contenu de l'entretien.

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives
- **k) à la rupture du lien matrimonial ?**
- **l) aux effets pécuniaires du divorce ?**
- **m) à la liquidation des intérêts patrimoniaux des époux ?**
- **n) à la responsabilité parentale ?**
- **o) aux obligations alimentaires entre parents et enfants ?**

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

A. Les décisions étrangères rendues aux différends, lesquelles selon le droit hellénique sont soumises à la juridiction contentieuse, acquièrent en Grèce *force de chose jugée*, si les conditions prévues par l'art. 323 du Code de Procédure Civile concourent. Les conditions requises pour cela sont les suivantes :
    a. la décision doit avoir force de chose jugée selon le droit de l'État où elle a été rendue ;

    b. l'affaire contentieuse devait, selon le droit hellénique, être soumise à la juridiction des tribunaux de l'État à qui appartient le tribunal qui a déclaré la décision ;
    c. la partie succombée a eu le droit à sa défense et en général, a participé au procès ;
    d. la décision ne doit pas être contraire à une décision d'un tribunal hellénique, laquelle a été prononcée pour la même affaire entre les mêmes parties ;
    e. la décision ne doit pas être contraire aux bonnes mœurs ou à l'ordre public.

Concernant *l'exécution forcée* de ces décisions l'art. 905 du Code de Procédure Civile est appliqué. Selon l'art. 905 al. 4, les alinéas 1-3 dudit article qui concernent l'exécution forcée d'un titre étranger sont applicables pour reconnaissance de la force jugée d'une décision d'un tribunal étranger qui concerne la situation personnelle.

L'alinéa 1 de l'article 905 al.1 du Code de Procédure Civile prévoit que, sous la réserve de ceux que les Conventions Internationales, ainsi que les règlements de l'Union Européenne prévoient, l'exécution forcée d'un titre étranger peut se faire en Grèce du moment que ce titre a été déclaré comme exécutoire par un jugement provenant du tribunal d'instance du lieu de domicile ou de la résidence du débiteur.

L'alinéa 2 de l'article 905 du Code de Procédure Civile prévoit que le tribunal d'instance déclare comme exécutoire un titre étranger, dans le cas où ce titre est exécutoire selon le droit de l'Etat où elle a été rendue et n'est pas contraire aux bonnes mœurs ou à l'ordre public.

L'alinéa 3 du l'article 905 du Code de Procédure Civile prévoit que dans le cas où le titre étranger serait un jugement, pour qu'il soit déclaré comme exécutoire il faut le concours des conditions prévues à l'art. 323 nos 2-5 du Code de Procédure Civile (les conditions prévues à l'art. 323 nos2-5 du CPrC sont déjà noté).(Voir *Grammatikaki-Alexiou*, op.cit., p.411 et s.)

B. Dans le cas où s'agit d'un divorce par consentement mutuel est appliqué l'art. 780 du Code de Procédure Civile qui concerne la reconnaissance des décisions judiciaires rendues par la procédure de la juridiction gracieuse, sous la réserve de ceux que les Conventions Internationales prévoient. La décision du tribunal étranger a en Grèce la vigueur que lui a reconnu le droit de l'État où était le tribunal qui l'a rendu, mais seulement si les conditions suivantes ont été respectées :
    1. Si la décision a appliqué la loi du fond qui aurait dû être appliqué selon le droit hellénique et si elle a été rendue par un tribunal compétent selon le droit de l'État dont la loi a été appliquée.
    2. S'il n'est pas contraire aux bonnes mœurs et à l'ordre public.(Voir *Grammatikaki-Alexiou*, op.cit.,p. 413)

C. S'il s'agit d'une décision émanant d'un État membre de l'Union Européenne (sauf le Danemark) le Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en *matière matrimoniale* et en *matière de responsabilité parentale*, est applicable**.**

La reconnaissance et l'exécution des décisions provenant d'un État-membre de l'Union Européenne qui sont relatives aux *obligations alimentaires* découlant de relations de famille, de parenté, de mariage ou d'alliance sont réglées par le règlement (CE) n° 4/2009 du Conseil du 18 décembre 2008 relatif aux obligations alimentaires. Ledit règlement vise à garantir le recouvrement effectif et rapide des créances alimentaires découlant de relations de famille, de parenté, de mariage ou d'alliance. Selon l'article 15 du règlement(CE) n° 4/2009 le droit applicable aux obligations alimentaires est déterminé par le Protocole de la Haye de 23 novembre 2007 sur la loi applicable aux obligations alimentaires pour les États membres liés par cet instrument (voir *Papasiopi-Passa*, op. cit., p. 236). Voir aussi réponse à la question 16.

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

Une décision de divorce provenant d'une autorité compétente islamique laquelle a dissout le mariage par l'institution du « repudium » -talaq- et sous la condition que la femme a été expulsée par son mari de leur logement familial sans son consentement ou même sans qu'elle soit écouté devant l'autorité compétente, n'est pas reconnue en Grèce parce que elle est contre l'ordre public.

Par contre il est soutenue que dans le cas où de la décision de divorce résulte que la femme a consenti à cette expulsion on peut assimiler le « repudium » à un divorce par consentement mutuel et par conséquent une telle décision de divorce n'est pas contre l'ordre public et peut être reconnue en Grèce (*Z.Papasiopi-Passa*, La loi applicable en divorce aux conflits de lois helléniques et étrangers , Thessaloniki, 1997 (éd. Sakkoula), p. 238-239).

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

Oui. Les Grecs qui habitent à l'étranger sont obligés de déclarer à l'autorité consulaire compétente tous les actes d'état civil qui sont nécessaires d'être inscrit au bureau d'état civil (art. 42 de la loi 344/1976 concernant les actes d'état civil). Un de ces actes est le divorce. Par conséquent la personne qui a reçu l'acte d'état civil (dans notre cas la décision judiciaire irrévocable de divorce) est obligée d'expédier, au bureau d'état civil d'Athènes, la copie de cet acte (art 44 de la loi 344/1976).

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

Ces modalités de publicité sont obligatoires.

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

Les actes de l'état civil ont force probante.

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

HUNGARY

Hungary

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I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

Textes règlementant le droit de famille

1. **Loi VI de 1952 sur le mariage, la famile et la tutelle** 1952. évi IV. törvény a házasságról, a családról és a gyámságról
2. **Décret-loi 13 de 1979 sur le droitinternational privé** (1979. évi 13. tvr. a nemzetközi magánjogról)
3. La Constitution nouvellement adoptée, appelée:„**Loi fondamentale de la Hongrie"** (Magyarország Alaptörvénye) publié dans Le Journal Officiel de la Hongrie le 25 avril 2011
4. **Loi XXIX de 2009 sur le concubinage enregistré** (2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról)
5. **Loi CCXI de 2011 sur la protection de la famille** (2011. évi CCXI. Törvény a családok védelméről)
6. **Loi III de 1952 sur la procédure civile**
7. **Loi LV de 2002 sur la médiation**
8. **Loi LXXII. de 2009 sur la mise à l'écart**

9. Décret gouvernemental n°149/1997 (IX. 10.) relatif à l'autorité de tutelle ainsi qu'aux services de tutelle et de protection de l'enfance

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

„Avant 1952[844], le texte fondamental en matière de droit du mariage était la loi XXXI de 1894. C'est elle qui a introduit en Hongrie l'institution du mariage civil obligatoire et qui a établi pour les procès en matière de mariage la compétence des tribunaux civils. Auparavant, il n'existait pas de droit commun en cette matière, le droit variait suivant la confession des époux et les procès en question relevaient de la compétence des tribunaux ecclésiastiques.
La loi de 1894 a réglementé le droit du mariage à proprement parler, à savoir la formation1 (conditions et formalités), la nullité et la dissolution du mariage. Sur ce dernier point, elle a été complétée, à l'issue de la Seconde Guerre mondiale, par un texte important, le décret-loi 6.800-1945 M.E. qui a ajouté au système existant des causes de divorce trois nouvelles causes.
Or, ni la loi de 1894, ni le décret-loi de 1945, n'ont réglementé la matière des rapports personnels et patrimoniaux des époux, matière dont les règles se trouvaient dans les sources écrites du droit coutumier et dans la jurisprudence. Cette situation n'a été modifiée que partiellement par la loi XII de 1946. Jusqu'à cette date, la matière des régimes matrimoniaux était caractérisée par une dualité du régime légal : le régime légal des nobles était différent de celui des roturiers. La loi XII de 1946 a supprimé ce vestige suranné de l'ancienne distinction des classes sociales."

La loi actuellement applicable au divorce est la loi hongroise IV de 1952 sur le mariage, la famille et la tutelle qui est entrée en vigueur le 1er janvier 1953.[845]. L'exécution de cette loi, appelée Code de la famille, a été prévue par le décret-loi 23 de 1952. Depuis sa création, la loi été modifié à de nombreuses reprises et se divise en trois parties. La première est relative au mariage, et comprend quatre chapitres : I. De la célébration du mariage (art. 2 à 6) ; II. De la nullité du mariage (art. 7 à 16) ; III. De la dissolution du mariage (art. 17 à 22) ; IV. Des droits et des devoirs des époux (art. 23 à 33). La deuxième partie traite de la famille et se divise également en quatre chapitres (les chapitres V à VIII) : V. Du statut juridique de la famille (art. 34 à 45) ; VI. De l'adoption (art. 46 à 59) ; VII. De l'entretien des parents (art. 60 à 69), et VIII. De la surveillance exercée par les père et mère (art. 70 à 93). Enfin, la troisième partie porte sur la tutelle et comprend les chapitres IX à XI : IX. Du rétablissement de la tutelle (art. 94 à 101) ; X. De l'exercice de la tutelle (art 102 à 106) et XI. De la cessation de la tutelle et des fonctions de tuteur (art. 107 à 111).

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

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[844] Zajtay Imre. Le droit du mariage dans le nouveau Code hongrois de la famille. In: *Revue internationale de droit comparé*. Vol. 6 N°3. Juillet-septembre. pp. 491-503. doi : 10.3406/ridc.1954.8635 url : http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1954_num_6_3_8635

[845] (1) La loi IV de 1952 fut promulguée dans le Journal Officiel hongrois, n° 48, du 6 juin 1952. Des traductions, en langue française, de la loi ont été publiées dans le recueil Textes législatifs étrangers, Bruxelles, Ministère des affaires étrangères et du commerce extérieur, 1953, n° 3, p. 31 et s., et dans la Revue de la législation hongroise, Budapest, Ministère de la justice, 1953, n° 2, p. 34 et s.

Aspects de la codification en matière de droit de la famille[846]

Le travail de codification portant sur le code civil hongrois est en cours depuis près de 15 ans. L'une des étapes majeures de ce processus de codification a été marquée par le décret n°1050/1998 (IV.24.), entré en vigueur le 24 avril 1998, qui a prévu la refonte complète du droit civil, y compris le code civil. Le débat parlementaire du code civil a lieu pendant l'automne 2012, et le projet sera voté par le parlement au cours du mois de novembre 2012, avec une entrée en vigueur prévisible pour le début de l'année 2014. A l'intérieur du code civil, le droit de la famille constitue le 4e tome.

Les modifications essentielles du code sont les suivantes du point de vue de la présente étude :
Les règles qui régissent le divorce par consentement mutuel et le divorce sans consentement mutuel seront distinguées d'une manière plus nette que dans le code actuellement en vigueur.
Dans le nouveau texte, le divorce par consentement mutuel sera conçu sur le plan de sa définition juridique et de ces conditions en partie différemment par rapport au texte actuellement en vigueur. Selon la nouvelle approche, à l'inverse de celle actuellement en application, le consentement mutuel ne sera plus considéré comme une preuve de la rupture complète, irréversible et irrémédiable du lien matrimonial. De même que dans le droit d'autres pays, le consentement mutuel sera dorénavant considéré comme une option, en quelque sorte comme un motif de divorce, et rendra possible de prononcer le divorce sans examiner les causes et le processus au cours duquel la relation conjugale s'est altérée. Le tribunal aura comme seule compétence d'examiner le caractère définitif et non imposé des déclarations d'intention de divorce des parties (soit l'accord sur le divorce qui fait l'objet du consentement mutuel). La validité des déclarations sera vérifiée au cours d'auditions[847] auxquelles les parties seront soumises. Une autre nouvelle condition pour le divorce par consentement mutuel concernera l'accord au sujet des conséquences du divorce. Ainsi, le partage des biens communs des époux n'est plus requis comme condition préalable d'un divorce par consentement mutuel[848].

La deuxième variante du divorce par consentement mutuel, actuellement en vigueur, sera supprimée. Pour prononcer un divorce par consentement mutuel de ce type, il était exigé d'une part que les parties aient vécu séparément pendant trois ans et d'autre part qu'elles prouvent ou attestent qu'elles ont convenablement réglé les questions du placement et des obligations alimentaires de leur(s) enfant(s) mineur(s) dans le respect des intérêts de ce(s) dernier(s).

Une nouvelle loi régit la médiation. La codification de la médiation sous forme d'une loi se produit pour la première fois sur le plan du divorce. La médiation interviendra à l'initiative des parties ou du juge, mais sur une base optionnelle dans les deux cas. [849]
Les obligations alimentaires des époux restent les mêmes, mais il sera attribué une plus grande importance à la durée de la vie commune des parties. Ainsi, le législateur plafonne la

[846] Hegedűs Andrea: Le droit de famille hongrois dans le nouveau Code Civil -A magyar családi jog az új Ptk-ban, A jogterületet érintő főbb változások In.: Vajdasági Magyar Tudományos Társaság Konferencia kiadványa. Újvidék (Szerbia).
[847] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:21. § (2)
[848] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:21. § (3)
[849] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:22.§

durée de l'obligation alimentaire des époux pour les mariages sans enfant d'une durée inférieure à un an, en mettant à égalité la durée de la pension alimentaire et la durée du mariage. Il sera toutefois possible de déroger à cette règle dans des cas particulièrement délicats[850].

La reconnaissance de **l'union libre** aura une incidence directe sur les obligations alimentaires des parties vu que le droit à une pension alimentaire sera supprimé si la partie bénéficiaire se met à vivre en union libre avec un nouveau partenaire. Jusqu'ici, c'est uniquement le remariage de la partie bénéficiaire qui mettait fin à l'obligation alimentaire.[851]
La réglementation du droit des biens patrimoniaux sera beaucoup plus détaillée qu'elle ne l'était auparavant. Le projet fait une distinction entre, d'une part, les biens nécessaires à la bonne conduite de la vie quotidienne et, d'autre part, les biens de caractère professionnel ou commercial qui sont nécessaires à l'exercice de l'activité professionnelle des ou d'une des parties (au cas où l'époux ou l'épouse aurait un statut d'entrepreneur individuel, d'entreprise unipersonnelle à responsabilité limitée, ou un statut d'associé dans une société, une entreprise ou une coopérative). Cette distinction concernera l'usage, la gestion, l'exercice du droit de disposition et le partage de ces biens.

On s'attend à ce que les frais et charges des biens séparés[852] soient définis et que la présomption de l'appartenance aux biens communs soit explicitement définie, car actuellement cette définition peut seulement être obtenue par déduction alors que les juges sont souvent amenés à appliquer cette déduction.

Autre changement important sur le plan pratique : le droit de disposer seul des biens immobiliers incluant le domicile commun des époux sera exclu. Le texte stipule explicitement qu'il n'est plus possible de présumer l'accord de la partie absente. Nouveauté en matière d'usage des logements par les époux : les catégories existantes ont été élargies et englobent désormais l'usufruit. Néanmoins, le nouveau texte ne contient pas de dispositions nouvelles concernant le règlement des logements locatifs ou propres. Par contre, les appartements de service ne feront plus l'objet de la nouvelle réglementation.

La reconnaissance de l'union libre en tant que forme familiale apparaît pour la toute première fois de son histoire dans la nouvelle législation sur la famille. L'union libre est reconnue, soutenue et acceptée au sens juridique, mais pas autant que le mariage.

Le code de la famille refondu va introduire la notion de l'union libre enregistrée et agréée (une sorte d'équivalent du PACS) qui ne peut être conclue que par des personnes de même sexe. Les règles détaillées qui portent sur cette forme de vie commune nouvellement reconnue sont entrées en vigueur le 1er juillet 2009. De ce fait, le nouveau code de la famille contient des dispositions laconiques à son égard, en portant surtout sur le fait que l'enregistrement à l'état civil se déroule à la mairie devant l'officier de l'état civil et en présentant ses conséquences juridiques. Ces dispositions mettent en valeur les différences fondamentales par rapport au mariage qui relèvent nécessairement du „caractère" de la relation homosexuelle des intéressés[853]. Vu la place attribuée à cette forme de vie commune dans le système, il semble qu'elle vient en troisième position après le mariage et l'union libre.

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[850] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:29.§ (3)
[851] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:33.§
[852] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:39.§
[853] Nouveau code civil hongrois, 4e tome sur le droit de la famille. 4:102-104. §

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

Le mariage se dissout soit par la mort de l'un des époux, soit par le divorce prononcé par le tribunal (art. 17, al. 1 du Loi sur la famille.). Il n'existe pas d'autre moyen pour rompre le mariage.

La dissolution du mariage du fait de la mort de l'un des époux peut être invoquée sur la base d'une inscription au registre des décès ou d'une déclaration judiciaire de décès ayant acquis force de chose jugée. Si, après l'inscription de la mort de l'époux sur le registre des décès, l'autre époux contracte un nouveau mariage, le mariage antérieur continuera d'être considéré comme dissous même si l'inscription ou la déclaration en question sont annulées. Cependant, cette règle ne s'applique pas au cas où, lors du nouveau mariage, l'une des parties sait que le conjoint du mariage antérieur est vivant (art. 17, al. 2): en effet, dans ce cas, le nouveau mariage est nul.

En ce qui concerne le deuxième mode de dissolution du mariage, le divorce est prononcé à la suite d'une procédure judiciaire par le tribunal d'instance, ayant examiné les intérêts de l'enfant mineur. Le tribunal est saisi soit par une demande par l'un des époux soit par une demande conjointe. Il n'existe qu'une seule cause de divorce : la rupture totale et irrémédiable de la vie commune (art. 18. Loi sur la famille.)

Quand le divorce est demandé conjointement, le tribunal peut, dès la première audience, prononcer le divorce si les époux ont exprimé leur volonté libre, concordante et définitive de divorcer, l'échec irréversible du mariage étant présumé et

- qu'ils nont pas d'enfants mineurs communs
- ou qu'ils se sont mis en accord sur l'exercice de l'autorité patentale et l'entreien des enfants mineurs communs, sur l'obligation alimentaire entre époux, sur le sort du logement familial commun et sur le partage des biens mobiliers, et que le tribunal a approuvé cet arrangement,
- ou s'ils vivent séparément depuis trois ans et s'ils se sont mis d'accord sur l'exercice de l'autorité parentale et l'entretien des enfants mineurs.

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

Voir annexe I[854]

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

[854] Le diagramme a été fait a la base des statistiques officielles de la Hongrie par Központi Statisztikai Hivatal (KSH) - http://www.ksh.hu/docs/hun/xstadat/xstadat_hosszu/h_wdsd001b.html?692

Le mariage entre personnes de même sexe n'est pas admis dans le droit hongrois. La nouvelle Constitution de la Hongrie (datée de 2011) qui définit le mariage comme l'union entre un homme et une femme (article L) était largement critiqué concernant le mariage homosexuel[855]. La Hongrie, en effet, a déjà un "PACS" (depuis 2009)[856] dans son système juridique et c'est le seul moyen de l'union enregistrée pour les couples homosexuels. En effet, la loi reconnaît l'égalité entre le "concubinage enregistré" et le mariage du point de vue de la situation matérielle et de la succession des conjoints.

Bien que la loi vise l'égalité, elle comprend quelques paragraphes ambivalents. Par exemple, l'adoption d'un enfant par l'un ou les deux partenaires n'est pas permise aux concubins, même si c'est l'enfant de l'un des deux. Ils n'ont pas le droit de participer dans une procédure de reproduction médicalement assistée et ne peuvent pas porter le nom de leur concubin au contraire des personnes mariées. Le rapport de concubinage enregistré peut être rompu par le souhait de l'un ou des deux partenaires ou par leur mariage. Cela sous-entend que le mariage est toujours un rapport d'un niveau supérieur.

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

L'article L de la nouvelle Constitution contient une garantie constitutionnelle pour la défense de l'institution du mariage, définie comme une « union de vie fondée sur un engagement volontaire entre un homme et une femme », ainsi que de la famille « comme base de la survie de la nation ». Cette définition du mariage a été critiquée, car elle pourrait être interprétée comme excluant l'union entre personnes de même sexe.[857]

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

Le système et le contenu des solutions juridiques du règlement Rome III n'étaient pas cohérents avec les articles 40 et 41 du Décret-loi 13 de 1979 sur le droit international privé *(Décret-loi sur le droit international privé)* préalablement en vigueur qui ont, par conséquent, été rendus caducs par le législateur hongrois lors de la ratification de ce règlement. L'art. 40 du Décret-loi sur le droit international privé actuellement applicable stipule uniquement que les

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[855] Sue cette question voir aussi: Amnesty International: Document - Hongrie. La Constitution nouvellement adoptée ne respecte pas les droits humains, Déclaration publique, Index AI : EUR 27/006/2011 (Public), AILRC-FR, 20 avril 2011

[856] Loi XXIX de 2009 sur le concubinage enregistré (2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról

[857] Commission Européenne pour la Démocratie par le droit (Commission de Venise) Avis sur la nouvelle Constitution de la Hongrie, adopté par la Commission de Venise lors de sa 87e session plénière (Venise, 17 - 18 juin 2011)- http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-f.pdf

époux peuvent bénéficier du choix applicable au divorce, prévu par les articles 5 à 7 du règlement Rome III, seulement avant le date limite que le juge fixe lors de la première audience de la procédure de divorce. L'accord y relatif est valable en respectant les règles formelles fixées dans l'al. (1) de l'art. 7 dudit règlement. La loi hongroise ne prévoit aucune autre disposition spécifique au sujet des divorces entre époux originaires d'autres pays (divorce international), les juges saisis des dossiers de divorce doivent appliquer les dispositions du règlement d'une manière directe.

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

Non

B2. Effets du divorce

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

b). Rome 3 n'est pas applicable

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

15. Quelle est la loi applicable à la responsabilité parentale ?

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

Réponses 13-16 :

Quant à la loi applicable aux conséquences pécuniaires du divorce, les dispositions du protocole de La Haye restent applicables en vertu de l'art. 14 du règlement 4/2009/CE. Les dispositions du protocole de La Haye sont d'une application universelle : elles doivent être appliquées dans tous les cas même si ces cas ne relevaient pas de l'application du droit de l'État signataire du protocole de La Haye. De ce fait, la loi n°CXXVII de 2010 a rendu

caduques les dispositions spécifiques portant sur les obligations alimentaires. (Ces dispositions faisaient partie de celles de Décret-loi n° 13 de 1979 *(Décret-loi sur le droit international privé)* sur le droit international privé qui définissaient la loi applicable.) Le décret-loi contient les règles suivantes dans le domaine des conséquences pécuniaires du divorce :[858]

Quant à la loi applicable aux conséquences pécuniaires du divorce, les dispositions du protocole de La Haye restent applicables en vertu de l'art. 14 du règlement 4/2009/CE. Les dispositions du protocole de La Haye sont d'une application universelle : elles doivent être appliquées dans tous les cas même si ces cas ne relevaient pas de l'application du droit de l'État signataire du protocole de Hague. De ce fait, la loi n°CXXVII de 2010 a rendu caduques les dispositions spécifiques du *Décret-loi sur le droit international privé.* portant sur les obligations alimentaires. (Ces dispositions faisaient de celles de décret-loi n° 13 de 1979 sur le droit international privé qui définissaient la loi applicable.) Le décret-loi *Décret-loi sur le droit international privé.* contient les règles suivantes dans le domaine des conséquences pécuniaires du divorce :

C'est le droit personnel de l'enfant qui prévaut pour ce qui est des conditions juridiques familiales entre les parents et l'enfant (les enfants), et en particulier, du nom, du placement, de l'éducation, de la représentation juridique et de la gestion des biens, à l'exception de la pension alimentaire. L'énumération précédente ne fait qu'évoquer des exemples et ne comprend pas l'ensemble des cas de figure possibles.

Pour les enfants ressortissants hongrois (de nationalité hongroise) ou résidant en Hongrie, le droit hongrois doit être applicable aux conditions juridiques existant entre l'enfant et ses parents, mis à part l'obligation alimentaire, à condition d'être plus avantageux pour l'enfant.

S'il est nécessaire de prendre des mesures urgentes dans l'intérêt du placement ou de la prise en charge d'un enfant de nationalité hongroise ne résidant pas en Hongrie, c'est le droit hongrois qui est applicable.

Quant aux conditions juridiques personnelles et patrimoniales des époux – y compris l'usage du nom de famille et les contrats de mariage sur le partage ou la séparation des biens conjugaux – le droit applicable est le droit personnel commun des époux au moment du jugement. Si le droit personnel des époux est différent au moment du jugement, il faut prendre en compte leur dernier droit personnel commun, ou, à défaut, le droit du pays où ils avaient leur dernier domicile commun. Si les époux n'avaient pas de domicile commun, c'est le droit du tribunal saisi du divorce ou celui d'autres autorités saisies du divorce qui doit être appliqué. Les changements du droit personnel des époux n'ont d'incidence ni sur le port du nom de famille établi en fonction d'un droit préalable, ni sur les conditions patrimoniales préalablement établies, y compris sur le contrat de mariage.

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

[858] Nagy Csongor István : Doit international privé – Nemzetközi magánjog, Budapest, 2012. HVG-ORAC Lap,- és könyvkadó Kft. p.155-174

Il incombe au juge hongrois qui reconnaît applicable un droit étranger, d'en rechercher, soit d'office, soit à la demande d'une partie qui l'invoque, la teneur, et de donner à la question litigieuse une solution conforme au droit positif étranger.

Il existe une exception à l'application du droit étranger : si les parties demandent conjointement d'éviter le droit étranger et d'appliquer le droit hongrois ou le droit choisi.

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

La possibilité de principe d'appliquer le droit étranger est reconnue. Les règles générales formulent les principes directeurs relatifs au choix, à l'application ou à la non application des règles de droit qui régissent une situation de droit international privé. Les règles fixées par le décret-loi sur le droit international privé[859] ne sont pas applicables aux questions réglées par des conventions internationales. En ce qui concerne la qualification juridique des faits et rapports à juger, le décret-loi en prescrit l'interprétation d'après les règles et notions du droit hongrois. Toutefois, conformément à la pratique législative et judiciaire, il énonce que si le droit hongrois ne connaît pas une institution juridique ou bien s'il la connaît mais sous un contenu ou un nom différents, et qu'on ne peut l'interpréter selon les règles du droit hongrois, on doit tenir compte du droit étranger réglementant cette institution. C'est le rejet du principe de la discrimination à l'encontre des autres systèmes de droit qui se traduit dans cette règle.

En ce qui concerne la question très discutée du renvoi, le décret-loi adopte une solution de compromis. Il édicte notamment que si aux termes du décret- loi un droit étranger doit être appliqué, il faut appliquer dans ce cas les dispositions qui règlent directement le fond de la question posée. Mais si le droit étranger renvoie au droit hongrois, celui-ci doit être appliqué (renvoi au premier degré). Par contre, c'est le droit étranger indiqué par le décret-loi qu'il faut appliquer si les règles du droit étranger renvoient au droit d'un autre Etat (renvoi au second degré).
L'application du droit étranger ne dépend pas de la réciprocité. Si une règle de droit fait dépendre l'application du droit étranger de la réciprocité, celle-ci doit être regardée — jusqu'à preuve du contraire — comme existante (la réciprocité doit être donc présumée).
Il y a des cas où le droit étranger n'est pas applicable. Ces cas sont déterminés par le décret-loi en harmonie avec la pratique internationale. Ce sont : la violation de l'ordre public, la fraude à la loi et la demande commune d'inobservation par les parties. [860]

II. LE DROIT MATERIEL

G. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

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[859] décret-loi 13 de 1979 sur le droit international privé, articles 4-9

[860] Zoltan Odon. La nouvelle réglementation hongroise du droit international privé. In: Revue internationale de droit comparé. Vol. 32 N°1, Janvier-mars 1980. pp. 87-100. doi : 10.3406/ridc.1980.3638 - http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1980_num_32_1_3638

Il n'y a pas de temps minimum quant à la durée de mariage, le divorce peut être demandé sans limitation du temps.

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

Le conjoint doit faire lui-même la demande en divorce. Le conjoint dont la capacité est limitée peut lui aussi demander le divorce, sans le consentement de son représentant légal. Cependant, s'il est placé sous une curatelle, entraînant la pleine incapacité, le représentant légal est recevable à présenter la demande en son nom avec l'autorisation de l'autorité tutélaire. (art.19 du Loi sur la famille.)

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

Il n'existe qu'une seule cause de divorce : la rupture totale et irrémédiable de la vie commune (art. 18. Loi sur la famille.).

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

Voir la question 28.

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre de demandes présentées sur chaque fondement.

Il n'y a pas de statistiques sur cette question.

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

Lorsque le divorce est demandé sur la base du consentement mutuel, le tribunal n'examine pas les causes qui ont entraîné la dissolution du mariage car le consentement mutuel implique la présomption de la rupture irrévocable du mariage. Cependant, la décision de divorce par consentement mutuel n'est prononcée qu'en cas d'accord complet entre les parties sur les questions principales.(voir la question 27.)

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

La requête peut être présentée par les deux époux agissant ensemble, mais il est aussi possible pour l'autre d'accepter le principe du divorce en cours d'instance.

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

Oui, en cas de consentement mutuel, les époux doivent être d'accord sur les effets du divorce, notamment:

- sur la garde de l'enfant commun, contacts entre les père ou mère et l'enfant (droit de visite), entretien de l'époux, utilisation du logement commun, ainsi que – à l'exception de la suppression et la propriété commune de l'immeuble – le partage des biens communs et que le tribunal a approuvé cet arrangement,
- ou s'ils vivent séparément depuis trois ans et s'ils se sont mis d'accord sur l'exercice de l'autorité parentale et l'entretien des enfants mineurs.

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

La législation hongroise ne connaît pas le divorce-sanction. Néanmoins, la faute continue à jouer un rôle considérable en matière d'effets du divorce, notamment dans les questions accessoires de l'action en divorce. Parmi les questions accessoires, la faute des époux, ou plutôt leur faute grave peut avoir une importance – mais elle n'entre pas nécessairement en ligne de compte – pour la réglementation de l'entretien de l'époux, de l'utilisation du logement des époux, de la restitution des cadeaux donnés à l'occasion du mariage, soit avant la célébration du mariage, soit pendant le mariage, ainsi que la garde de l'enfant.[861]

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?

g) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?

h) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

Si le divorce est demandé par consentement mutuel, le tribunal n'examine pas les causes qui ont entraîné la dissolution du mariage, ainsi seule la question de savoir si la déclaration de volonté des époux est définitive et exempte d'influence est examinée. La déclaration des époux est considérée comme définitive si les époux sont tombés d'accord sur la dissolution du mariage et ses conséquences. Si la communauté de vie entre les époux a cessé depuis trois ans au moins et ils vivent en résidence séparée, il suffit de justifier au cours de l'action en divorce qu'ils ont réglé le placement et l'entretien de l'enfant conformément à ses intérêts.

Si la dissolution du mariage n'est pas demandée par consentement mutuel des époux, le tribunal doit examiner les causes de la détérioration de la vie conjugale et la question de savoir si ces causes ont vraiment entièrement et irréparablement ruiné le mariage. La loi ne lie ni la présentation de la demande ni la dissolution du mariage à la résidence séparée pendant une durée déterminée[862].[863]

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[861]WEISS Emilia: Hongrie.= Legislation Comparée. Tecniques - Juris> Classeur, 1993. 1-33. Paris, sur feuillets mobiles, point 46

[862]WEISS Emilia point 40

[863]sur cette question voir aussi: NAGY Veronika – Le logement dans les procédures de divorce (France/Hongrie), Allocations familiales, Dossier d'études, 2011 numéro 138.- http://www.caf.fr/sites/default/files/cnaf/Documents/Dser/dossier_etudes/dossier_138_-logement_dans_procedures_divorce.pdf

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

36. Dans cette procédure, quelle place est laissée la séparation des époux ?
- **La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**
- **Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit elle être continue ?**

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

H. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
- **avant le mariage ;**
- **pendant le mariage ;**
- **pendant la procédure de divorce ?**

Avant le mariage :

Avant la conclusion du mariage et pendant l'existence du mariage, les futurs époux peuvent fixer d'une autre manière que la loi quels biens feront partie de la communauté et lesquels seront propres[864]. La pratique interprète cette disposition dans un sens large. Est admis même un contrat de mariage qui exclut totalement la communauté de biens des époux et également un contrat qui fixe la participation aux biens communs d'une autre manière que par moitié. Certains contrats de mariage n'ont pour but que de déterminer par contrat les biens propres apportés par chacun des époux dans le mariage. Les contrats d'achat et de vente, d'échange, de donation et de prêt conclus entre les époux pendant l'existence du mariage sont considérés comme un contrat de mariage. Par contre, le contrat conclu entre les époux après la cessation de leur vie commune en vue de la répartition de leurs biens communs n'est pas considéré comme un contrat de mariage.

Pendant le mariage et la procédure de divorce :

Pour toutes les questions relevant du droit familial qui sont liées au divorce, les époux peuvent conclure un accord à l'exception de la date d'effet du divorce parce que celle-ci est identique à la date d'effet du jugement qui prononce le divorce.

Voir aussi des réponses : 53., 59., 72., 80.

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

Si la convention passée entre les époux est conforme à la législation en vigueur, il n'est plus nécessaire d'examiner si les intérêts légitimes des époux ont été pris en compte. Par contre, le juge doit examiner d'office si cette convention tient compte des intérêts d'un enfant mineur (placement, droit de visite, pension alimentaire, usage du logement).

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[864] Emilia WEISS points 31-32

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

Si la convention conclue par les parties n'est pas approuvée par le juge, le divorce peut intervenir seulement après avoir mis en évidence les causes qui ont conduit à l'altération irrémédiable du lien conjugal. Autrement dit, le juge ne peut pas modifier directement l'accord. Il est cependant possible de modifier un accord préalablement approuvé par le juge. Seule limite d'une telle modification : les parties peuvent solliciter une modification seulement dans un délai de deux ans et seulement dans les cas suivants : a) cette modification est dans l'intérêt de leur(s) enfant(s) mineur(s) commun(s), b) l'accord préalablement établi lèse grièvement les intérêts d'une des parties du fait d'un changement important du contexte et des conditions.

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

La rupture a minima n'existe pas dans le droit hongrois.

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

Le divorce rompt définitivement le mariage le jour où le jugement entre en force de chose jugée. Si l'un des époux décède avant que le jugement devienne exécutoire, le tribunal doit arrêter l'instance et doit abroger la décision rendue. (art 19 et 20 du Loi sur la famille.)

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

Les ex-époux peuvent se remarier sans limitation de temps et ils peuvent se remarier l'un avec l'autre.

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

En général, le divorce n'affecte pas l'usage du nom des époux. S'ils veulent en changer, ils peuvent le faire dans une déclaration devant l'officier de l'état civil. (art 26. du Loi sur la famille)

En outre, à la demande de l'époux, le juge peut interdire à l'épouse de continuer à porter le nom de son ex-conjoint quand elle a été condamnée à une peine de prison pour crime.
Si l'épouse se marie à nouveau, elle n'a pas le droit de porter le nom de son époux divorcé.

Les effets corrélatifs du divorce :

- Si lors du divorce, l'un des époux n'a pas dix-huit ans révolus, il conserve la capacité juridique d'un majeur qu'il avait acquise par le mariage. (art 12 du Code civil.)

- L'enfant qui naît dans les 300 jours suivant la dissolution du mariage bénéfice de la présomption de paternité du mari sauf si la mère s'est remariée avant la fin de cette période. Dans ce cas, l'enfant a pour père le nouveau mari. (art. 35 du Loi sur la famille.)

- Les ex-époux peuvent se remarier sans limitation de temps. Lorsqu'un remariage est entaché de nullité pour cause de bigamie mais que ce mariage n'a pas encore fait l'objet d'une décision définitive, la dissolution du mariage précédent met fin « ex nunc » à l'irrégularité qui affectait la validité du deuxième mariage. (art 7 al 2 du Loi sur la famille.)

50. Le divorce produit-il des effets

- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;**
- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

Une personne ayant acquis la nationalité hongroise par le mariage ne la perd pas du simple fait de divorcer. La nationalité hongroise n'est retirée qu'à une personne qui l'a acquise d'une manière frauduleuse (en commettant une infraction à la loi, en fournissant des renseignements faux quant à son identité, en induisant en erreur les autorités du pays, etc), la confiscation de la nationalité pouvant intervenir dans ce cas au plus tard dans les 10 années qui suivent son acquisition. [865]

Le droit de séjour des époux et membres de famille ressortissants des pays de la CEE est supprimé dès qu'ils ne remplissent plus les conditions nécessaires à son exercice. Le droit de séjour des époux originaires d'un pays tiers reste valable malgré un divorce ou l'annulation du mariage si[866]

a. le mariage a duré pendant au moins deux ans avant l'annulation et l'ex-époux (l'ex-épouse) a séjourné au minimum un an en Hongrie pendant la durée du mariage en tant que membre de la famille d'un(e) Hongrois(e) ou d'une personne originaire d'un pays de la CEE ;
b. en vertu d'une décision judiciaire ou d'un accord entre les époux, l'époux (épouse) venant d'un pays tiers exerce l'autorité parentale sur un enfant qu'il a en commun avec une personne originaire d'un pays de la CEE ;
c. c'est justifié par des circonstances particulières qui doivent être prises en compte ;
d. en vertu d'une décision judiciaire ou d'un accord entre les époux, l'ex-époux (l'ex-épouse) a un droit de visite pour voir son enfant sur le territoire hongrois.

Le tribunal compétent en matière de divorce n'a pas d'obligation de déclaration : tout changement de nationalité doit être déclaré par la personne concernée qui doit également justifier qu'elle remplit les conditions nécessaires pour poursuivre son séjour en Hongrie lorsqu'elle fait la demande d'un titre de séjour auprès des autorités compétentes (soit à la police des étrangers).

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[865] Loi LV de 1993. sur la nationalité hongroise

[866] art 14 de la loi I. de 2007. sur l'entrée sur le teritoire et le séjour des personnes ayant la nationalité d'un pays tiers

ii. Les effets du divorce à l'égard des enfants

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

Les enfants mineurs se trouvent placés sous l'autorité parentale ou sous tutelle.(art 70 du Loi sur la famille) Les principes fondamentaux de l'exercice de l'autorité parentale est qu'elle doit être exercée selon les intérêts de l'enfant et que les parents l'exercent en commun. Les parents vivant séparément ont un droit de visite (droit de maintenir des rapports), un droit de prise de décisions en commun avec l'autre parent exerçant l'autorité parentale sur les questions importantes concernant l'enfant, notamment: soins et éducation, gestion des biens de l'enfant, représentation légale de l'enfant, droit de désigner le tuteur et l'exercice de la tutelle. L'intervention de l'État dans l'exercice de l'autorité parentale ne peut être qu'exceptionnelle. Une telle intervention ne peut avoir lieu que si les parents la demandent parce qu'ils ne peuvent pas se mettre d'accord sur l'exercice des droits ou si les parents les exercent d'une manière qui n'est pas conforme aux intérêts de l'enfant.

Au lieu de résidence de l'enfant, le droit hongrois utilise l'expression garde de l'enfant. La résidence de l'enfant est chez le parent qui a le droit de garde.

Voir aussi la question 58.

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

Oui. Selon la règle principale, en cas de dissolution du mariage, l'autorité parentale revient principalement au parent ayant la garde de l'enfant de telle sorte que l'autorité parentale de l'autre parent est suspendue. Les parents peuvent demander d'exercer en commun l'autorité également dans le cas de divorce ou de la séparation définitive. (art. 72. par. 2 du Loi sur la famille.) Cependant, même si le tribunal ordonne l'exercice de l'autorité parentale en commun, il faut décider de la garde de l'enfant par le père ou la mère.

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

Après la dissolution du mariage ou la rupture de la vie commune, l'autorité parentale peut être exercée en commun sur la base de l'accord ou de la demande de parents aptes à l'exercer, de manière à ce que le tribunal approuve l'accord des parties ou, sur demande des parties, ordonne par son jugement l'exercice de l'autorité parentale en commun. Au cours de la soumission de la demande, les parents sont tenus de déclarer de quelle manière ils désirent coopérer lors de l'exercice de l'autorité parentale en commun, particulièrement en matière de prise en charge et de l'éducation.

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Le juge n'a pas le droit de modifier l'accord, mais s'il est contraire à l'intérêt de l'enfant, il refuse de l'approuver.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

Au cas où la disposition à coopérer à l'égard de l'enfant des parents exerçant l'autorité parentale en commun cesse pour quelque raison que ce soit, par la demande de l'un ou de l'autre des parents le tribunal met fin à l'autorité parentale exercée en commun si l'intérêt de l'enfant le nécessite.

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

Le juge retire aux parents l'autorité parentale : (art 88 Loi sur la famille)

a. Si le père ou la mère par son conduite met manifestement en danger ou heurte gravement les intêrêts de l'enfant, notamment son bien-être physique ou son développement intellectuel ou moral
b. Si le juge a confié l'enfant à un tiers à titre temporaire et pendant cette période le parent refuse la collaboration avec cette personne, ne contacte pas son enfant et ne fait pas d'efforts pour changer sa manière de vivre qui a conduit le juge à suspendre l'exercice de l'autorité parentale.
c. Si le père ou la mère a été condamné par une juridiction pénale à une peine de réclusion pour un crime commis intentionnellement contre la personne de l'un de ses enfants

Si le juge considère que le comportement conjugal a mis en danger les intêrêts de l'enfant (son bien-être physique, son développement intellectuel ou moral) le parent peut se voir privé de l'exercice de l'autorité parentale.

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

Celui des parents dont le droit de l'exercice de l'autorité parentale a été retiré ou suspendu a toujours le droit de voir l'enfant. En cas de contestation relative aux modalités de ces visites, celles-ci sont déterminées par l'autorité de tutelle qui, dans l'intérêt de l'enfant, peut limiter ou même retirer ce droit de visite. (art 93 Loi sur la famille)

Les formes juridiques de l'exercice de l'autorité parentale sont les suivantes : maintien de rapports continus et périodiques – avec le droit d'emmener et l'obligation de remettre l'enfant –, visite de l'enfant à son domicile, échange des lettres, contacts par téléphone, envoi de cadeaux et colis.

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

Au lieu de résidence de l'enfant, le droit hongrois utilise l'expression garde de l'enfant. Dans les cas de dissolution du mariage ou de la rupture définitive de la vie commune des parents vivant en mariage ou en union libre, la garde des enfants est confiée généralement à l'un des parents. Il en est ainsi même si l'autorité parentale est exercée en commun par les parents séparés. Contrairement au droit français, le droit hongrois ne rend pas possible la résidence (garde) alternée de l'enfant.

Ce sont en premier lieu les parents qui décident de la garde de l'enfant – cette décision constitue l'une des conditions légales du divorce par consentement mutuel. En absence d'accord des parents, le juge décide de la garde de l'enfant et la confie à celui des père et mère qui lui assurera le développement corporel, intellectuel et moral le plus avantageux. Si la garde de l'enfant par le père et par la mère risque de compromettre les intérêts de l'enfant, le tribunal peut exceptionnellement confier la garde de l'enfant à une tierce personne. La condition en est que cette personne demande elle-même que la garde de l'enfant lui soit confiée. La personne tierce à qui la garde de l'enfant est confiée par le juge, est nommée tuteur de l'enfant par l'autorité tutelle et c'est elle qui exercera en tant que tuteur les droits de l'autorité parentale. [867]

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Oui, ces questions peuvent être déterminées par une convention parentale. Le juge n'a pas le droit de modifier l'accord, mais si celui-ci est contraire à l'intérêt de l'enfant, il refuse de l'approuver.

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

L'exercice du droit de visite accordé par le tribunal n'est pas garanti par le juge, mais par la Protection des mineurs (art. 92, par. 6 de la loi sur la famille). Cependant, la vie montre que les mesures – ou sanctions - qui peuvent être prises pour garantir les liens entre l'enfant et chacun de ses parents ne sont pas aptes à faire respecter au parent fautif son obligation de maintenir les relations avec son enfant.

Les sanctions à la disposition de la Protection des mineurs sont les suivantes :

- une injonction peut être adressée au parent qui empêche les liens entre l'enfant et l'autre parent en lui demandant de ne pas dresser l'enfant contre l'autre parent. Les frais engagés sont portés à sa charge.
- on peut faire intervenir un médiateur spécialisé à la protection d'enfants
- si les injonctions restent sans résultat, on peut faire intervenir le service spécialisé dans les relations du Service du Bien-être des Enfants. Si le maintien des liens est

[867] Emilia WEISS point 86.

chargé de conflits, s'il est en permanence entravé, ou si les parents ont du mal à communiquer, le Service de Bien-être des Enfants peut être saisi et intervenir en demandant une mise sous protection.
- On peut introduire une demande au tribunal pour retirer la garde de l'enfant
- Une plainte pénale peut être porté pour mis en péril de l'enfant.

e. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre
18. une compensation financière,
19. une créance alimentaire,
20. une compensation de droits à pension de retraite,
21. des dommages-intérêts
22. ou d'autres sommes ou droits patrimoniaux ?

La pratique hongroise, comparée avec les règles et la pratique de nombreux autres pays européens, l'entretien de la femme revêt lui aussi une **importance sensiblement moindre**.

Le droit hongrois prévoit une pension alimentaire en cas de la dissolution du mariage. L'article 21 du Code de la famille régissant la pension en cas de dissolution stipule : En cas de la dissolution du mariage, la personne qui a besoin d'une pension alimentaire sans qu'il y ait faute de sa part, peut la réclamer à son ex-conjoint, sauf si, au cours du mariage, par son comportement, elle s'est rendue indigne de la recevoir. La somme de la pension ne peut être réclamée que dans la mesure où elle ne met pas en danger les conditions d'existence de l'ex-conjoint et de toute personne envers qui l'ex-conjoint a un devoir d'entretien au même titre que le demandeur de la somme.

La Loi sur la Famille, dans son esprit, mais aussi par ses dispositions de droit positif, conformément à ce qui figure dans les principes fondamentaux (§1 de la Loi sur la Famille), défend l'institution du mariage. Cette défense se manifeste également par le fait qu'elle ne considère pas que la responsabilité mutuelle des conjoints cesse d'exister dans tous les domaines à la suite de la dissolution du mariage, mais elle l'étend même dans une certaine mesure à la période postérieure à la dissolution du mariage (à la rupture de la vie commune). Ainsi, elle règlemente, en tant qu'obligation juridique, le devoir d'entretien à la charge du conjoint divorcé afin d'assurer les conditions d'existence de l'ex-conjoint, conformément aux prescriptions de la loi.

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

La demande peut être faite à l'introduction de l'instance, en cours d'instance et après le prononcé du divorce. Le fait qu'au moment de la dissolution du mariage, l'époux se trouve dans le besoin n'est pas une condition préalable absolue du droit de l'entretien. Toutefois, l'ancien époux qui ne se trouve pas dans le besoin que plus de cinq ans après la dissolution du mariage, ne peut réclamer son entretien que dans des cas particulièrement dignes d'être pris en considération

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

La loi sur le droit de famille fixe les aspects qui doivent être pris en considération sur la base de la loi. Cependant, les époux peuvent convenir par contrat de l'entretien envers l'époux même à défaut de ces conditions légales, ou dans une mesure dépassant celle prescrite par la loi, ou l'un des époux, généralement le mari, peut assumer une telle obligation par une déclaration unilatérale.

Du côté de l'ayant droit, l'obligation d'entretien envers l'époux est subordonnée à deux conditions préalables aux termes de la loi : il doit se trouver dans le besoin sans faute de sa part, et il ne doit pas être indigne de l'entretien. L'indignité suppose un comportement qui lèse d'une manière plus grave les bases morales du mariage que la faute ayant entraîné la dissolution du mariage. Il est assez rare que le tribunal constate que l'époux (l'épouse) est indigne de la pension alimentaire.[868]

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

Non.

68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

La pension alimentaire est réglée entre les droits et devoirs des époux, indépendamment de la liquidation du régime matrimonial et des règles de droit des biens.

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

Les causes de divorce n'ont pas effet direct ni sur la compensation financière ni sur les autres conséquences en matière patrimoniale. En ce qui concerne la pension alimentaire,

[868] Emilia WEISS points 23-26

l'indignité de la recevoir n'est pas identique à la faute ayant entraîné la dissolution du mariage.

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

Le droit hongrois ne donne pas de définition des obligations patrimoniales entre ex-époux. En dehors du partage des biens, de la pension alimentaire, et du règlement de l'utilisation du logement par les ex-époux, il n'y a pas d'autres formes d'obligation patrimoniale.

Lors de la cessation de la vie commune, la communauté de biens prend fin et chacun des époux peut exiger le partage des biens communs. Les biens communs – en l'absence d'un contrat de mariage d'un contenu contraire – reviennent aux époux par moitié. Les biens doivent être remis si possible en nature. Si cela n'est pas possible ou entraîne une dépréciation considérable des biens, en cas de litige, le mode de la répartition est déterminé par le tribunal.

En ce qui concerne l'utilisation du logement, en l'absence d'accord des parties, le tribunal prend la décision sur demande. Lors de la prise de décision, l'intérêt de l'enfant commun mineur va primer. Ce n'est pas la nature de l'appartement en propriété ou locatif qui est décisive selon la loi, mais la question de savoir si le logement faisait partie des biens propres de l'un des époux ou était son appartement locatif, ou s'il était commun des époux. Si l'appartement où vivent les époux est le bien propre ou est un logement loué par l'un des époux, le droit de l'utilisation du logement revient en général à cet époux après la dissolution du mariage. Le juge ne peut autoriser qu'exceptionnellement l'utilisation partagée ou exclusive du logement par l'autre époux si l'enfant ayant droit à l'utilisation du logement est placé chez lui et si le droit de l'enfant à l'utilisation du logement l'exige. Si le logement est un appartement de fonction, le locataire de fonction ne peut pas être obligé de quitter l'appartement.

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

Oui. Voir aussi les réponses 65-66.

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Non, le juge n'a pas un droit de regard sur la convention et sans demande il ne peut pas solliciter une modification.

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

Le montant de la pension alimentaire est en fonction des besoins de l'ayant droit et de la capacité du débiteur, mais ni la loi ni la directive de la Cour suprême ne donnent à cet égard d'instructions précises.

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

La pension alimentaire est accordée pour une durée déterminée ou indéterminée, en fonction de la prévisibilité ou de l'imprévisibilité de la durée supposée des besoins. Elle est d'une durée déterminée si on peut supposer que le besoin à l'entretien de l'ayant droit cessera après un certain temps, par exemple au moment où il achèvera ses études.

Le montant de la pension alimentaire peut être modifié à la demande du débiteur si les changements dans les circonstances servant de base à la fixation de l'entretien sont survenus.

Le droit à l'entretien cesse si le bénéficiaire :

- se remarie
- en devient indigne en raison de son comportement ou
- n'en a plus besoin.

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

L'obligation d'entretenir financièrement l'enfant est liée à la garde de l'enfant.

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

Le père et la mère à qui la garde de l'enfant est confiée doit fournir l'entretien en nature alors que le parent vivant séparément doit verser une pension alimentaire en numéraire. Lors de la fixation du montant de la pension alimentaire due à l'enfant, il faut prendre en considération

a. les besoins effectifs de l'enfant,
b. les revenus et les conditions de vie matérielles des deux parents
c. le nombre d'enfants qui sont à charge dans le ménage des parents et
d. le revenu propre de l'enfant.

L'ensemble des pensions alimentaires à payer par une personne ne peut excéder 50% de son revenu.

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

Oui. Ce sont en premier lieu des parents qui décident de la garde de l'enfant et de la pension alimentaire. Ces décisions constituent –entre autres- des conditions légales du divorce par consentement mutuel. En l'absence d'accord des parents, le juge fixe le montant de la pension alimentaire.

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

Le juge n'a pas le droit de modifier l'accord, mais il refuse de l'approuver si celui-ci est contraire à l'intérêt de l'enfant ou au vu des revenus des parents.

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

Le divorce et ne peut être prononcé que par une décision judiciaire. En ce qui concerne les conséquences, dans la procédure de divorce, c'est le juge qui décide d'office sur la garde de l'enfant mineur et sur sa pension alimentaire. Cependant, les époux peuvent se mettre d'accord sur d'autres conséquences devant un avocat ou un notaire, mais dans la plupart des cas, ils demandent de régler toutes les conséquences du divorce dans le cadre de la procédure judiciaire.

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

Sans objet

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

Compétence d'attribution

En règle générale, les procédures judiciaires en divorce relèvent des juridictions locales. Des procédures judiciaires concernant le partage des biens patrimoniaux peuvent être engagées dans le cadre de la procédure de divorce, mais également en dehors de celle-ci. Dans les deux cas, c'est du tribunal local qu'elles relèvent si la valeur des biens matrimoniaux en question dépasse 30 millions de HUF[869]. (art 22 al 1 de la loi sur la procédure civile – Code de procédure civile.)

[869] Environ 100.000 euros

Compétence territoriale

Ce sont les règles générales de la compétence territoriale qui prévalent dans le cas des procédures judiciaires en divorce. Ainsi, le tribunal compétent du point de vue territorial est celui dont relève le domicile ou, à défaut, le lieu de résidence du défendeur. Si le lieu de résidence du défendeur n'est pas connu ou qu'il se trouve à l'étranger, c'est son dernier lieu de résidence sur le territoire hongrois qui doit être pris en compte. S'il n'est pas possible d'établir son dernier lieu de résidence en Hongrie ou s'il n'en a jamais eu du fait de vivre à l'étranger, c'est le domicile ou le lieu de résidence du demandeur qui va déterminer quel sera le tribunal compétent du point de vue territorial. (art 29 Code de procédure civile)

Compétence alternative :

A. Le demandeur peut choisir le tribunal ayant la compétence territoriale du fait du dernier lieu de résidence commun des époux.
B. Il est possible d'engager une procédure portant sur la suppression du droit de garde des ou d'un des parents en saisissant le tribunal territorialement compétent selon le domicile ou le lieu de résidence de l'enfant mineur. (art 302 Code de procédure civile)

Si la procédure de divorce ne relevait d'aucun tribunal hongrois compétent ni selon les règles générales ni selon celles de la compétence territoriale, la procédure devrait être engagée auprès de Tribunal Central de Pest *(Pesti Központi Kerületi Bíróság)*.

Compétence exclusive :
Si une procédure de divorce est déjà en cours, toute autre procédure portant sur le mariage ou les biens communs doit avoir lieu au même tribunal. (art 277 al 4 Code de procédure civile)

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

Après l'introduction de l'instance, le défendeur est tenu de réagir au cours de la première audience au plus tard. Dans le même délai, il doit présenter, pour sa défense, les faits et ses preuves. (art 126. Code de procédure civile)

Quand le divorce est demandé par l'un des époux, le tribunal tente de réconcilier les époux lors de la première audience. En cas d'échec, la demande en divorce doit être renouvelée par l'un ou l'aute des époux dans un délai de trois mois. Si la demande n'est pas renouvelée, la procédeure est close (art 285 al 4 et 5 Code de procédure civile). Si elle l'est, le tribunal statue sur le fond.

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

Médiation extrajudiciaire

Conformément à la Loi n° LV de 2002 sur la médiation (a közvetítői tevékenységről szóló 2002. évi LV. törvény), c'est le ministre de l'Administration publique et de la Justice qui est responsable de l'enregistrement des médiateurs et des personnes morales qui les emploient.
Une médiation est possible si les époux se mettent d'accord sur cela sous réserve que la loi ne l'interdise. Dans les cas de différends juridiques familiaux, une médiation est tout à fait souhaitable. Le médiateur peut prétendre à une rémunération et à un déffraiement des charges dont le montant peut être librement négocié entre les parties et le médiateur. Un accord établi au cours de la médiation n'affecte pas le droit des parties d'intenter un procès pour faire valoir leurs droits. La législation permet à des médiateurs agréés en Hongrie ou dans d'autres pays de la CEE d'intervenir au cours d'une procédure qui se déroule en Hongrie.
Les parties peuvent obtenir l'exécution du contenu de l'accord résultant d'une médiation. Elles doivent alors demander au tribunal ou à un notaire (közjegyző) d'intégrer l'accord dans une ordonnance ou dans un acte authentique (közokirat), qui pourra ensuite faire l'objet d'une exécution forcée.

Médiation judiciaire

Depuis le 1er octobre 2012, nombreux tribunaux permettent de recourir à une médiation. La médiation rend possible de régler plus rapidement et plus efficacement les différends au moment de l'ouverture ou pendant la durée de la procédure. La demande pour bénéficier d'une médiation doit être introduite conjointement par les parties dans l'un des tribunaux où une médiation est à disposition. Les médiateurs sont nommés par le président de l'Office National de la Magistrature.

Actuellement, ce sont des magistrats à la retraite, ayant une très grande expérience, qui remplissent cette fonction, mais les auxiliaires de justice peuvent également exercer ce métier. La procédure de médiation judiciaire est gratuite à l'inverse de la médiation extrajudiciaire. La médiation n'est qu'un outil limité vu que le divorce doit être prononcé par un tribunal. Les questions du placement, de la modification du placement des enfants et des demandes de pensions alimentaires peuvent dans tous les cas faire l'objet d'une médiation. Si celle-ci réussit, les parties arrivent à un accord dont la réalisation dépend évidemment de leur volonté, mais elles peuvent toujours demander au tribunal d'intégrer leur accord dans la décision. Si cette intégration a lieu, l'accord devient exécutoire en ayant la même force que la décision de divorce et peut faire l'objet de l'application par un huissier de justice.

Médiation en matière de protection de l'enfance par l'autorité de tutelle

Le décret gouvernemental n **149/1997 (IX. 10.)** relatif à l'autorité de tutelle ainsi qu'aux services de tutelle et de protection de l'enfance rend possible une procédure de médiation depuis le 1er janvier 2005 pour gérer les situations où les parents ou toute autre personne autorisée à entretenir des contacts avec le mineur ne peuvent pas s'accorder sur les modalités ou le calendrier des visites. La procédure est engagée par une demande conjointe des parties à un médiateur chargé de la protection de l'enfance. Le registre de ces médiateurs est tenu par l'Institut national de la politique familiale et sociale. Il peut être consulté auprès du siège officiel du bureau des tutelles ou des services de protection de l'enfance.

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- **au logement familial,**
- **aux enfants,**
- **à l'obligation alimentaire entre époux,**
- **aux conséquences de violences conjugales ?**

Pendant la procédure de divorce, le tribunal peut prendre des mesures provisoires soit d'office, soit à la demande d'une des parties.
Une demande de mesures provisoires doit avoir lieu si des préjudices ou des dommages immédiats peuvent être évités par leur biais ou s'il est ainsi possible de maintenir certaines conditions sans lesquelles la mise à disposition des preuves deviendrait impossible ou des préjudices risqueraient de se produire. Des mesures provisoires peuvent être ordonnées en vue de protéger certains des droits de la partie menacée qui doivent être pris en compte.
Des mesures provisoires peuvent être demandées dans les cas suivants :

a. le placement de l'enfant,
b. les obligations alimentaires,
c. les visites entre l'enfant et ses parents,
d. le logement familial,
e. la mise à disposition ou la restitution des biens mobiliers personnels à celui des époux qui a quitté le domicile familial.

Une décision doit être prise concernant le placement et les pensions alimentaires de l'enfant mineur commun des époux même en l'absence d'une demande d'action judiciaire. Les mesures provisoires peuvent être ordonnées d'office dans les cas du placement de l'enfant, des obligations alimentaires, de la limitation ou de l'expansion de l'autorité parentale, l'exercice du droit de visite et l'usage du domicile familial par les époux.

Afin de réduire les conséquences et le nombre de cas de violences conjugales et familiales, une nouvelle loi est entrée en vigueur en instituant la mise à l'écart. Cette loi vise à gérer les violences au sein de la famille avant qu'un acte criminel, soit un acte aux effets irréversibles, ne soit commis.
Il existe deux formes de mise à l'écart :

1. mise à l'écart provisoire dans un but préventif,
2. mise à l'écart préventive

La mise à l'écart préventive provisoire est imposée par la police alors que la mise à l'écart préventive est imposée par le juge afin de limiter la liberté de séjour, la liberté d'élection d'un lieu de résidence, l'autorité parentale ou l'exercice du droit de visite d'une personne violente auteur de maltraitances.

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

Un recours peut être déposé contre la décision relative au divorce au tribunal ayant la comptence territoriale, et ceci dans un délai de 15 jours à compter de la réception de celle-ci. Aucun recours administratif n'est possible.

La décision du tribunal peut être attaquée dans un cadre limité. Aucun recours ne peut avoir lieu concernant la décision de divorce ou contre la décision prononçant l'approbation de

l'accord de divorce, ainsi que dans le cas où le tribunal de deuxième instance a confirmé la décision de la première instance au sujet du placement ou de la modification du placement de l'enfant et des modalités de l'exercice du droit de visite. (Code de procédure civile. art. 217)

Après la prise d'effet de la décision de divorce, les ex-époux peuvent contracter un nouveau mariage. Il est impossible de remettre en question la décision de divorce par un recours afin d'éviter les cas de bigamie. Cependant, il est tout à fait possible de déposer un recours concernant les autres aspects du divorce qui font l'objet d'une action en justice, c'est-à-dire les questions du placement de l'enfant (l'autorité parentale), les pensions alimentaires et le partage des biens

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir
- **à l'instance en divorce ;**
- **à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?**

Si oui, sur quels fondements ?

Les procédures relatives à l'autorité parentale (cf. placement de l'enfant, modification du placement, suppression ou restitution du droit de garde) peuvent être à l'initiative d'un des parents, du service de protection de la jeunesse ou du procureur de la République (Code de la procédure civile. art. 90, al. 1). De plus, le procureur peut saisir le tribunal pour ce qui est de la pension alimentaire de l'enfant dans l'intérêt de l'enfant ou de celle du parent concerné toujours dans l'intérêt de l'enfant. Le procureur peut intervenir dans toute procédure, sous réserve de tenir compte du droit de disposition des parties, si une personne en droit d'intenter un procès n'est pas à même de défendre ses intérêts. Cependant, il ne peut pas saisir le tribunal pour des droits que seules des personnes nommées par la loi peuvent faire valoir (p. ex. une instance de divorce).

Pour obtenir la suppression ou la restitution de l'autorité parentale, c'est le représentant légal qui peut saisir le tribunal, avec l'accord du service de protection des mineurs, si l'enfant ou le parent concerné se trouvent empêchés du fait de leur incapacité juridique totale. L'enfant ou le parent dont la capacité juridique est limitée peut saisir le tribunal lui-même avec l'aide de son représentant légal (Code de procédure civile. art. 90, al. 2).

Administrateur : voir la question 90.

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

La loi sur la famille stipule que le juge doit entendre l'avis de l'enfant par le biais d'une audition directe ou d'un intermédiaire dans tous les cas justifiés au cours des procédures portant sur la garde, le placement ou la modification du placement de l'enfant. L'enfant peut également solliciter une audition. (cf. art. 74 de ladite loi). C'est en tenant compte de toutes les circonstances du cas précis que le juge doit décider si la participation personnelle ou l'audition de l'enfant est nécessaire.

Si l'enfant est âgé de plus de 14 ans, les décisions concernant son placement (relative à l'autorité parentale) ne peuvent être adoptées qu'avec son accord, sauf si le placement qu'il a choisi constitue un risque pour son développement équilibré.

Règles procédurales de l'audition de l'enfant par le juge

Si le juge a décidé de procéder à une audition de l'enfant, il nomme simultanément un administrateur d'office chargé de la représentation de l'enfant mineur dans les cas justifiés. Le juge peut également décider de faire cette audition en l'absence des époux et de leurs représentants juridiques. Le tribunal envoie une convocation à l'audition de l'enfant âgé de moins de 14 ans par l'intermédiaire du représentant légal de ce dernier. L'audition doit se dérouler dans un climat et dans un langage adaptés à l'âge de l'enfant. En fonction de l'âge et de la maturité de l'enfant, le juge demande à l'enfant de lui indiquer ses renseignements personnels au début de l'audition. Ensuite, il lui demande d'exprimer son avis. Si l'administrateur ou les époux souhaitent lui poser des questions, c'est le juge qui décide si elles sont nécessaires et c'est lui qui les pose. [870]

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives

- **p) à la rupture du lien matrimonial ?**
- **q) aux effets pécuniaires du divorce ?**
- **r) à la liquidation des intérêts patrimoniaux des époux ?**
- **s) à la responsabilité parentale ?**
- **t) aux obligations alimentaires entre parents et enfants ?**

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

Les dispositions du droit hongrois quant à la reconnaissance des décisions prononcées à l'étranger et à la liquidation des intérêts patrimoniaux ne sont applicables que dans les affaires qui ne tombent pas sous le coup de la réglementation européenne ou d'une convention internationale.

Le droit hongrois ne prévoit pas de dispositions spécifiques en ce qui concerne la reconnaissance des décisions relatives à la rupture du lien matrimonial, à la liquidation des intérêts et aux conséquences du divorce. Ainsi, ce sont les règles de droit générales qui sont à appliquer :

En matière de reconnaissance et d'application de décisions étrangères, la loi stipule des règles différentes en fonction des motifs sur lesquels repose la juridiction de l'autorité étrangère.

En règle générale, si les quatre conditions suivantes sont simultanément remplies, toute décision émanant d'un pays tiers doit être automatiquement reconnue :

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[870] Les règles relatives à l'audition de l'enfant mineur ont été modifiées par la loi n° LXII de 2012, en vigueur depuis le 29 juin 2012

1. La décision prononcée par le tribunal étranger ou l'autorité judiciaire étrangère a été bien fondée du point de vue des règles juridictionnelles hongroises,
2. la décision est entrée en force de la chose jugée dans le pays où elle a été prononcée.
3. il existe une réciprocité entre la Hongrie et l'État où opère le tribunal ou l'autorité judiciaire qui a prononcé la décision.
4. aucun motif de refus ne survient.

La reconnaissance et l'application de la décision doit être refusée si

1. elle portait atteinte à l'ordre public hongrois,
2. si la personne contre qui la décision a été prononcée n'a pas participé à la procédure parce que la convocation et l'acte introductif d'instance ne lui avaient pas été distribuées à son domicile ou à l'adresse de son lieu de résidence habituel dans les règles et dans des délais lui permettant de préparer sa défense.
3. la décision a été adoptée au terme d'une procédure qui portait grièvement atteinte aux principes fondamentaux du droit hongrois de la procédure civile
4. avant d'engager la procédure dans le pays étranger, un procès a été intenté sur le même fondement, en vue de l'obtention des mêmes droits et sous les mêmes conditions (litispendance)
5. la question est une chose déjà jugée.

Les décisions prononcées à l'étranger ne peuvent pas être reconnues en Hongrie si le tribunal hongrois a une autorité exclusive au sujet de l'affaire.

Les décisions adoptées dans des affaires où l'autorité judiciaire du tribunal hongrois est exclue doivent être reconnues sauf si elles mettent en péril l'ordre public hongrois, si elles portent atteinte au droit à la défense ou si elles portaient atteinte à la mise en oeuvre des principes fondamentaux du droit hongrois de la procédure civile.

La reconnaissance des décisions émanant d'un pays étranger est automatique si les conditions préalables sont remplies. Dans ce cas, les décisions doivent être appliquées en conformité avec les règles de la loi sur la mise en application des décisions judiciaires. La question de la reconnaissance est examinée par les tribunaux ou les autorités administratives au cours de la procédure desquels la question de la reconnaissance a été posée. La partie concernée peut solliciter une procédure à part, prévue à cet effet, pour obtenir la reconnaissance d'une décision émanant d'un pays étranger qui le concerne.

Le droit hongrois exclut la révision au fond, ainsi les décisions prononcées par une autorité étrangère ne peuvent pas être revues quant au fond.

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

D'après la conception en vigueur, l'application d'un droit étranger droit être écartée s'il se heurte à l'ordre public hongrois. Dans ce cas, il faut appliquer le droit hongrois à la place du droit étranger écarté. Le droit étranger ne peut pas être écarté pour la seule raison que le système socio-économique de l'Etat étranger diffère de celui de la Hongrie. (art 7 Décret-loi sur le droit international privé.)

En ce qui concerne la violation de l'ordre public, le système de droit hongrois estime qu'elle est de caractère exceptionnel et défensif, sert à la protection de l'ordre juridique existant et n'est pas utilisable à des fins discriminatoires.

On peut mentionner comme exemple la disposition du Code civil hongrois aux termes de laquelle la capacité de jouissance est générale, égale et sans condition, ou la disposition selon laquelle le contrat et l'acte unilatéral restreignant la capacité d'exercice de même que le droit de la personnalité sont nuls. Dans de tels cas, le décret-loi n'empêche l'application du droit étranger que dans l'affaire concrète.

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

L'enregistrement des naissances, des mariages et des décès à l'étranger auprès des autorités hongroises est géré par la Direction Générale des affaires de la citoyenneté du Département de l'immigration et de l'identité nationale. Les ex-époux vivant à l'étranger peuvent aussi initier au consulat l'enregistrement en Hongrie d'une dissolution de mariage prononcée à l'étranger.

Le seul moyen de publicité est l'acte de mariage qui porte une mention en marge sur le divorce et l'annulation du mariage. Le divorce ne fait pas l'objet de mentions sur d'autres actes de l'état civil.

A défaut de mention sur l'acte de mariage, la preuve du divorce est apportée par une copie du jugement muni de la clause « définitive », délivrée par le tribunal compétent.

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

La publicité n'est pas obligatoire.

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

Sans objet.

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

ITALY

Italy

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The main sources are:
- the law 1 December 1970, n. 898 (so called Law on Divorce) as modified by the law 1 August 1978, n. 436 and more extensively by the law 6 March 1987, n. 74;
- the law 14 May 2005, n. 80;
- and the law 8 February 2006, n. 54.

A reference to dissolution of marriage (*scioglimento del matrimonio*) is made in art. 149 of the Civil code (issued in 1942). Separation is regulated by art. 150 ff. of the Civil Code as modified in 1975 (thorough the law 19 May n. 151) and in 2006 (8 February 2006, n. 54).

2. Give a brief history of the main developments of your national divorce law

The Italian Civil code passed in 1942 - still in force, although extensively modified - did not envisage divorce but only personal separation, in the framework of a very traditional conservative family model. In 1948 the Italian Constitution came into force, introducing equality between spouses and between legitimate and natural offspring - principles which openly clashed with the Code rules. Divorce was introduced in 1970, arousing a huge debate in both society and politics, and was followed by a referendum won by a majority of "no" to the abrogation of the law amounting to 59,3% of the voters. In 1975 a comprehensive reform of family law was passed (law 19 May n. 151) not directly concerning divorce law - which was not however inserted in the Civil code - but altering the old rules of the Civil Code and providing for a family model where was much more coherent with the Constitution.

The Italian law on divorce was altered for the first time in 1978 (1 August 1978, n. 436); then in 1987 (shortening the time spouses had to be legally separated before applying for divorce – from five to three years: law 6 March 1987, n. 74); in 2005 (thorough the law n.

80 of 14 May, introducing new procedural rules); and in 2006 (law 8 February 2006, n. 54 introducing new rules for children custody in separation and divorce).

In the Italian statutory law the word "divorce" (*divorzio*) is never employed. Rather than that, it is used the expression "scioglimento del matrimonio" which includes both the dissolution of a civil marriage and the cessation of the civil effects of a marriage stipulated according to the Concordat (*cessazione degli effetti civili del matrimonio concordatario*). To understand this, please remember that the Italian legal system includes a Concordatarian marriage beside the civil marriage. A Concordatarian marriage at one time produces its binding effects in both the legal systems of Italy and of the Holy Seat, which however considers marriage to be indissoluble. Therefore, a "scioglimento del matrimonio" declared by a civil Italian court can only dissolve the civil Italian part of the marriage, leaving the two spouses still married against the Catholic Church.

3. Are prospective reforms currently under consideration?

The Italian Parliament is currently considering two law projects which should shorten from three to one year or to six months the length of the personal separation before the divorce. As we will see later (answer n.29), separation is in far most cases the necessary condition to obtain divorce.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

Divorce is the only ground envisaged by the Italian legislation. However, the exequatur (*delibazione*) of a decision of an Ecclesiastical Court declaring the marriage to be null can also have the effect of dissolving the marriage. Of course this may concern only Concordatarian marriages (see before answer 2).

5. If any, provide statistical data regarding divorce and legal separation?

The most recent data supplied by the Italian Central Institute for Statistics (Istat) are referred to 2010 (data published on 12 July 2012). In that year separations were 88.191 and divorces 54.160, with an increase of 2,6% as for separation and a decrement of 0,5% as for divorces in comparison to the year before. On the whole, however, separations and marriages increase steadily: in 1995, every 1.000 marriages there were 158 separations and 80 divorces; in 2010 we find 307 separations and 182 divorces (approximately one third of the marriages). A sensible difference in the number of applications exists between the North and the South of the country.

The medium length of a marriage ending in a separation is 15 years (18 in the case of divorce). The medium age of those applying for separation is 45 for the husband and 41 for the wives. The medium age at the petition for divorce is 47 for the husbands and 44 for the wives. These values are growing because Italians tend to marry when they are more and more grown up: only one marriage out of four nowadays concerns spouses who are both under 30 (precisely 22,9% of the marriages in 2010).

It is worthwhile to note that one of the newest phenomenon in Italy in this field is the increase of the number of separations involving at least one spouse over sixty: from 2000 to

2010 these separations have passed for men from 5,9% to 9,9% of the total number of separations, and for women from 3,6% to 6,4%.

Most of the proceedings are consensual (in 2010, 85,5% of the separations and 72,4% of divorces had such character). Judicial contentious separations are more frequent in the South and when both spouses have low level of education. Cases involving children were 68,7% of the separations and 58,5% of the divorces.

With reference only to separation (as I have no similar data for divorce) I may add that people with a hight level of education have a more distinctive propensity to separate than those who have low levels. For instance, in 2010 Istat has registered 4,4 separations out of 1.000 men who have a university or a high school degree, and 1,3 separations out of 1.000 men having only basic school degree. Similar proportion can be found among women (4,5 among women with university or a high school degree, and 0,7 among the others). It is however interesting to note the high percentage of homogamy showed by the Italian couples: 60,8% of the separated pairs have the same school degree.

Marriages between an Italian citizen and a person of different nationality, after many years where their number has been steadily growing, have begun to decrease: in 1995 they were 4,8% of the total number of marriages, in 2008 they were 15%, and in 2009 (latest available data) 13,9%. This must be connected with the passing of a rule (law 2009, n. 94) requiring the would be spouse to exhibit not only the traditional permission to marry (*nullaosta*), but also a document stating that the holder is staying regularly in Italian territory. But this rule has later on been declared unconstitutional by the Constitutional court (sentence n. 245 of 2011). We will see, as soon as more up to date date will be available, if the growing upward trend in marriages of spouses of different nationality has just been interrupted for a while or a new trend has established.

At present, data on separations in this kind of couples show a slow tendency to grow, with a drop in 2010: separations were 4.226 in 2000 (9,2% of the total number of separations), and 7.536 in 2005, with an increase of 76,7%. In 2010 separations of mixed couples were 7.173 (8,1% of the whole). Divorce, on the contrary is rising (1.940 divorces in 2000, 4.163 in 2010 (equal to 7,7% of the total).

More data – some dating back to 1862, when Italy was politically unified - can be found at the address: http://seriestoriche.istat.it/ (in Italian and in English).
Finally and of course according to my opinion, however, in order to understand the actual meaning and role of both marriage and divorce in the Italian society, statistic data on marriage and divorce should be linked to the massive increase of the number of cohabitations and the big decrease of the number of Concordatarian marriages.

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

Marriage is not allowed to same sex couples. The Italian national law does not even provide for a register of partnership (same sex or different).

B. Conflict of Laws

7. How is marriage defined in your national law?

Italian national law does not define marriage, not even in the 1942 civil code.

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

The law 31 May 1995, n. 218 on international private law regulates the choice of the law applicable to spouses. Under its art. 31, legal separation and divorce are governed by the national law of both spouses; if they are of different nationalities, separation and divorce are governed by the law of the State in which the couple is mainly located, with the exception that, if the foreign law (i.e., the law of the State where the couple resides) does not provide for legal separation or divorce, the Italian law shall prevail and be applied. The Italian law is anyway always applicable in the case one party is Italian, or the wedding was celebrated in Italy (art. 32).

Therefore, the Italian discipline not only meets the uniform rules set up by Art. 5 of the Rome III Regulation, but also expands its range of application by providing the spouses the chance of applying the Italian law whenever the wedding took place within the Italian territory, regardless of any other international private or EU rule.

It is fundamental to underline that the law n. 218 resolves at first hand the conflict of laws above, with the result that spouses can not designate any law but the one detected by its articles 31 and 32.

In conclusion, and to answer question n. 8, since under the Italian international private law the choice of the applicable law is not upon the spouses, no compulsory form is prescribed. Art. 7 of the Roma III Regulation is therefore the only valid and binding rule applicable in accordance with the Italian legal system.

Consent to the agreement must in any case be free from the usual vices of consent (violence, mistake, malice).

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

All these three kinds of marriage are void under Italian law, as they are considered against public order.

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

11. Is parties' will taken into account in order to determine the applicable law for divorce?

12. If parties may choose the applicable law, how shall this choice be expressed and when?

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

The financial consequences of divorce are disciplined by law 1970 n. 898 as modified by the law 1987, n. 74; by the Hague Conventions 2 October 1973 and 23 November 2007, and the Protocol 23 November 2007; and by the Regulation (CE) n. 4/2009.

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

Matrimonial assets settlements are disciplined by the same sources listed in answer 13

15. What is the applicable law for parental responsibility?

Parental responsibility is ruled by the Italian Law 31 May 1995, n. 218 (which in the art. 31 refers to the national law of the child) and by the Hague Convention of 5 Obtober 1961.

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The same sources listed in answer 15 apply to answer 16.

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

Yes, he is obliged to follow the conflict of law rule.

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

The issue of coming to know the foreign law rules which the Italian judge should apply is a debated issue nowadays in the country. There is actually no central information agency, and

therefore each judge must look for the foreign rule, making use for instance of the web sites of the states which have them. In other cases he or she can make private researches.

Foreign judges who need to know the Italian statutory law now in force can refer to the site www.normattiva.it, whose language however is unfortunately only Italian.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

Divorce can be applied for directly only in some very specific cases (see later answer n. 21). When those conditions apply, there is no time limit to file a petition for divorce.

However, the far most common condition to apply for divorce is personal separation, which must have lasted for three years (starting to count from the hearing the spouses have first appeared in front of the judge in the separation proceeding). Personal separation can be asked for any time after the marriage, without any limitation.

The three years period is nowadays under discussion, and there are bills in Parliament aiming at reducing it.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

Consent to the separation expressed by a person who has been declared interdict for medical reasons (*interdetto giudiziale*) can be annulled by the court, while persons who have been declared interdict for other reasons (*interdetto legale*) can effectively consent to their own separation.

Disabled persons (*inabilitati*) and emancipated minors can effectively apply for personal separation. Only if separation includes agreements exceeding ordinary administration, the guardian will have to be involved.

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

According to the law on divorce (art.1 law 1 December 1970, n. 898), grounds for divorce are: "the impossibility of keeping or reconstructing the community between the spouses", AND the presence of one of the following conditions:

(civil grounds:)

a) personal separation
b) unconsummated marriage
c) change of sex (after a judicial decision ordering to modify the Civil Status Register
d) divorce obtained by the other spouses who is a foreign citizen

(criminal grounds:)

a) sentence to life imprisonment or to detention for more than 15 years
b) conviction to sexual crimes
c) attempted, committed or repeated crimes against one's own family members
d) when the spouse has been discharged for being totally insane (*vizio totale di mente*) or for prescription from the crimes listed above under letter f) and g).

For the effect of this rule, divorce in the Italian legal system follows the evaluation of more than one criteria. Therefore, it is not correct to say that irretrievable breakdown is the sole ground for divorce, because it is a necessary condition of it, and it must in any case be associated to other factual requisites, namely those listed in letters from a) to h) of the article above.

Ground for divorce are instead multiple, although the alternative is not between "Divorce by consent", "Divorce on the ground of irretrievable breakdown of marriage", and "Divorce on the ground of fault" as it seems implied by questions 29-42 of the questionnaire. I will then answer only the questions which make sense as for the Italian legal system, trying to let the whole framework to stand out.

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

k) Is separation sufficient to establish irretrievable breakdown?
l) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

In the years 1980-1999, according to Istat, 98,3% of the total number of divorce were based on personal separation. I have not found more recent data on this.

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

Divorce by consent is not envisaged by the Italian law. Divorce is always the result of a court decision issued when the judge has determined that the community of life between the spouses is irretrievably broken (the wording of the Italian statute is slightly different from this) (see before answer 21).

31. Must the spouses be separated before introducing the claim? If yes, for how long?

Separation is one of the pre-requisites of divorce (see above, answer 21). Spouses must have been separated for three years, starting to count from the hearing the spouses have first appeared in front of the judge in the separation proceeding

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

It doesn't apply to Italian law

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

It doesn't apply to Italian law

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

The law on divorce does not address the issue of the means through which the judge must satisfy himself or herself that the breakdown is irretrievable. It is prescribed however that during the first hearing the judge will listen to both parties, separately and then together. This will allow him or her to decide on that point.

Vast part of the legal doctrine, anyway, is convinced that the very fact of introducing a petition for divorce (even if this is the act of only one of the two separated partners) shows that "the community between the spouses" cannot be kept or reconstructed.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

Consent is not taken into account as such. But of course if the petition is a joint one, then consent of both spouses is to be implied.

36. How is separation between spouses taken into account regarding irretrievable breakdown?

k) Is separation sufficient to establish irretrievable breakdown?

As said before (answer 21), separation is one of the pre-requisites of divorce, but it is not sufficient to allow divorce. Beside that it is in fact necessary that the judge checks "the impossibility of keeping or reconstructing the community between the spouses".

l) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

Spouses must have been separated for three years, starting to count from the hearing the spouses have first appeared in front of the judge in the separation proceeding. This period of time is not interrupted by a momentary reconciliation of the parties, even if there are sexual intercourses between them (there are many decisions in this sense).

On the contrary, when the separated spouses start living together in permanency and they "reconstruct their family society" (thus Cassazione civ. 9 January 87, n. 72), if they separate a second time, then the period of three years starts running again from their second separation.

De facto separation is irrelevant to ground a divorce cause.

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

This question does not apply to Italian law, as - see above answer 21 - divorce by consent is not foreseen and fault is not, as such, a ground for divorce. Faulty behaviour is however surely relevant in ascertaining that the community between the spouses is broken irretrievably, and in the personal separation proceeding can lead to the establishing of an "addebito" (a charge) on the part of the faulty spouse.

It might be added here that the Italian law provides for two different kinds of proceedings for divorce: a contentious one, where the plaintiff is only one of the spouses, and a joint one, which is applied for by the two spouses jointly. In consideration of this, it may well be that a contentious proceeding is converted into a joint one or viceversa: for instance in 2009, 13,4% of the separations, and 14,7% of the divorces changed their nature, more frequently from contentious to joint than the other way round.

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

As said before (answer 37) fault is not, in itself, a ground for divorce. Faulty behaviour is however surely relevant in ascertaining that the community between the spouses is broken irretrievably, and in the personal separation can lead to the establishing of an "addebito" (a charge) on the part of the faulty spouse.

The maintenance issue in the divorce (see later answer 62) is not related to fault but to the need of the ex-spouse.

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

If the behaviour of a spouse causes a damage to the other, according to the art. 2043 of the civil code (concerning general civil responsibility) that behaviour may be considered as a tort, and can ground a cause of action for damages. In other words, fault is irrelevant in the divorce proceeding, but if it causes a damage then, according to the general law of civil responsibility, this must be compensated though a different legal proceeding having the characteristics of a classical action in tort. These provisions have been very recently introduced by the Italian case law (among many decisions, I will only quote Cass. civ. 15 September 2011, n. 18853).

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

Before marriage or during marriage, Italian spouses can not settle the consequence of their separation or divorce, as prenuptial agreements are void.

When however the spouses have actually decided to separate, it is possible for them to write down an agreement regarding the consequences of their separation. The judge will then control the agreement especially with regards to the involved children's rights. If he or she approved it, then the agreement will be endorsed in the separation sentence (art. 155 paragraph II of the Civil code).

As for divorce, the separated spouses in the joint procedure for divorce can propose a settlement which may be different from their separation agreement. Here again the judge will have full power of control over the provisions.

44. If yes, may the judge scrutinize the spousal agreement?

The judge is under a statutory duty to control the agreement.

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

The judge can directly alter the spouses agreements in the interest of the couple's children and whenever he or she thinks than the provisions or some of them are against the interest of the weaker ex-spouse.

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

Between spouses, separation causes a suspension of all the duties deriving from marriage, with the exception of the obligation to financial support which may originate to a duty to maintenance or to alimony. Rules have been worked out in a very detailed way mainly through judicial decisions.

Italian laws (both statutory law and case law) on the subject of economic solidarity between ex-spouses are on the whole quite diverse in the case of personal separation and in that of divorce . On the contrary, rules about parent-child relation are the same in separation and divorce. The law 8 February 2006 n. 54, in fact, providing rules on shared custody (*affidamento condiviso*) in personal separation, expressly applies also to divorce (art. 4 of that law).

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

Marriage is broken when the decision is passed. That decision must then become *res iudicata* (*sentenza passata in giudicato*), which means that it cannot be appealed and is therefore definitive.

The divorce sentence must be delivered to the Registry of the Civil Status to be registered.

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

After divorce the ex spouses become free again, and the Register of the Civil Status refers to them as holder of "stato civile: libero" (free). The man can remarry as soon as he wishes, while the woman must wait three hundred days counted from the sentence date. This time

limit does not apply when the divorce has been granted on the reason that the marriage had not been consummated, or the divorce has been applied for after a personal separation (art. 3 n. 2. lett. b and f) of the Law on divorce 1970, n. 898. In these cases the woman can remarry at once.

Ex-spouses can surely remarry each other. But it not clear - because the legislator is silent about this - whether a bond of affinity continues to exist between one ex spouse and the relatives of the other. This might be relevant to the existence if a duty to support. The case law on this subject is not consistent.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

According to the civil code (art. 143 bis) the married woman "adds" the husband's surname to her own. She should thus bear two names. This rule is not followed in real life because Italian women nowadays just go on using only their own family name.

Anyway, the Law on divorce, as altered in 1987, declares that: the divorce woman loses the right to use the man's name; she can however ask the Tribunal to be allowed to use her ex-husband's name when there is an interest to that or her or of the issue which is worth of protection; this decision can be reformed for particularly serious reasons, when asked by any of the interested parties (art. 5 law 1970, n. 898).

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

A) *Citizenship*.

Lacking statutory rules and case law, the answer to this question is uncertain. The prevailing legal doctrine thinks that divorce does not cause the loss of citizenship, as marriage with an Italian citizen is not the unique condition to gain Italian citizenship. According to the art. 5 of the law 5 February 1992, n. 91, in fact, the spouse of an Italian citizen acquires citizenship:

a) after having legally resided for at least six months in the Republic territory or
b) three years after the marriage, provided there has been no legal separation or dissolution of marriage between the spouses.

B) Residence permit.

According to the art. 12 n. 1 of the Dlgs 6 February 2007, n. 30, the divorce or the annulment of the marriage of a citizen of the Eu have no effect on the residence permit of the members of his or her family who are citizen of a member state, provided they have gained the right to a permanent stay (art. 14 of the Dlgs), or are able to fulfil the detailed conditions established in art. 7 of the same text (for instance, they are self-employed or salaried workers, or they have sufficient means to maintain themselves).
Similarly, the divorce or the annulment of the marriage of a citizen of the Eu have no effect on the residence permit of the members of his or her family who are NOT citizen of a member state, provided they have gained the right to a permanent stay, or are able to fullfill one of the following conditions:

a) marriage has lasted at least three years, one of which in the national territory;
b) the spouse who is not Eu citizen has custody of the couples' children;

c) the interested person is the victim of a crime against the person which has been perpetrated within the family;
d) the spouse who is not Eu citizen holds a right to visit a minor child.

(Please note that the actual text of these rules is very detailed and I have summarized them in the interest of clarity and brevity.)

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

Parental responsibility and residence are not connected in the Italian law of divorce. The law 8 February 2006, n. 54, on the theoretical basis that the minor has to right to preserve a relation with both his or her parents even if separated or divorced (the so called "diritto alla bigenitorialità"), has introduced the new institution of "shared custody" (affidamento condiviso). It is not fully clear what is the difference between the *affidamento condiviso* and the former institution of *affidamento congiunto* (joint custody), especially given that judges are applying the same precedents to both.

According to the art. 155 paragraph I of the Civil code, as altered by the cited law, "even in the case of personal separation of the parents, the minor had the right to maintain a balanced, prolonged relation with both of them, to receive care, education and schooling from both, and to keep meaningful relations with the ascendants and the relatives of both family branches".

Coherently, "parental authority (*potestà genitoriale*) is exercised by both parents...The decision of bigger interests for the children are taken by joint agreement by the parents, taking into account the abilities, the aptitudes, and the ambitions of the children" (art. 155 paragraph III quoted before). In case of disagreement of the parents, the judge will take the appropriate decision.

In the year 2010, according to the statistics of the Istat, shared custody has been granted in 89,9% of the separation cases obviously involving couples with children under age, and in 73,8% of divorces.

52. Does divorce produce automatic effects regarding parental responsibility?

Divorce does not produce any automatic effect on parental responsibility or authority. On the contrary, all the effects must be issued by the judge taking into account the peculiarities of each case.

53. Can the exercise of parental responsibility be subject to a parental agreement?

No. Decisions in the matter of parental responsibility are taken by the judge. Parents can however make agreements which the judge will "take into account" as for the exercise of

parental authority (art. 155 paragraph II) and the child maintenance (art.155 paragraph IV civil code).

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

The judge is positively vested with power to organise the exercise of parental responsibility, but only in limited way. It is the law - not the request of any of the parents - which give him or her such power.

According to art. 155 paragraph II of the Civil code, the judge "makes provisions about children with exclusive regard to their moral and substantial interest. He or she gives priority to the possibility to put minor children into both parents' custody; otherwise the judge decides to which of them the child is entrusted; the judge determines the times and the modalities of the child's stay with each parent, establishing the way and the amount of their contribution to maintenance, care, instruction and education of the children. The judge takes into account the parents agreements if they are not contrary to the children's interest".

It must be noted that art. 155 applies both to separation and to divorce (ex art. 4 of the law 8 February 2006, n. 54).

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

Given that the law imposes shared custody to both parents as a general rule, entrustment to only one parent is nowadays not frequent in Italy. In 2010 (four years after the passing of the law), shared custody was granted in 89,8% of the cases.

Any modification to the shared custody rule must be justified with serious reasons. According to art 155 bis paragraph I, the judge may allow custody to one parent when he or she is convinced that it is against the child's interest to be entrusted also to the other parent. In the same sense, the Court of Cassation: "in order to depart from the rule of shared custody, it is necessary that one of the parents shows open deficiencies in his or her education competencies so that the granting of custody to that parent would result in a damage to the child" (Cass, civ. 17 December 2009, n. 26587). In this context, the behaviour of one parent toward the other - as well as their high level of conflict - has no relevance (there are many concurring decisions on this point).

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

Yes, not only they can, but they must (see the text of art. 115 paragraph II quoted in answer 55). The judge will settle the matter with exclusive regard to the children's moral and substantial interest.

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

The actual Italian law envisages only shared custody, allowing custody to one parent when the judge is convinced that it is against the child's interest to be entrusted also to the other parent. Therefore the parents, both having custody of the child, will decide together where the child will have residence.
It is important to note that the actual Italian law gives a special place to family home. Art. 155 quater of the Civil code, as modified by the law 8 February 2006, n. 54, states that " the enjoyment of the family home is attributed taking into primary account the children's interest". This rule applies also to unmarried couples. In this way, the law establishes a link between the child and his or her home, which bears on the decision on child's residence.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Parents may make arrangements which the judge will eventually follow if "they are not against the children's interest" (art. 155 paragraph II, already quoted). The judge has full power however to disregard them, or to change them.

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

Yes, there are. The more severe of them is foreseen by art. 330 of the Civil code: "the judge may declare to be decayed from parental authority the parent who violates or neglects the duties connected to it, or abuses of the related powers to his or her son's prejudice". In other cases "when the conduct of one of both the parents is not such to cause the decay foreseen in art. 330, but it is however harmful for the child, then the judge, according to the circumstances of the case, may take convenient measures. The judge may also arrange for the child's removal from home or the removal of the parent or the cohabitant who mistreat or abuses of the child" (art. 333 of the Civil code).

Recently, the law 2006 n. 54 has introduced art 709 ter of the Code of civil procedure which runs: "in case of serious breaches [of the rules on custody] or in case of acts which causes damage to the child, or hinder the correct execution of custody, the judge can modify the actual provisions [on custody] and can:

1) warn the parent in default;
2) order the parent in default to pay compensation in favour of the minor;
3) order the parent in default to pay compensation in favour of the other parent;
4) order the parent in default to pay a disciplinary sum varying from 75 Euros to 5.000".

Apart from these statutory rules, it may be interesting to note that in the last years the Italian case law has been very active in promoting new categories of damages which can lead to a compensation, even in the field of the parent-child relation: non-patrimonial damage, biological damage, existential damage.

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

The personal and the financial consequences of the marriage breakdown are dealt with in the same proceeding.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

In the requested conditions exist, in the Italian legal system spouses may be entitled to:
- maintenance
- a right to live in the family home
- a rights on reversionary pensions
- a right on the severance pay (*indennità di fine rapporto*)

No compensation or damages are allowed in the divorce proceeding. Of course it is possible to claim damages in a different action based on civil responsibility.
In 2010, maintenance has been assessed only in 5,9% of the total number of divorces in favour of the spouse, in 31,6% in favour of the issue, and in 5,8% in favour of both spouse and issue.

The medium amount of the contribution - referred to the same year - is 444,9 Euros per month for the spouse and 458,7 Euros for each son or daughter. In practice, the amount is lower in the South and higher in the North. Just to give an idea, the maintenance for one child is 520,3 Euros in the North-West and 413,4 Euros in Sicily and Sardinia.

On the whole, 56,6% of the divorces (30,2 of the divorces with children) do not include any economic contribution.

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

The request of maintenance can be claimed both in the original petition for divorce and in the course of the proceeding.

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

After divorce, maintenance may be claimed only when, according to art. 9 of the Law on divorce, justified reasons have turned up. These reasons may only be connected with the fact that the claimant has lost adequate means for life or it is now impossible for him or her to earn them for objective reasons (see for instance Court of Cassation 24 September 2002, n. 13860).

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

Maintenance must be specifically petitioned for (for instance Cass. civ. 26 September 1991, n. 7203). If none of the parties does so, the judge will not grant it.

According to the case case, the judicial decision on maintenance consists of two steps. The first is the evaluation of the applicant's requisites, following the art. 5 of the Law on divorce: maintenance can be granted only when the spouse has "no adequate means or it is anyway impossible for him or her to earn them for objective reasons". Adequate means has been constructed as meaning "adequate means to keep up a standard of living which is similar to the one enjoyed during marriage" (many decisions in this sense).

The second step - according to the same article - is the estimate of the amount of maintenance: to this aim, the judge has to consider "the conditions of the spouses; the reasons of the decision; the personal and economic contribution given by each of them to the family running and to the building of a personal or a common patrimony; the income of both". These elements must be related to "the marriage length" and may lead to a refusal of the maintenance petition and therefore to discharging a spouse from providing allowance to the other (for instance see, among many other concurring decisions, Cass. civ. 11 November 2009, n. 23906).

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

Maintenance can be refuses if the applicant does not possess the requisites listed in art 5 of the Law on divorce (see answer 65).

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

Not directly. Personal assets are relevant in the decision about the existence of "adequate means" or the possibility to acquire them (again art. 5 of the Law on divorce), in relation to the standard of live enjoyed during marriage (see also answer 65).

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

The liquidation of matrimonial assets is not a direct effect of divorce because in the Italian legal system the dissolution of the community property regime takes places at the moment of the personal separation of spouses. On the contrary, rules on family home following divorce and property law rules are strictly interrelated (see later answer to question 71).

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

Grounds for divorce do not impinge on the awarding of the maintenance, but only in the determination of its amount ("having taken into account ....the reasons of the decision" so runs art. 5 of the Law on Divorce).

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

Maintenance usually takes the shape of a periodic assignment of money from one ex-spouse to the other but the two can agree that a lump sum of money is paid one and for all by the obliged ex-spouse. In this case, no other economic request can be presented in the future. The judge must be satisfied that this is an equitable (*equa*) solution (art. 5 Law on divorce).

Payment in one solution depends on the agreement of the parties, and is not related to grounds for divorce.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

In the Italian legal system of today the allocation of the family home is probably the most controversial, debated issue of the law of divorce. This is probably rooted in the peculiarities of the housing market and policies of the country.

Art. 6 n. 6 of the Law of divorce states that the "occupancy (*abitazione*) of the family home is due to the parent who has the custody of the children or with whom they are living after having reached majority. In any case, to the aim of the assignment, the judge will have to evaluate the economic conditions of the spouses and the reason of the decision, and will have to favour the weaker spouse".

This provision - with its bulky case law - is still in force, although the subsequent law 8 February 2006, n. 54, introducing shared custody of the children, has issued new rules based on a different hierarchy of value. Thus, art. 155 quater of the Civil code now states that "the enjoyment of the family home is attributed taking primary account of the children's interest. When regulating the economic relation between the parents the judge will take into account that attribution, also considering the title of ownership, if there is any. The right to enjoyment of the family home expires if the assignee does not live or stops living permanently in the home, or cohabits, or gets married again".

In the new provision, therefore, the family home is bound to the interests of the children who, by the way, must be sons and daughters of the divorcing partners together (Cass.civ. 2 October2007, n. 20688). It may be added that according to the Constitutional Court the loss of the family home does not follow automatically from a new cohabitation or a re-

marriage of the assignee, but must be subordinated to a judgement of its conformity to the children's interest (Constitutional Court 30 July 2008, n. 308).

The allocation of family home is not part of the maintenance allowance (according to several decisions of the Cassation, see e.g. Cass. civ. 17 December 2007, n. 26574). The expenses related to the home, including the expenses for the condominium administration, must be paid by the assignee.

The assignment must be registered following art. 2643 Civil code, and it is an overriding right toward third parties after art. 2644 of the Civil code.
The meaning of family home is not defined by any statutory instrument, but case law constructs these words as referring to the home where the spouses had their last residence together.

In conclusion, the answer to the question is that Italian law does allow the judge to allocate the family home for property or renting, but for the use and personal enjoyment of the ex-spouses and the couple children's.

As for statistics, date referred to 2010 show that the family home is allocated to the man in 14,2% of divorces and to the woman in 36,3% of the cases; most of people, however (amounting to 48,5%) go and live in two different homes. Another 1% of cases find other non specified solutions.

It might be added that, according to Istat date referred to 2009 (but published in 2011) those who have changed their homes after divorce have gone back to their parents' home (32,5% of the men and 39,3% of the women) or have rented a flat or a house (36,8% of men and 30,5% of women).

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Yes, spouses can determine by agreement both the amount and the modes of fulfilling their financial obligations, but the agreement must be ratified by the judge decision. This happens usually in the proceeding for divorce based on joint application (see art. 4 paragraph XVI of the Law on divorce).

The judge, "having heard the spouses, having verified the existence of the legal requisites and having controlled that the conditions [proposed by the spouses] meet the children's interest, decides through sentence" (*sentenza*): art. 4 quoted before.

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

Spouses are under a duty of full disclosure. Art. 5 paragraph IX of the Law on divorce states in fact that "spouses, at the hearing in front of the President of the tribunal, must present their own income tax declaration, and any document about their income and their personal and common patrimony". In some cases "the Tribunal orders investigations on the income, the patrimony and the life standard, if necessary with intervention of the Tributary police".
Case law confirms that the tax income declaration does not amount to full evidence of the real economic condition of a person, and that other parameters must be considered, like the standard of life (Trib. Novara, 23 September 2009).

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

The judge must first satisfy himself or herself that one of the spouses "has no adequate means or it is anyway impossible for him or her to earn them for objective reasons" (art. 5 paragraph VI of the Law on divorce) considering that "adequate means" has been interpreted as means to keep up a standard of living similar to the one enjoyed during marriage (see for instance, among plenty of decisions in the same sense, Cass. civ., united section, 29 November 1990, n. 11490).

When the judge is convinced that a right to maintenance is founded, then he or she must assess the amount of the maintenance. To this aim, the judge has to consider "the conditions of the spouses; the reasons of the decision; the personal and economic contribution given by each of them to the family running and to the building of a personal or a common patrimony; the income of both". These elements must be related to "the marriage length" (art. 5 cited before). According to a uniform case law, the judge will not have to take into account all these elements in every case, but only those which are relevant.

Legal doctrine notes that the criteria listed in art. 5 are not sufficiently defined. The meaning of "the conditions of the spouses" is anyway identified in the whole of their condition, not only economic, but with reference also to their health, age, social position, capacity of work, qualification (Cass. civ. 4 September 2004, n. 17901). The "reasons of the decision", which is also unclear, implies, according to Cass. civ. 9 September 2002, n. 13060, an investigation over the whole of the family life and not only over the decision to divorce. As for "the contribution of both" the spouses, it must be evaluated taking into consideration the patrimony and not only the income of both. This parameter is especially important to assess the maintenance allowance (for instance Cass. civ. 16 July 2004, n. 13169).

In any case, the right to maintenance expires when the assignee remarries (art. 5 par. X Law on divorce).

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

Yes. The amount of maintenance as fixed in the divorce sentence is automatically revised year by year according to the index of devaluation (art. 5 par. 7 Law on divorce).

Apart from this, in other cases the judge may be asked to alter the amount of the allowance because the economic conditions of one or both the ex-spouses has changed. According to the art. 9 par. 1 of the Law on divorce, in fact, the amount may be altered "when justified reasons overcome after the sentence". Here, again, this provision must be coordinated with the criterion of the standard of life during the marriage (Cass. civ. 3 August 2007, n. 17041) and to the need to keep a balance between the conditions of the spouses (Cass. civ. 21 January 2008, n. 1761). This applies both to the improvements as well as to the worsening in the conditions, even when the latter is due to a choice of the obliged person who, for instance, has decided to change his or her job to a less paid occupation (e.g. Cass. civ. 11 March 2006, n. 5378).
It may be interesting to note that many decisions have given relevance - in the silence of the law - to the position of an assignee who benefits of contributions from a cohabitant. In these cases, courts have reduced or even excluded maintenance from the ex-spouse (Cass. civ. 20 January 2006, n. 1179, among many others).

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

The obligation to maintain the child is not expressly related to any of these criteria but rests on parents because of their relation with the issue. According to art. 155 paragraph IV of the Civil code (as amended by the Law 2006, n. 54) each parent must maintain the issue in a way "which is proportional to his or her income; the judge may impose to one of the parents to pay a regular allowance (*assegno di mantenimento)* in order to ensure that the proportionality principle is respected". The allowance amount must consider:

1) the actual need of the child;
2) the standard of living of the child when the parents lived together;
3) how long the child lives with each parent;
4) the economic resources of both parents;
5) the economic value of the tasks fulfilled by each parent at home and in the child's support.

If the information about his or her own economic condition given by one parent to the judge do not appear sufficiently documented, the judge can order the Tributary Police to verify the real situation (art 155 paragraph VI Civil code). In the case of breach of the duty to pay, it is possible for the Tribunal to order the employer of the parent in breach to pay a portion of his or her income directly to the other parent (art. 148 paragraph II of Civil code).

The duty to maintain a son or a daughter does not expire when he or she comes of age, but only when he or she are able to maintain themselves with their own income, or when they are at fault for not having put themselves in the condition of earning their own living (several decisions of the Cassation Court in this sense).

The amount of the *assegno di mantenimento* can be altered at any time.

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

The means provided by the law is the periodical allowance of money, but it might possible, according to art. 155 paragraph IV, to propose different agreements which, anyway, the judge must approve of .

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

Agreements between the parents must always be controlled by the judge, who has the power to alter them directly (art 155 par. IV Civil code).

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

No. The court is the only place where the consequences of divorce can be settled with legal effects.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

The court legally competent is the ordinary Tribunal, composed by three judges. Criteria to indicate the Tribunal competent by territory are: domicile or resident of the defendant; when the defendant is untraceable, domicile or resident of the petitioner; if petitioner resides abroad, any Tribunal of the Republic. Joint applications for dissolution of marriage can be presented to the Tribunal where one or the other spouse has residence or domicile. No special court is provided for transnational proceeding.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

No.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

Alternative dispute resolution is not allowed. As for mediation - according to the art 5 par. III, D.lgs. 2010/28 - the judge can invite the parties to a non judicial attempt to mediate. In practice, this does not happen frequently.

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

Yes. After the first hearing "having heard the spouses, their lawyers, and - when it appears strictly necessary also in consideration of their age - the minor children of the couple, the judge, even without being requested by the parties, through ordinance, takes the temporary and urgent measures he or she thinks fit in the couple's and the children's interest" (art. 4 par. VIII of the Law on divorce).

These measures may concern the family home, provisions on children or spouse maintenance, children custody, and their meetings with the other parent.

The judge may also take measures in case of marital abuse or abuse against children. According to the articles 342 bis and 342 ter of the Civil code (added by the Law 4 April 2001, n. 154), the judge can make protection orders varying from the imposition to stop the faulty behaviour, to the removal from the family home of the same person, and to the prohibition to approach the place where the rest of the family lives.

88. Is appeal available against the divorce order or against an out of court divorce decision?

Yes. The sentence declaring the dissolution of marriage in the contentious procedure can be appealed in front of the Court of Appeal and then before the Court of Cassation. Those who are legitimated to contest the judgement are the spouses and the Public Ministry, the latter only with reference to the part of the decision concerning the patrimonial rights of the minors or of the persons who are legally incapable.

The sentence issued in the joint procedure can be appealed too, but only when the judge has altered the conditions presented together by the two spouses and concerning them.

The Public Ministry can also appellate but again only with reference to the part of the decision regarding the patrimonial rights of the minors or the persons legally incapable.

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene

- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**
  If yes, on which grounds?

The only third party legitimated to intervene is the Public Ministry, who must be informed of the proceeding by the President of the Tribunal from its very beginning, i.e. the deposit of the petition (*ricorso*). If this does not happen, then the proceeding for dissolution of marriage will be null.

The Public Ministry must be notified that an appeal has been presented, but this does not apply when there are no children or they are over the majority age (Cass. civ. 13 June 1985, n. 3552).

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

According to art. 155 sexties of the Civil code (introduced by the law 2006, n. 54), in the proceeding for divorce the judge "disposes...the audition of the minor child who is almost twelve or less provided the child is capable of discernment".

This rule is debated. Some scholars write that it is not clear whether the judge is under a positive duty to hear the child or this is just a possibility. This opinion should no longer be justified as decision n. 22238 of the 21 October 2009 of the Court of Cassation has stated that not to have listened to the minors' opinion amounts to " a violation of the rules on the contradictory and the rules on fair process".

It appears however that minors are not always heard, especially in joint application, where parents agree on their custody and its conditions. The methods of the hearing - as there is no statutory provision on this point, nor any Directive, say from the Ministry of Justice - differ from court to court.

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

z) the termination of marriage,
aa) financial consequences of divorce,
bb) the settlement of matrimonial assets,
cc) parental responsibility,
dd) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

According to the art. 64 of the law 31 May 1995, n. 218, foreign decisions - also those from states which are not members of the Eu - can be recognized when:

a) a - the judge who pronounced the decision was competent according to the Italian rules on judicial competence;
b) b - the petition was brought to the defendant's knowledge according to the law of the place when the case was discussed and the essential rights of the defence have not been violated;
c) c - parties have appeared in court following the law of the place where the action was discussed or the proceeding was declared to be *in absentia* according to the same law;
d) d - the decision become final according to the law of the place where it was pronounced;
e) e - the decision is not contrary to any other decision of an Italian judge, which has become final;

f) f - in front of any Italian judge a proceeding is not pending concerning the same issue and between the same parties, having started before the proceeding in front of the foreign court;
g) g - the content of the decision does not produce effects which are conflicting with the Italian public order.

If all these conditions are satisfied, the foreign sentence is immediately effective in Italy (see also answer n. 93).

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

Public order is a very important debated limit to the recognition of foreign decisions. It is expressly stated by art. 16 n. 1 of the law 31 May 1995, n. 218: "The foreign law is not applied if its effects are contrary to the Italian public order".

The notion of public order has been interpreted by the Italian courts in different ways with the passing of time. Just after the introduction of divorce (1970), courts only recognized foreign decisions which assessed divorce for reasons which where similar to those admitted by he Italian law. After the passing of the law 10 June 1985, n. 301 enforcing the Hague Convention 1 July 1970, public order has been restricted to mean only "the principles which are fundamental and indefeasible in the inner Italian legal system". In particular, most courts have chosen to recognize all the decisions which prove that the couple bond has irreversibly broken, even in case when the divorce has been granted on the reason of mutual consent, which is not admitted in the Italian legal system.

Public order acts as a barrier against the recognition of decision which would introduce rules or institutions which are against fundamental principles of the Italian legal system. For instance, in the case of unilateral repudiation foreseen by many Islamic countries, courts have excluded its applicability in Italy, the main reason being that is infringes the rule of equality between the spouses (see for instance the decisions of the Appellate Court of Milan 17 December 1991, and the Tribunal of Milan 24 March 1994). The judge, therefore, in these case can do nothing else than applying the Italian legislation, namely the law 1970, n. 898.

More recently, this line has been reaffirmed at the highest court level in a case not concerning divorce but personal status. In the case in point, the Italian judge should have applied, for reasons of greatest connection, the Egyptian law which only allows to recognize one's own legitimate sons, with the exclusion of natural offspring. This rule is openly against the Italian principle which allows anyone who has been conceived to be recognized, irrespective of the existence of a marriage between his or her parents. According to the decision 28 October 2006, n. 27592 of the Court of Cassation, therefore, the judge must apply the Italian rule on the subject.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

To be effective towards third parties, foreign decisions on dissolution of marriage must be registered on the citizen's Act of marriage by the Official of the Civil Status. No other publicity is required.

In case the Official refuses, it is then possible to start a proceeding to recognize the foreign decision (*procedimento di delibazione*).

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

95. What are the consequences of registration or lack of registration?

Registration is mandatory. In not registered, the divorce will not have effect in the Italian legal system. The Official of the Civil Status (*Ufficiale di Stato Civile*) is in charge of the proceeding.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

I do not think there are meaningful points in the Italian law on divorce which have not emerged in the answers before. I may however add that from a social point of view the whole of the machinery is time consuming and cause of quarrels between the partners. The need to have recourse to a double step procedure including two different and expensive legal proceedings in court, the requirement to wait three years, the fact that mediation is rare do not help couples to part in the most peaceful way. Maintenance toward the ex-spouse, moreover, consists in most cases of a periodical payment and not in a lump sum, resulting in a continuous source of contacts and discussions.

Another point deserving more attention is related to the condition of women after divorce, who risk poverty in a higher percentage of case (24%) than males (15,3%). According to Istat data referred to 2009 (published in December 2011), most women after divorce live in a family unit with one of more children (35,8% against 7,3% of men), while ex-husbands usually live alone (43% against 25,4 of women) or start a new partnership (32% against 23,3 of women). From the social and economic point of view, women are underprivileged: their economic position after divorce worsens in 50,9% of cases (against 40,1% of men). The percentage is higher for those having children (52,9%).

As for children in divorced couples, the majority of mothers state that their children have not slept at their father's home in the two years following the separation (52,8%); and the 20,1% of them declare that beside that children have not seen their father at all. The relation of the child to the parents and the relatives of the divorced spouse becomes more occasional too, but they are closer to the mother's connections: in 18,6% of cases children's closeness to father's relatives have decreased, while the same applies only in 8,7% of cases in relation to the mother's. It appears also that in 20,7% of the case children's performance at school drops.

In conclusion, these date show, I think, that, apart from legal technicalities which should make divorce easier and more coordinated to the procedure of other countries of the EU, many provisions should be taken by the Italian legislator to let people divorce in less

controversial way, easing the task of the ex-partners - also in their capacity as parents - and especially of the women to go on with their lives.

NETHERLAND

Netherland

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

In case of national divorce the legislation with regard to divorce is laid down in Book 1 of our Civil Code and in the Code of Civil Procedural Law. Besides these two statutes, we do have specific Court Regulations in the procedural regulations, made by the presidents of the family courts and the family sections of the Courts of Appeal (www.rechtspraak.nl/landelijke regelingen). Dutch law is originally based at a combination of old traditional, roman and (from 1804) French law. The Dutch Civil Code dates from 1838. Since World War II all aspects of family law, including Book 1 of the Civil Code, have undergone drastic changes.

New foreign law systems have greatly influenced Dutch family law, especially human rights conventions. In particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has, in addition to other important Conventions and treaties, been of great importance in the development of modern family law. The direct and extensive applicability of Article 8 (the right to respect for private and family life) of the ECHR has been of paramount importance. Since several year our law, especially case law, has also been influenced by the United nations Convention on the Rights of the Child and by European treaties as well as the Hague Conventions. Dutch law is mainly statutory law, but particularly since 1979 and the decision of the European Court of Human Rights in Marckx v. Belgium, judge-made law has become more and more important.

The impact of decisions from the European Court of Human Rights and the International Court of Justice is great, although our Supreme Court (Hoge Raad) in the past years has also reached many very modern and interesting decisions in the field of juvenile law and the law of affiliation, parental authority, child protection measures and custody cases. Judges set aside our law if they thought it was not in accordance with the ECHR or other international instruments.[871]

[871] See also: http://ec.europa.eu/civiljustice/divorce/divorce_net_en.htm

2. Give a brief history of the main developments of your national divorce law

A Brief Dutch history on Marriage and Registration of partnership

After the French occupation (by the emperor Napoleon; from 1804 till 1813) the Dutch legislator wished to make a new civil code. In 1838 the new legislation in The Netherlands entered into force. Book 1 of the Civil Code contains family law. This new Dutch family law has been greatly influenced by the French Civil Code, so the separation of religion and state is one of the main principles. According to Dutch family law only civil law marriages are valid (Art. 1:30); religious marriages may only be solemnized after the wedding before a public registrar has taken place. But family law also contains Roman influences and ancient law. Although this code has been changed several times since 1838, the main changes with regard to marriage are the introduction of the no fault divorce in 1971 and – from 1st April 2001 – the introduction of the possibility for couples from the same sex to marry. So, since that date two (heterosexual, lesbian or homosexual) persons are allowed to marry if they meet the other demands in our family law (see below). It is not allowed to be married with more than one person, although there are several persons in the Netherlands ho are married with more than one spouse (polygamy), but officially this is not allowed.

Now, the Netherlands have a total population of 16.730348 inhabitants in 2012. The total number of marriages and registered partnerships in 2011 was 81.571, mostly between men and women (79.681). In 2011 811 marriages/registered partnerships of two males and 1000 marriages/registered partnerships of two females were solemnized.[872]

In practically all respects marriages for same sex couples are the same as marriage of a man and a woman, but the marriage between a same sex couple will have no effects upon the consequences of affiliation in case a child is born during a marriage of a lesbian couple. However, there is a new bill which – after enactment - will make it possible for the non-biological mother to become legal parent of the child of her female spouse after the birth of her baby or by acknowledgement.[873] Another difference between heterosexual and homosexual marriages is that the international effects of the marriage between a same sex couple differ from the effects of a marriage between a man and a woman.

Since 1st January 1998 the rules for marriage are also applicable for the rules with regard to the registered partnership. The registration of partnership is also possible for two (heterosexual, lesbian or homosexual) persons. The age of consent as regards marriage is 18 for both men and women (Art. 1:31 para 1). An exception is made for those who wish to marry and who have reached the age of 16 and:

- if the woman can show a medical statement of her pregnancy; or
- if she has already given birth to a child (Art. 1:31 para 2).

Dispensation by the minister of Justice is possible in all other circumstances (e.g. in the case of a younger person), though in practice it is seldom granted (Art. 1:31 para 3). It is not

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[872] (Statistics Netherlands: http://statline.cbs.nl/StatWeb/publication/?DM=SLEN&PA=37943eng&D1=399-440&D2=(l-16)-l&LA=EN&VW=T

[873] The Second Chamber of the Dutch parliament accepted this bill at 30th October 2012. The bill is now open for discussion in the First Chamber (Senate). It is almost certain that it will be accepted in the year 2013.

possible to marry if the person involved is mentally disabled and if he is incapable of determining his or her free will or of understanding the meaning of the statement (Art. I:32). A minor (i.e. a person under the age of 18) cannot marry without the parents' consent (Art. 1:35). But if the parents(s) refuse(s) consent, the minor can request the (Family)Court for substitute consent (Art. I:36).

A person under tutelage for reason of mental handicap is only allowed to marry with the consent of the Kantonrechter (Art. 1: 38). If this person is put under tutelage for reasons of dissipation or alcoholism, he has to get the consent of his guardian in order to marry. If he refuses, the Kantonrechter may be requested to give substitute consent (Art. 1:37 paras 1 and 2).

If two persons who are related to each other within the prohibited degrees of consanguinity in the ascending (or descending) line they may not marry. The same absolute prohibition holds well for brothers and sisters. Dispensation by the minister of Justice can be granted for a brother and sister related to each other by adoption (Art. 1:41 paras 1 and 2), but this never occurs.

In the Netherlands marriages (and also registered partnerships) are solemnized in public in the official municipal town hall in the presence of the Registrar and at least two or at most four adult witnesses (Art.1 :63). If one of the parties cannot go to the town hall (e.g. because of illness or imprisonment) the marriage may be solemnized in a 'special building' (hospital or prison). In that case six witnesses have to be present at the wedding, although this is a rather old fashioned rule. It is more and more common that the partners choose to marry not in the town hall of their city, but in a special home, such as a castle, another old building or restaurant. This is possible with the agreement of the local authorities. The Minister of Justice can give permission for a marriage by proxy under special circumstances (Arts. 1:65 and 66). This request for permission hardly ever happens anymore.

The same rules with regard to the solemnization of marriage are applicable in the case of a registration of partnership.

In The Netherlands religious confirmations of marriages can only take place after the solemnization of the civil marriage in the town hall (Art. 1:68). If the priest, reverend, imam or pundit will solemnize a marriage without a previous civil marriage, he can be prosecuted. Of course, it is allowed to marry in the church or mosque after the official solemnization of the marriage has taken place by the Registrar.

New legislation on the rules to marry

It must be noted that the government has sent a new bill (Kamerstukken II, 2012/13, 33 488, nrs. 1-3) to Parliament with regard to the rules to marriage and the registration of partnership. In case this bill will be accepted by both Chambers of Dutch Parliament it will be no longer allowed to marry under the age of 18, unless the pregnant woman of ≥ 16 years old[874] has received a declaration from the judge in which she has been declared major. Marriages and registration of partnerships between relatives in the third and fourth degree (so between uncles, aunts, cousins and nieces) will then only be allowed if they by oath will

[874] Or in case the 16 year old girl does already have a child.

declare that they wish to marry voluntarily and without pressure of others, such as family members.

The solemnization of the marriage
Once the marriage has been solemnized, it can be dissolved in 4 different ways.
According to Art. 1:149 Dutch Civil Code a marriage is terminated by:

- the death of one of the spouses or both spouses;
- by a divorce;
- by a legal separation eventually followed by the dissolution of the marriage;
- by the new marriage or registration of partnership of the surviving partner in case the court has decided that the missing husband/partner is presumed to be dead.
-

Most marriages are dissolved by the death of one of the spouses, but the divorce rate in the Netherlands has gradually increased in the latter part of last century. These days almost one in every three marriages ends in divorce (approx. 33.755 in 2011; about 35.000 children are annually involved).

Almost the same rules are applicable in the case of a registration of partnership. The differences between them are that in case of the registration of partnership the legal separation is not allowed and that the registered partnership can be ended on mutual request by the Public Registrar of the local community of both partners. A solicitor or notary must also sign this request, and the partners must have made an agreement with regard to the consequences of the ending of their registration of partnership.

At 1st march 2009 an end has been put to the so called 'flash divorces'. Converting a marriage into a registered partnership through the Registrar of Births, Deaths and Marriages (followed by an ending on mutual request) is since then no longer an option.[875] Registered partners can end their relationship without going to court, unless they have the joint parental power of the children.

Divorce of the married couple

A divorce may be sought by both partners (on mutual request) or by one of them by petition (Art. 1:150 Dutch civil code). There is only one ground for divorce: the permanent disruption of marriage (Art. 1:151). This ground for divorce does not have to be proved. The courts accept the allegation without evidence. If one of the spouses objects to this, because he or she thinks that the marriage can still be continued, the judge will investigate whether the marriage is "really" permanently disrupted. This will almost never lead to the rejection by the judge of the demand for divorce. The last decade not the divorce itself, but the legal consequences have drawn more attention, such as questions of alimony, joint parental authority, access rights and pension rights.

The marriage in the Netherlands is not terminated by the divorce decision of the court, but by the official registration in the civil Registers. Either parties or one of them can request this registration. After a period of six months without registration the divorce is no longer

[875] This administrative procedure of 'flash divorces 'was ended because it causes considerable practical problems, as such a 'divorce' was not recognised in other countries and it could also lead to alimony problems.

held valid, which means that the spouses will still be married and – at the wish of one or both of them – new divorce proceedings must take place (Art. 1:163).

Alimony rights after divorce

Where one of the ex-spouses does not have sufficient income to provide him- or herself with the necessities of life, nor is in a position to obtain such income, the court can give an alimony order. It has to take into account the needs of the person claiming maintenance and the financial strength of the other party (Art. 1:157).

The present alimony-limit is 12 years[876] after registration of the divorce decision, but in hard cases the court can lengthen this period at the request of the person in need (Art. 1:157 paras 3-5). If the marriage lasted less than 5 years and there are no children born from this marriage, the maintenance-obligation lasts exactly as long as the marriage existed (art. 1:157 paras 1 and 6). The maintenance payments are indexed yearly (Art. 1:402a).

The entitlement to maintenance ceases when the person who has this right remarries, registers as partners or starts living together with another person as in marriage or registered partnership (Art. 1:160). Of course it also ends if the persons involved remarry, of if one of them dies.

The legal Separation and Dissolution of Marriage

For those who believe marriage to be an unassailable institute (e.g. on religious grounds) a legal separation has for a long time been the only solution if the situation at home had become unbearable for the spouses. The legal separation makes an end to the rights and duties of the spouses (art. 1:92a) and makes an end to the total community of goods system, but the marriage still exists. Both parties together or one of them may request legal separation on the same ground as divorce i.e. permanent disruption of the marriage (Art. 1:169). Due to secularisation, the legal separation is hardly used in practice.
At the request of one or both spouses, the judge will decide which one of them will exercise parental authority over the minor children of the couple. The other parent does, in principle, not lose his authority and he/she has an access arrangement. The maintenance rules in case of a divorce also apply in case of a legal separation (Art. 1:169 paras 2 and 3). The legal separation will have its legal effects from the moment the legal separation has been inscribed in the registers of matrimonial acts, held at the district court. After a period of six months without registration, the legal separation is no longer held valid (Art. 1:173 para 3).
If the spouses reconcile, the legal separation ceases to exist and the (sleeping) marriage and its legal consequences revive from the moment they have registered this reconciliation in the register held at the district court (Art. 1:176). Although after such a registration the marriages revives, the validity of legal acts performed during the separation and reconciliation are judged according to the moment they took place (Art. 1:176 para 2).

The dissolution of the Marriage After a Legal Separation

The marriage of legally separated spouses can be dissolved at any time on communal request (Art. 1:181). The same may happen at the request of one of the spouses if the separation has

[876] Until 1995 the ex-partner had to pay maintenance to the other party all his/her life.

lasted for a period of three years without conciliation (Art. 1:179 para 1). This term may be shortened to one year if one spouse cannot be expected to continue the marriage (e.g. in case of misbehaviour; Art. 1:179 para 2). About future pension rights arrangements must be made prior to the dissolution (Art. 1:180).
Whatever the intentions of the spouses were when they requested a legal separation, the situation is no longer a cul-de-sac, but simply a detour of three years maximum to reach the definite termination of an unsuccessful marriage.

New trends in other relationships than marriage

The number of singles is still growing, which can have several causes, such as the choice of people to live as a single, a growing number of divorced persons, widows and widowers, etcetera. As said before, in the Netherlands there are already more than 1 million single parent families and there is a widespread tolerance in our society for unmarried couples. As for people of the same sex who prefer to live together, more homosexual and lesbian couples are living together –- unmarried, married or as registered partners –- on a durable basis, also caring for children. Since 2001, same-sex marriages are officially recognized. In recent years, more lesbian than homosexual couples have got married: nearly 800 versus 600 in 2010. The number of homosexual and lesbian couples living together totalled 57,000 thousand in 2010 (in 2002: about 30,000). One in three couples had their relationships officially registered. Nearly 11,000 thousand homosexual couples were married and more than 6,000 thousand had registered partnerships.

New legislation since 1st March 2009

In 2005 two new Bills have been sent to Parliament. One by mr. Luchtenveld, whowas member of the liberal party in parliament. The other Bill was from our Minister of Justice. Parents whowould like to divorce would be obliged to draw up a so-called 'parenting plan', specifying arrangements concerning care, development and education of their children. In this way, the number of problems arising in relation to divorce and parental access, can be reduced. The Bill, submitted by mr. Luchtenveld, would also make it possible to divorce without going to court in case the two spouses do not have the parental authority of minor children. With both Bills it was assumed that both parents would remain jointly responsible for their children after the divorce. If they should share parental responsibility it is important that well-functioning, verifiable agreements would be made to prevent any future problems from arising. A mediator may be of assistance in drawing up a parenting plan. Such a plan will also provide a framework for the parental obligation to promote closer ties between the minor and the other parent. It is in the child's interest that contact is maintained with both parents. In that Bill it was also proposed that the parent who has no parental authority should also have a right of access to his or her child, according to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) and the United Nations Convention on the Rights of the Child (CRC). After all, both conventions call on governments to promote contact between children and their parents. The parenting plan is part of the divorce application process.

When parents are unable to reach an agreement during their divorce, the court can refer them to a mediator. This will only take place when the court believes that there is a possibility that both parties can reach an agreement. This new development is consistent with the Minister's policy of applying mediation as a way of resolving conflicts for cases where it has a real chance of success.

Not all parents are able to make arrangements on their divorce or to solve conflicts arising after their divorce. In such cases, third party assistance may be required. This can be a known type of mediation. Results from pilot projects on divorce and parental access mediation have shown that mediation has a positive influence on both the handling of the divorce and on solving conflicts concerning the access to children.

Costs involved for spouses in the event of a court referral will be the same as when a mediator is engaged privately. Persons of limited means will have to pay a contribution that will be determined according to the Dutch Legal Aid Act (Wrb). Regardless of income, spouses are entitled to receive two and a half hours if a court referral had been involved. If they need more hours of mediation, that must pay it themselves. Probably this is the reason why mediation is not used in all cases where it might be useful.

With regard to the near future it is expected that we will have the administrative divorce, because the new government announced in their government program that they will come to the possibility to end the marriage by administrative law, so that the judge will no longer have to decide upon the dissolution of marriage by divorce in case both spouses agree on their divorce and they do not have minor children. The question however is how they will allow the ending of marriage in case they still have children older than 18 years, but younger than 21 years, because in that case both parents must support the child till its 21st anniversary. Of course, they can agree (in their divorce agreement) to continue the support their child because of its study.

3. Are prospective reforms currently under consideration?

Yes, the new government (Rutte II) pronounced in their coalition agreement ("Bruggen slaan", Kamerstukken 2011/12, 33 410, nr. 15, p. 27) that it will enable the administrative divorce for married couples if there are no children involved and the partners have reached an agreement.

At present, it is not possible to divorce without a decision by the judge. Besides this, new initiatives have been taken by members of Parliament and by the Section of the Council for the Judiciary to change the system to decide upon the alimony for former partners and for the children. (the berekening of the alimony for children and former spouses/partners).

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

According to article 1:149 Dutch Civil Code a marriage is terminated by:

1. the death of one of the spouses or both spouses;
2. a divorce;
3. a legal separation eventually followed by the dissolution of the marriage;
4. the new marriage or registration of partnership of the surviving partner if the court has decided that the missing husband/partner is presumed to be dead.

Actually, most marriages are dissolved by the death of one of the spouses, but the divorce rate in the Netherlands has gradually increased in the latter part of last century. These days one in every three marriages ends in divorce (approx. 31,000 in 2012).

A divorce may be sought by both partners (on mutual request) or by one of them by petition (article 1:150 CC). In the Netherlands there is only one ground for divorce: the permanent disruption of marriage (irretrievable breakdown of marriage; article 1:151 CC). This ground for divorce does not have to be proved. The courts will accept the allegation without evidence. In the last decade not the divorce itself, but the legal consequences have drawn much more attention, such as questions on alimony, joint parental authority, access rights and pension rights.

The marriage is not terminated by the divorce decision of the court but by the official registration in the civil registers. Either parties or one of them can request this registration. The divorced partners must do this in time, because after a period of six months after the court's decision on divorce without registration the divorce is no longer held valid (article 1:163 BW).

5. If any, provide statistical data regarding divorce and legal separation?

Marriage and registered partnership may be dissolved by death or by divorce. In 2011, a total of 87,756 marriages were dissolved, 55,246 by death and 32.510 by divorce. Dissolution is a straightforward matter since The Netherlands embraces no-fault divorce. The permanent disruption of marriage is the only ground for divorce (Art. 1:151 Civil Code), which does not have to be proved. It is not important how long the marriage has lasted or who is the initiator for the divorce. The courts simply accept the allegations without evidence. Over the last decade, while divorce itself has been relatively uncontested, attention has focussed on the legal thereof, including alimony, joint parental authority, access rights and pension rights. Marriage is terminated by the official registration of the divorce decision in the civil registers within six months after the court decision came into force. Either parties or one of them may request this registration, but registration is essential, since after a period of six months without registration the divorce is no longer valid (Art. 1:163 Civil Code). There is a whole range of agencies and voluntary workers to help the couple and family during and after the divorce, e.g. with legal, financial, social and/or pedagogic help.

At present (November 2012), it is not possible in The Netherlands to get divorced without a judge's decision. However, registered partners who wish to separate can ask the registrar of the local community to dissolve their partnership. This is not possible if they have minor children together. Recently, MP's indicated that they would favour dissolution of marriage by mutual consent if the spouses do not have minor children. It is likely that this reform will be effected in the future since it is consistent with the social-liberal view of the present government and because it will save on judicial costs. In its government plan the new government Rutte II has declared that it will come to the administrative divorce for couples with no minor children.

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

Yes, it does. Dutch Family law has originally (1838) been greatly influenced by the French Code Civil, so the separation of religion and state is one of the main principles. Only civil law marriages are valid (Article 1:30 BW). Before 2001 some (protestant) churches already allowed a kind of solemnization of the partnership of homosexual and lesbian couples.

However, this was not a real marriage, because according to Dutch law only a civil marriage is valid.

Since 1 April 2001 the Dutch legislation with regard to marriage has changed, so that since that date two (heterosexual, lesbian or homosexual) persons can marry. In practically all respects marriages for same sex couples are the same as the marriage of a man and a woman, but the marriage between a same sex couple will have no effects upon the consequences of affiliation if a child is born during a marriage of a lesbian couple. The lesbian partner of the mother will – from the moment of the child's birth - have joint custody if she was married or registered partner from the mother of that child. Another difference between heterosexual and homosexual marriages is that the international effects of the marriage between a same sex couple differ from the effects of a marriage between a man and a woman.

A man or woman can only be married to one other person at a time. The rules for marriage are also applicable for the rules with regard to registered partnership.

Marriage is not allowed to same sex couples. The Italian national law does not even provide for a register of partnership (same sex or different).

B. Conflict of Laws

7. How is marriage defined in your national law?

Although our Civil Code gives many regulations on the solemnization of the marriage, the law does not give a definition of marriage. However, marriage can be defined as the solemnization of the marriage and as the legal status of two partners. Actually, marriage can be defined as the official regulation of the partnership of two persons (a man and a woman, two women or two men). Bigamy and polygamous marriages are not allowed in The Netherlands, although people who came from abroad may have two or more official partners, they are not entitled to take more than one official partner into The Netherlands.

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

The Netherlands have not accepted the Rome III Regulation. Since 1st April 2001 the Netherlands it is allowed for homosexuals and lesbian couples to marry each other. Bigamous and polygamous marriages are not allowed, although the Dutch administration has to accept that foreigners who live in the Netherlands may be married with more than two

spouses. However, according to the Dutch regulation it is not allowed to bring more than one spouse to the Netherlands, so the person who is married with more than one spouse, must make a choice, which one of them he will bring to the Netherlands.

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

According to Article 3 of Brussels II-bis a foreigner may file for a divorce[877] in The Netherlands in one of the following circumstances, irrespective of his/her nationality or the country where he/she married, in case:

- both spouses are habitually resident in The Netherlands;
- both spouses were last habitually resident, and one still resides in The Netherlands;
- the defender is habitually resident in The Netherlands;
- The pursuer is habitually resident, and either has resided there for at least a year preceding the application or is domiciled (or a national) in The Netherlands and has resided in The Netherlands for at least six months preceding the application;
- both spouses are domiciled (or nationals).

According to Dutch law the courts in The Netherlands do not have jurisdiction in case:

- both married in the Netherlands, but neither party now resides here
- one of the spouses is a Dutch national but neither party now resides here (Art. 3 Brussel II-bis).

If the Dutch court is entitled to deal with the case and to dissolve marriage, the court is also allowed to deal with the demands and objections of the other spouse. As we saw before, divorce can be either petitioned jointly by both spouses or individually by one of the spouses. In both cases a lawyer is mandatory for filing the divorce petition. The only ground for divorce in The Netherlands is that the marriage has irretrievably broken down. As said before, the proof of this is no longer demanded by the Dutch judges. If one of the parties claims that the marriage has irretrievably broken down, the courts assume that such is the case and will hear the divorce.

11. Is parties' will taken into account in order to determine the applicable law for divorce?

Yes, according to Art. 3 etc. Brussel II-bis and Dutch Law (Art. 4 and 814-828 etc. Code of Civil Procedure).

12. If parties may choose the applicable law, how shall this choice be expressed and when?

In their request for divorce the parties must mention this to the court.

B2. Consequences of divorce

[877] Including the entertaining of an action for legal separation, or nullity.

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

The applicable law is the Civil Code, especially Articles 1:157-160 and 1:392-408 Civil Code, but we do also have judge made law, which has been laid down in the Alimentatienormen 2012 (Rules for the counting of the needs and support of the person in need and the possibility to pay alimony for the other one).

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

The applicable law is the Dutch Civil Code (Art. 81 – 143) and other (international) regulations.

15. What is the applicable law for parental responsibility?

Title 14 of Book 1 of the Civil Code is the applicable law. Both legal parents are entitled to have joint parental authority with regard to their minor children, and in case both parents have been divorced, the joint parental authority will be continued till the children have reached the age of majority. In case both or one of the parents wishes to have the parental authority for him/herself the judge may order that the parental authority will be given to one of them, although this is only allowed if it is in the best interests of the child and there is really no other possibility to continue the joint parental authority. The judge must really take a close look to see if there is not another way for both parents to continue their authority.

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The Dutch Civil Code; Brussel II-bis; several international conventions.

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

Yes, he is obliged to control whether there is no conflict with other laws. Divorce proceedings always commence with a petition, which must give the surname, first names and place of domicile or residence of the spouses. If there are minor children, the same details must also be supplied for those children. In The Netherlands divorce proceedings always commence with a petition, which must give the surname, first names and place of domicile or residence of the spouses.

If there are minor children, the same details must also be supplied for those children. In addition to this petition for divorce, one or more ancillary provisions may also be requested. This is a petition connected with the divorce. Matters in respect of which the court may make an ancillary provision include: custody of and access to minor children, maintenance for one of the ex-spouses and/or for the children, the division of community property or the settlement of the system agreed upon in the prenuptial agreement, the use of the marital home, pension equalisation, etc.

The petition must be filed with the court by the lawyer. If the petitioner lives in the Netherlands, the petition may be filed with the court for the district in which the petitioner lives.

If the petitioner does not live in the Netherlands, but the other spouse does, the petition is sent to the court for the district in which the other spouse lives. If both spouses live outside the Netherlands, the petition must be sent to the court in The Hague.

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

Yes. The judge must look at the applicable foreign law rules and in case he is not allowed to deal with the case, he must refer parties to the other country. He is also not allowed to deal with the case when he finds out that a judge in another country has already given a decision on this matter.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

No, it is possible to divorce within a short period after the wedding ceremony. The sole ground for divorce is the irretrievable breakdown of marriage.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

If one of the spouses is not capable to perform his opinion or in case he is under curatelle (which leads to the total incapacity to perform legal acts), it is not possible for him/her to start divorce proceedings. The curator or representation of the spouse involved is not allowed to start this proceeding. On the other hand, in case the other spouse starts the proceedings and the other spouse is not capable to perform his legal opinion, the court will order the appointment of a solicitor for the defence of the incapable one.

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

If national law provides for sole ground for divorce (irretrievable breakdown of marriage) answer part A1, if not answer part A2 only

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

Actually, the ground for divorce is established if one of the spouses has the feeling that he or she wishes to end the marriage. There are no other grounds or a certain time period that has to be taken into account.

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

There is only one ground for divorce or legal separation. It is not known how many spouses deny the claim of the other that marriage has irretrievably been broken down. Since 1st October 1971 we do not longer know the guilt (adultery, serious maltreatment, serious penal sanction, or leaving the other spouse) in the grounds for divorce. The irretrievable breakdown is for more than 40 years the sole ground for divorce.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

If both spouses agree with this ground, the marriage will be ended by the judge. If the other spouse argues that there is still love between them, the judge will confront the other spouse with this opinion. However, if the other spouse argues that the love is really over, the judge will end the marriage. So, actually the saying of one of the spouses that the marriage must be ended, will also lead to a divorce.

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

Both possibilities are allowed. But in case both spouses do have minor children together they must add a parenting plan to their request for divorce.

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

In case the parents do both have minor children, they must (try to) make a parenting plan (on the care of the children, child support and information/consultation), that must be linked to the divorce request. In case they cannot reach an agreement, they must inform the judge on the reason why they could not reach an agreement on the parenting plan and ask the judge to take a decision on the issues that divide the parties involved.

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

No, since 1st October 1970 we do have the no-fault divorce and there are no other grounds than that one or both spouses believe that the marriage is irretrievably broken down.

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

m) Is separation sufficient to establish irretrievable breakdown?

Yes, separation can be seen as a ground for irretrievable breakdown. De facto separation is not the same as legal separation. A legal separation is a means of ceasing to live together without the marriage itself coming to an end. A legal separation is of interest to spouses who wish to separate and regulate the legal consequences of that, but who want to remain married, perhaps for religious reasons. A legal separation offers a possibility of conciliation, but can also be a "stepping stone" towards dissolving the marriage. However, also due to the secularization of The Netherlands legal separation has lost its 'popularity'. Legal separations have consequences in regard to the law on matrimonial property, custody (access arrangements) of the children, maintenance and pension. The marriage continues to exist. However, if both spouses, having (been) legally separated, decide that they do want to fully separate, they can request the dissolution of the marriage after legal separation. So, they cannot start a divorce procedure. A petition for the dissolution of the marriage subsequent to legal separation cannot be made at any time. Joint petitions for dissolution are not subject to a waiting period. Unilateral petitions, however, are subject to a 3-year waiting period, which the court may reduce to one year in certain cases. The 3-year period starts to run once the legal separation is recorded in the register .

n) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

There is no certain length for the duration of separation.

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

As Dutch law does not know specific grounds for divorce and no-fault divorce is the only ground, all divorces are based on this legal ground.

a.Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

It is just a specific form of divorce for irretrievable breakdown of marriage.

31. Must the spouses be separated before introducing the claim? If yes, for how long?

No, in The Netherlands we do not have a rule that spouses must be separated before they can ask for divorce. Even at the moment of divorce or after the divorce they can live together.

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

Both possibilities exist in The Netherlands. At the request for divorce from one of the spouses the other spouse may give a declaration that he refers the decision to the court. However, in case both spouses do have joint parental authority they must (try to) make a parenting together.

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

In case of divorce by mutual consent both spouses will usually present an agreement to the court on the different issues/consequences of their divorce (house, matrimonial property, alimony, pension rights, etc.). If the judge has given his decision he can add this agreement – if it has been requested by the parties involved - to his decision in order to give it the full consequence of the divorce (so the agreement can be executed).

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

Just by the declaration of one or both spouses that their marriage is over. In Dutch law, there is only one ground for divorce: the irreparable breakdown of the marriage. The marriage can be said to have irretrievably broken down if to continue living together has become unbearable for one or both spouses and there is no prospect of a restoration of proper marital relations. In the case of a unilateral petition, the petitioning spouse must assert the irretrievable breakdown and, if it is denied by the other spouse, prove it. The court must determine whether the marriage has irretrievably broken down.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

Consent between both spouses is not necessary to decide upon the dissolution of the marriage by divorce. The claim of one or both spouses that the marriage is over will usually be followed by the judge's decision that their marriage is dissolved.

36. How is separation between spouses taken into account regarding irretrievable breakdown?

According to Dutch law the (legal) separation or de facto separation of the spouses is not a ground for divorce. Of course, the fact that the spouses do not live together since a while may show that the marriage between them is irretrievably broken down.

m) Is separation sufficient to establish irretrievable breakdown?

It is not necessary.

n) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

Separation is not a ground for divorce in The Netherlands. After the court's decision with regard to the request for legal separation both spouses, having (been) legally separated, wish to fully separate, they can request the dissolution of the marriage after legal separation. So, they cannot start a divorce procedure after the legal separation. A petition for the dissolution of the marriage subsequent to legal separation cannot be made at any time. Joint petitions for dissolution are not subject to a waiting period. Unilateral petitions, however, are subject to a 3-year waiting period, which the court may reduce to one year in certain cases. The 3-year period starts to run once the legal separation is recorded in the official register of the court.

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

Yes, during the divorce proceedings both partners can reach an agreement (e.g. by mediation) on the divorce and its consequences. Judges will usually try to reach such an agreement between the partners or – in case both are willing to start negotiations or wish to be mediated – send both spouses to a mediator. This can all belong to the same divorce procedure. During the mediation the judge will decide that his decision will be postponed for several months, in order to give parties the possibility to reach an agreement. If they will report to the judge that the mediation has not been successful, the judge will continue the process and will finally give his decision.

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

The irretrievable breakdown of marriage is the only ground for divorce.

39. Are there some specific requirements regarding proof of fault in this proceeding?

No, although the other spouse can try to prove that their marriage can still be repaired. If the petitioner stays to his opinion that the marriage is 'over', the judge will decide that marriage will be dissolved by divorce. There are only a few cases in which the judge did not agree with the irretrievable breakdown of the marriage.

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

No.

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

No, even after one or more reconciliations one or both spouses can still petition for divorce on the ground of irretrievable breakdown. The starting of mediation between both partners, does not influence their possibilities to start a new procedure for divorce on the only ground of irretrievable breakdown of marriage. Of course, it possible to appeal against a court decision relating to divorce, legal separation, or a marriage annulment.

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

No, although fault can play an important role in the decision of the court on the legal consequences of the divorce, e.g. alimony, access rights, etc.

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement
- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

No, in The Netherlands it is not allowed for to settle all consequences of divorce (apart from the matrimonial consequences) before the parties get married. The settlements with regard to alimony (after divorce) are void if these settlements were made before the parties married together. During their marriage[878] and after marriage both parties are allowed to make an agreement with regard to all consequences of their divorce.

44. If yes, may the judge scrutinize the spousal agreement?

Yes, that's allowed in Dutch law, although the judge plays a passive role in civil law cases. E.g. in the case that the judge finds that there is an unbalance in the agreement or in case the agreement is against the law or good morals.

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

The judge may decide that the agreement is void when it is against the law. In case the judge has the impression that the agreement is not in the best interests of the children he may ask further information. He can also ask the Child Protection Board to give advice in this matter. In case the judge thinks that there is an unbalance in the spousal agreement, he can invite both parties (and their lawyers) to inform him and to show that they both have understood what will be the consequences of this agreement for one party or both parties, e.g. in the case spouses have agreed upon the financial consequences of the divorce and this might lead to serious negative position for one of them.

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

a. The personal consequences of divorce

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[878] See Art. 1:159, Para 2 of the Dutch Civil Code, which states the agreement is void if the agreement contains the rule that the agreement cannot be changed by a decision of the court in case of change of circumstances.

Legal separation has consequences in regard to the law on matrimonial property, access arrangements of the children, maintenance and pension, although the marriage between the spouses continues to exist. This means that if the woman gives birth to a child during the legal separation, her husband (with whom she is still married) will be the legal father of that child. In case he is not the begetter of the child, his fatherhood may be denied by a court 's decision at the request of the mother, the father or the child (not by the begetter of the child). starts to run once the legal separation is recorded in the register. The legal separation makes an end to the rights and duties of the spouses (art. 1:92a) and makes an end to the total community of goods system (if the spouses were married on that basis), but the marriage still exists. The matrimonial property will also have to be divided between the two spouses. Both parties together or one of them may request legal separation on the same ground as divorce i.e. permanent disruption of the marriage (irretrievable breakdown of marriage (Art. 1:169).

In case both spouses are the parents of the children involved, they will continue to exercise their parental authority over their minor children. Both parents will have the parental authority of their children, born during their marriage (so even if they were born after the legal separation of the parents). They must make a parenting plan with regard to the education of the children (including access), child support and information/consultation rights. The maintenance rules in case of divorce also apply in case of a legal separation (Art. 1:169 paras 2 and 3). The legal separation will have its legal effects from the moment the legal separation has been inscribed in the registers of matrimonial acts, held at the district court. After a period of six months without registration, the legal separation is no longer held valid (Art. 1:173 para 3).

If the spouses reconcile, the legal separation ceases to exist and the (sleeping) marriage and its legal consequences revive from the moment they have registered this reconciliation in the register held at the district court (Art. 1:176). Although after such a registration the marriages revives, the validity of legal acts performed during the separation and reconciliation are judged according to the moment they took place (Art. 1:176 para 2).

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

The divorce takes effect upon the recording of the court ruling in the register of marriages. This can only be done once the ruling has become irreversible ("become final and conclusive"). The divorce must be registered within six months of the ruling becoming irreversible, otherwise the ruling ceases to have any effect and the divorce can no longer be registered (Art. 1:163). If the marriage was solemnized abroad and the foreign marriage certificate has not been filed in the Dutch registers, the (Dutch) divorce ruling is recorded in the special register of marriages in The Hague.

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

Spouses are entitled to remarry. Until 1997 partners had to wait one year after the dissolution of their previous marriage before they could remarry each other. It was allowed to remarry another, immediately after the divorce. Besides this, until 1997 it was only

possible to remarry the same person twice. So, in those days partners were not allowed to remarry a third time with each other. This moral code had been left aside and now one can remarry as often as possible, but of course within the other rules for marriage.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

According to Dutch Law spouses are entitled to use their own surname or the surname of the other and also in combination with the other's name. If Mr. Patrick Jansen marries with Pamela Mooij, he and she may use the following names: Jansen, Mooij, Jansen-Mooij or Mooij-Jansen. After their divorce or termination of registered partnership, the ex-partner can complaint and stop his former spouse/partner continuing to use his or hers surname. The district court is entitled to decide upon this petition, but there have to be important grounds for this complaint. This complaint is only possible if there are no (more) living descendants from this marriage (art. 1:9 para 2).

Parents have the right to choose either the father's surname or the mother's. However, the choice for the first child of these two parents is binding for the surname of the other children of the parents together. The choice has to be made before the registration of birth of this (first) child and is done at the registrar's office. In case the parents cannot choose between their two surnames, the Dutch Civil Code makes a difference between children born in and out of wedlock. In case the child is born during the marriage of the parents, the child will receive his father's name, unless the parents choose for mothers' name. If the child is born out of wedlock and the child is recognised by the father or in case of judicial establishment of parenthood and the parents cannot choose, the child will automatically keep his mother's surname (Art. I: 5). It is possible to change one's surname by obtaining a Royal Decree on recommendation of the Minister of Security & Justice (Art. 1:7). The consent of the child in question, if he is twelve years old or older, is compulsory.

The Rules(on changing the surname) also create the possibility to change an indecent, dirty or ridiculous surname. The same applies for extremely frequent surnames (such as Jansen and Petersen).

A few years ago the Committee on liberalization of the law on surnames had been appointed by the minister and gave advise, but could not find a good solution in case the parents do not agree with the family name. In that case the judge should decide, according to the committee.[879] The Minister's proposals adopt part of the recommendations of this committee. The first proposal regards the procedure for choosing a name. Until so far, married parents, wanting to give the child the last name of the mother, or unmarried parents, wishing to pass on the name of the father, had to appear in person before the registrar of births, deaths and marriages. The proposal is to make this possible by means of a written declaration. The second proposal regards the possibility to change this first choice. If the parents agree that the child should have the last name of the other parent after all, they should, from now on, have a non-recurring opportunity to arrange this in a simple manner by means of a joint request to the registrar of birth, deaths and marriages. This should be done before the child's first birthday. Should the parents have a serious difference of opinion concerning the last name acquired by the child, they should be able to present their dispute

[879] Report "Bouwstenen voor een nieuw naamrecht", Werkgroep liberalisering naamrecht, mei 2009.

to the courts within the same period. A legislative amendment will be required to realize these plans.

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

Yes, it does. A person who does not have the Dutch nationality can submit an application for naturalisation after 3 years of marriage or registered partnership (possibly abroad) and uninterrupted cohabitation. If the person has cohabited in the Netherlands with a Dutch man or woman (both partners unmarried) for an uninterrupted period of 3 years, he/she can also submit an application.

The Netherlands wants EU member states to have the scope to impose stricter rules on prospective family migrants, according to the Government's response to the European Commission's questions about the Netherlands' experience with the Family Reunification Directive. The (last) Cabinet has approved the response on the recommendation of the former (till November 2012) Minister for Immigration, Integration and Asylum Policy, Mr. Gerd Leers. The Government wants to impose stricter requirements on immigrants before they come to the Netherlands, so that they are better equipped to integrate into Dutch society. This should mean fewer immigrants relying on social benefits and fewer children growing up in deprivation. The present government (Rutte II) announced **s**tricter conditions for obtaining Dutch nationality, because this government (Cabinet) wants everyone to do their best to participate in society before giving them the right to acquire Dutch nationality. To achieve this, the government is tightening up the requirements for those wishing to acquire Dutch nationality. Four measures are proposed:

- All those wanting to acquire Dutch nationality must give up the nationality of their country of origin. Certain exceptions apply: recognised refugees and people who cannot give up their original nationality. The latter group includes Moroccan nationals who cannot renounce their Moroccan passports.
- Those who wish to acquire Dutch nationality through the option procedure must also take a Dutch language test.
- In future, someone cohabiting with a partner must spend five years becoming integrated into Dutch society before being eligible for naturalisation, instead of three years, as now. The rule will not change for those who are married, for whom the period of three years will continue to apply.
- In future, foreign nationals must have a household income equal to at least the minimum wage in the Netherlands. In addition, they must have spent two years attending some form of professional or vocational training or in work experience.

The foreigner who is older than 21 years old and who has not the Dutch nationality, but who is married to (or registered partner of) a Dutch person can obtain a residence permit. In case the person is married to (or registered with) more than one person, may only obtain for one spouse or registered partner.

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

Yes, during marriage the parents exercise parental authority jointly and after their divorce the parents will continue their joint parental authority. However, each of them may request sole custody. If one or both parents did request this, the court decides which of the parents will be entrusted with the authority (Article. 1:251 BW). The court can also decide that the joint parental authority will not be changed, but that the child will have its habitual residence with only one from its parents. Parents who are not married or have not even lived together can jointly exercise parental authority if they have registered their combined request in the custody register (Article 1:244 and 1:252 BW). After their separation their parental authority will usually be continued as in the case of divorced parents.

So, after divorce both parents can have parental authority at the same time, although the children may have their residence with one of the parents. Actually, the parent with whom the children have their habitual residence can take all the appropriate (daily) measures that are necessary for the education and raising of the children. However, the other parent with parental authority must give his/her permission too for legal decisions in case of medical care, choice of school, removal, etc.

In the case of conflicting interests, the court can appoint a third person as a 'special guardian' (the so-called 'specialcurator' according to Article 1:250 C.C) to represent the minor and to look after his interests. If the two parents with joint parental authority do not agree on specific issues with regard to the education of their child(ren), they can ask the juvenile judge to mediate between them or to give a decision himself, e.g. in the choice of a school.

Parenting Plan in case of divorce
In cases of divorce, termination of registered partnership, or legal separation, parents are obliged to record agreements about their children in a so-called parenting plan (art. 815 Rv[880]). This obligation also applies to cohabiting parents who have joint custody over their children. This new parenting plan has been provided for in the Promotion of Continued Parenting and Proper Divorce Act, which took effect on 1 March 2009. This also led to the end of the so-called 'flash divorce'[881].

The new legislation proceeds on the principle that both parents remain jointly responsible for the children after the divorce. If they continue to have joint custody, it is essential that proper and verifiable agreements are made to avoid future problems. A mediator may be of help in drawing up the parenting plan. This parenting plan forms a part of the petition for a divorce. The plain should, in any case, include agreements made by the parents on three key subjects:

- division of care and parenting tasks;
- child maintenance; and
- exchange of information on important issues with regard to their children's personalities and assets.

Proper agreements may prevent future conflicts, and this is essential to the children, as divorce-related conflicts may be detrimental to a child's development. Not all parents are capable of making agreements about their divorce or resolving conflicts arising after their

[880] Code of Civil Procedure.

[881] This was the procedure of converting a marriage into a registered partnership at the registry of births, death and marriages, and subsequently terminating this partnership This flash divorce was allowed from 1 January 1998 till 1 March 2009.

divorce. In those cases, help from third parties is desirable. The court may refer these parents to a mediator, but only if it sees possibilities for the parties to reach agreement. Results from experiments with divorce and access mediation show that mediation has a positive influence on both the settlement of the divorce and the resolution of a conflict about access to the children. Of course, it is important that this parenting plan will be evaluated between the former partners after a certain period (e.g. six months and then every year) or in case of important changes in the life of the parents or children (removal; new partner, illness, etc.).

52. Does divorce produce automatic effects regarding parental responsibility?

No, parental authority of the two parents will usually be continued, unless the court will decide differently.

53. Can the exercise of parental responsibility be subject to a parental agreement?

Yes and no, because usually joint parental authority will be continued after the divorce of the parents, but the parents must make a parenting plan to regulate all other issues with regard to the children involved. In their parenting plan the parents may agree upon the education of the children (including access), child support and information/consultation rights.

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Yes, he may scrutinize the agreement made by the parents, e.g. in the case when he thinks that the agreement is against the best interests of the children or against the moral order, e.g. when the parents agree that the father will not have to pay child support. The judge may also advise the parents to reconsider their original agreement and to change some parts of the agreement

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

No, he will usually not reorganise the exercise of parental rights himself, but he will do so at the request of (one of) the parent(s) or at demand of the Child Protection Board.

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

No, this is only allowed at the request of the Child Protection Board. However, the judge can postpone his decision in order to have the situation of the children investigated by the board or to give parents the chance to make a better plan, which fits more to the best interests of the children.

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of

his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

Yes, by law, children and parents have a right of access to each other. When parents divorce, this is often a difficult issue to resolve. The best thing of course is for parents to make arrangements on access together with the children. According to Dutch law, parents are obliged to send in a parenting plan together with their petition for divorce. In this parenting plan they must make arrangements with regard to the care and education of the child, access and information rights and child support. During divorce proceedings, the parents may ask the court, either jointly or alone, to make access arrangements (Article 1:377a C.C.).

- Even if the parents have never been married to each other, the parent who does not have responsibility for the child can ask the court to make access arrangements, but here too the court may first ask them to make a parenting plan before the parents can come to the court. A parent may ask the court to deny the other parent access rights.
- The court will do this only if:
    - access would be seriously damaging to the child's psychological or physical development;
    - the parent in question is unsuited to or incapable of access to the child;
    - the child is 12 or older and has serious objections him/herself to access;
    - access would conflict with the child's best interests on other grounds.

Denial of access is often a temporary measure. According to the decision of our Supreme Court a parent is always entitled to ask for access again after at least one year after the last request to the court. People who have close ties with the child ('family life') may also apply to the court for access. For example, a parent's ex-partner, a former guardian, foster parents, step-parents or grandparents may all apply for access according to Article 1:377a BW.
If access has been arranged, the terms of the arrangement must be complied with. If there are problems, the parents should contact a welfare agency. The agency will examine the options for resolving the conflict, the most radical being instituting injunction proceedings against the person refusing access. To do this, the parent seeking access will have to apply to the president of the district court and they will need the assistance of a lawyer.

The parent with responsibility must keep the other parent – at his or her request – informed of important matters that concern the child. For example, his/her health and what is happening at school. What is more, the parent with responsibility must consult the other on important decisions affecting the child. Of course, the parent with responsibility is the one who ultimately decides in such matters. In the child's interests, the court may decide that the parent with responsibility is no longer required to inform or consult the other parent about the child. Either the parent with responsibility may request the court to take this step, or the court may act on its own initiative.

People such as teachers who are, because of their profession, in possession of important information about the child, are also obliged to give such information to the parent without responsibility if he/she asks for it. This has to take the form of a specific question. A parent who does not exercise responsibility may for example ask the school for information about

the child's performance. It may then be reasonable for the school to invite the parent to attend a parents' evening at school. There are exceptions to this obligation to provide information. Someone may be exempted if:

- he/she may not even give the information in question to the parent with responsibility because of professional confidentiality (e.g. a family doctor);
- providing the information would conflict with the child's best interests.

Of course the rules about access and information can be amended if the circumstances have changed (Art. 1:377e C.C.).

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

All possibilities between the parents are allowed, as long as the arrangements are in the best interests of the child and not against moral or public order.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Yes, this is allowed, although the judge us allowed to confront the parents with this arrangement in case he thinks that the agreement is not in the best interests of the child, or in case the agreement cannot be fulfilled because the parent with whom the child has its natural residence moves to another place and the other parent does not agree in this. The judge can speak the parents during the court hearing, advise them to address themselves to a mediator, appoint a special curator for the child involved, or the judge may ask the Child Protection Board to investigate the situation and report this to the court. He can also decline the request in which the court is asked to agree with the arrangements.

The court may make changes to an arrangement, irrespective whether it is one made by the parents themselves or established by court. One or both parents may apply to the court to have the arrangement altered. The court will agree to do this only if the circumstances have changed or if the original arrangement was based on inaccurate or incomplete information.

Children aged twelve and over may apply to the courts, by writing a letter or making a telephone call. Children under the age of twelve may also do so. In the latter case, the court will decide whether the child is capable of making a reasonable assessment of his/her own interests. Children may ask the court to make or to alter an access arrangement, or to change joint responsibility into sole responsibility. The court will then decide if it is necessary to start official proceedings. This is not always necessary. Sometimes the question may be settled in other ways.[882]

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

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[882] <www.rvdk.nl/brochures>: When parents get a divorce. About the Child Protection Board.

No, if parents have made an agreement, the judge cannot get guarantees that his decision will be fulfilled. However, the former spouses themselves may ask the judge to change his decision or to change the agreement, if one of them or both do not longer wish this agreement. In case the best interests of the children involved are infringed, the State may interfere There are several situations in which state intervention in the family is necessary, because parental authority is not exercised according to principles of accepted morals and public order. For example, if a child grows up under circumstances which threaten him in his moral, mental or physical interests and other non-compulsory measures to change this situation have failed, the court can order a family guardianship (Article 1:254). This means that an organization for family guardianship is appointed which will advise the parents and the minor and help them with the educational problems for the time of one year (Article 1:256 and 1:257 BW). This term can be extended. The family-guardianship-society (Bureau Jeugdzorg or Youth Care Agency) may give (written) instructions that have to be followed by the parents and the minor (Article 1:258 BW). The court can suspend, abrogate or withdraw the instructions (Article 1:259 and 1:260 BW). If necessary the court may authorize the organization to place the child in residential care for the duration of one year at most, but an extension of one year is always possible (till the child becomes adult; Article 1:261, 1:262 and 1:263 BW). During the family guardianship the Youth Care Agency can take all kinds of measures e.g. concerning access to or contracts of the minor with third persons or concerning medical treatment (Article. 1:263a, 1:263b and 1:264 BW).

These Youth Care Agencies are private organizations (but fully subsidized by the state). They have the special task to care of and educate the children of released or dismissed parents. The Agencies have to be accepted as such by the Government. They receive subsidies from the local and provincial authorities but they mainly rely on private initiative (Article 1:295, 1:302 and 1:306 BW; Wet op de Jeugdzorg).

Dutch law (still[883]) knows two ways of ending parental authority:relief and dismissal. If a parent is unfit or unable to fulfil his/her parental duties the court can order the parent to be relieved of his/her authority over the underage children. The parent has to sign a declaration of no-objection (Article 1:266 and 1:268 section 1 BW). In a few cases, the court can order relief even if the parent(s) object(s), e.g. in the situation where the parent is mentally so disturbed that he/she would not be able to make up his/her mind or understand the meaning of the declaration of no-objection (Article 1:268 section 2 sub c BW). A third party guardian, usually a family-guardianship society (Youth Care Agency), will take care of the children in the period during which the parent(s) is (are) relieved or dismissed of their parental authority.
The second way to lose parental authority is by a dismissal ordered by the court. The grounds are:

- abuse of the authority or serious neglect of the care for one or more of the children;
- misconduct;.
- a conviction for committing a crime with the minor, or for committing a crime against the minor.

[883] New legislation will change this. There is a draft-bill with regard to an new organization of the laws with regard to youth care (change is foreseen not sooner than 2015) and a bill, which is dealt with by the Senate at this moment, with regarding tot the child protection measures (Kamerstukken 32 015).

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

According to Dutch law both possibilities are allowed, but usually spouses will try to deal with their divorce and its consequences in one legal proceeding. The parenting plan with regard to the children of both parents must always be sent to the court in case of divorce. Later, (parts of) this parenting plan can be changed. In addition to a petition for divorce, one or more ancillary provisions may also be requested. This is a petition connected with the divorce. Requests with regard to changes of the former decision of the court can be sent to the court after the divorce proceedings in case the situation of (each of) both spouses or the child(ren) has changed.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :

- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

Compensation and damages are not usual in the Netherlands, unless for pension rights. The maintenance obligation between spouses remains effective after the marriage is dissolved. Either in the divorce ruling or in a subsequent ruling, the court may award a maintenance allowance payable by the other ex-spouse to an ex spouse who does not have sufficient income to support him/herself and cannot reasonably obtain sufficient income to do so, at the request of that spouse. In determining the amount of maintenance, the court takes account of the needs of the ex-spouse who will be receiving the payment and the capacity (financial means) of the other ex-spouse. Non-financial factors may also have a bearing, such as the length of the marriage and for how long the spouses lived together or misbehavior of the former spouse (e.g. an attempt to kill the other spouse). If the court does not set a time-limit on the maintenance obligation, it will cease after 12 years. In circumstances of acute need, this period may be extended by the court at the request of the ex-spouse in need of maintenance payments. After a short (i.e. no longer than 5 years) childless marriage, the maintenance obligation will not, in principle, exceed the length of the marriage. If the (ex-) spouses reach mutual agreement about maintenance, they can record this in a divorce agreement. There is a discussion in legal literature and in the House of Parliament with regard to the length of the time-limit for alimony for the former spouses. Proposals have been made to shorten this time-limit from 12 years to a maximum of 8 or even 5 years.

The maintenance payments are indexed yearly (Art. 1:402a). The entitlement to maintenance ceases when the person who has this right remarries, registers as partners or starts living together with another person as in marriage or registered partnership (Art. 1:160).

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

Either in the divorce ruling or in a subsequent ruling, the court may award a maintenance allowance payable by the other ex-spouse to an ex spouse who does not (any longer) have sufficient income to support him/herself and cannot reasonably obtain sufficient income to do so, at the request of that spouse.

The Netherlands has a fairly unusual system for income and assets during marriage. The statutory system is the general community property regime, whereby, in principle, all property of the spouses, acquired both before and during the marriage, form part of the community (including all debts). Both sets of assets are combined to form one joint set of assets. In principle, all debts contracted both before and during the marriage also form part of the community, regardless of which of the spouses contracted the debt. Each of the spouses' creditors may seek to recover their claim from the entire community. The community property is dissolved by divorce and must then be divided up. The basic premise in law is that each of the spouses is entitled to half. The spouses may deviate from this and agree different arrangements, either in a divorce agreement or at the time of division (Arts.1-93, 94-114 C.C.). This means that the community is divided in two equal parts, one half going to one spouse (or registered partner) or his/her heirs and one half going to the other spouse or his/her heirs (Art. 1:100). However, after the dissolution each of the spouses remains liable for the total of the common debts for which he or she was liable previously and each spouse or registered partner is still liable for half of the other debts (Art. 1:102).

After the dissolution of the community each of the spouses has the right to buy the clothes he/she used wear and the jewelry. The same applies to his/her professional tools and the papers and documents belonging to his/her family (Art. 1:101). The money for the personal clothes and jewelry falls into the community of goods.

However, there are only a few exceptions to this before-mentioned complete community of property: firstly it does not include those objects for which the donor or testator decided that they should be excluded from the community. Secondly, it does not cover those goods and debts that are specially attached to one of the spouses (Art. 1:94 pars 1 and 3).[884] Lastly, since the new law on the equalization of pension rights came into force in 1994, the pensions do not fall in the community of goods (anymore) (Art 1:94 para 4). The equalization of pensions forms a rather tough and complicated legal problem field just now.

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

Yes, the court will decide upon this request as soon as possible. There are no specific time limits for the proceeding on these questions.

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[884] So, this means that although the spouses are married in a total community of goods system, each of them may have private assets, that do not have to be divided after the dissolution of marriage.

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

Yes, in case a maintenance allowance payable by the other ex-spouse to an ex spouse who does not have sufficient income to support him/herself and cannot reasonably obtain sufficient income to do so, at the request of that spouse. In determining the amount of maintenance, the court takes account of the needs of the ex-spouse who will be receiving the payment and the capacity (financial means) of the other ex-spouse. Non-financial factors may also have a bearing, such as the length of the marriage and for how long the spouses lived together or misbehavior of the former spouse (e.g. an attempt to kill the other spouse). If the court does not set a time-limit on the maintenance obligation, it will cease after 12 years.

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

Yes, a maintenance allowance payable by the other ex-spouse to an ex spouse who does not have sufficient income to support him/herself and cannot reasonably obtain sufficient income to do so, can be limited, or ended at the request of that spouse, e.g. in the case that there is no longer need for alimony, the paying spouse does not any longer have the capacity to pay (the whole) amount of alimony (e.g. by a new situation of unemployment, a new family). In case the former spouse who received alimony gets a (new or better paid) job, the amount can be reduced. In case of a new marriage, the alimony may be ended.

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

No, but in case of a total community of goods system e the community is divided in two equal parts, one half going to one spouse (or registered partner) or his/her heirs and one half going to the other spouse or his/her heirs (Art. 1:100). However, after the dissolution each of the spouses remains liable for the total of the common debts for which he or she was liable previously and each spouse or registered partner is still liable for half of the other debts (Art. 1:102).

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

No, although the division of the matrimonial assets may lead to a situation in which both former spouses can afford to live from (the income of) their assets.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

No. The amount of alimony will depend from the needs and income of both spouses.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

It depends upon the answer to the question whether the spouses during or after their divorce proceedings succeed in reaching an agreement upon this matter. If they do not agree (any longer) they may ask the court to decide upon this (again). The judge will deal with the alimony according to the national rules of law and the calculation schemes, made by specialised family judges that are published at the website from the Council for the Judiciary.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

The judge may decide which of the spouses is allowed to stay in the house/family home. This is mostly dependent from the question with whom the children will have their habitual residence and the question whether that parent is able to pay the costs of that specific house. Usually parents will reach an agreement upon this.

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Yes, this is possible, e.g. by spousal agreement or divorce agreement. Of course the house-owner of the bank must agree with this. In case they cannot reach an agreement, the judge may decide upon this matter at the request of the person(s) involved.

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Yes, see the answers above. In case the former spouses agreed that their divorce agreement cannot be changed (e.g. in the case of alimony), then their agreement can only be changed or revoked when the original agreement was made with serious neglect of the legal standard (Art. 1:401 Para 5).

According to Art. 401, Para 4, the legal decision can be changed or revoked by the court in case the decision from the start on did not comply with the legal standards or in case the judgment was bases at wrong or incomplete information.

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets ?

Yes, in alimony cases and in case of the division of the matrimonial property (former) spouses are obliged to give full disclosure of their income and assets. In case it is a fact that one of them is not open (there must be evidence of that), the judge may calculate as if these assets are still there.

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

See the answer to question 74.

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life,

needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

For the calculation of the needs of the former spouses the judge will calculate with the former household way of live\. For the capacity to take care for oneself and the former spouse, the judge will calculate with the former and present incomes, the possibility to find A better or more paid job, the health conditions et cetera. The Council for the Judiciary publishes the calculation schemes for alimony at their website (http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/sector-familie-en-jeugdrecht/Pages/Werkgroep-Alimentatienormen.aspx).

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

Yes, the amount can be changed at the request of the person in need (who needs more money for living) or at the request of the person who is obliged to pay in case he or she does no no longer the capacity to pay (the full amount of) alimony. If the former spouses do not reach an agreement upon this, the court will be asked to give a (new) decision.

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

No, both parent are obliged to support the child, irrespective with whom the child lives. Parents, legitimate and natural children, children-in-law and stepparents are legally obliged to support one another (Art. 1:392). This obligation is always compulsory for parents and stepparents with regard to their minor children. In all other cases the obligation exists only in case of need of the person concerned (Art. 1:392) and dependent on the financial capacity of the supporting party.
This civil law obligation lost some of its importance, because of the public (administrative) Wet Werk en Bijstand (WWB) i.e. the state support of the needy and poor. The local authority must undertake the task of providing financial support to meet the cost of living of those who could not do so themselves. But this 'welfare state' principle hardly exists anymore. So the civil law family support rules are gaining new importance.

A very important regulation has been the 'indexing' of maintenances.[885] Every year the minister of Security & Justice changes the fixed amounts of maintenance by a certain percentage (for 2013: 1.7 %), corresponding to the raise in wages. The stepparent too has the duty to keep his/her stepchildren, but only during the time of marriage to the biological parent (Art. 1:395). The man, who is the begetter of a child, without being married to the mother and without having recognized the child, can be forced via a court order to pay the costs of living while the child is under age (Art. 1:394). If the child is (mentally) handicapped the obligation to support continues when the child reaches majority (Art. 1:405). Parents of all children are obliged to support their children till they reach majority, i.e. the age of 18.

[885] Law of 6 July 1972, *Stb.* 390; since then the law was changed several times.

But the duty to provide maintenance continues for three more years till their young adult children reach the age of 21 (Art. 1:395a).

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

See the answer to question 78.
The National Institute for the Collection of support Contributions (Landelijk Bureau Inning Onderhoudsbijdragen, LBIO; since 1997) has two financial tasks:

- To claim the costs which have been made for the minor (e.g. when it was placed in a foster family or in a children's home) from the parents; and
- To pay out sums of (received) money to the party, e.g. the divorced mother, who is entitled to such a sum of money.

This Bureau has its registered office in Rotterdam.

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

Usually parents will agree (in their parenting plan) or by a later agreement what amount of child support must be paid and when must be paid (usually just before the new month starts). In case the other spouse neglects his duty to pay, the parents who educates the children may ask the judge to intervene or he/she can ask the LBIO (see answer 79) to sue the other parent.

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

Yes, the judge may do so at the request of one or both parents.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

No, divorce may (until now) only be judged by the courts, although people are allowed to make other arrangements with regard to the other aspects of the divorce. In case the divorcing parents have the parental authority of their children they must make an parenting plan.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

Not relevant.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

The district court is competent to order divorce. Until 1st January 2012 we had 19 district courts. From that date till 1st April 2012 we had 10 district courts and 4 courts of appeal. Since 1st April 2012 the number of district courts has increased to 11 courts, because one court in the east was too big. We do not have specific courts for divorce or special cases. However, since 1st January 2012 the only competent court in case of international abduction by one of the spouses are dealt with by the district court in The Hague and the court of appeal in The Hague.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

No, there is no cooling-off period in Dutch divorce law. The request for divorce of one or both spouses will be dealt with by the court as soon as possible.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

Since divorce mediation is very common and popular in the Netherlands the spouses will usually try, with the help of a mediator and, if necessary, their lawyers, to reach agreement about the divorce and its consequences. These agreements are laid down in a divorce agreement, which is a written document. The agreements might, for instance, relate to the division of property, the maintenance commitments between the ex-spouses, and childcare. The court may include the agreement in its ruling. Proper agreements may prevent future conflicts, and this is essential to the children, as divorce-related conflicts may be detrimental to a child's development. Not all parents are capable of making agreements about their divorce or resolving conflicts arising after their divorce. In those cases, help from third parties is desirable. The court may refer these parents to a mediator, but only if it sees possibilities for the parties to reach agreement. Results from experiments with divorce and access mediation show that mediation has a positive influence on both the settlement of the divorce and the resolution of a conflict about access to the children. Therefore, judges are willing to advise the divorcing spouses/parents to a mediator. In the past ten years mediation has become increasingly important in the practice of dispute resolution. Between 2006 and 2008 the number of referrals from the Legal Aid Desk increased from 1,412 to 2,419. The courts also showed an increase: 2,133 referrals in 2006 compared to 3,708 in 2008.
The association of family lawyers and divorce mediators (the Vereniging van Familierechtadvocaten en Scheidingsbemiddelaars; visit: www.vfas.nl) has specialised lawyers in especially divorce, parental authority, maintenance and in divorce mediation.

Family mediation has become very popular in the majority of all European countries, which is probably also due to the Recommendation of the European Council in terms of Family Mediation, which surely will have promoted mediation in the different countries of Europe. There are many different models of family mediation, especially phasing emphasis upon the need for the couple to "evolve" and upon the superior interest (relationship right) of the children."[886] Reaching agreements in mediation will be a vital component in making and maintaining co-operative relationships between divorcing parents: it reduces conflict, and encourages continuing contact between children and both their parents. Therefore,

[886] Family Mediation in Europe, p. 8.

mediation will be in the best interests of the children of the divorcing parents and will also strongly help the parties themselves to overcome the disputes.[887] Because of the possible positive consequences for the parties involved particular attention should be paid to the issue of providing equal access to mediation. The application of legal aid schemes will be of assistance in those cases. In the case of out of court mediation, the parties may enter mediation in order to prevent judicial proceedings from arising or to overcome problems, due to the separation or divorce. Mediation can be used for all sorts of family conflicts. In many countries the judge will recommend divorcing couples, without any sanction, that they should make use of the mediation facilities. Sometimes these facilities will be offered by the courts, in most cases however parties must pay (at least part of) the mediator themselves. Besides the out court mediation it is import to notice that also in-court mediation is a possibility to deal with and to resolve family disputes. The court related mediation does exist, but in The Netherlands not many judges try to mediate themselves, because of the risks (e.g. privacy, the judge must give an objective decision without knowledge of private knowledge of the parties, etc.). However, many Dutch judges will try to bring the parties to an agreement by discussing with the parties what divides them.

87. May the competent authority during the course of divorce proceeding make interim orders on
- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

Yes, according to Art. 821-824 of the Code for Civil Procedure the court may give interim orders. In addition to a petition for divorce, one or more ancillary provisions may also be requested. This is a petition connected with the divorce. Matters in respect of which the court may make an ancillary provision include:
- custody of and access to minor children;
- maintenance for one of the ex-spouses and/or for the children;
- the division of community property or the settlement of the system agreed upon in the prenuptial agreement;
- the use of the marital home;
- pension equalization;
- other provisions.

Almost the same provisions are possible as an temporary measure during the divorce procedure, such as the use of the marital home (the court may order that the other husband must leave the house and may not enter the house), the deliverance of goods for the daily use of the other husband and the goods for the daily use of the children), an arrangement with regard to the custody of the children, access rights, support etc.

88. Is appeal available against the divorce order or against an out of court divorce decision?

Yes, appeal is allowed against the divorce order, but not against the interim orders. In case the situation of the spouses has changed during the period of the interim orders (so before

[887] Recommendation No. R (98) 1 of the Committee of Ministers to member states on family mediation (Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies).

the court decided upon the divorce) one of the spouses or both spouses may demand the court to change the interim order (Art. 824 Rv[888]).

89. Does a third-party (public prosecutor, child's sollicitor, social services, institution aiming at protecting children…) have the right to intervene
- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**
- **If yes, on which grounds?**

No, it is not allowed for third parties to interfere in the divorce proceedings. The only agency that is allowed to interfere in the divorce proceeding is the Child Protection Board, e.g. in case there might be an infringement of the children's interests.

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

There is a growing tendency to ask the child's opinion in cases where the child is involved in questions of religious education, school career, medical treatment, etc. Article 12 of the UN Convention on the Rights of the Child guarantees that States Parties shall assure to the child who is capable of performing his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Parents, legal guardians or other persons legally responsible for the child, must provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of his rights. And, in the case of (any) judicial and administrative proceedings affecting the child, the child shall in particular be provided the opportunity to be heard, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
In The Netherlands every child that has reached the age of twelve years old will (usually) receive a written invitation by the court to be heard (Art. 809 Rv). This child hearing is behind closed doors. The child may be guided by a special curator (a guardian ad litem) or another person (e.g. a social worker), but not by his parent(s). Usually children come alone. The child younger than 12 years that is capable to be heard, can also be invited to be heard by the court. Children do have this right in any court proceeding affecting the child.

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:
ee) the termination of marriage,
ff) financial consequences of divorce,
gg) the settlement of matrimonial assets,
hh) parental responsibility,
ii) children's maintenance?

[888] Rv : Dutch abbreviation for Wetboek van Burgerlijke Rechtsvordering = Code of Civil Procedure.

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

The Brussels II-bis Regulation applies to divorce, legal separation and marriage annulment. On the grounds of this Regulation, divorces pronounced in the other EU Member States (except Denmark) are recognised in the Netherlands without any judicial process (Article 21, 1 of the Regulation). Nor is any special procedure required to amend the relevant certificates, for instance if a marginal note relating to the divorce has to be placed on the marriage certificate.

According to Art. 10:57 C.C. a foreign decision from a non-EU country can be recognised in case there has been a fair procedure before a court or any other authority with the legal power ro decide upon divorce in that particular country. In case one of this criteria is not met, the court may nevertheless decide to recognise the foreign decision in case the other party explicitly or implicitly agreed with the foreign decision or resigned to this decision after the procedure. Nevertheless a foreign decision cannot be recognised in case it is against Dutch public order.
Divorces based at a unilateral repudiation of one of the spouses (usually the male husband) will only be recognised in The Netherlands when the four following criteria are met:

- the dissolution of marriage must be according to the national law of the husband who unilateral repudiated the other spouse;
- the dissolution of marriage will have legal consequences in the state where the repudiation took place;
- it must be obvious that the other spouse explicitly or implicitly agreed with the foreign decision or resigned to this decision after the procedure Art. 10:58 Rv).

Nevertheless the dissolution of the marriage by unilateral repudiation cannot be recognised in case it is against Dutch public order (Art. 10:59 Rv).

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

Yes. Any interested party may institute judicial proceedings in order to establish whether or not a decision will be recognised, e.g. in case the recognition of the divorce would be contrary to (Dutch) public order. The judge will also control whether the respondent (the party who did not file a petition for divorce) was properly informed of the proceedings. The accuracy of the decision, however, may not be verified.
On the basis of the Brussel II-bis Regulation, the court of a Member State in which the decision was pronounced will, at the request of each interested party, issue a certificate regarding that decision (according to a standard format).

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Yes, the divorce will at the request of the parties involved be inscribed in the registers of the public registrar in The Hague if all criteria are met.

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

It is completely facultative, but it may have legal consequences for the legal position of the persons involved. E.G. if one of the divorced spouses wishes to remarry in The Netherlands he/she must give evidence of the foreign divorce decision.

95. What are the consequences of registration or lack of registration?

This may have consequences for the legal status of the person(s) involved as they can still be seen as married.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

It is in discussion in Parliament whether the laws with regard to divorce and alimony (for children and former spouses) should be changed/modernised, e.g. by the introduction of an administrative procedure for divorce for spouses with no (minor) children and a shorter period for alimony for the former spouse and another (easier) way to calculate the financial needs of each spouse and the financial ability of each spouse to meet those needs.

POLAND

POLAND

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The main source of law for divorce in Poland is The Family and Guardianship Code of February 25, 1964 (hereinafter **k.r.o.**)[889], which came into force on January 1, 1965. This code is not part of the Polish Civil Code of April, 23 1964[890], but is treated as part of the civil law. The introduction of a separate statute for family law (and divorce) was prompted by political and ideological reasons rather than theoretical ones[891].

Articles 56-61 of the k.r.o. address divorce, and they are part of section IV (entitled "Termination of marriage") of title one (entitled "Marriage") of the Code. Article 56 states the prerequisites of divorce. Articles 57-58 regard the contents of divorce judgments. Article 59 deals with the impact of divorce on the names of ex-spouses who had acquired marital names. Articles 60-61 concern the maintenance of former spouses.

Procedural issues regarding divorce are found in articles 436-446 of Code of Civil Procedure of November 17, 1964 (hereinafter **k.p.c.**)[892]. This legislation came into force on January 1, 1965.

[889] Dz. U. 2012, no 788.
[890] Dz. U. 1964, no 16, position 93.
[891] Tadeusz Smyczyński, Prawo rodzinne i opiekuńcze, Warszawa 2009, p. 14.
[892] Dz. U. 1964, no 43, position 296.

Both statutes were introduced during the former political system of Poland. Although the statutes have been amended numerous times since they came into force, the general prerequisites of divorce have not changed.

2. Give a brief history of the main developments of your national divorce law

After becoming an independent country in 1918, Poland had various divorce regulations that were the legacies of the different countries that had partitioned Poland. The aim of the newly independent Poland was to prepare legislation on divorce that applied to the entire country. In order to achieve this goal, the Codification Commission was established. In 1929, the Commission enacted a draft of law regarding divorce and legal separation, but it did not become a statue and did not enter into force.

The first uniform regulation for the entire territory of Poland was prepared in 1945. The decree was entitled Matrimonial Law of September 25, 1945[893] and came into force on January 1, 1946. Pursuant to this regulation, divorce was permitted on the basis of the decision of a state court. The decision could be granted in cases of "permanent disintegration of matrimonial life"[894]. The Act provided a few examples that could cause such a disintegration: adultery, threats against a spouse's life, debauched or dissolute conduct, commitment of a heinous crime, chronic drunkenness, drug addiction, infectious venereal disease, mental disease lasting for more then one year, and impotence. A judicial decision of divorce could not be granted, however, when it would be contrary to the welfare of minor children. During the divorce proceeding, furthermore, the court was obliged to decide which of the spouses was guilty of the breakdown of the marriage[895]. Importantly, separation was not a prerequisite of divorce. One of the provisions of the decree allowed divorce upon a unanimous motion of the spouses. There was, however, one condition – the marriage must have lasted at least three years.

A subsequent regulation was the Family Code June 27, 1950, which came into force on October 1, 1950. Instead of a casuistic enumeration of prerequisites, it introduced a general one: "if, because of important reasons, a complete and permanent disintegration of matrimonial life has occurred between the spouses, each of them may request that the court dissolves their marriage by divorce[896]". Under this regulation, a divorce could not be granted in two situations: 1) when it was proved that the divorce would be to the detriment of the spouses' minor children and 2) when the divorce was sought by a guilty spouse solely responsible for the breakdown of matrimonial life. In the latter case, however, divorce was possible when the other spouse consented. Despite the lack of consent, however, divorce was also allowed if it aligned with the social interest and the spouses were in actual and permanent separation. According to the regulation, furthermore, the court was obliged to

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[893] Dz. U. 1945, no 48, position 270.
[894] In other words, the irretrievable breakdown of marriage.
[895] This obligation of the court was excluded in cases of mental disease and impotence.
[896] The translation prepared by Andrzej Mączyński & Tomasz Sokołowski, National Report for CEFL – Ground for Divorce and Maintenance Between Former Spouses, 2002, p. 3.

establish who was guilty for the disintegration of matrimonial life. However, spouses might decide that they did not want to have a decision rendered regarding guilt, and the court would then omit this issue from its decision granting divorce.

The current regulation of divorce is the Family and Guardianship Code (articles 56-61), which has been binding law since January 1, 1965 and was last amended in 2009.[897] This regulation concerns the agreement of the spouses regarding how to exercise parental authority and maintain contact with the child after divorce. It also added a provision that a court granting divorce may delegate the exercise of parental authority to one of the parents, limiting the parental authority of the other parent to specific rights and duties related to the child. Alternatively, the court may leave parental authority with both parents at the unanimous application of the parents, if presented with such an agreement by the parents and if it would be reasonable to expect that they would co-operate in matters concerning the child.

3. Are prospective reforms currently under consideration?

There are no drafts of statutes that would change the regulation regarding divorce.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

Divorce is the only ground for marriage dissolution. However, the termination of marriage also occurs if one of the spouses dies or if there is a declaration of death regarding one of the spouses.

According to Polish law, legal separation is possible if there has been an irretrievable breakdown of matrimonial life between the spouses. However, the decision to separate does not cause the end of the marriage and separated spouses cannot remarry (article 61^4 § 2 k.r.o.).

5. If any, provide statistical data regarding divorce and legal separation?

Between 2001 and 2010, there were 593.900 divorces. Approximately 83% of them were of spouses who lived in cities and towns rather than in the countryside. From 2001 to 2005, the number of divorces grew from 45.300 divorces in 2001 to 67.600 divorces in 2005. In 2010, there were 61.300 divorces, which was less than in 2009 (65.300 divorces).

Divorces in Poland 2001−2010[898]

[897] Statute of November 6, 2008 (Dz. U. no 200, position 1431), which came into force on June 13, 2009.
[898] See http://www.stat.gov.pl/cps/rde/xbcr/bip/BIP_raport_2010-2011.pdf.

Year	Number of divorces	Rate of divorces for 10.000 people			Rate of divorces for 1.000 new marriages		
		total	towns	countryside	total	towns	countryside
2001	45308	11,7	16,1	4,7	232,2	323,2	91,5
2002	45414	11,8	16,2	4,7	237,2	330,4	93,1
2003	48632	12,7	17,4	5,2	248,8	344,3	99,9
2004	56322	14,7	19,6	7,0	293,2	394,8	136,4
2005	67578	17,7	23,0	9,3	326,6	426,7	170,3
2006	71912	18,9	24,6	9,3	317,9	422,2	155,1
2007	66586	17,5	22,6	8,7	277,7	354,3	131,6
2008	65475	17,2	22,4	8,8	254,0	335,3	127,0
2009	65345	17,1	22,2	9,0	260,6	336,7	137,1
2010	61300	16,1	20,4	9,0	268,5	345,4	147,3

The largest group of divorced people, regardless of gender, consists of those who entered into marriage between the ages of 20-24. Furthermore, the majority of divorces concerned marriages that lasted between 5 and 9 years. The next group of divorces was of those who were together between 10 and 14 years. In the vast majority of cases, the petition for divorce is initiated by the wife. The most common causes of divorce, as reported in the judgments, are the infidelity of a spouse, alcoholism, and clashes of personalities.

Legal separation was introduced in 1999 as an alternative for divorce. In 2000, there were only 1.340 legal separations. Over the next few years, the number of separations grew to 11.600 verdicts on separation in 2005. The current trend is the decrease of legal separations. In 2010, there were only 2.789 legal separations. Notably, however, the number of separations in the countryside is increasing. These figures suggest that the role of separation is different from that assumed by the introduction of separation to Polish family law: separation is not a substitute for or a transition to divorce.

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

There is no regulation that permits marriage or registered partnership for same-sex couples. More than half of society (56%) is against the introduction of marriage or registered

partnership for same-sex couples[899]. However, there were two drafts of an Act regarding partnerships prepared in 2012[900] that provide rules regarding the conclusion and dissolution of partnerships, as well as the rights and duties of partners. According to one of the drafts, partners are able to dissolve the partnership agreement by mutual consent. Alternatively, one partner may terminate the partnership in front of a registry officer and the partnership will expire after six months. The second draft states the possibility of partnership dissolution by the mutual consent of the partners, as well as dissolution by the court in cases of permanent and irretrievable breakdown of the bonds between partners.

B. Conflict of Laws

7. How is marriage defined in your national law?

Marriage is defined by the Constitution of the Republic of Poland as a permanent relationship between a man and a woman. The Family and Guardianship Code articulates the conditions for a valid marriage, which occurs when a man and a woman are both present in front of a head of registry office (or a cleric) and state that they are entering into marriage with each other[901].

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

b). Rome 3 is not applicable

10. What is the applicable law for divorce (lex fori, common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

The applicable law for the dissolution of marriage is the common national law of spouses at the time the divorce proceedings were started[902]. Failing that, the applicable law is that of the

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[899] See article from July 2012: http://spoleczenstwo.newsweek.pl/ponad-polowa-polakow-przeciwko-zwiazkom-partnerskim,94443,1,1.html.
[900] See http://orka.sejm.gov.pl/Druki7ka.nsf/0/9436A1BBFEDA2278C1257A370043EC9D/%24File/554.pdf. and http://orka.sejm.gov.pl/Druki7ka.nsf/0/97A9C9C40D26CB7CC1257A370043EC84/%24File/552.pdf.
[901] Art. 1 § 1-2 k.r.o.
[902] Art. 54 ust. 1 p.p.m. (Act of February 4, 2011 – Private international law).

state where the spouses were resident at the time the claim for divorce was filed. Otherwise, the applicable law is that of the state where the spouses resided if one of the spouses still resided in that state[903]. Lastly, Polish law applies[904].

11. Is parties' will taken into account in order to determine the applicable law for divorce?

The will of the spouses is not taken into account.

12. If parties may choose the applicable law, how shall this choice be expressed and when?

Spouses are not able to choose the applicable law.

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

National law applies to the financial consequences of divorce.

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

For matrimonial assets, spousal common law applies first[905]. Failing that, the law of the state of the common habitual residence of the spouses applies. Failing that, the law of the state where the spouses reside applies. Failing that, the law of the state with which the spouses have the closest connections applies[906].

15. What is the applicable law for parental responsibility?

The law applicable to parental responsibility and contacts with children is stated by the Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Polish private international law cross-references this convention[907].

If the habitual residence of the child changes to a state that is not party to the convention, from the time of the change in residence does the law of that state (the new habitual

[903] Art. 54 ust. 2 p.p.m.
[904] Art. 54 ust. 3 p.p.m.
[905] Art. 51 ust. 1 p.p.m.
[906] Art. 51 ust. 2 p.p.m.
[907] Art. 56 ust. 1 p.p.m.

residence) govern the conditions of application of the measures taken in the state of the former habitual residence[908].

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The law applicable to maintenance is stated by Council Regulation (EC) no 4/2009 of December 18, 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations. Polish private international law cross-references this regulation[909].

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

The court *ex officio* is obliged to look for and apply applicable foreign law. The applicable law should be established and applied in every instance and this rule does not depend on the motions of the parties[910]. The court may consult with the Minister of Justice to receive the text of foreign law and explanations regarding foreign practice[911].

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

See question 17. The court has an obligation to establish what law should be applied in a particular case. Apart from the information provided by the Minister of Justice, the court may use other measures to establish the content of foreign law. For example, an opinion of an expert may be useful. It is also possible to receive an opinion of a group of experts in foreign law. If it is not possible to establish the circumstances on which the application of foreign law depends, the law most closely connected with the particular legal relationship should be applied. If it is impossible to establish the content of foreign law in a reasonable timeframe, Polish law is applied[912].

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

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[908] Art. 56 ust. 2 p.p.m.
[909] Art. 63 p.p.m.
[910] See decision of the Supreme Court of 9th May 2007, II CSK 60/07, OSNC 2008/5/53.
[911] Art. 1143 § 1 k.p.c.
[912] Art. 10 ust. 2 p.p.m.

There is no special provision stating the period for which a marriage should last before divorce. However, in practice, if the marriage only lasted a few months or years, judges are more cautious in examining whether there has been a total and irretrievable breakdown of the marriage.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

A spouse who is partially or wholly incapacitated is unable to initiate a lawsuit for divorce[913]. A guardian appointed for the wholly incapacitated person is not permitted to initiate a lawsuit for divorce[914]. In the case of a partially incapacitated person, a lawsuit for divorce can be initiated by a curator.

A guardian or a curator can defend the rights of an incapacitated person in divorce proceedings because the spouse of an incapacitated person is permitted to initiate a divorce claim in the court[915].

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

According to article 56 § 1 k.r.o., the basic prerequisite for divorce is an irretrievable and total breakdown of matrimonial life between the spouses. A total breakdown of marriage means a lack of any spiritual, physical and economic bonds between the spouses.

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

The irretrievable breakdown of matrimonial life means that the spouses will never return to each other or reconcile. Whether the spouses will reconcile must be established by the circumstances of each divorce case. According to one recent judgment, an irretrievable breakdown takes place if the bonds between the spouses ceased so long ago that, according to the principles of life experience, a return to matrimonial life will not happen[916].

There is no presumption regarding the irretrievable breakdown of marriage, which means that the specific circumstances of the case are examined very carefully. The court establishes these circumstances using the same evidence as in other civil cases. However, a few exceptions should be mentioned.

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[913] Art. 65 k.p.c.
[914] Marek Andrzejewski [in] Henryk Dolecki, Tomasz Sokołowski (eds), Kodeks rodzinny i opiekuńczy. Komentarz, LEX 2010.
[915] See decision of the Supreme Court of April 17, 1948, C 493/47, OSNC 1948/2/28.
[916] Decision of the Appellate Court of Katowice of March 12, 2010, I ACa 51/10, LEX no 1120376.

First, a decision of the court may not be solely based on the admission of the claim or certain facts by the defendant[917]. The examination of the evidence in these cases cannot be simplified this way and must instead be carried out carefully and thoroughly[918].

Second, the court must hear the testimony of both parties[919]. When the court can hear only the evidence of one spouse due to the facts or the law, the court should decide whether to hear only one spouse or omit this evidence entirely. It is assumed that in such a situation, the court should hear only one spouse[920].

Third, if the defendant admits the claim and the spouses have no common minor children, the court may limit the evidence to the testimony of the parties[921]. This does not mean, however, that the divorce is not permitted if the spouses have common minor children and other evidence is not provided to the court[922].

The main aim of the divorce proceedings is to establish the circumstances of the breakdown of matrimonial life, as well as to establish the circumstances regarding the children of the spouses and their situation. In case of a spouse's admission of a claim in the divorce case, the court also seeks to establish the reasons for the defendant's admission of the claim[923].

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

As the only formal prerequisite of divorce is the total and irretrievable breakdown of the marriage, there are a few concrete reasons for it that are mentioned in the various decisions of the courts. Among these reasons are adultery, chronic drunkenness, and incompatibility, which have remained unchanged for many years[924].

In 2001, the main cause of divorce was adultery (30,9%). The next ones were drunkenness (28,1%) and incompatibility (24,5%)[925]. In 2010, on the other hand, the main cause of divorce was incompatibility (34,8%). The second one was adultery (25,4%) and the third one was drunkenness (19,8%). The last cause has decreased in importance and is likely connected to societal change. However, it should be noted that "incompatibility" is ambiguous. It can be hard to assess to what extent it reflects the differences in behavior, attitudes and aspirations

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[917] Art. 431 k.p.c.
[918] See decision of the Supreme Court of July 7, 1995, I CRN 89/95, LEX no 1110740.
[919] Art. 432 k.p.c.
[920] See decision of the Supreme Court of September 17, 1946, III C 719/45, LEX no 160843.
[921] Art. 442 k.p.c.
[922] See decision of Appellate Court of Łódź of December 13, 1995, I ACr 557/95, OSA 1997/3/19.
[923] Art. 441 k.p.c.
[924] Compare Andrzej Mączyński & Tomasz Sokołowski, National Report for CEFL – Ground for Divorce and Maintenance Between Former Spouses, 2002, p. 7.
[925] See http://www.stat.gov.pl/cps/rde/xbcr/bip/BIP_raport_2010-2011.pdf.

of the spouses, and how often it is used only as an alleged cause of fictitious divorces[926]. Financial differences between the spouses play an increasingly important role each year. In 2010, it was the cause of 7,3% of divorces.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

According to article 56 § 3 k.r.o., divorce is not permitted if it has been requested by the spouse who is solely guilty for the breakdown of marriage unless the other spouse consents to the divorce, or the refusal to consent to the divorce is, under the circumstances, contrary to the principles of social coexistence. Lack of this consent precludes divorce.

The court should determine the motives of the consenting spouse. The court should also examine whether the consent was freely given, without pressure or threats by the other spouse[927].

A spouse's consent for the divorce should be expressed in front of the court during the divorce proceedings.

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

The application for divorce should be made by one spouse. The consent of the other spouse for divorce does not mean the acknowledgement of the petition for divorce. If the defendant admits the claim and the spouses have no common minor children, the court may limit the evidence to the testimony of the parties. The court is always obliged to establish whether there is a total and irretrievable breakdown of marriage.

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

The judge is entitled to decide the consequences of divorce. There are a few elements of each divorce ruling, which are mentioned in article 58 k.r.o. The court takes into account the agreement of the spouses on how to exercise parental authority and how to maintain contact with the child after the divorce. However, such an agreement should be compatible with the welfare of the child. It is also important that siblings should be brought up together, unless the welfare of the child requires otherwise.

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

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[926] *Ibid.*
[927] Decision of the Supreme Court of May 14, 1956, I CR 746/55, OSN 1956, poz. 120.

In a divorce ruling, the court decides whether there is fault and which spouse is at fault for the breakdown of the marriage[928]. Upon joint motion of the spouses, the court may waive a ruling on fault. In this situation, neither of the spouses is considered to be at fault. Otherwise, in regard to fault, there are three possible rulings: 1) sole guilt is attributed to one spouse, 2) both spouses are guilty, or 3) neither of the spouses is deemed to be guilty.

The part of the ruling regarding fault is important not only in light of article 56 § 3 k.r.o.,[929] but also weighs heavily in whether maintenance is required and to what extent.

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

o) Is separation sufficient to establish irretrievable breakdown?

Separation[930] can be evidence of an irretrievable breakdown of the marriage, but it is insufficient to establish the irretrievable breakdown of the marriage. For example, separation can result from changes in employment when one spouse must leave the family to get a job. In this case, other circumstances are necessary to show that there has been an irretrievable breakdown of marriage.

p) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

Time matters in assessing whether there is an irretrievable breakdown of marriage, but the Supreme Court has pointed out that it is not crucial[931]. In its older decisions, the Supreme Court has mentioned a five-year separation period,[932] but this statement is no longer maintained by the courts. All cases are instead analyzed separately and in the scope of the individual characteristics of each marriage. A helpful criterion can be the comparison between the length of the marriage and the length of the separation. Specifically, the longer the marriage lasts, the less chance there is for the irretrievable breakdown of marriage in cases of misunderstandings between spouses[933].

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

See question 23.

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[928] Art. 57 § 1 k.r.o.
[929] As previously mentioned, a divorce is not permitted if it has been requested by the spouse who is solely guilty for the breakdown of the marriage.
[930] Factual, not legal separation. Legal separation is not mandatory before divorce.
[931] See decision of the Supreme Court of December 14, 1984, III CRN 272/84, OSNC 1985/9/135.
[932] Decision of the Supreme Court of April 26, 1952, C 798/51, OSN 1952/1/1.
[933] Decision of the Supreme Court of December 12, 1955, I CR 1889/54, OSN 1957/2/44.

a. Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

There is no special form of divorce known as divorce by consent. In all cases, courts are obliged to establish total and irretrievable breakdown of marriage. If the defendant admits the claim and there are no common minor children, the court may limit the evidence to the testimony of the parties[934]. The rule is that the decision of the court cannot be based only on the acknowledgement of the claim or confirmation of facts[935].

31. Must the spouses be separated before introducing the claim? If yes, for how long?

As a rule, spouses are not obliged to live separately for a certain period of time before initiating a claim for divorce. However, a factual separation is seen as evidence for the total and irretrievable breakdown of the marriage. Nonetheless, because many people cannot afford to buy or rent separate apartments, the lack of separation cannot be the only reason for the denial of a grant of divorce[936].

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

There is no divorce by mutual consent of spouses. See question 30.

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

If there is consent for divorce by both spouses, the court is still obliged to establish all of the consequences of divorce. The court takes into account the agreement of the spouses on how to exercise parental authority and how to maintain contact with the child after the divorce, if is compatible with the welfare of the child[937].

b. Divorce on the ground of irretrievable breakdown of the marriage

34. How is irretrievable breakdown established?

Total[938] and irretrievable breakdown of the marriage means a lack of spiritual, physical and economic bonds between the spouses. These bonds are important because spouses are

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[934] Art. 441 k.p.c.
[935] *Ibid.*
[936] See decision of the Supreme Court of May 28, 1955, I CO 5/55, LEX no 117989.
[937] Art. 58 § 1 k.r.o.
[938] Pursuant to art. 56 k.r.o., the breakdown of marriage must be both total (complete) and irretrievable.

obliged to live together, assist each other and remain faithful, and work together for the good of the family their marriage has created[939]. According to previous decisions of the Supreme Court, however, because of extraordinary circumstances, some elements of the economic bond may remain despite the initiation of divorce. For example, spouses may not be able to afford to buy or rent another apartment and must therefore still live together. In such a case, the court should establish whether there is a complete lack of spiritual and physical bonds between spouses.

There is no presumption regarding the total and irretrievable breakdown of marriage. The court uses the general rules of civil proceedings, but the court should take into account some differences in divorce proceedings. The court's decision cannot be based on the acknowledgement of the claim or facts made by the defendant. The court is obliged to hear the testimony of both parties. In the case of an acknowledgement of the claim by defendant, if the spouses do not have common minor children, the evidence proceedings can be limited to the testimony of the spouses. This testimony of the spouses aims to establish the circumstances regarding the question of whether total and complete breakdown of marriage occurred, as well as the question regarding the situation of the children. If the defendant has acknowledged the claim, the court is obliged to establish reasons why the acknowledgement took place.

35. How is consent between spouses taken into account regarding irretrievable breakdown?

Consent is important but not decisive. In the case of an acknowledgement of the claim by the defendant, there are some changes in the general rules of divorce proceedings. See question 34.

36. How is separation between spouses taken into account regarding irretrievable breakdown?

Separation is not required before the initiation of divorce proceedings. However, the period of separation can be evidence for the irretrievable breakdown of marriage.

o) Is separation sufficient to establish irretrievable breakdown?

Separation is significant evidence of the irretrievable breakdown of the marriage, but it is not decisive. As previously mentioned, spouses can be granted divorce even if they occupy the same house because they cannot afford to buy or rent separate apartments. On the other hand, it is possible that spouses live separately, but such separation is insufficient to establish the irretrievable breakdown of the marriage.

[939] Art. 23 k.r.o.

p) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

There is no specific period of separation that can be recognized as an irretrievable breakdown. Courts take into account the length of the marriage and all of the circumstances of the case in establishing whether irretrievable breakdown occurred. Separation does not need to be a continuous period of time, but breaks in separation can be evidence of the lack of irretrievable breakdown. The irretrievable breakdown of marriage means that spouses will not return to each other at any time.

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

There is only one proceeding. In each divorce case, the court is obliged to establish that a total and irretrievable breakdown of marriage occurred. See also question 30.

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

Pursuant to article 57 § 1 k.r.o., in each divorce case, the court must rule on whether there is fault and which spouse is at fault for the breakdown of the marriage. There is one exception: by joint motion of the spouses, the court may waive a ruling on fault, which has the effect that neither of the spouses is considered at fault.

However, fault is not a prerequisite for divorce, but it is an important aspect of divorce proceedings. There are three possible situations: 1) one of the spouses is at fault, 2) both spouses are at fault, or 3) neither spouse is at fault.

Establishing guilt is important for the grant of divorce, as well as for the existence and scope of the duty to pay maintenance.

39. Are there some specific requirements regarding proof of fault in this proceeding?

There are no special rules regarding proof of fault. Spouses can use different evidence.

The basis for establishing fault is the behavior of each spouse. If the court comes to the conclusion that the behavior of a spouse affected the total and irretrievable breakdown of the marriage, that spouse is at fault and it is irrelevant that the fault of the other spouse is greater. The differing extent of each spouse's guilt is not an obstacle to finding them both at

fault[940]. The court's ruling on the sole guilt of one spouse should be preceded by the establishment that only one of the spouses caused the total and irretrievable breakdown of the marriage[941].

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

The court is able to rule that both spouses are at fault for the breakdown of the marriage even if the plaintiff wants a ruling that the defendant is solely guilty[942]. It is the obligation of the court to rule on whether there is guilt and which spouse is guilty. Only a joint motion of the spouses waives this obligation.

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

The Family and Guardianship Code does not recognize spouses' reconciliation as a factor that erases guilt. Nonetheless, reconciliation is one of the circumstances taken into account when assessing the state of matrimonial life and the breakdown of the marriage. The subsequent change of behavior by one spouse does not mean that the previous misbehavior cannot be treated as a factor causing the breakdown of the marriage[943]. According to the decisions of the Supreme Court, reconciliation is deemed to occur after the subsequent improvement of the spouse's behavior, but a spouse can refer to previous misconduct even if it has been forgiven[944].

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

A spouse's fault cannot be considered a tort, but the acts underlying the fault can be torts and therefore a source of claims for damages. In such cases, the general rules of tort law apply.

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

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[940] See, e.g., the decision of the Supreme Court of June 29, 2000, V CKN 323/00; the decision of the Supreme Court of September 22, 1997, II CKN 329/97.
[941] See decision of the Supreme Court of May 13, 1997, II CKN 140/97.
[942] Bronisław Czech [in] Kazimierz Piasecki (ed.), Kodeks rodzinny i opiekuńczy. Komentarz, Warszawa 2006, p. 390.
[943] See decision of the Supreme Court of March 23, 1956, III CR 347/55, OSN 1956/4/114.
[944] See decision of the Supreme Court of December 19, 1950, C 347/50, OSN 1951/2/55.

Spouses are not able to decide the date at which the divorce becomes effective. A marriage is dissolved at the moment the court's judgment becomes final and cannot be appealed.

Spouses also cannot settle the consequences of the divorce before or during the marriage. However, in the course of divorce proceedings, spouses can conclude an agreement on how to exercise parental authority and maintain contact with their child after the divorce. This agreement is taken into account by the court. The property consequences of the divorce can also be settled by spouses after divorce. If there is disagreement in this matter, the court will decide how to distribute the property between the spouses. The maintenance obligation towards children, as well as between the spouses, can also be the subject of agreement between the spouses.

44. If yes, may the judge scrutinize the spousal agreement?

The judge may scrutinize spousal agreements regarding the exercise of parental authority and children. Spousal agreements on marital property or maintenance obligations are not subject to judicial decision as long as they are made outside the court. If those agreements are concluded in front of the court, they are examined as to whether they are contrary to the law and principles of social coexistence or whether they aim to circumvent the law[945].

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

The judge examines spousal agreements on how to exercise parental authority or maintain contact with the child based on whether they are compatible with the welfare of the child[946]. It is also important that siblings be brought up together unless the welfare of the child requires otherwise. See also question 44.

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

Legal separation exists in Poland. A ruling on separation has the same effect as the dissolution of marriage by divorce unless law provides otherwise[947]. The most significant difference between separation and divorce is that separated spouses cannot remarry[948]. One of the results of separation is a new matrimonial property regime: separation of property replaces community of property as the default regime. In a ruling on separation, the court rules on joint parental authority over minor children of both spouses and on parental contact with the child, as well as alimony for the children. However, if the ruling is the result of a joint motion of the spouses and is judged in a special proceeding, the court does not

[945] See art. 184 k.p.c.
[946] See art. 58 § 1 k.r.o.
[947] See art. 61^4 § 1 k.r.o.
[948] See art. 61^4 § 2 k.r.o.

rule on parental authority because a prerequisite of that special proceeding is the lack of common children.

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

Marriage is broken off when the ruling on divorce becomes final. This occurs when the ruling cannot be appealed because either the timeframe for appeal has expired or the appealed proceedings have ended with the ruling of the upper court.

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

There are no limitations on the freedom of the ex-spouses. They can remarry as soon as the ruling on divorce is final. Ex-spouses can remarry each other.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

Spouses may change their surnames upon marriage. Pursuant to article 25 § 1 k.r.o., the surname that the spouses use during marriage must be submitted in a statement. The statement is made in front of the head of the registry office and may be submitted immediately after the wedding, as well as before the head of the registry office who draws up a statement that there are no hindrances to the marriage. The latter approach is chosen more often.

There are a few possibilities regarding surnames. First, one spouse may adopt the surname of the other. Second, each spouse may retain their current surname. Finally, spouses may combine their surname with that of the other spouse. A surname which is made as a combination of surnames may not be composed of more than two elements.

If spouses have not made any statements regarding surnames, each of them will retain their existing surname.

There is a special provision in the law concerning surnames after divorce. Within three months after the ruling on the divorce becomes final, a divorced spouse who changed a surname as a consequence of the marriage may submit a statement before the head of the registry office to revert back to the previous surname[949]. The ex-spouse cannot demand from the other ex-spouse a change in the surname[950].

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[949] Art. 59 k.r.o.
[950] See decision of the Supreme Court of February 2, 1978, IV CZ 11/78, LEX no 8065.

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

Divorce does not affect citizenship, but has some consequences for residence permits. A tenable residence permit can be granted to a foreigner who has married a Polish citizen[951]. This permit may be disaffirmed when the marriage comes to an end unless there are other circumstances which are prerequisite of granting a residence permit (e.g., an ex-spouse has permission to work in Poland).

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

The residence of the child is either the common residence of the parents or the residence of the parent who has the sole power to exercise parental responsibility. If both parents have power to exercise parental authority, the residence of the child is the residence of the parent with whom the child stays. If the child stays with both of the parents, the residence of the child is established by a court[952].

52. Does divorce produce automatic effects regarding parental responsibility?

In its ruling on divorce, the court should rule on parental responsibility. On this issue, the court takes into account the agreement of the spouses on how to exercise parental responsibility insofar as it is compatible with the welfare of the child. Divorce does not produce automatic effects regarding parental responsibility.

53. Can the exercise of parental responsibility be subject to a parental agreement?

Parental responsibility can be subject to a parental agreement. However, the court is able to influence parental responsibility to ensure the welfare of the child.

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

The judge is vested with the power to scrutinize the agreement of the parents on how to exercise parental responsibility and maintain contact with the child after divorce. The judge may leave parental responsibility with both parents at their joint motion if they presented such an agreement and if it is reasonable to expect that they will co-operate in matters

[951] Art. 53 ust. 1 pkt 6 Act of June 13, 2003 on foreigners.
[952] Art. 26 k.c. (Civil Code of April 23, 1964).

concerning the child. The judge may also ask parents to reconsider their agreement or to modify it. If there is no agreement between the spouses or if the agreement is incompatible with the welfare of the child, the judge may give the power to exercise parental responsibility to one parent, limiting the parental responsibility of the other parent to specific rights and duties.

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

The court can organize the exercise of parental responsibility. The court should ask parents about their agreement regarding the exercise of parental responsibility. The agreement of the parents regarding maintenance of contact with the child after divorce does not permit the court to leave this matter out of the ruling on divorce[953].

56. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

The judge should take into account all the circumstances of the case and the welfare of the child. The judge can modify the exercise of parental responsibility. One parent can be deprived of parental responsibility to ensure the welfare of the child. Misbehavior of one parent toward the other can result in the modification of parental responsibility as it is assumed that this misbehaver can be dangerous for a child. On the other hand, infidelity to the other parent is not a reason to limit parental responsibility.

57. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

Contact with children is not an element of parental responsibility (parental authority[954]). Regardless of parental authority, parents and children have the right and obligation to maintain contact with each other[955]. Contact with the child specifically includes spending time with the child, direct communication, maintaining correspondence, and using other means of communication, including electronic communication[956].

The parent deprived of parental responsibility can still be vested with contact with the child if necessary for the child's welfare. However, the court may prohibit meetings with the child, prohibit taking the child outside the child's place of residence, allow one parent to meet with the child only in the presence of the other parent, limit contacts to specific kinds of

[953] See decision of the Supreme Court of June 5, 2012, III CZP 72/11, Biuletyn SN 2012/6/7.
[954] In the Family and Guardianship Code, the term used is „władza rodzicielska" (which translates as „parental authority") instead of „odpowiedzialność rodzicielska" (which translates as „parental responsibility").
[955] Art. 113 § 1 k.r.o.
[956] Art. 113 § 2 k.r.o.

communication or even prohibit communication. The court may entirely limit or even prohibit contact with the child if it seriously endangers or violates the child's welfare.

The residence of the child is the residence of the parent who has exclusive parental authority. If both parents have equal parental authority and have separate residences, the residence of the child is with the parent with whom the child permanently resides. If the child does not reside permanently with one of parents, the court decides the child's place of residence.

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

There is no shared residence in Poland. The general rule is that a person can have only one domicile. If one parent is deprived of parental authority, the child should not reside with that parent because it would be very difficult for the other parent to exercise parental authority. If both parents have parental authority, the court should establish the residence of the child in the ruling on divorce.

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

In cases when both parents want to have parental authority, they should consider the residence of the child. However, the court is vested with the power to scrutinize the parental agreement. Although the court takes the agreement into account, its ruling can differ from the agreement.

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

There are no special provisions regarding the guaranty of the relationships between the parents and the child after the divorce, other than general rules regarding parental authority and contact with the child. In particular, the guardianship court may amend a decision on parental authority and how it is exercised after a ruling on divorce, separation or annulment of the marriage. The guardianship court may also establish the custody of the child[957]. Parental authority may be limited, suspended or deprived. Contact between the parents and child may also be limited or prohibited.

b. Post-marital financial consequences

[957] Art. 106 k.r.o.

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

The rule is that by motion of either spouse, the court may divide the joint property in the ruling on divorce, as long as carrying out the division does not cause undue delay to the proceedings[958]. In practice, the distribution of property does not occur very often because of a lack of suitable motion or because the spouses are not unanimous in determining the common property and its division. In the last instance, it is possible to divide common property in divorce proceedings only if evidentiary proceedings are not time-consuming. If they are, the court decides to neglect the motion for division because the division would cause undue delay. Spouses can divide their common property in an agreement and if it is not possible to conclude the agreement, they are able to make a motion to the court. The condition of division of common property is that the ruling on divorce is final[959].

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :
- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

Under a few conditions mentioned in the Family and Guardianship Code, spouses may be entitled to maintenance. The property rights of the spouses depend on the marital property regime applicable in a particular marriage.

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

The maintenance issue can be subject to a ruling on divorce. Request for maintenance can be made subsequently, and the scope and time of the maintenance obligation towards an ex-spouse depends on guilt. There are two general rules.

First, a divorced spouse who has not been found exclusively guilty in the breakdown of the marriage and who finds himself without means may demand that the other spouse provide the means for upkeep as appropriate in light of the needs of the entitled spouse and the earning capacity and assets of the obliged spouse[960].

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[958] Art. 58 § 3 k.r.o.
[959] Spouses are able to divide common property if they conclude a marital property agreement introducing separation of property or if this regime is the compulsory one.
[960] Art. 60 § 1 k.r.o.

According to the second rule, if one spouse has been exclusively guilty for the breakdown of the marriage and the divorce results in a significant deterioration in the standard of living of the innocent spouse, at the motion of the innocent spouse, the court may decide that the guilty spouse is obliged to contribute as appropriate to satisfy the needs of the innocent spouse, even if the innocent spouse is not destitute[961].

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

Claims for maintenance as discussed in question 63 can be introduced after the divorce. There is no time limit for initiating an action in this regard. However, the obligation to provide maintenance for an ex-spouse ceases if the entitled ex-spouse remarries. If the obliged spouse was not found exclusively guilty of the breakdown of marriage, the obligation also ceases five years after the ruling on divorce, unless extended by the court at the request of the entitled spouse due to exceptional circumstances[962].

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

An ex-spouse may be discharged from providing maintenance when the entitled spouse remarries. The obligation also ceases five years after the ruling on divorce. According to the general rule regarding the maintenance obligation, a change in the relationship may require a change in the ruling or agreement concerning the maintenance obligation[963]. For example, if the needs of the entitled spouse are lowered, the obliged spouse may demand cutting the payments for the ex-spouse. The same is possible if the earning capacity of the obliged spouse is decreased. On the other hand, the entitled spouse may demand higher payments as well.

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

The entitled spouse can be deprived from obtaining maintenance if the circumstances on which the maintenance obligation is based have ceased. For example, this can occur if the entitled spouse is not without means and there is no significant deterioration in the standard of living of the innocent spouse.

The maintenance obligation ceases if the entitled spouse remarries. However, cohabitation is not treated the same way as remarriage[964].

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[961] Art. 60 § 2 k.r.o.
[962] Art. 60 § 3 k.r.o.
[963] Art. 138 k.r.o.
[964] See decision of the Supreme Court of July 10, 1998, I CKN 788/97, LEX no 34443.

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

The termination of the marriage means the end of the default property regime, which is community of property. When the community of property regime ceases, the shares of spouses in the common (joint) property are equal, unless their marital property agreement provides otherwise. This rule is one of the guarantees of the balance between the ex-spouses. The majority of couples do not conclude a marital property agreement and the rules on the default property regime are applied.

Balance between the ex-spouses can be sought by way of a maintenance obligation. Deterioration in the standard of living can be the reason for claiming maintenance if the claimant has not been found exclusively guilty for the breakdown of the marriage. This rule is significant particularly for long-lasting marriages in a traditional family, wherein the husband is the bread-winner and the wife takes care of the children and the household.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

Division of common (joint) property is an issue independent from the maintenance obligation. However, the results of the division of common property can influence the maintenance obligation.

The general rule is that if the relationship changes, the ruling or agreement concerning maintenance may also be changed[965]. As soon as the ruling regarding division of property is final, the obliged spouse may demand changing the ruling on maintenance. If the ruling on maintenance is made after the ruling on property division, the court takes into account the amount of property obtained by the plaintiff as a result of the property division.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

Grounds for divorce do not have a direct influence on maintenance. The maintenance obligation between former spouses is connected with the guilt for the breakdown of the marriage. The particular grounds for divorce are taken into account by the divorce court ruling on whether there is fault and which spouse is at fault for the breakdown of marriage.

There are two types of maintenance claims between former spouses: the "narrow" and the "broad" type. The broad type can exist only between a solely guilty spouse and a wholly innocent spouse.

[965] Art. 138 k.r.o.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

In practice, maintenance takes the form of periodical monetary payment, not lump sums. Compensation cannot be claimed by former spouses and maintenance does not act as compensation.

The amount of periodical payments is calculated taking into consideration the justified needs of the entitled person and the economic and earning capacity of the obliged person.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

The family home is not treated in any special way in the sense that the most important aspect is the legal title to it (ownership). The rules of matrimonial property regimes are applied. If the home is part of the separate property of a spouse, it is not subject to division. Once it is part of common property, it is divided by the spouses or the court based on the rules of the division of common property.

If the spouses share an accommodation such as a family home, the court also rules on the use of that residence for as long as the divorced spouses share the accommodation[966]. In exceptional cases, when one spouse's blameworthy behavior makes such cohabitation impossible, the court may order an eviction on the suitable motion of the other spouse.

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Spouses are not able to conclude an agreement on maintenance in the case of an eventual divorce. Furthermore, while the default regime of community of property exists, neither of the spouses can demand the division of the common (joint) property. They may also not dispose of or undertake to dispose of particular assets belonging to them, or the share of common property that they would receive if the default regime ceased[967].

However, spouses can conclude an agreement on maintenance between themselves during the actual divorce proceedings and after the divorce. After the default regime of community of property ceases, spouses may divide their common property.

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[966] This is the obligation of the court to rule on this issue. However, if the spouses have decided on this issue and the court finds their agreement on this subject not dangerous either to the welfare of the children or to the spouse who has parental responsibility, the court may leave this issue out of the ruling of divorce. It is also unnecessary to include this issue in the ruling of divorce when one spouse has left the family home (see the decision of the Supreme Court of July 18, 2002, IV CKN 1249/00, LEX no 80269). The burden of proving that one spouse has left the family home lies with that spouse.

[967] Art. 35 k.r.o.

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Once the agreements on maintenance or division of property are concluded after divorce, and neither of the spouses questions them, the court is not vested with the power to scrutinize these agreements.

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets (incomes, capital, assets, pension, benefit…) of can they be discharged from full and frank disclosure?

Spouses are obliged to provide information on their assets. The court can demand such information[968] and can order all those concerned to provide information regarding the financial situation of spouses.

While it is not possible to estimate the financial situation of the spouses, the court will take into account the age, profession, and the earning capacity of the debtor.

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

See question 74. Spouses are obliged to give all of the necessary information[969]. The finances of the spouses can be established by ordering tax offices, banks and other institutions to provide sufficient information and documents that would help the court[970].

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

The criteria depend on the type of maintenance between the former spouses. There are two types of maintenance: the narrow type and the broad type.

The narrow one is regulated by article 60 § 1 k.r.o. The entitled spouse should prove that he or she finds himself or herself without means. The first criterion is the lack of means. The other criterion is the earning and economic ability of the obliged spouse. The general rule regarding all maintenance is that the scope of the maintenance depends on the earning capacity and assets of the obliged person[971].

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[968] See art. 433 k.p.c.
[969] See art. 3 k.p.c. Pursuant to this regulation, parties are obliged to act according to good practice. They must provide explanations of the circumstances of the case as well as the true evidence without hiding anything.
[970] See art. 248 k.p.c.
[971] Art. 135 § 1 k.r.o.

The broad type of maintenance requires proof of a significant deterioration in the standard of living. The court takes into account the present standard of living and the standard of living during the marriage. Justified needs of the innocent spouse should be satisfied, even if the entitled spouse is not completely without means. The general rule regarding earning capacity is also applied.

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

If the circumstances have changed, the amount of maintenance can be adjusted. One spouse can initiate a new claim and the court must decide whether to increase or reduce the amount of the maintenance. Former spouses are also able to conclude an agreement and adjust this amount to their new situation.

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

The obligation to maintain the child is not linked to parental responsibility or the residence of the child. Even though the child lives with one parent does not mean that the other parent is not obliged to participate in the costs of caring for the child. Parents are obliged to provide maintenance to a child who cannot provide for himself or herself, unless the income from the child's property is sufficient to cover his or her maintenance and upbringing[972].

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

The parent who does not live with the child covers half of the maintenance or upbringing costs of the child.

One of the elements of a divorce ruling can be the decision on the amount of maintenance. It is possible to adjust the amount of the alimony either by a subsequent decision of the court or by an agreement between the parents of the child[973].

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

The methods provided to carry out the maintenance obligation regarding children may be determined by parental agreement. Although there is no developed regulation on agreements regarding the maintenance obligation, such an agreement is mentioned in article

[972] Art. 133 § 1 k.r.o.
[973] Art. 138 k.r.o.

138 k.r.o.: if the relationship changes, a change in the ruling or agreement concerning the maintenance obligation may be required.

By such agreements, parents are not allowed to terminate their maintenance obligations. Their agreement is subsidiary in the sense that parents may establish the amount of the maintenance or the time of payment by the agreement, but they should take into account the justified needs of the child and the earning capacity of the obliged parent.

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

The court is not bound by the agreement of the parents if the relationship has changed after the conclusion of the agreement. In such a case, the court may modify the rules on the maintenance obligation by, for example, waiving the amount of maintenance. The court does not ask the parents to reconsider the agreement and simply rules on the maintenance obligation.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

Articles 57-58 k.r.o. are relevant because they mention the mandatory elements of the ruling on divorce. These elements can be divided into three groups:

1) elements put into the ruling *ex officio* without any motion by the spouses,
2) elements introduced to the ruling because of a motion by at least one spouse,
3) elements introduced to the ruling on the joint motion of the spouses[974].

The first group includes fault in the breakdown of marriage[975], parental responsibility (authority), the maintenance obligation towards children, and the temporary use of shared accommodations[976].

The second group includes an eviction from shared accommodation, division of common property[977], and maintenance between spouses[978].

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[974] See Tadeusz Smyczyński [in:] Prawo rodzinne i opiekuńcze, Warszawa 2009, p. 147.
[975] The court may waive a ruling on fault by joint motion of the spouses. Such a ruling has the effect that neither of the spouses is guilty.
[976] The ruling has temporary effect. If one of the ex-spouses leaves the shared accommodation, the ruling loses its power.
[977] The division of common property can be made so long as carrying it out does not cause undue delay to the proceedings.
[978] This issue can be subject to separate proceedings after divorce, which is very often the case.

The third group includes the division of the common home, i.e., a home belonging to the common property of the spouses.

Issues which are not the mandatory elements of the ruling on divorce or those not necessary by motion of one or both of the spouses can be subject to agreements between ex-spouses.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

There is no special register of agreements on the consequences of divorce. If real estate is the subject of an agreement between the ex-spouses, information about ownership of the real estate should be entered into the land register.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

Divorces are granted by regional courts[979] acting as courts of the first instance. The higher courts in these cases are the courts of appeal. The regional courts are on the second level in the structure of Polish courts and they are both the courts of the second instance for the majority of cases and the courts of the second instance for the cases mentioned in the Code of Civil Procedure[980], which include divorce cases.

The regional courts are authorized to decide all issues that could be the elements of a divorce ruling[981]. However, if the division of property is not made in divorce proceedings and is instead made later, the competent court is the district court. This court also has competence to decide cases on maintenance between the parents and children and between ex-spouses. If the ruling on divorce establishes the amount of maintenance, it can be changed by the district court if the circumstances subsequently change.

In regard to transnational divorce proceedings, Council Regulation (EC) no 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and of parental responsibility is applied. Where no court of a Member State has jurisdiction, jurisdiction is determined by article 1103^1 § 1 k.p.c. Pursuant to this article, jurisdiction over matrimonial matters shall lie with Polish courts:

- if both spouses have the last common habitual residence or residence in Poland, provided that at least one spouse has a habitual residence or residence in Poland, or
- when the plaintiff spouse has a habitual residence or residence in Poland for at least one year, or

[979] Art. 17 pkt 1 k.p.c.
[980] See art. 17 k.p.c.
[981] See question 82.

- when the plaintiff spouse who is a Polish citizen has a habitual residence or residence in Poland for at least six months, or
- both spouses are Polish citizens.

If jurisdiction lies with the Polish courts, the case is considered in the regional courts.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

There is no cooling-off period. Mediation in divorce cases is not mandatory. However, the court is able to refer the parties to mediation.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

Spouses are not under a duty to turn to alternative dispute resolution. If there is potential for maintaining the marriage, the court may direct the spouses to mediation,[982] but mediation is not mandatory. The main aim of mediation is the return of the spouses to common living.

Mediation can also be used in divorce proceedings to secure an agreement of the spouses regarding disputed issues such as how to meet the needs of the family, alimony, how to exercise parental authority, problems relating to contacts with the children, and other financial issues, which are subject to the ruling on divorce[983].

87. May the competent authority during the course of divorce proceeding make interim orders on
- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

There are no interim orders during divorce proceedings. However, the court may make temporary orders on the issues of parental responsibility, maintenance of contact with the children, how to meet the needs of the family, and alimony. These orders are valid until the ruling on divorce is final.

88. Is appeal available against the divorce order or against an out of court divorce decision?

An appeal of the ruling on divorce is possible and is heard by the court of appeal. The decision of the court of the second instance is final.

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[982] Art. 436 § 1 k.p.c.
[983] Art. 445^2 k.p.c.

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene

- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**
  If yes, on which grounds?

A public prosecutor and an ombudsman have the right to take part in divorce proceedings and the proceedings on parental responsibility. They are not entitled, however, to initiate divorce proceedings because the right to initiate a petition for divorce is personal and exclusively connected to the spouses. There are no special prerequisites for taking part in the proceedings. The prosecutor should take part in the proceedings if – according to the prosecutor – it involves public interests, or the protection of human rights and public order[984].

Other third parties, such as institutions seeking to protect children, do not have the right to intervene either in divorce proceedings or proceedings on parental responsibility. Opinions of such institutions can, however, be evidence in these proceedings.

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

Minors under 13 years of age cannot be witnesses in divorce proceedings. This prohibition is applied to the children of spouses who are under 17 years of age[985].

Before deciding parental responsibility and the parents' maintenance of contact with the child, the court should hear the child if the child is sufficiently mature. The parties to the proceeding and their attorneys are informed about the place of the hearing, which is outside the courtroom,[986] and the terms of the hearing, and they may be present during the hearing of the child. The hearing is made in the presence of the child's statutory representative and minutes from the hearing are recorded.

In reaching its decision, the court may take into account all of the circumstances, including the level of maturity, mental development, and health condition of the child. The court may also consult the opinion of the child and consider those preferences.

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

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[984] Art. 7 k.p.c.
[985] Art. 430 k.p.c.
[986] Art. 216[1] k.p.c.

jj) the termination of marriage,
kk) financial consequences of divorce,
ll) the settlement of matrimonial assets,
mm) parental responsibility,
nn) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

Council Regulation (EC) no 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and of parental responsibility applies. There are also several bilateral and multilateral conventions regarding the recognition of foreign decisions.

In addition to these regulations, there are special rules in this regard in the Code of Civil Procedure. The general rule is that foreign decisions of the courts are recognized unless there are obstacles mentioned in article 1146 k.p.c., which include:

a) the decision of the court is not final,
b) the decision has been made in a case in which the jurisdiction of the Polish courts is exclusive,
c) if the respondent was not served with the document that initiated the proceedings with sufficient time and in such a way as to enable the respondent to arrange for his or her defense,
d) the party of the proceeding was not able to defend,
e) a case regarding the same issues was instituted earlier before the Polish courts,
f) the decision is irreconcilable with a judgment given in proceedings between the same parties in Poland or in another country, provided that the judgment made in this country fulfills the conditions necessary for its recognition in Poland,
g) the decision is manifestly contrary to the public order of Poland.

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

A foreign decision on divorce can be denied recognition because it violates the public order. However, according to decisions of the Supreme Court, this could happen only in extraordinary circumstances when the regulation on divorce in another country considerably differs from Polish regulation on divorce[987]. For example, the Court of Appeal in Warsaw denied recognition of the decision of an American court pursuant to the law of the state of Illinois because this law significantly differs from Polish law and the American decision is in violation of the public order[988].

[987] See decision of Supreme Court of January 18, 2002, I CKN 722/99, LEX no 53145.
[988] See decision of Court of Appeal in Warsaw of October 3, 1997, Wokanda 1998/1/10.

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Foreign decisions related to the citizens of Poland can be registered in the registry office. They should be delivered to the registry office with the enforcement clause. The petitioner should also provide the certificate referred to in article 39 of regulation no 2201/2003.

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

The registration is facultative. However, if an ex-spouse wants to enter into a new marriage, that spouse will have to get a certificate stating that there are no circumstances that would prevent the conclusion of the marriage from the head of the registry office. The ex-spouse does not receive the certificate if it is not registered that he is a divorced person.

95. What are the consequences of registration or lack of registration?

See question 94. The certificates issued by the registry office regarding civil status are the only evidence of the events found within them. If they are inconsistent with the actual situation, the inconsistency can be proven only in the front of the court[989].

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

No.

[989] See art. 4, Act on Registry Office Records.

ROMANIA

Romania

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I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

Conformément à l'article 1 du Nouveau code civil (NCC), les sources du droit civil sont la loi, les usages et les principes généraux du droit. Comme dans la matière du divorce a été opérée récemment une reforme assez profonde, il est peu probable de rencontrer des usages dans le domaine. D'autre part, conformément à l'alinéa (3) du même article, dans les matières règlementées par la loi, les usages s'appliquent seulement dans le cas où la loi y renvoie expressément.

Donc, on trouve la règlementation du divorce principalement dans le Chapitre VII du Titre II du Livre II du Nouveau code civil (en vigueur depuis le 1er octobre 2011) , intitulé "La dissolution du mariage", en ce qui concerne les dispositions du droit matériel et dans le Chapitre VI du livre VI du Code de procédure civile sous l'aspect des normes de procédure applicables au divorce dispose sur voie judiciaire.

Ici s'impose une précision : Le Code de procédure civile de Roumanie de 1865 devait cesser son applicabilité le 1er septembre 2012, date à laquelle aurait dû entrer en vigueur Le Nouveau code de procédure civile (NCPC) (loi no. 134/2010). Dans cet acte normatif, la réglementation de la procédure du divorce fait l'objet du Titre I, du Livre VI.

L'entrée en vigueur du Nouveau code civile a été ajournée pour le 1er février 2013.

Par la suite, à la date de l'envoi du présent rapport, sont encore en vigueur les normes du Code de procédure civile de 1865, parfois incomplètement harmonisées avec la réglementation contenue dans le Nouveau code civil, mais à la date de la rédaction du rapport final, seront en vigueur les normes du Nouveau code de procédure civile. C'est pour cela qu'on va se rapporter aux deux actes normatifs.

De même , il faut avoir en vue les dispositions des articles 39-46 de la loi 71/2011 pour la mise en application du Code civil , contenant des règles d'application dans le temps des normes concernant le divorce et aussi celles des articles 8 lettre p) , 10 lettre e) et 85^19 de la loi des notaires publics et de l'activité notariale no. 35/1995, pour la procédure du divorce par voie notariale.

Enfin, selon l'article 5 du Nouveau code civil, dans les matières règlementées par le code, les normes du droit de l'Union Européenne s'appliquent prioritairement, indifféremment de la qualité ou du statut des parties.

Pour les situations qui échapperaient a la réglementation légale, comme on a montré ci-dessus il faut faire appel aux principes généraux du droit.

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

Dans le droit moderne de la Roumanie, on peut établir 4 étapes importantes dans l'évolution de la réglementation concernant le divorce : la période comprise entre le moment de l'entrée en vigueur du Code civil de 1864 et l'instauration totale du régime communiste (plus précis ,en 1954 , quand par l'intermédiaire du décret 32/1954 pour la mise en application du Code de la famille et du décret no. 31/1954 concernant les personnes physiques et les personnes morales , le livre I de l'ancien Code civil – Sur les personnes - a été abrogé) ; la période du régime communiste (1954-1989) , quand la réglementation du divorce était contenue dans le Code de la famille et dans le Code de procédure civile ; la période de transition , entre 1989 et 2011 , quand la réglementation du divorce a continué à être celle du Code de la famille , sous son aspect matériel et celle du Code de procédure civile , sous son aspect procédural, en opérant , quand même , certaines modifications , plus importantes pendant les dernières années ; la période actuelle, quand les normes de droit matériel concernant le divorce ont été réintroduites dans le Code civil (le Nouveau code civil , entre en vigueur le 1er septembre 2011) , de paire avec toute la matière du droit de la famille , les normes de procédure faisant l'objet du Code de procédure civile (actuellement celui de 1865 , après le 1er février 2013, le Nouveau code de procédure civile).

Brève caractérisation de chaque période :

Dans la **réglementation de l'ancien Code civil,** le divorce pouvait être demandé, tout d'abord, pour adultère. L'article 211, qui mentionnait cette cause de divorce, était l'équivalent de l'ancien article 229 du Code civil français, avec la différence que le divorce pouvait être demandé tant par le mari, que par la femme, et non pas seulement par le mari, comme dans le droit français.

La dissolution du mariage pouvait être requise, réciproquement, pour excès, sévices ou injures graves (article 212, correspondent à l'ancien article 232 du Code civil français), comme au cas où l'un des époux était condamné au travail force ou à la réclusion (article 213, article 232 Code civil français, dans l'ancienne rédaction).

Ce qui est important à retenir, c'est que pendant cette période était connu le divorce par le consentement mutuel des époux, règlemente par l'article 214, le législateur roumain de 1864 ayant repris l'article 233 du Code civil français , bien que celui-ci eut été abrogé, avec toute

la matière du divorce, par la loi du 8 mai 1816 et la loi du 27 juillet 1884 , qui a recréé le divorce, n'a pas réintroduit le divorce par consentement mutuel des époux.

En ce qui concerne la procédure, celle-ci était lourde et formaliste, étant règlementée par les articles 217-253 du Code civil, des textes qui représentaient une traduction des articles 234-274 du Code civil français (dans leur ancienne rédaction).

En ce qui concerne la procédure du divorce par consentement, celle-ci était règlementée par les articles 254-276 du Code civil, ces textes aussi étant pratiquement identiques aux articles 275-294 du Code civil français.

Les effets du divorce étaient prévus par les articles 277-285 (articles 295-305 Code civil français).

Pendant le régime communiste, le divorce a connu sa réglementation la plus stricte , dans le sens où il était considéré comme une mesure d'exception, qui pouvait intervenir seulement quand les relations entre les époux, comme conséquence d'un fait coupable de l'un d'entre eux, étaient grièvement et irrémédiablement affectées, le mariage ne pouvant pas continuer ; le divorce par le consentement des époux était tout à fait prohibé.

La réglementation était contenue dans le Code de la famille (les articles 37-44) et dans le Code de procédure civile (les articles 607-619). La procédure était assez longue et difficile, avec des termes de réflexion et de réconciliation.

Apres la révolution de décembre1989, les règlementations de la période antérieure ont été maintenues, mais en leur apportant certaines modifications. La plus importante a été celle concernant le divorce par l'accord des époux, opérée en 1993 par la loi 59/1993. Ainsi, l'article 38 alinéa. (2) du Code de la famille a été modifié par l'introduction de la disposition qui permettait aux époux de divorcer par consentement mutuel. Cette possibilité était, quand même, limitée à la situation où il n'y avait pas d'enfants mineurs issus du mariage et supposait au moins un an de mariage. Récemment, en 2010, par la loi no. 208/2010 concernant l'accélération de la réforme en justice, cette restriction a été enlevée, les époux pouvant divorcer indifféremment de la période passée depuis la conclusion du mariage et même s'il y a des enfants mineurs.

Par la même loi a été prévue la possibilité de dissolution du mariage par accord devant le notaire public ou l'officier d'état civil. Toutefois, ce dernier ne peut pas instrumenter le divorce au cas où il y a des enfants mineurs nés du mariage.

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

Comme on a déjà indiqué, la matière du divorce a été récemment reformée, le Nouveau code civil entrant en vigueur le 1er octobre 2011. En ce qui concerne les normes de procédure, le Nouveau code de procédure civile entre en vigueur le 1er février 2013.

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

Oui, le divorce est le seul moyen de rompre le mariage, l'institution de la séparation de corps, existante dans le Code civil du 1864 dans la période d'avant-guerre, n'a pas été réintroduite ni après 1989, ni dans le Nouveau code civil non plus.

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

Non, conformément à l'article 277 alinéa (1) NCC, le mariage entre personnes de même sexe est expressément interdit. Conformément à l'alinéa (2) du même article, les mariages entre personnes de même sexe, conclus ou contractes à l'étranger soit par des citoyens roumains, soit par des citoyens étrangers, ne sont pas reconnus en Roumanie.

De même, sur le fondement de l'article 277 alinéa (3) , les partenariats civils entre personnes de même sexe (comme aussi de sexe oppose) conclus ou contractes à l'étranger , soit par des citoyens roumains , soit par des citoyens étrangers , ne sont pas reconnus en Roumanie.

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

Le mariage est défini par l'article 259 alinéa (1) NCC, comme étant l'union librement consentie entre un homme et une femme, conclue dans les conditions de la loi.

Conformément à l'alinéa (2), l'homme et la femme ont le droit de se marier dans le but de constituer une famille.

L'alinéa (3) : la célébration religieuse du mariage peut être accomplie seulement après la conclusion du mariage civil.

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

Avant de répondre strictement à la demande du point 8 du questionnaire, il est utile de mentionner que le Nouveau code civil de la Roumanie, par l'article 2597, règlemente dans des termes presque identiques le choix de la loi applicable au divorce par les époux, a l'exception du cas prévu par l'article 2597 lettre d), qu'on ne retrouve pas dans le contenu de l'Accord.

Donc, conformément à l'article 2597 qui a l'indication marginale "Le choix de la loi applicable au divorce", les époux peuvent choisir l'une des lois suivantes :

a) la loi de l'Etat sur le territoire duquel les époux ont la résidence habituelle au moment de la convention de choix de la loi applicable ;
b) la loi de l'Etat sur le territoire duquel les époux ont eu leur dernière résidence habituelle commune, pour autant que l'un d'eux réside encore au moment de la convention de choix de la loi applicable ;
c) la loi de l'Etat de la nationalité de l'un des époux ;
d) la loi de l'Etat sur le territoire duquel les époux ont habité au moins 3 ans ;
e) la loi roumaine.

En ce qui concerne **la date** de la convention de choix de la loi applicable, l'article 2598 alinéa (1) dispose que la convention désignant la loi applicable au divorce peut être conclue ou modifiée au plus tard au moment de la saisine de l'autorité compétente de prononcer le divorce.

Néanmoins, l'instance judiciaire peut constater l'accord des époux au plus tard au premier terme de jugement pour lequel les parties ont été légalement citées.
On observe, donc, que la possibilité de la désignation de la loi applicable au cours de la procédure existe seulement dans le cas du divorce par voie judiciaire et non pas dans celui prononcé par le notaire public ou l'officier d'état civil.

Quant à **la forme** de la convention de choix de loi applicable au divorce, elle doit être formulée par écrit, daté et signé par les deux époux.

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

Non. Comme on a déjà indiqué au point 6. , l'article 277 alinéa(2) du Nouveau code civil, dispose qu'en Roumanie ne sont pas reconnus les mariages entre personnes de même sexe, conclus ou contractés à l'étranger soit par des citoyens roumains, soit par des citoyens étrangers.

Sur le fondement de l'article 277 alinéa (3), les partenariats civils entre personnes de sexe opposé ou de même sexe conclus ou contractés à l'étranger soit par des citoyens roumains, soit par des citoyens étrangers, ne sont pas reconnus en Roumanie.

La notion de *mariage privé* ne se retrouve pas dans la loi roumaine , mais, évidemment , ne peut pas être reconnue dès lors que, selon l'article 287 alinéa (1)NCC , pour la célébration du mariage , les futurs époux sont obligés de se présenter ensemble au siège de la mairie , pour se donner publiquement le consentement au mariage, en présence de deux témoins , **devant l'officier d'état civil.** Le mariage conclu au mépris de ces dispositions est frappé de nullité absolue (art. 293 alinéa (1) NCC).

Quant au **mariage polygame,** l'article 273 NCC interdit la **bigamie** : est interdite la conclusion d'un nouveau mariage par une personne qui est mariée.

b). Rome 3 n'est pas applicable

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

L'article 2600 NCC désigne la loi applicable au divorce, à défaut du choix par les époux :

a) la loi de l'Etat sur le territoire duquel les époux ont leur résidence habituelle commune au moment de l'introduction de la demande de divorce ;
b) à défaut de résidence habituelle commune, la loi de l'Etat sur le territoire duquel les époux ont eu leur dernière résidence habituelle commune, si au moins l'un d'eux a encore la résidence habituelle sur le territoire de cet Etat a la date de l'introduction de la demande de divorce ;
c) à défaut de résidence habituelle de l'un des époux sur le territoire de l'Etat de la dernière résidence habituelle commune, la loi de la nationalité commune des époux a la date de l'introduction de la demande de divorce ;
d) à défaut de la nationalité commune des époux, la loi de la dernière nationalité commune des époux, si au moins l'un d'eux a gardé cette nationalité a la date de l'introduction de la demande de divorce ;
e) la loi roumaine dans tous les autres cas.

Comme on peut observer de l'énumération ci-dessus, dans les cas prévus aux lettres a)-d) la loi applicable peut être, parfois, la loi étrangère. Conformément à l'alinéa (2) du même article, si la loi étrangère, déterminée comme prévue à l'alinéa (1), ne permet pas le divorce, ou l'admet dans des conditions extrêmement restrictives, on applique la loi roumaine, dans le cas où l'un des époux est, à la date de la demande de divorce, citoyen roumain ou à la résidence habituelle en Roumanie.

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

La volonté des parties est prioritaire dans la détermination de la loi applicable, la désignation de celle-ci conformément à l'article 2600 NCC n'intervenant qu'à défaut d'une convention des époux dans ce sens.

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

La convention de choix de la loi applicable au divorce doit être conclue par écrit, signée et datée par les deux époux.

La convention peut être conclue et modifiée au plus tard jusqu'à la saisine de l'autorité compétente pour prononcer le divorce. Mais l'instance judiciaire peut en prendre acte au plus tard jusqu' au premier terme pour lequel les parties ont été légalement citées.

B2. Effets du divorce

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

Conformément à l'article 2641 NCC, la loi applicable aux obligations extracontractuelles se détermine conformément aux réglementations du droit de l'Union Européenne.

Dans les matières qui n'entrent pas sous l'incidence des réglementations de l'Union Européenne on applique la loi qui dirige le fond du rapport juridique préexistent entre les parties, sauf dispositions spéciales légales ou contenues dans des conventions internationales.

Donc, la loi applicable aux conséquences pécuniaires du divorce est applicable la loi du divorce, déterminée conformément aux règles mentionnées plus haut (les articles 2597 et 2600 NCC), car ces dispositions ne distinguent pas.

Par conséquent, la loi applicable sera celle désignée par la convention des époux et, à défaut du choix des époux, par la loi établie conformément aux critères de l'article 2600 NCC.

Il faut garder à l'esprit aussi les dispositions de l'article 5 du Nouveau code civil, qui établissent que, dans les matières règlementées par le code, les normes du droit de l'Union Européenne s'appliquent prioritairement, indifféremment a la qualité ou au statut des parties.

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

La loi applicable à la cessation et à la liquidation du régime matrimonial, comme au partage des biens communs aussi, est la loi applicable au régime matrimonial (article 2593 alinéa (1), lettre f) NCC), celle-ci étant celle choisie par les époux (article 2590 alinéa (1) NCC). Ils peuvent choisir :

a) la loi de l'Etat sur le territoire duquel l'un d'eux a sa résidence habituelle à la date du choix ;
b) la loi de l'Etat dont la nationalité est détenue par n'importe lequel d'entre eux à la date du choix ;
c) la loi de l'Etat ou ils établissent leur première résidence habituelle commune après la célébration du mariage (article 2590 alinéa (2) NCC).

Selon l'article 2592, si les époux n'ont pas choisi la loi applicable à leur régime matrimonial, celui-ci est soumis à la loi applicable aux effets généraux du mariage qui, conformément à l'article 2589, est celle de la résidence habituelle commune des époux et, à défaut, la loi de la nationalité commune des époux. A défaut de la nationalité commune, s'applique la loi de l'Etat sur le territoire duquel le mariage a été célèbre.

Par exception, les droits des époux sur l'habitation de la famille, ainsi que le régime de certains actes sur cette habitation sont soumis à la loi ou celle-ci est située.

15. Quelle est la loi applicable à la responsabilité parentale ?

La loi applicable à l'autorité parentale s'établit selon la Convention concernant la compétence , la loi applicable , la reconnaissance , l'exécution et la coopération en ce qui concerne la responsabilité parentale et les mesures concernant la protection des enfants , adoptée a la Haye le 19 octobre 1996 , ratifiée par la loi no. 361/ 2007 publiée dans le M. Of. De Roumanie, Partie I, no. 895 du 28 décembre 2007 (article 2611 NCC).

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

Selon l'article 2612, la loi applicable à l'obligation d'entretien se détermine conformément aux réglementations du droit de l'Union Européenne.

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

Oui. Selon l'article 157 de la loi no. 105/1992 concernant les rapports de droit international privé (article 1070 NCPC), l'instance saisie vérifie d'office sa compétence internationale et, implicitement, la norme conflictuelle applicable dans la matière.

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

Conformément à l'article 2562 alinéa (1) le contenu de la loi étrangère s'établit par l'instance judiciaire par des attestations obtenues des organes de l'Etat qui l'a édictée, par l'avis d'un expert ou par un autre mode adéquat.

La partie qui invoque une loi étrangère peut être obligée de faire la preuve de son contenu (article 2562 alinéa (2) NCC).

Dans le cas de l'impossibilité d'établir, dans un terme raisonnable, le contenu de la loi étrangère, on applique la loi roumaine (article 2562 alinéa (3) NCC).

Nous sommes d'avis que pour la détermination du sens de la notion de *terme raisonnable* il faut tenir compte des dispositions de l'article 6 alinéa 1 de la Convention Européenne des Droits de l'Homme concernant le droit à un procès équitable et la jurisprudence CEDH dans la matière.

II. LE DROIT MATERIEL

I. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

Non. La condition que le mariage ait duré au moins un an, exigée seulement pour le divorce par l'accord des époux, a été supprimée à l'occasion de la réforme opérée en 2010. C'est le motif pour lequel on doit le mode de rédaction du texte de l'article 374 alinéa (1) NCC qui mentionne expressément que le divorce par accord des époux peut être prononcé indifféremment de la durée du mariage et indifféremment s'il y a ou non des enfants mineurs issus du mariage, justement pour souligner la différence par rapport au mode dans lequel a été réglementé le divorce par consentement mutuel, constamment, depuis sa réintroduction, en 1993, jusqu' en 2010.

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

La mise sous interdiction de l'un des époux détermine **l'inadmissibilité de la demande de divorce par l'accord des époux** (article 374 alinéa (2) NCC).

De même, dans l'hypothèse où l'un des époux se trouve dans une période **d'absence de discernement,** sans être mis sous interdiction, le divorce par consentement mutuel ne peut pas être prononcé parce que le juge, selon l'article 374 alinéa (3), est obligé de vérifier l'existence du consentement libre et non vicié de chacun des époux. Dans le cas où, quand même, le divorce a été prononcé, l'époux intéressé peut formuler une **action dans l'annulation du divorce** (v. F. Baias et collectif, Le Nouveau Code Civil commenté et annoté, Ed. C.H. Beck, 2011, p. 399).

Ces précisions sont valables aussi pour la situation où la dissolution du mariage a été constatée par voie notariale ou administrative (article 375 alinéa (3) et 376 alinéa (3) NCC).

Dans les autres cas de divorce, l'époux mis sous interdiction peut demander le divorce par représentant légal ou personnel (art. 917 NCPC).

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

Le divorce peut intervenir pour causes multiples, les motifs de divorce étant réglementés par l'article 373 NCC :

a) par l'accord des époux, à la demande de tous les deux ou à l'un d'entre eux acceptée par l'autre époux ;
b) lorsque, à cause de certains motifs fondes, les rapports entre les époux sont grièvement blessés et la continuation du mariage n'est plus possible ;
c) à la demande de l'un des époux, après une séparation en fait qui a duré au moins 2 ans ;
d) à la demande de l'époux dont l'état de sante fait impossible la continuation du mariage.

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre de demandes présentées sur chaque fondement.

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?

i) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?

j) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

Du mode dans lequel sont énumérés les motifs de divorce dans le cadre de l'article 373 NCC, on peut déduire que la dissolution du mariage par consentement n'est pas une forme de divorce pour altération définitive du lien matrimonial, mais a un caractère autonome. Ainsi, l'accord des époux est le premier motif de divorce, n'étant pas conditionne dans aucun mode, ni par l'impossibilité de la continuation du mariage, ni par la faute de l'un des époux, ni par l'écoulement d'une durée de temps etc.

En plus, l'article 259 alinéa (6) NCC mentionne que la mariage peut être dissous par divorce, dans les conditions de la loi, sans préciser que cela ne peut intervenir que dans des situations exceptionnelles, comme le faisait l'article 37 alinéa 2 de l'ancien Code de la famille ou l'article 38 du même code, qui prévoyait que l'instance judiciaire ne peut décider la dissolution du mariage par divorce que lorsque , à cause de motifs bien fondés , les rapports entre les époux sont grièvement et irrémédiablement blessés, de sorte que la continuation du mariage et évidemment impossible.

Enfin, la doctrine récente (v. F. Baias et collectif, op. cit. p.399) a soutenu que l'accord des époux pour le divorce est un acte juridique, symétrique à la conclusion du mariage, donnant expression à l'adage *mutuus consensus – mutuus disensus.*

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

Le divorce d'accord n'est conditionné ni par l'écoulement d'un laps de temps après le mariage, ni par la **séparation** des époux avant d'introduire la demande de divorce.

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

Concernant cet aspect on doit faire les distinctions suivantes :

a) Dans le cas où le divorce se réalise **par voie judiciaire, il** n'est pas nécessaire que les époux déposent ensemble la requête. L'article 373 lettre a) mentionne expressément que la dissolution du mariage peut avoir lieu à la demande des deux époux ou de l'un d'eux acceptée par l'autre.

En plus, quand la demande de divorce est fondée sur la faute de l'époux défendeur et si celui-ci reconnait les faits qui ont conduit à la rupture de la vie conjugale, le juge, si le requérant est d'accord, va prononcer le divorce sans rechercher le bien fondé des motifs et sans faire aucune mention sur la faute des parties (article 613^1a du Code de procédure civile de 1865 et article 920 NCPC). De même, dans la situation réglementée par l'article 379 alinéa (2) NCC quand, dans l'hypothèse prévue par l'article 373 lettre c) – la séparation en fait qui a duré au moins 2 ans – le défendeur se déclare d'accord avec le divorce, il est prononcé sans faire mention sur la faute des époux (v. aussi, F. Baias et collectif, *op. cit.* , p. 399).

b) Dans le cas du divorce par l'accord des époux par **voie notariale ou administrative,** la demande de divorce est déposée par **les époux ensemble** (article 376 alinéa (1) NCC). Par exception aux dispositions de l'alinéa (1), la demande de divorce peut être déposée par **mandataire avec procuration authentique, mais seulement au notaire public et non pas à l'officier d'état civil.**

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

Ici, de même, il faut faire certaines distinctions selon la procédure choisie pour la dissolution du mariage par accord (judiciaire, administrative ou notariale), comme aussi en fonction de la catégorie d'effets du divorce dont il s'agit.

Ainsi, dans le cas du divorce par accord par **voie judiciaire** les époux peuvent conclure une convention concernant l'utilisation du nom acquis par le mariage. Si une telle convention n'est pas intervenue, pour des motifs bien fondes, le juge peut approuver que les époux gardent le nom porte pendant le mariage. Si nous ne nous trouvons dans aucune de ces situations, chacun des époux porte le nom d'avant le mariage (article 383 NCC).

De même, les anciens époux peuvent convenir en ce qui concerne **les rapports entre eux et leurs enfants mineurs.** Le juge va prendre acte de cette convention seulement si elle est dans l'intérêt supérieur des enfants, autrement il va décider selon cet intérêt (article 396 NCC).

Les époux peuvent aussi convenir quant au **moment de la cessation du régime matrimonial (article 385 alinéa (2) NCC) ou sur le partage des biens communs.**

Dans le cas du **divorce par accord par voie administrative** (procédure admissible seulement quand les époux n'ont pas d'enfants mineurs nés du mariage, en dehors du mariage ou adoptés) les époux sont **obligés** de convenir du nom de famille qu'ils porteront

après la dissolution du mariage. S'ils ne conviennent pas de cet aspect, l'officier d'état civil émet une disposition de rejet de la demande de divorce et conseille aux parties de s'adresser à l'instance judiciaire pour réaliser le divorce par accord par voie judiciaire, conformément à l'article 374 (article 376 alinéa (5) NCC).

Dans la situation du **divorce par accord par voie notariale ,** s'il y a des enfants mineurs , les époux **ont l'obligation** de convenir de tous les aspects concernant le nom de famille porté après le divorce, l'exercice de l'autorité parentale par les deux parents , l'établissement de la résidence des enfants après le divorce, les modalité pour garder les liens personnelles entre le parent séparé et chacun des enfants, comme aussi sur la contribution des parents aux dépenses d'entretien, d'éducation, d'enseignement et de formation professionnelle des enfants. Si du rapport d'enquête psychosociale résulte que l'accord des époux concernant l'exercice en commun de l'autorité parentale ou celui concernant le établissement de l'habitation des enfants n'est pas dans l'intérêt de l'enfant, le notaire va émettre une disposition de rejet de la demande de divorce et il va conseiller les parties de s'adresser à l'instance judiciaire selon l'article 374. La même solution va être donnée dans le cas où les époux ne s'entendent pas sur les aspects mentionnés plus haut (article 375 alinéa (2) et 376 alinéa (5) NCC).

Tant dans le cas de divorce par accord par voie administrative, que dans celui par procédure notariale, la solution des requêtes concernant d'**autres effets du divorce** sur lesquels les parties ne s'entendent pas relevé de la compétence de l'instance judiciaire.

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

Le législateur roumain a adopté une **conception mixte, entre le divorce-remède,** quand celui-ci n'est pas conditionné par la faute de l'un des époux, mais de l'impossibilité de la continuation du mariage au moins pour l'un d'entre eux et **le divorce sanction –** quand la dissolution du mariage est prévue comme une sanction contre l'époux coupable de la dégradation du mariage. Donc, dans la conception du Nouveau code civil, le divorce est prononcé lorsque, à cause de la conduite coupable d'un époux, la continuation du mariage est devenue impossible, comme le prévoit expressément l'article 373 lettre b) (v. aussi F. Baias et collectif , *op.cit.* , p. 398-399 , 400 ; E. Florian, Droit de la famille , Ed. C.H.Beck , 2006, p. 171).

En même temps , le Nouveau code civil règlemente un cas aussi d'une altération du lien matrimonial, la continuation du mariage étant impossible pour l'un des époux, sans être impliquée , en même temps, la faute de l'un d'entre eux : il s'agit de la situation prévue par l'article 373 lettre d) – le divorce peut être prononcé à la demande de l'époux dont l'état de santé rend impossible la continuation du mariage (v. aussi ibid. , p. 400).

Donc , pour conclure , on peut retenir comme **fondements de l'altération définitive du lien matrimonial ,** la situation prévue par l'article 373 lettre b) – lorsque , à cause de motifs bien fondés , les rapports entre les époux sont grièvement blessés et la continuation du mariage n'est plus possible (en incluant ici la séparation ayant duré plus de deux ans – article 373 lettre c) et celle de l'article 373 lettre d) – quand l'état de la sante de l'un des époux rend impossible la continuation du mariage.

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

Par consentement mutuel, les époux peuvent transformer une demande de divorce pour altération grave des relations entre les époux, en une demande de divorce par accord. Il s'agit de la situation mentionnée par l'article 373 lettre a) ou de celle mentionnée par l'article 379 alinéa (2) – divorce demandé après une séparation de fait qui a duré au moins 2 ans.

De même, les époux peuvent **convenir en ce qui concerne certains effets du divorce :**

- sur la base de l'article 383 alinéa (1) NCC, à l'occasion de la dissolution du mariage par divorce, les époux peuvent **convenir de garder le nom porté pendant le mariage ;**
- conformément à l'article 396 alinéa (1) NCC, le juge statue, en même temps que le prononcé du divorce, sur **les rapports entre les parents divorces et leurs enfants mineurs,** tenant compte, parmi d'autres éléments, de la **convention des parents** ; naturellement, si la convention n'est pas dans l'intérêt supérieur de l'enfant, le juge peut la censurer ;
- les parents peuvent convenir aussi en ce qui concerne **l'habitation des enfants mineurs** après le divorce (article 400 alinéa (1) NCC). Bien sûr, si l'entente intervenue est contraire à l'intérêt supérieur de l'enfant, le juge a la possibilité de n'en pas tenir compte.

36. Dans cette procédure, quelle place est laissée la séparation des époux ?

- **La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**

Oui, la séparation est suffisante pour établir la rupture irrémédiable du lien matrimonial, étant l'un des motifs de divorce expressément règlementé par la loi : l'article 373 lettre c).

- **Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?**

La séparation, conformément à l'article 373 lettre c), doit avoir duré au moins 2 ans.

Le texte de la loi ne mentionne pas expressément le caractère continu de la période de séparation, mais de la rédaction utilisée on peut déduire sans faute que la séparation doit avoir eu lieu une période **continue** de 2 ans. Ainsi, le texte légal parle d'**une** séparation qui ait duré au moins 2 ans, **non pas de plusieurs séparations** qui, cumulées, accomplissent ce terme.

De même, l'article 617-1 du Code de procédure civile (article 934 alinéa (1) NCPC) utilise l'expression "quand les époux **sont** séparés en fait depuis au moins 2 ans (…)". Du fait de l'utilisation du temps présent du verbe "être", on déduit qu'on a affaire à une situation présente, en cours, qui n'a souffert aucune interruption.

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

La demande de divorce pour altération grave des relations entre les époux due à la faute de l'un d'eux (la conception mixte) peut être convertie en divorce d'accord. C'est ce que prévoit expressément l'article 613-1 a du Code de procédure civile (article 931 NCPC) : quand la demande de divorce est basée sur la faute de l'époux défendeur et que celui-ci reconnait les faits qui ont mené à la déchirure de la vie conjugale, le juge , si le demandeur est d'accord , va prononcer le divorce sans rechercher le bien fondé des motifs de divorce et sans mentionner sur la faute pour la dissolution du mariage.

La même solution est prévue par l'article 379 alinéa (2) NCC et l'article 617-1 alinéa (3) (article 934 alinéa (2) NCPC) pour la situation dans laquelle le divorce avait été demandé pour séparation qui a duré au moins 2 ans et l'époux défendeur est d'accord.

En ce qui concerne la transformation en demande de divorce pour faute, on a déjà montré que le législateur roumain a adopté la **conception mixte** concernant le divorce : pour la dissolution du mariage est nécessaire l'accomplissement de deux exigences : l'affectation grave des relations entre les époux, si bien que le mariage ne puisse pas continuer et que cette affectation soit due à la conduite coupable de l'un des époux ou de tous les deux.

Le Nouveau code civil mentionne une seule situation d'altération irrémédiable du lien matrimonial, la continuation du mariage étant impossible pour l'un des époux, sans qu'il existe, en même temps, la faute de l'un d'entre eux : le cas prévu par l'article 373 lettre d) et l'article 381 NCC – le divorce à cause de l'état de santé de l'un des époux. Dans cette circonstance, le mariage peut être dissolu à la demande de l'époux dont l'état de sante rend impossible la continuation du mariage.

On est d'avis que cette demande aussi peut être transformée **en une demande de divorce par accord,** si l'autre époux est d'accord avec le divorce. Dans cette situation, le juge ne va plus faire l'application des dispositions de l'article 613-1b du Code de procédure civile (article 921 NCPC) et donc, il ne va plus administrer des preuves concernant l'existence de la maladie et l'état de l'époux malade, mais il va dissoudre le mariage par l'accord des époux.

Quant à la conversion d'une demande de divorce fondée sur l'état de la sante en une demande de divorce pour faute, on est d'avis que rien ne s'oppose à ce que celle-ci soit modifiée dans les conditions du droit commun concernant la modification des demandes en justice. Ainsi, conformément à l'article 132 du Code de procédure, civile les parties peuvent modifier leur requête **jusqu'au premier jour de comparution.** Le premier jour de comparution, conformément à l'article 134 Code de procédure civile, est considéré le jour où les parties, légalement citées, peuvent formuler des conclusions.

Le Nouveau code de procédure civile établit, par l'article 204, que le requérant peut modifier sa demande seulement jusqu' au premier terme pour lequel il est légalement cité. Donc on a écarté la condition concernant la possibilité de formuler des conclusions.

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

Le législateur roumain a maintenu dans le cadre de la réglementation contenue dans le Nouveau code civil la technique adoptée dans le cas du Code de la famille, c'est à dire de ne pas énumérer limitativement les causes de divorce, mais de prévoir que la dissolution du mariage peut être prononcée chaque fois que, à cause des motifs bien fondés, les rapports entre les époux sont grièvement affectés et la continuation du mariage n'est plus possible.

Par "motifs bien fondés" le législateur a compris **la conduite coupable de l'un ou des deux époux.** Dans ce sens, l'article 379 alinéa (1) prévoit que, dans le cas prévu par l'article 373 lettre b), le divorce peut être prononcé si l'instance établit la faute de l'un des époux ou de tous les deux dans la déchirure du mariage.

Un seul cas de conduite coupable a été **mentionné expressément : celui prévu par l'article 373 lettre c), la séparation en fait qui a duré au moins 2 ans.**
Au fil du temps, la jurisprudence a considéré comme conduites coupables, qui peuvent être des motifs bien fondés de divorce :

- le refus injustifié de l'un des époux d'habiter ensemble avec l'autre ou le délaissement injustifié du domicile conjugal ;
- l'infidélité de l'un des époux sous la forme de relations extraconjugales ;
- mauvais traitements appliqués par un époux a l'autre ; des violences exercées sur l'autre époux ;
- le refus injustifié d'entretenir des relations sexuelles ;
- des mésententes graves et répétées etc.

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

Non, la faute, comme n'importe quel fait juridique, peut être prouvée avec tous les moyens de preuve. Une mention s'impose concernant la preuve testimoniale : conformément à l'article 190 du Code de procédure civile (article 316 NCPC), dans les procès de divorce peuvent être acceptes des témoins parents, sauf les descendants.

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

Oui, conformément à l'article 379 alinéa (1) NCC, si des preuves administrées résulte la faute des deux époux, le juge peut prononcer le divorce pour leur faute commune, même si seulement l'un d'entre eux a demandé le divorce.

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

Selon l'article 618 alinéa (2) du Code de procédure civile (article 924 NCPC) les époux peuvent se réconcilier dans toutes les phases du procès.

Conformément à l'article 618 alinéa (3) (article 924 alinéa (2) NCPC), n'importe lequel des époux peut formuler une nouvelle demande **pour des faits qui se sont produits après la réconciliation et, dans ce cas, il pourra se servir aussi des faits anciens.**

Donc, pour pouvoir commencer une nouvelle action, la partie doit invoquer des faits coupables nés après la réconciliation. Dans la situation où de tels faits existent, dans le cadre d'une nouvelle demande de divorce il pourra être valorisé aussi le comportement antérieur à la réconciliation.

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

Selon l'article 388 du Nouveau code civil, l'époux non coupable qui subit un préjudice par la dissolution du mariage, peut demander à l'époux coupable de le dédommager.

Pour l'octroi des dommages et intérêts il faut faire la preuve de l'accomplissement des conditions de droit commun pour l'engagement de la responsabilité civile, conditions prévues par l'article 1357 NCC : le préjudice, le fait illicite, le lien de causalité entre fait et préjudice et la faute (v. aussi F. Baias et collectif , *op. cit.*, p.421).

Selon l'article 388 NCC et l'article 907 alinéa (1) NCPC, la demande de dommages et intérêts sera solutionnée par l'instance de tutelle, par le jugement de divorce.

Rien ne s'oppose, en même temps, que les dédommagements soient sollicités par l'intermédiaire d'une action séparée, bien sûr dans le délai général de prescription de 3 ans (v. *ibid.* , p. 422).

J. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
- **avant le mariage ;**
- **pendant le mariage ;**
- **pendant la procédure de divorce ?**

En ce qui concerne **la date de la dissolution du mariage**, il n y a pas la possibilité que les époux l'établissent par convention, car le mode dans lequel est rédigé l'article 382 exclut une telle hypothèse : le mariage est dissous du jour ou le jugement du divorce est définitif (irrévocable, pendant la période ou le Code de procédure civile de 1865 est encore en vigueur).

Par exception, si l'action de divorce est continuée par les héritiers de l'époux requérant, le mariage sera considéré dissous **à la date du décès.**

Dans le cas du **divorce par voie notariale ou administrative**, le mariage est dissous **à la date de délivrance du certificat de divorce.**

Quant aux **autres effets du divorce**, il convient de faire les distinctions suivantes :

En ce qui concerne **le régime matrimonial, la date de sa cessation** peut être établie conventionnellement par les époux, comme étant **celle de la séparation en fait** (par

dérogation de la règle selon laquelle la date de la cessation est celle **de l'introduction de la demande de divorce** – article 385 alinéa (1) NCC).

Du mode dans lequel est formule l'article 385 alinéa (2) NCC , il semble que la possibilité d'établir le moment de la cessation du régime matrimonial par la convention des époux existerait seulement dans le cas du divorce par accord car en précisant que les époux peuvent demander ensemble au juge la constatation de la cessation du régime matrimonial à la date de la séparation, **dans le cas du divorce par l'accord des époux,** *a contrario* il résulte qu' ils ne pourraient pas le faire dans les autres cas de divorce.

Toutefois, dans la doctrine on a soutenu que rien ne s'oppose à ce que les époux concluent une telle convention dans le cas où le divorce est demandé en raison de l'état de la sante de l'un des époux ou pour faute (v. F. Baias et collectif , *op. cit.*, p. 417).

Vraiment, on ne voit aucun argument, sauf celui qui tient exclusivement au texte, qui s'opposerait à l'établissement conventionnel du moment de la cessation du régime matrimonial dans d'autres cas de divorce que celui du divorce par accord.

Concernant **le moment** ou peuvent intervenir la convention sur la date de la cessation du régime matrimonial et la convention sur **les modalités de liquidation du régime matrimonial,** de telles conventions peuvent être inclues dans **la convention matrimoniale,** qui peut être conclue **avant** le mariage ou **pendant** le mariage (article 330 alinéa (2) et (3) NCC. Bien sûr qu'une convention concernant la date de la cessation et la modalité de la liquidation du régime matrimonial peut intervenir **pendant la procédure du divorce aussi.**

Les époux peuvent, aussi, conclure des conventions concernant **le maintien du nom porté pendant le mariage** (article 383 alinéa (1) NCC), **les rapports des parents avec leurs enfants mineurs** (art. 396 alinéa. (1)NCC), **la résidence de l'enfant après le divorce** (article 400 alinéa (1)) ou **l'établissement de la contribution de chaque parent aux dépenses d'entretien, éducation, enseignement et formation professionnelle des enfants.**

Une telle convention doit être conclue **pendant la procédure du divorce.** Bien sûr que les époux peuvent conclure la convention aussi pendant le mariage, mais elle va garder son efficacité seulement dans la mesure dans laquelle les époux maintiennent l'accord donné.

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

Oui, le juge dispose d'un tel droit, notamment en ce qui concerne les conventions qui ont pour objet les effets du divorce par rapport aux enfants mineurs, quand il peut ne pas en tenir compte.

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

Dans le cas des conventions concernant **les enfants mineurs,** le critère est **l'intérêt supérieur de l'enfant.** S'il n'est pas respecté dans la convention, le juge peut imposer une

modification des clauses, si cela suffit ou, sinon, il peut écarter la convention et décider conformément à l'intérêt du mineur.

Dans les autres cas, le juge va vérifier seulement si les conventions n'enfreignent pas les dispositions légales d'ordre public.

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

Le droit roumain actuel ne connait pas l'institution de la séparation de corps.

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

Comme on a déjà montré au point 43, la date de la dissolution du mariage est celle du jour ou le jugement de divorce est devenu **définitif** (article 382 alinéa (1) ; **irrévocable** pendant que le Code de procédure civile de 1865 est encore en vigueur).

Par exception, si l'action de divorce est continuée par les héritiers de l'époux requérant, le mariage sera considéré dissous à la date du décès.

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

Non, les époux peuvent se remarier soit ensemble, soit avec d autre personnes, sans être soumis à aucun délai ou à n'importe quelle autre condition.

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

En règle générale, les époux reviennent, suite au divorce, au nom porté antérieurement au mariage (article 383 alinéa (3) NCC).

Néanmoins, à la dissolution du mariage par divorce, les époux peuvent convenir de garder le nom porté pendant le mariage (article 383 alinéa (1) NCC).

De même, pour des motifs bien fondés, justifies par l'intérêt de l'un des époux ou de l'intérêt supérieur de l'enfant, le juge peut admettre que les époux gardent le nom porté pendant le mariage, même à défaut d'une entente entre eux (article 383 alinéa (2) NCC).

50. Le divorce produit-il des effets

- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;**
- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

Selon la loi roumaine, le mariage avec un citoyen roumain n'entraîne pas l'acquisition automatique de la nationalité roumaine par l'époux. Pour acquérir la nationalité roumaine, à la demande, il faut remplir cumulativement les conditions prévues par l'article 8 alinéa (1) de la Loi sur la nationalité roumaine no. 21/1991, republiée en 2010. Le mariage avec un citoyen roumain a de l'influence seulement sur l'une de ces conditions, plus exactement sur la durée de temps pendant laquelle le sollicitant a habité légalement, constamment et continument sur le territoire roumain : 5 ans après le mariage, au lieu de 8 ans dans le cas où il n'est pas marié avec un citoyen roumain.

Une fois la nationalité acquise, le divorce n'a aucune influence sur cela.

En ce qui concerne **le droit de séjour des étrangers** sur le territoire de la Roumanie, il est réglementé par la loi no. 123/2001 concernant le régime juridique des étrangers en Roumanie qui ne contient pas de dispositions spéciales concernant le mariage, celles-ci se retrouvant dans les Normes méthodologiques d'application, approuvées par l'Arrêt du Gouvernement no. 476/17.05. 2001.
En tout cas, sont exceptés de l'obligation d'obtenir le visa les citoyens des Etats avec lesquels la Roumanie a conclu des conventions de suppression des visas. Parmi ceux-ci se dénombrent, tout d'abord, les pays de l'Union Européenne.

Concernant **le séjour** des citoyens étrangers sur le territoire de la Roumanie, conformément à l'article 15 alinea (1) de la loi 123/2001, cela est limité à la durée du visa ou à la durée prévue dans la convention de suppression des visas conclue par la Roumanie avec l'Etat dont la personne en cause détient la nationalité.

De même, dans les Normes méthodologiques d'application de la Loi concernant le régime des étrangers en Roumanie, est réglementé **le visa pour la réunification de la famille (VF)** (article 9 alinéa (1) lettre o), comme aussi le régime du prolongement de ce visa (article 28 alinéa (1) lettre e)).

On peut aussi approuver **l'établissement du domicile en Roumanie** pour l'étranger marié avec un citoyen roumain, la période de séjour temporaire nécessaire étant d'au moins 4 ans des derniers 5 ans, par rapport à 6 des derniers 7 ans, dans d'autres situations (article 35 alinéa (1) lettre a) des Normes).

Dans le cas **de la cessation du motif qui a constitué la base de l'octroi du visa,** la Direction Relations Consulaires du Ministère des Affaires Etrangères ou l'organe compétent du Ministère de l'Intérieur, selon le cas, peut décider **l'annulation du visa de séjour** (article 15 alinéa (2) de la Loi concernant le régime juridique des étrangers).

On considère donc, que le divorce aussi peut constituer une cessation du motif pour lequel a été octroyé le visa, dans la situation où le mariage a constitué ce motif.

ii. Les effets du divorce à l'égard des enfants

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

Oui. L'exercice de l'autorité parentale et la résidence de l'enfant sont réglementés par des textes légaux différents.

Pendant le mariage, le **mode de l'exercice de l'autorité parentale** est réglementé par l'article 503 NCC. Selon le texte, les parents exercent ensemble et de manière égale l'autorité parentale. De même, conformément à l'article 506, avec l'accord de l'instance de tutelle, les parents peuvent convenir de l'exercice de l'autorité parentale.

La résidence de l'enfant fait l'objet de l'article 496 NCC :

- L'enfant mineur habite chez ses parents (alinéa (1)).
- Si les parents n'habitent pas ensemble, ils établiront, de commun accord, la résidence de l'enfant (alinéa (2)).
- En cas de mésentente entre les parents, c'est à l'instance de tutelle de décider, tenant compte des conclusions du rapport d'enquête psychosociale et écoutant les parents et l'enfant s'il a atteint l'âge de 10 ans.

Donc, entre l'exercice de l'autorité parentale et la résidence de l'enfant n'existe pas de lien de dépendance. Alors qu'en règle générale, l'exercice de l'autorité parentale revient à tous les deux parents, il est possible que l'habitation de l'enfant soit seulement chez l'un d'entre eux, sans que cette circonstance affecte l'exercice ensemble et de manière égale de l'autorité parentale.

De même est également possible la situation inverse. Quand bien même,= les parents auraient une résidence commune et l'enfant habiterait avec eux, l'autorité parentale peut être exercée, exceptionnellement, par un seul époux, lorsque l'autre parent est mis sous interdiction, déchu de l'exercice des droits parentaux ou si, pour n'importe quel motif, se trouve en impossibilité d'exprimer sa volonté.

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

Non, la règle étant que, après le divorce, les parents continuent d'exercer en commun l'autorité parentale, sauf le cas où le juge en décide autrement (article 397 NCC).

Selon l'article 398, s'il y a des motifs bien fondés, ayant en vue l'intérêt supérieur de l'enfant, le juge décide que l'autorité parentale sera exercée par un seul parent.

De même, exceptionnellement, l'instance de tutelle peut décider le placement de l'enfant chez un parent ou chez une autre famille ou personne , avec leur consentement ou dans une institution de protection, à ces personnes revenant l'exercice des droits et des obligations parentales concernant la personne de l'enfant. Les droits concernant les biens de l'enfant seront exercés par les parents, ensemble ou séparément, selon la décision du juge.

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

Oui, comme on a montré au point 51 aussi, pendant le mariage les parents peuvent convenir sur l'exercice de l'autorité parentale, avec l'accord de l'instance de tutelle (article 506).

A l'occasion du divorce, sur le fondement de l'article 504 qui renvoie à l'article 396 NCC, les parents peuvent aussi s'entendre sur le mode d'exercice de l'autorité parentale, bien sûr,

avec l'accord du juge. Dans tous les deux cas, la convention entre les parents doit être dans l'intérêt supérieur de l'enfant.

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Oui, comme on a déjà montré plus haut, n'importe quelle convention des parents concernant l'exercice de l'autorité parentale doit être approuvée par le juge.

Chaque fois que cela lui semble dans l'intérêt supérieur de l'enfant, le juge ne va pas tenir compte de la convention des parents, décidant de l'exercice de l'autorité parentale après avoir écouté les parents, l'enfant et prenant en considération les conclusions du rapport d'enquête psychosociale (article 396 , 486 NCC).
Bien sûr, le juge peut aussi imposer certaines modifications dans la convention des parents, s'il considère que cela suffit pour protéger l'intérêt supérieur de l'enfant.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

Oui, le juge décidera soit l'exercice en commun de l'autorité parentale aussi après le divorce, ce qui constitue la règle, (article 397 NCC), soit, s'il y a des motifs bien fondés, l'exercice seulement par l'un des parents (art. 398) soit, dans des cas exceptionnels, l'exercice par une autre personne (article 399 NCC).

Ayant en vue la rédaction impérative de l'article 396 NCC et les dispositions expresses de l'article 918 alinéa (2) NCPC , ainsi que la jurisprudence constante en la matière, le juge est **oblige de se prononcer d'office** sur l'exercice de l'autorité parentale, comme sur tous les aspects concernant les rapports entre les parents et les enfants (articles 396-404 NCC) (v. aussi , F. Baias et collectif, *op. cit.* , p. 431), n'ayant pas besoin d'être investi par une demande faite par l'un des parents.

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

Le critère dont le juge doit tenir compte quand il statue sur l'exercice de l'autorité parentale c'est **l'intérêt supérieur de l'enfant** et on retrouve cet aspect dans tous les textes légaux.

Pour pouvoir déterminer l'intérêt supérieur de l'enfant, le juge va tenir compte des conclusions du rapport d'enquête psychosociale, de la position de l'enfant, qu'il doit entendre, des soutiens des parents, qu'il doit entendre, comme de la convention de ceux-ci, si c'est le cas.

Comme on l'a vu, un parent peut être privé de l'exercice de l'autorité parentale dans les cas mentionnés par les articles 398 et 399 NCC, pas pour son comportement conjugal, mais seulement dans la considération de son attitude vis-à-vis de l'enfant (des mauvais traitements

appliqués à celui, négligence grave, comportement abusif, consommation abusive d'alcool etc.) , d'une telle manière que sa vie , sa santé , ou son développement soit en danger.

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

Conformément à l'article 398 alinéa (2), le parent privé de l'exercice de l'autorité parentale garde le droit de veiller sur le mode d'entretien et éducation de l'enfant, comme le droit de consentir à son adoption.

Comme la doctrine récente citée dans ce rapport le soutient, conformément au droit de veiller sur l'entretien et l'éducation de l'enfant, le parent titulaire de ce droit est autorisé à vérifier, pendant ses rencontres avec l'enfant et l'ancien époux, le mode dans lequel le mineur est éduqué et il peut solliciter de l'autre parent de prendre des mesures pour que l'éducation et l'entretien se déroulent dans les meilleures conditions (v. F. Baias et collectif, *op. cit.*, p. 435).

Dans le cas où il considère que ses démarches sont sans résultat, le parent peut demander à l'instance judiciaire la modification de la mesure concernant l'exercice de l'autorité parentale, sur le fondement de l'article 403 NCC, demandant soit le retour à l'exercice de l'autorité parentale par les deux parents, soit l'attribution pour lui-même de l'exercice de l'autorité parentale.

Nous sommes d'avis que le droit de veiller sur le mode d'entretien et éducation du mineur diffère du droit d'avoir des liens personnels avec celui-ci , droit réservé à la situation du parent chez qui n'a pas été établie la résidence de l'enfant, sans que celui-ci perde l'exercice de l'autorité parentale.

On considère que le droit d'avoir des liens personnels avec l'enfant inclut le droit de le prendre chez soi pendant les weekends ou pendant les vacances ou le droit de passer certaines périodes pendant les vacance avec l'enfant, ce qui est exclu dans le cas où un des parents est privé de l'exercice de l'autorité parentale, dans le cas contraire , l'efficacité de la mesure de scinder l'autorité pouvant être affectée.

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

Conformément à l'article 400 alinéa (1) NCC, à défaut d'une convention entre les parents ou si celle-ci est contraire à l'intérêt supérieur de l'enfant, l'instance de tutelle établit, lors du prononcé du divorce, la résidence du mineur chez le parent avec lequel celui-ci habite durablement.

Si jusqu'au divorce l'enfant a habité avec les deux parents, le juge établit la résidence chez l'un d'entre eux, selon son intérêt supérieur (alinéa (2)).

Exceptionnellement, et seulement si cela est dans l'intérêt supérieur de l'enfant, le juge peut établir sa résidence chez les grands parents ou chez d'autres parents ou personnes, avec leur consentement, ou dans une institution de protection. Celles-ci exercent la surveillance de

l'enfant et accomplissent tous les actes courants concernant sa santé, son éducation et son enseignement (alinéa (3)).

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

De l'interprétation *a contrario* des dispositions de l'article 400 alinéa (1) NCC, il résulte que les parents peuvent s'entendre sur chez qui d'entre eux habitera l'enfant après le divorce.

De même, toujours de l'interprétation *a contrario* de l'article 401 alinéa (2) ressort que les anciens époux peuvent convenir des modalités d'exercice du droit d'avoir des liens personnels avec les enfants du parent chez qui ceux-ci n habiteront pas (droit de visite, de passer ensemble les week-ends, des vacances etc.).

Ces conventions intervenues entre les anciens époux seront vérifiées par le juge qui, s'il constate qu'elles sont contraires à l'intérêt supérieur de l'enfant, établira lui-même, par le jugement de divorce, le lieu de résidence de l'enfant (article 400 alinéa (1) NCC).

L'instance judiciaire peut imposer certaines modifications dans la convention des anciens époux et seulement dans la mesure où ceux-ci ne se conforment pas, elle va statuer sur la résidence du mineur et les autres aspects visant cette résidence.

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

Selon l'article 396 alinéa (1) NCC, l'instance de tutelle décide, conjointement avec le prononcé du divorce, des rapports entre les parents divorces et leurs enfants mineurs.

Ces rapports concernent l'exercice de l'autorité parentale (les articles 397, 398, 399 NCC), la résidence de l'enfant après le divorce (article 400 NCC), les droits du parent séparé de l'enfant (article 401 NCC), l'établissement de la contribution des parents aux dépenses d'entretien, d'éducation, d'enseignement et de formation professionnelle des enfants (article 402 NCC).

Au cas où l'un des parents ne respecte pas les obligations qu' il a vis-à-vis de l'enfant (celle de garder des liens personnels avec l'enfant y compris), selon l'article 403 NC , l'instance de tutelle, à la demande de l'autre parent ou d'un autre membre de la famille, de l'enfant , de l'institution publique spéciale pour la protection de l'enfant ou du procureur, peut modifier les mesures concernant les droits et les obligations des parents divorcés quant à leurs enfants mineurs.

A cette occasion, le juge peut retirer au parent coupable l'exercice de l'autorité parentale, établir la résidence de l'enfant chez l'autre parent, modifier le mode de l'exercice du droit d'avoir des liens personnels avec l'enfant.

Dans des cas extrêmement graves, articles 508 et 509 NCC, la déchéance totale ou partielle des droits parentaux peut être prononcée. Bien sûr, en ce qui concerne strictement l'obligation visée par le point 60, celle de maintenir les relations personnelles avec l'enfant après le divorce, il est assez difficile d'imaginer en pratique une situation pour laquelle soit nécessaire une sanction d'une gravité telle que la déchéance des droits parentaux.

f. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

Le règlement des effets patrimoniaux entre les époux peut s'effectuer par l'instance de divorce, a l'occasion du jugement de celui-ci, ou ultérieurement, par l'instance de droit commun à **l'exception de la prestation compensatoire,** prévue par les articles 390-395 NCC, qui , conformément à l'article 391 alinéa (1) , ne peut être sollicitée qu'en même temps que la dissolution du mariage ; donc, seule l'instance de divorce peut juger la demande d'octroi de la prestation compensatoire.

Quant aux effets patrimoniaux vis-à-vis des enfants, ceux-ci doivent être réglés obligatoirement par l'instance de divorce, dans le même jugement (selon les articles 396 NCC et 918 alinéa (2) NCPC).

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre
23. une compensation financière,
24. une créance alimentaire,
25. une compensation de droits à pension de retraite,
26. des dommages-intérêts
27. ou d'autres sommes ou droits patrimoniaux ?

Au moment de la rupture du mariage, les anciens époux, dans la mesure où ils remplissent les conditions prévues par la loi, peuvent obtenir l'un de l'autre :

- **des dédommagements** pour le préjudice subi par l'époux non coupable du fait de la dissolution du mariage (article 388 NCC) ;
- **de l'entretien,** s'il se trouve en détresse à cause d'une incapacité de travail survenue pendant le mariage ou pendant 1 an après la rupture du mariage, mais seulement si l'incapacité est causée par une circonstance en lien avec le mariage (article 389 NCC) ;
- **une prestation compensatoire,** que l'époux non coupable peut solliciter de celui dont la faute exclusive a déterminé la rupture du mariage, prestation destinée à compenser, autant que possible, un déséquilibre significatif que le divorce cause dans les conditions de vie de celui qui la sollicite. La prestation compensatoire peut être accordée seulement dans le cas où le mariage a duré au moins 20 ans (les articles 390-395 NCC).

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

Comme on a déjà montré, pour la prestation compensatoire le Nouveau code civil prévoit que cela ne peut pas être demandée que seulement en même temps que le divorce. Cela veut dire que la demande doit être formulée devant l'instance de divorce, qui la solutionnera par le même jugement.

En ce qui concerne la question si la demande doit être formulée dans le contenu de la demande introductive d'instance ou elle peut être faite aussi ultérieurement, pendant le procès de divorce, tant la demande concernant la prestation compensatoire, que les demandes concernant les autres droits patrimoniaux que l'un des époux peut prétendre de l'autre sont soumises au droit commun dans la matière. C'est à dire, si la demande initiale ne contient pas aussi un chef concernant la demande accessoire respective, elle pourra être modifiée jusqu' au premier terme quand, la partie, légalement citée, peut formuler des conclusions, conformément à l'article 132 du Code de procédure civile, en vigueur jusqu' au 1fevrier 2013 ou jusqu' au premier terme pour lequel la partie est légalement citée, conformément à l'article 204 NCPC.

Si le demandeur ne modifie pas sa demande dans ce terme, cela ne pourra pas être solutionné que par voie séparée, après la dissolution du mariage, sauf la demande concernant la prestation compensatoire, qui, si elle n'a pas été demandée en même temps que le divorce, ne pourra plus être accordée.

En ce qui concerne cette demande, dans la doctrine on a exprimé aussi l'opinion que si la prestation n'a pas été réclamée par la demande de divorce , par un chef distinct , elle pourrait être demandée aussi par voie séparée , mais avant le prononce du jugement de divorce , suivant a la connexité au dossier de divorce (article 164 Code de procédure civile , respectif article 134 NCPC) , pour s'assurer son jugement "en même temps avec la dissolution du mariage" (v. F. Baias et collectif , op. cit. , p. 427).

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

Oui, exception faisant la demande concernant la prestation compensatoire qui, comme on a vu, doit être jugée en même temps que la demande de divorce.

Les demandes pour l'octroi des autres droits patrimoniaux doivent être introduites dans le terme général de prescription de 3 ans prévu par l'article 2517 NCC. Ce terme commence à couler, dans le cas des dédommagements prévus par l'article 388 NCC, de la date ou l'époux préjudicié a connu ou devrait connaitre les dégâts.

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

En ce qui concerne les **dédommagements,** seulement l'époux **coupable** de la dissolution du mariage peut être oblige au payement de certains dédommagements. Pour que ceux-ci soient accordés il est nécessaire d'accomplir une condition supplémentaire, celle que l'époux qui réclame les dédommagements soit **non coupable,** l'article 388 prévoyant cela

expressément. Autrement dit, en cas de faute commune, les époux ne pourront plus prétendre à des dédommagements de la part de l'autre.

Quant à la **prestation compensatoire**, seul l'époux **par la faute exclusive duquel** a été prononcé le divorce peut être obligé à prestation compensatoire. Ce qui veut dire que dans le cas de faute partagée, on ne peut plus accorder la prestation. L'époux innocent ne peut pas être obligé à la prestation compensatoire, même si l'autre époux (coupable) subirait, suite au divorce, un déséquilibre significatif en ce qui concerne les conditions de vie.

L'obligation d'entretien en faveur de l'époux **coupable** sera limitée a la durée d'un an à compter de la dissolution du mariage.

De même, on ne peut pas obliger l'un des anciens époux à payer une pension à l'autre, si celui-ci s'est remarie.

Enfin, **dans le cas du divorce par consentement mutuel ou pour motifs de santé,** on ne peut pas accorder ni dédommagements, ni prestation compensatoire, parce que, dans ces situations la faute pour la rupture du mariage n'est pas établie.

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

La faute dans la rupture du mariage prive l'époux coupable, tant du droit d'obtenir des dédommagements, que du droit à prestation compensatoire.

En ce qui concerne **l'entretien,** la faute limite à un an son octroi.

La perte de ces droits résulte tant de l'article 384 alinéa (2) NCC, qui établit que l'époux à l'encontre duquel a été prononcé le divorce perd les droits que la loi ou les conventions conclues avec les tiers confèrent à celui-ci, que du mode de règlement de chacun de ces droits.

Le remariage de l'époux bénéficiaire détermine la cessation de l'octroi tant de l'entretien, que de la prestation compensatoire.

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

Le rétablissement d'un équilibre est évidemment recherché dans le cas de la prestation compensatoire, mais moins entre les situations patrimoniales des anciens époux qu'entre la situation d'après le divorce de l'époux qui en bénéficie et celle qu'il avait pendant le mariage, bien que lors de l'établissement de la prestation compensatoire, on tienne compte tant des ressources du époux qui la sollicite que des moyens de l'autre.

68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

Comme on a vu, le mode de réglementation de l'octroi de ces droits (dommages et intérêts, entretien) n'a pas de lien avec la liquidation du régime matrimonial. Il en va différemment pour la prestation compensatoire ; parmi les critères d'établissement de celle-ci sont en effet considérés "les effets qu'aura la liquidation du régime matrimonial" (article 390 alinéa(2).

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

- Ainsi, dans le cas du **divorce d'accord ou pour des motifs de santé,** on ne peut pas accorder ni dédommagements, ni prestation compensatoire et la durée de l'obligation d'entretien due par les anciens époux l'un envers l'autre ne peut pas être limitée dans le temps.
- Dans le cas **du divorce pour faute,** ou pourra accorder tant la prestation compensatoire, que des dédommagements et entretien. **La faute** dans la rupture du mariage est importante, l'époux coupable n'ayant pas droit ni aux dédommagements, ni à la prestation compensatoire, et l'entretien que lui doit l'autre époux, s'il remplit les conditions légales, est limité à un an à compter de la dissolution du mariage.
- Il faut ajouter que pour **l'attribution du bénéfice du contrat de location de l'habitation de la famille,** la faute dans la dissolution du mariage peut être un critère (article 324 alinéa (1) NCC).

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

L'énumération des formes que peuvent revêtir les obligations patrimoniales entre ex-époux a été faite au point 62.

L'octroi de dédommagements est règlementé par l'article 388 NCC. A la base du texte, l'époux non coupable qui subit un préjudice du fait de la rupture du mariage peut demander à l'époux coupable de le dédommager. Les dédommagements peuvent être **cumulés** tant avec la prestation compensatoire qu'avec l'entretien.

La prestation compensatoire est règlementée par les dispositions des articles 390- 395 NCC. Dans le cas où le divorce est prononcé pour faute exclusive de l'époux défendeur, l'époux requérant peut bénéficier d'une prestation qui compense, dans la mesure du possible, un déséquilibre significatif que le divorce causerait dans les conditions de vie de celui qui la sollicite (article 390 alinéa (1) NCC).
La prestation compensatoire s'octroie seulement dans le cas où le mariage a duré au moins 20 ans (article 390 alinéa (1) NCC).
La prestation compensatoire peut être octroyée en argent, sous la forme d'une somme forfaitaire ou d'une rente ou en nature, sous la forme d'usufruit sur des biens immeubles ou meubles qui appartiennent au débiteur (article 392 alinéa (1)NCC) et cesse par le décès de l'un des époux, par le remariage de l'époux créancier, comme lorsque celui obtient des ressources de nature à lui assurer des conditions proches de celles qu' il a eues pendant le mariage (article 395).
La prestation compensatoire ne peut pas être cumulée avec la pension d'entretien (article 390 alinéa (3) NCC), mais elle peut l'être avec les dédommagements (article 388 NCC).

L'obligation d'entretien entre les époux est réglementée par l'article 389 du Nouveau code civil, qui prévoit, dans l'alinéa (1), que, en règle générale, elle cesse en cas de dissolution du mariage. En revanche, si l'époux divorcé se trouve en détresse due à une incapacité de travail survenue pendant le mariage ou pendant un an après sa dissolution, si l'incapacité est déterminée par une circonstance liée au mariage, il a droit à l'entretien de la part de l'autre époux (article 389 alinéa (2)NCC).
L'entretien dû s'établit jusqu'à un quart du revenu de celui tenu au paiement, par rapport à ses moyens et à l'état de détresse du créditeur.
Quand le divorce est prononcé pour faute exclusive de l'un des époux, celui-ci ne bénéficie d'un entretien que pendant un an après la rupture du mariage (article 384 alinéa (4) NCC). *A contrario,* il résulte qu'en cas de faute commune, la limitation ne s'applique pas.
L'obligation d'entretien **cesse** par le remariage du créancier (article 389 alinéa (5) NCC).
Le mode dans lequel les causes de divorce influencent les droits patrimoniaux entre les anciens époux résulte tant de celles mentionnées plus haut, dans le cadre de ce point, que de celles montrées aux points 65, 66, et, notamment 69.

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

En ce qui concerne le logement familial, s'il est détenu en vertu d'un contrat de bail, à la dissolution du mariage, dans la mesure où il n'est pas possible que le logement soit utilisé par les deux époux et s'ils ne s'entendent pas, le bénéfice du contrat de bail peut être attribue à l'un d'entre eux, en tenant compte, **dans l'ordre,** de l'intérêt supérieur des enfants mineurs, de la faute dans la rupture du mariage et des possibilités d'habitation des anciens époux (article 324 alinéa (1)NCC).

L'attribution de la jouissance du logement peut être faite sur le fondement des mêmes critères dans le cas où il est la propriété commune des époux. L'attribution produit des effets seulement jusqu'à ce que le jugement de partage devienne définitif (irrévocable jusqu'au 1er février 2013) (article 324 alinéa (4) NCC).

A l'occasion du partage, dans la mesure où il n'est pas possible le partage en nature et si les ex-époux ne s'entendent pas, le juge attribue le logement à l'un d'entre eux en tenant compte des critères mentionnés par l'article 673^9 du Code de procédure civile du 1865 (article 987 NCPC) et de ceux mentionnés par l'article 324 alinéa (1) NCC.

En tout cas, l'intérêt supérieur des enfants a priorité, donc, si le parent chez qui a été établie la résidence des enfants, n'a pas son propre logement, c'est à lui que sera attribué le logement familial a l'occasion du partage.

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

Selon la loi roumaine, les époux peuvent s'entendre par convention sur tous les aspects qui concernent la dissolution du mariage, donc, ils peuvent aussi conclure une convention quant au montant et aux modalités des obligations patrimoniales entre eux.

Dans le Nouveau code civil, par convention matrimoniale, on comprend la convention par laquelle les époux choisissent un autre régime matrimonial que celui de la communauté légale des biens (article 329).

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Le juge peut censurer une telle convention dans la mesure où elle enfreint des dispositions légales d'ordre public.

En tout cas, le juge va censurer une convention concernant les rapports patrimoniaux entre ex-époux, si elle est contraire à l'intérêt supérieur des enfants mineurs.

En ce qui concerne la modalité d'intervenir, le juge sollicitera une modification des clauses en discussion, sinon il ne tiendra pas compte de la convention.

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

Il semble que la réponse soit affirmative dans le cas d'obligation d'entretien et de la prestation compensatoire.

Pour la pension alimentaire, l'article 389 alinéa (2) NCC dispose qu'elle est attribuée à l'époux qui se trouve **en détresse,** et l'alinéa (3) du même article prévoit que son montant peut aller jusqu'à un quart du revenu de celui oblige, par rapport à ses moyens et à l'état de détresse du créancier.

Pour établir **l'état de détresse** du créancier, comme les moyens du débiteur aussi, il faut analyser tous les éléments qui constituent leur patrimoine.

En ce qui concerne **la prestation compensatoire**, même l'article 391 prévoit que pour son établissement on tient compte tant des ressources du conjoint qui la sollicite , que des moyens de l'autre époux au moment du divorce, des effets qu'aura la liquidation du régime matrimonial, comme de toutes autres circonstances prévisibles de nature à les modifier , comme seraient l'âge et l'état de santé des époux , la contribution qu'a eue et a chaque époux dans l'éducation des enfants mineurs, leur formation professionnelle, la possibilité d'exercer une activité productrice de revenu et d'autres similaires.

Quant aux **dédommagements** accordés conformément à l'article 388 NCC à l'époux non coupable pour les préjudices subis par la rupture du mariage, tous ces éléments ne seront plus nécessaires, le seul aspect qui doit être prouvé étant **le montant du préjudice.** Bien sûr, en fonction de la nature concrète du préjudice, on peut analyser un ou plusieurs de ces éléments.

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

Naturellement, la conséquence sera le rejet de la demande d'octroi du droit patrimonial respectif.

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

V. Q 74.

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

Cela diffère, en fonction de la catégorie d obligations patrimoniales entre ex-époux. Ainsi, si on se réfère aux **dédommagements** octroyés sur le fondement de l'article 388, leur montant peut être modifié dans les conditions du droit commun de la responsabilité civile extracontractuelle. Dans ce sens, l'article 1386 alinéa (4) NCC établit que, dans le cas du préjudice futur, le dédommagement pourra être augmente, réduit ou supprimé, si, après son établissement, le préjudice a agrandi, a amoindri ou a cessé.

La pension d'entretien pourra être modifiée si se modifie l'état de détresse de l'ancien époux qui en bénéficie ou les moyens de l'époux débiteur.

En ce qui concerne la **prestation compensatoire**, l'article 394 NCC règlemente expressément le mode de sa modification.

Ainsi, le juge peut augmenter ou diminuer la prestation si se modifient, significativement, les moyens du débiteur ou les ressources du créditeur. Dans le cas où la prestation compensatoire consiste d'une somme d'argent, cela sera indexée de droit, trimestriellement, en fonction de la cote de l'inflation.

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

L'obligation d'entretenir l'enfant est règlementée par l'article 499 qui fait partie du Chapitre II – "Les droits et les devoirs parentaux" – du Titre IV du Nouveau code civil, intitule "L'autorité parentale".

Il semblerait que l'entretien de l'enfant soit l'apanage de l'autorité parentale. De même il a été traité dans la doctrine sous l'empire du Code de la famille, quand *l'autorité parentale* était intitulée *la protection parentale (v.* dans ce sens, E. Florian, Droit de la famille, Ed. C.H. Beck, 2006, p. 378-379).

L'article 510 NCC prévoit toutefois expressément que **la déchéance de l'exercice des droits parentaux** n'exonère pas le parent de son obligation de donner entretien à l'enfant. Or, selon l'article 507, la déchéance de l'exercice des droits parentaux signifie la perte de l'autorité parentale, le texte mentionnant que dans cette situation l'autre parent exerce seul

l'autorité parentale. Voilà comment le parent qui n'a plus l'exercice de l'autorité parentale est néanmoins tenu de l'obligation d'entretien.

Pour ce motif, à notre avis, l'obligation d'entretien est liée à la qualité de parent. Bien sûr, en règle générale, cela coïncide avec la détention de l'autorité parentale, mais si, exceptionnellement, le parent perd cette qualité, l'obligation d'entretien subsiste, que la perte de l'autorité soit due à la déchéance de l'exercice des droits parentaux ou elle ait été décidée par le juge a l'occasion du divorce, conformément a l'article 398 NCC. Dans ce sens, l'article 402 alinéa(1) prévoit que l'instance de tutelle, par le jugement de divorce , fixe la contribution de chaque parent aux dépenses pour l'élevage des enfants, sans distinguer selon que le parent a gardé ou non l'exercice de l'autorité parentale.

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

Comme on a vu au point précédent, conformément a l'article 402 alinéa (1) NCC, l'instance de tutelle fixe, par le jugement de divorce, la contribution de chaque parent a l'entretien des enfants.

En ce qui concerne le montant maximum de l'obligation d'entretien, il est établi par l'article 529 (qui fait partie du Titre V – L'obligation d'entretien – du Nouveau code civil, dont les dispositions sont applicables, en vertu de l'article 402 alinéa (2) NCC, au divorce). Dans l'alinéa (2) l'article mentionne prévoit que si l'entretien est dû par le parent, il s'établit jusqu' a un quart de son revenu net mensuel pour un enfant, un tiers pour deux enfants, et la moitié pour trois enfants ou plusieurs.

Le montant de l'entretien dû aux enfants, avec l'entretien dû aux autres personnes, ne peut pas dépasser la moitié du revenu net mensuel du débiteur (article 529 alinéa (2) NCC).

Concernant **les modalités d'exécution** de l'obligation d'entretien, l'article 530 alinéa (1) établit qu'elle s'exécute **en nature,** par l'assurance de celles nécessaires à la vie et, selon le cas, des dépenses pour l'éducation, l'enseignement et la formation professionnelle.
Si l'obligation d'entretien n'est pas exécutée volontairement en nature, l'instance de tutelle impose son exécution par le payement d'une pension en argent (alinéa (2)).

La pension peut être établie sous la forme d'une somme fixe ou d'une quotité en pourcentage du revenu net mensuel du celui qui doit entretien (alinéa (3)).

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

Oui, comme les parents peuvent convenir sur tous les aspects concernant les rapports des parents divorces avec leur enfants mineurs, conformément a l'article 396 alinéa (1) NCC.

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

On a vu que toute convention entre les parents concernant leurs enfants mineurs est soumise au contrôle du juge, donc la convention sur les modalités d'octroi de l'entretien aussi. Le juge va intervenir chaque fois qu'il considère que la convention conclue entre la partie porte atteinte à l'intérêt supérieur des enfants.

Dans cette situation, il peut imposer soit la modification de certaines clauses, soit , si les parents ne s'y conforment pas ou s'il considère que la convention est dans son intégralité contraire à l'intérêt supérieur des enfants, ne pas tenir compte de la convention et fixer lui-même, conformément a l'article 402 NCC , dans le jugement de divorce, la contribution de chaque parent a l'entretien des enfants , comme les modalités de son exécution aussi.

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

Oui, conformément à l'article 375 NCC, **le divorce par l'accord des époux** peut être constaté aussi par l'officier d'état civil ou par le notaire public, dans le cas où les époux n'ont pas d'enfants mineurs nés du mariage, en dehors du mariage ou adoptes.

Le notaire public peut constater le divorce d'accord également dans la situation ou les époux ont des enfants mineurs, s'ils s'entendent sur tous les aspects concernant le nom de famille qu' ils vont porter après le divorce, l'exercice de l'autorité parentale par les deux parents, l'établissement de la résidence des enfants après le divorce , la modalité de maintien des liens personnels entre le parent sépare et chacun des enfants, tout comme l'établissement de la contribution des parents aux dépenses d'entretien des mineurs (article 375 alinéa (2) NCC).

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

Il s'agit du notaire public et de l'officier d'état civil. Tant la procédure notariale, que celle administrative, représente seulement une alternative au **divorce d'accord**, celui-ci pouvant être obtenu aussi par la voie judiciaire, conformément à l'article 374 NCC.

Le divorce pour faute ou pour l'état de santé des époux ne peut être obtenu que par voie judiciaire.

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

Le système de droit roumain ne connait pas deux ordres de juridiction, judiciaire et administratif, le seul ordre étant l'ordre judiciaire.

Les instances de droit commun sont compétentes pour statuer tant à l'égard de la dissolution du mariage, qu'à l'égard des effets du divorce. L'instance compétente matériellement pour juger les actions de divorce est le tribunal d'instance, conformément a l'article 607 du Code de procédure civile de 1865 et article 914 NCPC.

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

Seulement dans le cas du divorce par l'accord des époux par voie administrative ou par procédure notariale. Dans ce cas, conformément a l'article 376 alinéa (1) NCC, l'officier d'état civil ou le notaire public enregistre la demande et donne aux époux un délai de réflexion de 30 jours.

Dans le cas du divorce par voie judiciaire, l'article 613 du Code de procédure civile de 1865 établit que le président de l'instance, recevant la demande de divorce, donne au requérant des conseils de réconciliation et, dans le cas ou celui insiste, fixe le délai pour le jugement de la cause.

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

Non. L'article 614-1 alinéa (1) du Code de procédure civile de 1865 prévoit que, aux instances de fond, le juge insiste pour la solution du divorce par l'entente des époux.

L'alinéa (2) du même article établit que **dans le cas ou** (n.s. M. S.) le juge recommande la médiation, **et les parties l'acceptent** (n.s. M.S.), celles-ci vont se présenter au médiateur, pour information. Après l'information les parties décident si elles acceptent ou non la solution du divorce par médiation.

Cette "solution du divorce par médiation" ne peut consister que dans la conclusion d'une convention sur le divorce tous ses effets, convention avec laquelle les époux vont se tourner vers l'instance judiciaire ou se présenteront devant le notaire public ou l'officier d'état civil , pour que ceux-ci prononcent ou constatent, selon le cas, le divorce, seules ces structures ayant de la compétence dans la matière de dissolution du mariage, et non pas le médiateur.

Le Nouveau code de procédure civile n'a pas repris les dispositions de l'article 614-1 alinéa (2), en mentionnant seulement, dans l'article 920 alinéa (2), que l'instance va essayer, à chaque comparution, la réconciliation des parties.

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- **au logement familial,**
- **aux enfants,**
- **à l'obligation alimentaire entre époux,**
- **aux conséquences de violences conjugales ?**

Selon l'article 613-2 Code de procédure civile de 1865 (article 919 NCPC), l'instance peut prendre, tout au long du procès, par ordonnance de référe, des mesures provisoires à l'égard de l'assignation des enfants mineurs, l'obligation d'entretien, l'allocation pour les enfants et l'utilisation du logement familial.

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

Le jugement par lequel est prononcé le divorce par l'accord des parties n'est soumis à aucune voie de recours (article 619 alinéa (4) Code de procédure civile 1865, article 930 alinéa (4) NCPC).

De même, ni le certificat de divorce émis par le notaire public ou l'officier d'état civil dans le cadre du divorce par l'accord des époux par ces voies n'est soumis à aucune voie de recours, comme aussi leur refus de constater le divorce. Dans le cas de refus, les époux peuvent s'adresser à l'instance judiciaire pour décider la dissolution du mariage par leur accord ou à la base d'un autre fondement prévu par la loi (article 378 alinéa (2) NCC).

Dans les autres cas, les jugements sont soumis tant à l'appel qu'au pourvoi en cassation.

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir
- **à l'instance en divorce ;**
- **à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?**

Si oui, sur quels fondements ?

Le Ministère Public peut intervenir pour la défense des droits de l'enfant dans l'instance de divorce en vertu du droit du procureur de formuler des conclusions dans n'importe quel procès civil , dans toute ses phases , s'il apprécie qu' il est nécessaire pour la défense de l'ordre public , des droits et des libertés des citoyens.

En même temps, selon l'article 403 NCC, l'institution de protection à laquelle a été assigné l'enfant, l'institution publique spécialisée pour la protection de l'enfant ou le procureur peuvent solliciter a l'instance de tutelle la modification des mesures concernant les droits et les devoirs des parents divorces à l'égard de leurs enfants mineurs.

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant, quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

Dans le cas **du divorce par accord par voie administrative,** le problème des rapports entre les parents divorcés et leurs enfants mineurs ne se pose pas parce que cette modalité de divorce n'est admissible que dans le cas où il n y a pas d'enfants mineurs résultant du mariage ou dans de situations assimilées.
Dans le cas du **divorce par procédure notariale** non plus, on a l'impression qu'il ne se pose pas le problème d'auditionner le mineur, car dans cette situation le divorce peut être constaté par le notaire seulement si les époux ont conclu une convention a l'égard des rapports avec leurs enfants mineurs. Le notaire va vérifier si l'accord des époux est dans l'intérêt des enfants, par l'intermédiaire du rapport d'enquête psychosociale, car c'est seulement à cela que l'article 375 alinéa (2) se réfère expressément. Si le législateur avait souhaité conférer au notaire la possibilité d'entendre l'enfant , il l'aurait prévu expressément.

Mais, **le juge** entendra l'enfant toutes les fois qu'il prendra des mesures qui le concernent. Cette règle est établie en général par l'article 396 alinéa (2) pour toutes les circonstances qui tiennent des rapports entre les parents divorces et leurs enfants mineurs.

La disposition est ensuite reprise par des textes qui règlementent des situations particulières : l'article 400 – la résidence de l'enfant après le divorce – et l'article 401 – les droits du parent sépare de l'enfant.

L'audition de l'enfant est réglementée par l'article 264 du Nouveau code civil. Ainsi, dans les procédures administratives ou judiciaires qui le concernent, l'audition de l'enfant qui a atteint l'âge de 10 ans est obligatoire. L'enfant qui n'a pas 10 ans peut être entendu si l'autorité compétente considère que cette chose est nécessaire pour la solution de la cause (l'alinéa (1)).

Le droit d'être entendu suppose la possibilité de l'enfant de demander et de recevoir n'importe quel renseignement, conformément à son âge, d'exprimer son opinion et d'être informé sur les conséquences que cela peut avoir, si on la respecte, ainsi que sur les conséquences de n'importe quelle décision qui le concerne.

Tout enfant peut demander à être entendu, selon les dispositions des alinéas (1) et (2). Le rejet de la demande par l'autorité compétente doit être motivé (alinéa (3).

Les opinions de l'enfant seront prises en considération par rapport à son Age et a son degré de maturité (alinéa (4)).

Quant à son **assistance ou à son accompagnement** pendant son audition, dans la pratique cela est laissé à la latitude du juge, qui peut décider que l'enfant soit accompagné par les parents ou assisté par un représentant (généralement, psychologue) de l'institution publique qui s'occupe de la protection des enfants.

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives

- **u) à la rupture du lien matrimonial ?**
- **v) aux effets pécuniaires du divorce ?**
- **w) à la liquidation des intérêts patrimoniaux des époux ?**
- **x) à la responsabilité parentale ?**
- **y) aux obligations alimentaires entre parents et enfants ?**

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

Avant de répondre, il est nécessaire de préciser que, selon l'article 1093 du Nouveau code de procédure civile , dans le sens du Titre III – L'efficacité des arrêts étrangers – du Livre VII – Le procès civil international – du NCPC , le terme *d'arrêts étrangers* se réfère aux actes de juridiction contentieuse ou non contentieuse des instances judiciaires ou de toutes les autorités compétentes d'un Etat **non membre** (s.n.) de l'Union Européenne.

Comme on a montré au cours de ce rapport, le Nouveau code de procédure civile entre en vigueur le 1 février 2013. Le texte correspond, en vigueur aujourd'hui, l'article 165 de la loi

no. 105/1992 concernant les rapports de droit international privé, **ne distingue pas entre les Etats membres et non membres** de l'UE, en établissant que le terme d'arrêts étrangers se réfère aux actes de juridiction des instances judiciaires, des notariats ou de toutes les autorités d'un autre Etat.

Quand même, on est d'avis que même jusqu'à l'entrée en vigueur du NCPC, la solution concernant les arrêts étrangers doit être la même, par arrêts étrangers en comprenant les arrêts prononces dans un Etat non membre de l'UE, et c'est à ceux-ci qu'il suit a s appliquer les normes du droit interne concernant l'efficacité des arrêts étrangers. En ce qui concerne les arrêts prononcés dans des Etats membres de l'UE, on va appliquer les normes du droit de l'UE, comme seraient celles contenues dans le Règlement (CE) no. 44 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale ou dans le Règlement (CE) no. 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale. Seulement dans les domaines qui ne sont pas réglementés par des normes européennes, seront appliquées les normes du droit international prive contenues dans la loi no. 105/1992.

Pour revenir aux dispositions de droit interne, l'article 166 de la loi no. 105/1992 prévoit que les décisions étrangères **sont reconnues de plein droit** en Roumanie si elles se réfèrent **au statut personnel** des citoyens de l'Etat ou ont été prononcées ou , si elles ont été prononcées dans un Etat tiers , ont été reconnues d'abord dans l'Etat de la nationalité de chaque partie. Le texte qui remplacera l'article 166 de la loi no. 105/1992 après le 1er février prochain , l'article 1094 NCPC , ajoute que , à défaut de reconnaissance dans l'Etat de la nationalité de chaque partie , les décisions seront reconnues de plein droit en Roumanie , si elles ont été prononcées sur la base de la loi déterminée comme applicable conformément au droit international prive roumain , elles ne sont pas contraires à l'ordre public de droit international prive roumain et elles ont à respecter le droit à la défense.

Les **décisions relatives à d'autres aspects** que le statut personnel, peuvent être reconnues en Roumanie, conformément à l'article 167 de la loi no. 105/1992 (l'article 1095 NCPC après 1er fevrier 2013) si elles remplissent les conditions suivantes :

a) la décision est définitive selon la loi de l'Etat dans lequel elle a été prononcée ;
b) l'instance qui l'a prononcée a, selon la loi mentionnée, la compétence de juger le procès ;
c) il y a de réciprocité en ce qui concerne les effets des décisions étrangères entre la Roumanie et l'Etat de l'instance qui a prononcé la décision.

Si la décision a été prononcée par défaut de la partie qui a perdu le procès, elle doit constater aussi qu'a la partie en cause a été communiquée en temps utile la citation pour les débats en fond, comme aussi l'acte de saisine de l'instance et qu'on lui a donné la possibilité de se défendre et d'exercer la voie de recours contre la décision.

En ce qui concerne les motifs de refus de la reconnaissance de la décision étrangère, il y a des différences entre la réglementation en vigueur (la loi no. 105/1992) et celle qui va entrer en vigueur le 1 février 2013 (La livre VII du NCPC).

Ainsi, en ce qui concerne le refus de la reconnaissance pour **violation de l'ordre public de droit international prive roumain,** le Nouveau code de procédure civile se réfère a la situation ou la décision est **manifestement contraire** à l'ordre public (article 1096

alinéa (1) lettre a)), pendant que la loi encore en vigueur considère comme motif de refus **la simple violation** de cet ordre.

Alors que la loi en vigueur considère la violation de la compétence exclusive des instances roumaines comme un cas de violation de l'ordre public de droit international privé, le NCPC traite cette situation comme un motif distinct de refus de reconnaissance de la décision.

La loi no. 105/1992 consacre comme motif de refus de la reconnaissance le fait que la décision est le résultat d'une fraude commise dans la procédure à l'étranger (article 168 point 1), cas qu'on ne retrouve pas dans la réglementation du NCPC.
Le NCPC contient les cas suivants dans lesquels la reconnaissance peut être refusée, des cas qui ne sont pas contenus dans la loi no. 105/1992 :

- la décision prononcée dans une matière ou les personnes ne disposent pas librement de leurs droits a été obtenue dans le but exclusif de soustraire la cause a l'incidence de la loi applicable conformément au droit international prive roumain ;
- est inconciliable avec une décision prononcée antérieurement a l'étranger et susceptible d'être reconnue en Roumanie ;
- les droits de la défense ont été violés ;
- la décision peut faire l'objet d'une voie de recours dans l'Etat ou elle a été prononcée.

Le seul motif de refus de la reconnaissance réglé de façon similaire dans les deux actes normatifs est le fait que le procès était entre les mêmes parties, même par une disposition non définitive, des instances roumaines ou il y est en train de jugement a la date de la saisie de l'instance étrangère.

Selon les deux réglementations, la reconnaissance ne peut pas être refusée pour le seul motif que l'instance qui a prononcé l'arrêt étranger a appliqué une autre loi que celle qui aurait été déterminée par le droit international prive roumain , sauf si le procès concerne la état civil et la capacité d'un citoyen roumain et la solution diffère de celle à laquelle on serait arrivée selon la loi roumaine.

Pour **conclure** le jugement étranger relatif à la **dissolution du mariage,** sera reconnu de plein droit, dans les condition de la loi (article 166 de la loi no. 105/1992 , article 1094 du NCPC) et en ce qui concerne les autres effets du divorce (effets pécuniaires du divorce , la responsabilité des parents ou les obligations entre parents et enfants), la reconnaissance sera faite conformément à l'article 167 de la loi 105/1992 (article 1095 NCPC).
La conséquence du fait que la disposition provient d'un Etat tiers a l'UE, la constitue juste l'application des normes de droit international prive roumain, sauf la situation ou par des traites internationaux ou la Roumanie est partie on ne dispose autrement.

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

Comme on a vu, l'article 168 de la loi no. 105/1992 (en vigueur jusqu' au 1er fevrier 2013) prévoit que la reconnaissance d'une disposition étrangère peut être refusée si elle viole l'ordre public de droit international prive roumain. Donc, toutes les fois que l'instance de reconnaissance constate une violation de l'ordre public de droit international privé, indifféremment de la gravité de cette violation, il doit rejeter la demande. Le même texte

indique aussi un cas de violation de l'ordre public, la violation de la compétence exclusive des instances roumaines.

Le Nouveau code de procédure civile, par l'article 1096 alinéa (1) lettre a) exige, pour pouvoir refuser la reconnaissance de la disposition étrangère, qu'elle soit **manifestement contraire** à l'ordre public de droit international privé, s'agissant, donc, d'une violation évidente, qui ne pourrait pas être mise en doute sous aucun motif. A la suite, le texte offre aussi un critère pour l'appréciation de la violation, en précisant que l'incompatibilité entre la disposition et l'ordre public de droit international privé roumain s'établit en tenant compte, notamment, de l'intensité du lien de l'affaire avec l'ordre juridique roumain et de la gravite de l'effet ainsi produit.

Ce qui nous semble intéressant c'est que le Nouveau code civil, cette fois, réglemente un cas d'application de la règle du refus de la reconnaissance d'une disposition étrangère pour violation de l'ordre public de droit international privé roumain. Ainsi, l'article 2601 NCC sur "La reconnaissance du divorce par dénonciation unilatérale", établit que l'acte fait à l'étranger (donc le jugement aussi) par lequel est constatée la volonté unilatérale de l'homme de défaire le mariage, sans que la loi étrangère applicable reconnaisse a la femme un droit égal (ce qu'on a appelé "la répudiation de la femme"), ne peut pas être reconnu en Roumanie, à l'exception de la situation ou sont remplies cumulativement les conditions suivantes :

a) l'acte a été fait dans le respect de toutes les conditions de fond et de forme prévues par la loi étrangère applicable ;
b) la femme a accepté librement et sans équivoque cette modalité de dissolution du mariage.

Donc, dans la situation ou une décision judiciaire constaterait la rupture du mariage suite à la seule volonté unilatérale de l'homme, sans que soient réalisées les deux conditions mentionnées plus haut, il y aurait violation de l'ordre public international roumain.

D'autres exemples d'une telle violation seraient : l'arrêt qui prononce la dissolution d'un mariage homosexuel, ce type de mariage étant prohibé par la loi roumaine ; la disposition qui ferait une discrimination, à l'occasion de l'établissement des rapports entre les parents divorcés et leurs enfants mineurs, entre les enfants du mariage et les enfants hors mariage ; la disposition qui accorderait une situation plus favorable à l'un des époux ayant en vue exclusivement le critère du sexe de celui-ci; la disposition qui établirait pour l'un des époux un traitement dégradant etc.

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

Conformément à l'article 41 alinéa (3) de la loi no. 119/1996 relative aux actes d'état civil, les actes d'état civil des citoyens roumains faits par les autorités étrangères ont force probatoire dans le pays seulement s'ils sont inscrits ou transcrits sur les registres d'état civil roumains.

Le citoyen roumain est obligé, 6 mois après son retour au pays ou après la réception de l'étranger du certificat ou de l'extrait d'état civil, de demander la transcription de ces actes

au service public communauté local d'évidence des personnes ou à la mairie de la localité de son domicile.

Il faut mentionner aussi que, selon l'article 48 de la même loi, même dans le cas où elle a été disposée en Roumanie, la dissolution du mariage (tout comme la constatation de la nullité et l'annulation du mariage) s'inscrit par mention dans la marge de l'acte de mariage et de naissance des anciens époux.

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

Comme il résulte de la rédaction de l'article 41 alinéa (3) de la loi no. 119/1996, l'inscription ou la transcription est obligatoire ("le citoyen roumain est oblige (…)) et elle se réalise à la demande des anciens époux.

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

Comme il ressort du texte légal, la formalité est demandée pour assurer **la force probatoire** dans le pays des actes respectifs.

Donc, la sanction de l'absence de transcription ou d'inscription sera la privation de force probatoire des actes respectifs sur le territoire de la Roumanie.

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

SPAIN

SPAIN

Pr. Christina GUILARTE MARTIN-CALERO

Université de Valladolid

I. PARTIE GÉNÉRALE

A. Droit national

1. Quelles sont les principales sources du droit (législatives et/ou jurisprudentielles) actuellement applicable au divorce ?

PRÉALABLE

Après la Constitution espagnole de 1978, la structure politique-administrative de l'Etat espagnol est organisée en Communautés Autonomes ; quelques-unes de ces communautés, pour des raisons historiques (La Galice, Le Pays Basque, la Navarre l'Aragon, la Catalogne, les Baléares, la Valence), détiennent une compétence législative en matière civile, ainsi, elles ont leurs propres normes applicables en la matière, voire, le régime économique-matrimonial et quelques- unes des conséquences qui découlent du divorce.

En outre, la compétence en matière civile correspond exclusivement à l'Etat espagnol, en quelques-unes des matières traitées par cette analyse : les formes relatives au mariage et sa rupture, les normes pour résoudre les conflits des lois et ceux qui concernent les Registres publics (article 149.1.8ª CE). De même la législation procédurale est exclusive à l'Etat, sans préjudice aux nécessaires spécialités qui, en la matière, pourraient découler des particularités du droit substantif des communautés autonomes (art.1.6° CE).

Référence sera faite aux particularités de ces communautés autonomes, le cas échéant, sur chaque paragraphe de manière séparée et explicite.

LES SOURCES DU DROIT ESPAGNOL

- La **Constitution Espagnole**: Article 32 CE:

1. L'homme et la femme ont le droit à contracter mariage en pleine égalité juridique
2. La loi réglera les formes du mariage, l'âge et la capacité de le contracter, les droits et les devoirs des conjoints, les causes de séparation et rupture et leurs effets.

- Applicable sur tout le territoire espagnol, la **Loi de Procédure civile de 2000,** articles 76 et suivants (procédure du divorce) et le **Code Civil** qui règle les délais, les causes et les effets légaux du jugement de séparation ou de divorce.

- Les conséquences conventionnelles ou judiciaires du divorce recueillies par le **Code Civil** qui sera applicable sur tout le territoire espagnol, excepté les communautés autonomes qui détiendraient une compétence en matière civile et qui auraient réglé quelques aspects en la matière de façon diverse. On pourra remarquer, le long du questionnaire, qu'il n'existe pas, en général, des grandes différences entre le Code civil et les lois autonomiques en cette matière.

a) L'Aragon : Código del Derecho foral de Aragón, Decreto Legislativo 1/2011, de 22 de marzo

b) Les Iles Balears: Texto Refundido de Compilación del Derecho civil de Baleares, Decreto Legislativo 79/1990, de 6 de Septiembre

c) La Navarre : Compilación Navarra Ley 1-1973, de 7 de marzo

d) La Catalogne : Ley 25/2010, de 29 de julio, del Libro II del Código civil de Cataluña, relativo a la persona y la familia.

e) La Valence : Ley de Régimen Económico matrimonial ley 10-2007, de 22 de marzo et la Ley 5-2011, de 5 de Abril de 2011, de Relaciones Familiares, questionné devant la Cour Constitutionnelle mais aplicable jusqu'à la decisión définitive.

f) Pays Basque: Ley 3-1992 Derecho foral del País Vasco

g) La Galice: Ley 2/2006, de 14 de junio de Derecho civil de Galicia et Ley de Apoyo a la familia y a la convivencia de Galicia, de 13 de julio de 2011.

- La **jurisprudence** de la Cour de Cassation a donné, depuis quatre ans, d'importantes règles d'interprétation des différents aspects de la rupture (prestation compensatoire, logement familial, garde des enfants…). On en fera référence dans les différents paragraphes, mais il faut tenir compte que, en Droit espagnol, la jurisprudence n'est pas source de Droit, bien que l'infraction à la doctrine jurisprudentielle ouvre la voie au recours en cassation.

- De son côté, la **Cour Constitutionnelle,** dont les décisions constituent source de Droit, a statué, les derniers mois, sur deux questions d'inconstitutionnalité portant sur les lois 13 et 15 de 2005 du mariage homosexuel et du divorce respectivement. La première question considère conforme à notre ordre constitutionnel le mariage contracté par des personnes du même sexe, et la deuxième déclare inconstitutionnel

l'article 92.8 du Code civil qui exigeait un rapport *favorable* du Procureur de la république pour que le juge puisse accorder la garde partagée en cas de désaccord des géniteurs. On déclare nul le réquisit *favorable*, de façon à ce que, à partir de la publication de la sentence sur le BOE, il ne soit nécessaire que le rapport du Procureur de la République pour accorder, si on l'estime adéquate, la garde partagée.

2. Faites un historique rapide des principales évolutions du droit du divorce dans votre pays.

En Espagne, après une brève période pendant la République (1932) de reconnaissance du divorce, celui-ci est introduit en 1981; jusqu'à ce moment-là, la nullité du mariage et la séparation étaient les seuls mécanismes de rupture à être réglés, à titre exceptionnel, dans un système de mariage permanent. La séparation était de type causal et ses effets correspondaient à deux cas de figure, aujourd'hui révolus, le conjoint innocent et le conjoint coupable. Il faut savoir que pendant la dictature du Général Franco, le mariage était régi par la religion catholique, qui était la religion de l'Etat, et en matière de Droit de famille le principe d'égalité n'était pas appliqué, c'est ainsi qu'il existait une supériorité de l'homme en tant que mari et père.

La Constitution espagnole de 1978 stipule, dans son article 32, que la loi réglera les causes de séparation et rupture du mariage, tâche qui fructifie dans la **loi du 7 juillet 1981** qui discipline la séparation et le divorce dans le Code Civil.

Cette loi introduit un système de séparation et de divorce qui établit, en tant qu'étape préalable à la rupture définitive du lien, une période obligatoire de séparation (de fait ou légale) ; les effets de la séparation ou du divorce ne dépendent plus du critère de la faute, même s'il en existe encore quelque vestige dans le Code Civil (74,95 et 1324 Cc). La séparation et le divorce peuvent être décidés de commun accord par les conjoints qui feront accompagner leur demande de séparation ou de divorce d'une convention réglant les effets de l'une ou de l'autre. Cette convention sera homologuée par le juge si elle ne résulte contraire aux intérêts de l'un des conjoints ou des enfants mineurs. Si un accord n'existe pas, les conjoints devront entamer la procédure contentieuse, fonder leur demande sur une cause de séparation ou de divorce avec les mesures correspondantes en rapport aux enfants, à la prestation alimentaire et compensatoire et au logement familial.

Les reformes du Droit de Famille de 1981 suppriment le critère de la faute dans la détermination des effets et des conséquences de la séparation el du divorce, mais gardent un système causal de séparation et de divorce qui, dans des cas déterminés, font possible l'identification d'un présumé coupable (l'abandon injustifié du foyer, l'infidélité conjugale, la conduite injurieuse ou vexatoire et toute violation grave ou répétée des devoirs conjugaux; toute violation grave ou répétée des devoirs à l'égard des enfants en commun ou à l'égard des enfants de l'un ou de l'autre conjoint qui cohabiteraient dans la résidence familiale ; l'alcoolisme, la toxicomanie…).

Les dernières années, il a existé un consensus sur la fin de la affectio maritalis en tant que cause de séparation et/ou divorce, de telle manière qu'il n'était pas nécessaire d'avoir recours aux causes légales au regard du Code civil.

Les années sont passées, la société a avancé et la culture du divorce s'est répandue, éloignée de la famille traditionnelle des années 80 et complètement incorporée aux nouveaux temps,

les différents acteurs juridiques réclamaient un changement dans la législation qui supprimerait la procédure de séparation en tant que démarche préalable obligatoire pour l'obtention du divorce, par ses coûts affectifs, économiques et procéduraux, ainsi que la suppression des causes taxées de séparation et de divorce, dont la preuve était considérée contraire au droit constitutionnel à l'intimité familiale.

De telles revendications trouvent leur pleine inclusion dans la **loi 15/2005,** du 8 juillet de modification du Code civil et de la Loi de procédure en matière de séparation et de divorce, qui maintient la séparation et le divorce comme alternatives légales, avec les mêmes présupposés et procédures et qui supprime le modèle causal, réglant une unique cause de séparation et de divorce fondée sur la volonté des conjoints de mettre fin au lien conjugal et y introduit la modalité de garde alternée des enfants et la temporalité de la prestation compensatoire.

La nouvelle régulation légale de la séparation et du divorce base tout le système sur la liberté des conjoints de décider sur le maintien de l'union conjugale, comme s'il s'agissait d'un consentement matrimonial suivi, de telle manière que la simple volonté de l'un des conjoints de mettre fin au mariage suffit à ce que la séparation ou le divorce soit déclaré. Une seule condition en est requise : l'écoulement de la période légale de trois mois depuis la date du mariage, délai qui pourra être inférieur si l'on certifie que la vie, l'intégrité physique, la liberté, l'intégrité morale ou la liberté et l'indemnité sexuelle du conjoint demandant ou des enfants en commun ou de l'un ou de l'autre, sont en danger.

Il est bien évident que, en une trentaine d'années, nous sommes passés d'une situation dans laquelle le divorce n'était pas reconnu en tant que moyen d'annulation du lien matrimonial, à la situation actuelle dans laquelle nous avons une des régulation les plus avancées et progressistes en matière de divorce et de mariage (reconnaissance pleine du mariage homosexuel).

3. Existe-t-il à l'heure actuelle un projet de réforme en la matière ?

A l'heure actuelle le Ministère de la Justice travaille sur un projet de loi qui comprend la formule du divorce notarial pour les cas de commun accord.

4. Le divorce est-il le seul moyen de rompre le mariage ou existe-t-il une/des possibilité(s) de rupture *a minima* (séparation de corps…) ?

- Avec des causes et des effets propres, le Code civil règle la nullité du mariage dans les articles 73 et suivants; la procédure est commune à la séparation et au divorce.

- Jusqu'à la Réforme de 2005, la séparation (de fait ou légale) constituait l'étape préalable et obligatoire pour l'obtention du divorce ; actuellement, on garde, en tant qu'alternative légale, la séparation comme outil qui supprime la cohabitation des conjoints sans toucher à l'existence du lien conjugal (art.81 et suivants Cc) Les requis, les délais et les procédures sont les mêmes que ceux du divorce.

5. Donnez les statistiques générales en matière de divorce et de séparation de corps.

Vid.Anexe I

6. Votre droit admet-il le mariage entre personnes de même sexe (ou le partenariat enregistré entre personnes de même sexe) ? Si oui, les causes et procédures de rupture de l'union sont-elles les mêmes que pour les couples hétérosexuels ?

La loi 13/2005 du 1er juillet reconnaît le droit à contracter mariage entre elles aux personnes du même sexe et cela en introduisant une incise dans l'article 44 du Code civil qui établit : Le mariage aura les mêmes requis et effets lorsque les deux conjoints seraient du même sexe ou de sexe différent.

Depuis la promulgation de la loi, un recours d'inconstitutionnalité déposé par le parti populaire (30 septembre 2005) et qui était en suspens, a été débouté par la Cour constitutionnelle lundi le 5 novembre ; le communiqué de presse de la Cour (la sentence n'étant pas encore publié avec ses voix divergentes) annonce qu'elle considère le mariage homosexuel comme étant constitutionnel par un résultat de huit voix contre trois.

B. Droit international privé

7. Comment est défini le mariage dans votre droit national ?

On peut définir le mariage comme l'union de deux personnes de différent sexe ou de même sexe, concertée à vie moyennant l'accomplissement de rites déterminés ou formalités légales et qui poursuit une communauté absolue d'existence (DIEZ-PICAZO/GULLON, Sistema de Derecho civil IV, Tecnos, Madrid, 2006, pg.62).

B1. Causes de divorce

a). Rome 3 est applicable

8. Au regard des articles 5 (choix de la loi applicable par les époux) et 7 (validité formelle d'un tel accord sur la loi applicable) du règlement Rome III, quelles sont les conditions de forme imposées par votre droit national pour le choix de la loi applicable au divorce ou à la séparation de corps ?

L'art. 9.2 Cc permet aux candidats au mariage, à défaut de la loi personnelle commune, de choisir la loi applicable au mariage entre la loi personnelle ou du domicile habituel de l'un ou de l'autre conjoint, s'ils le font par document authentique livré avant la célébration du mariage. Mais l'article 107 Cc, qui déterminait la loi applicable à la séparation et au divorce, ne comprenait pas de prévision normative à tel sujet, précisément pour ne pas laisser de marge à l'autonomie de la volonté en la matière.

En tout état de cause, les conjoints peuvent avant et pendant le mariage passer un contrat matrimonial pour stipuler, modifier ou remplacer le régime matrimonial ou *toute disposition en raison de mariage* (art.1325 Cc) ; donc, si les conjoints, dans leur contrat, déterminent la loi applicable à leur séparation et divorce, au regard du Règlement Rome 3, pour qu'il soit valide il devra faire l'objet d'un *titre public* (art.1327 Cc)

Si ce n'est pas fait sur le contrat de mariage, ils pourront faire observer leur choix sur document privé, comportant la date et la signature (art.7 Roma III).

9. Au regard de l'article 13 du règlement Rome III, les mariages suivants sont-ils reconnus dans votre droit national comme mariage ? 1° mariage de personnes de même sexe célébré valablement à l'étranger ; 2° mariage privé ; 3° mariage polygame…

1. Mariage de personnes de même sexe célébré valablement à l'étranger :

Oui

2. Mariage privé : se distinguen los siguientes divorcios no judiciales

   - divorcios acordados por autoridades públicas no judiciales: el Tribunal Supremo estima que tales divorcios pueden surtir efectos en España si superan el tradicional exequátur, porque son resoluciones similares a las sentencias extranjeras de divorcio. Se le aplican los requisitos generales para el exequátur.

   - divorcios meramente visados por autoridades extranjeras: el Tribunal Supremo entiende que la autoridad pública no participa con carácter constitutivo en la declaración del divorcio, sino que se limita a dar fe de la voluntad de los cónyuges. El Tribunal Supremo estima que ello vulnera el orden público internacional español, por tanto, no superan el exequátur y no surten ningún efecto en el derecho español

   - divorcios privados puros pactados por las partes sin intervención de ninguna autoridad. Estos divorcios al no constar en documento público, no pueden acceder al Registro civil español y no surtirán efectos constitutivos en España.

3. Mariages polygames:

Pour ce qui est de la polygamie, de prime abord, il faut signaler que le mariage espagnol est monogame, comme c'est le cas dans tous les pays à tradition chrétienne. C'est ainsi que l'article 46.2 du Code civil nie la capacité de célébration d'un mariage à ceux qui seraient déjà uni par un lien de mariage, et l'article 73.2 considère nul le mariage célébré par une personne déjà mariée. L'acte de célébrer un nouveau mariage sans avoir dissout le précédent constitue, même, un délit de bigamie, classé par l'article 217 du Code Pénal. Il existe donc une interdiction dont la contravention suppose la nullité, et qui empêche les espagnols de célébrer un mariage polygamique en Espagne.

La capacité de contracter un mariage est régie par la loi nationale de chacun des postulants. C'est ainsi que l'article 9.1 Cc le dispose faisant référence, d'une manière générale, à la capacité des personnes physiques, tout en se rapportant à leur loi personnelle. Il existe donc un renvoi à la loi étrangère, de façon à ce que, à priori, l'étranger ressortissant d'un pays qui admet la polygamie ait la capacité pleine de célébrer un deuxième mariage, même si le premier est toujours en vigueur, et c'est la manière dont il devrait être reconnu dans notre pays. Toutefois, ce renvoi à la loi étrangère peut être neutralisé en vue de l'application de l'Ordre public international, en vertu de l'article 12.3 Cc qui écarte l'application de la loi étrangère, lorsqu'elle devient contraire aux principes et aux valeurs fondamentaux de la société dans laquelle il prétend se faire valoir (lex fori), et qui est appliquée avec différentes

intensités selon que l'on prétende que le mariage polygamique se célèbre en Espagne ou qu'il ait déjà été célébré, valablement, dans un pays étranger.

a) Si l'on prétend célébrer le mariage en Espagne:

L'application de la loi étrangère en est exclue, tout en considérant que la polygamie est contraire aux principes et aux valeurs fondamentaux de notre ordre juridique, notamment au principe de l'égalité entre homme et femme, et à la dignité constitutionnelle de la femme ; l'application de telles lois porterait atteinte à la cohésion de l'organisation sociale et juridique de la société espagnole, fondée sur la monogamie matrimoniale comme expression de l'égalité juridique entre homme et femme, et de la dignité de la personne. Voilà la position soutenue sans faille par la Direction Générale des Registres et par le notariat, chargée de résoudre, entre autres, les questions juridiques en matière de statut civil. **En Espagne, *n'est pas autorisée la célébration d'un mariage polygamique, qui porterait atteinte à la dignité constitutionnelle de la femme et à la conception espagnole du mariage.***

De son côté la Cour de cassation (3ª) a affirmé que le régime familial polygamique est contraire à l'ordre public en Espagne, parce qu'il prévoit l'inégalité entre femmes et hommes, ainsi que la soumission de celles-là à ceux-ci.

b) Si le mariage polygamique a été célébré dans un pays étranger:

En l'espèce il ne faut pas oublier qu'il s'agit d'une situation légale dans le pays de la célébration et, pour cela, de même qu'ici en France, on propose l'application d'un ordre public international atténué, qui permettrait la reconnaissance sélective de quelques effets juridiques du mariage polygamique (pension de réversion, aliments, pension compensatoire...)

B2. Effets du divorce

10. Quelle est la loi applicable au divorce (lex fori, loi nationale commune, loi du domicile commun ou de dernier domicile commun…) ? La règle de conflit nationale désigne-t-elle parfois le droit étranger ?

11. Quelle place est faite à la volonté des parties dans la détermination de la loi applicable ?

12. Si les parties peuvent choisir la loi applicable, comment s'exprime ce choix et à quel moment peut-il être formulé ?

b). Rome 3 n'est pas applicable

13. Quelle est la loi applicable aux conséquences pécuniaires du divorce (pensions, prestations, dommages intérêts etc) ? Règles de droit interne, règlement européen, convention internationale ?

Ces aliments et compensations sont régis par la loi déterminée en vertu de l'art.5 du Protocole de la Haye du 23 novembre 2007 qui ne sera nécessairement la loi appliquée au divorce ou à la séparation matrimoniale.

14. Quelle est la loi applicable à la liquidation des intérêts patrimoniaux des époux (régimes matrimoniaux etc.) ?

En Droit International Privé espagnol cette question est déterminée conforme à ce qui est établi dans l'article 9.2 et 9.3 Cc.

Les effets du mariage seront régis (art.9.2) :

- par la loi personnelle commune des conjoints au moment de la célébration du mariage.
- par la loi personnelle ou le domicile habituel de l'un ou de l'autre conjoint, choisie par les deux et figurant sur document authentique livré avant la célébration du mariage.
- à défaut de ce choix, par la loi du domicile habituel commun immédiatement postérieur à la célébration
- et à défaut dudit domicile, par celui du lieu de célébration du mariage.

De son côté, l'art.9.3 établit que *les accords ou les contrats, par lesquels on stipule, modifie ou remplace le régime financier du mariage, seront valides quand ils seront conformes soit à la loi qui régit les effets du mariage, soit à la loi de la nationalité du domicile habituel de l'une ou l'autre partie au moment de l'octroi.*

15. Quelle est la loi applicable à la responsabilité parentale ?

En Espagne on applique la Convention de la Haye du 19 octobre 1996 et dans les hypothèses qui ne sont pas comprises dans ladite Convention, on appliquera l'art.9.6 Cc (la loi national du mineur). Il faut toutefois souligner que les tribunaux espagnols ignorent cette idée régulatrice et appliquent, fréquemment, à la garde et surveillance des mineurs la loi du divorce.

16. Quelle est la loi applicable aux obligations alimentaires entre parents et enfants ? Règles de droit interne, règlement européen, convention internationale ?

Ces questions sont régies par la loi qui règle la prestation d'aliments selon le Protocole de la Haye du 23 novembre 2007 (Loi applicable aux obligations alimentaires). Comme nous l'avons déjà fait remarquer : les tribunaux espagnols ignorent cette idée régulatrice et appliquent, fréquemment, à cette question la loi du divorce.

B3. Office du juge (ou de toute autre autorité compétente)

17. Le juge doit-il rechercher et appliquer d'office la règle de conflit de lois relative au divorce ?

Art.12.6 Cc: *Les Tribunaux et les autorités appliqueront d'office les normes de conflit du droit espagnol.*

La norme de conflit à un caractère obligatoire et impératif et elle est applicable d'office par l'interprète.

18. Si la règle de conflit nationale renvoie parfois au droit étranger, quel est l'office du juge en matière de droit étranger ? Est-il tenu de le rechercher d'office ? Comment peut-être établi le contenu de la loi étrangère ?

L'article 281.2Lec établit que le droit *étranger* doit être prouvé ; il s'agit d'une exception, de même que la coutume, du principe *iura novit curia.* Le droit étranger devra être prouvé en ce qui concerne son contenu et sa validité, et le tribunal pourra utiliser tous les moyens de recherche qu'il estime nécessaires pour son application. Un devoir de collaboration est établi entre les parties et le Tribunal pour la gestion et l'obtention des moyens probatoires.

Les moyens pertinents pour prouver en Droit étranger sont la preuve documentaire et la preuve d'expert. La première –qui permet de certifier le contenu et la validité des normes étrangères- peut consister en la présentation de certificats de la loi étrangère livrée par des agents diplomatiques ou fonctionnaires consulaires, aussi bien du for que des étrangers certifiés dans le for, ou des certifications du Ministère de la Justice. En ce qui est de la preuve d'expert, qui permet au juge de connaître la portée de la loi étrangère, elle consiste en un rapport des jurisconsultes. Evidemment le Tribunal pourra se servir du Réseau judiciaire européen en tant que mécanisme de certification du Droit étranger.

II. LE DROIT MATERIEL

K. Les causes de divorce

19. Le mariage doit-il avoir duré pendant un temps minimum avant que le divorce puisse être demandé ?

La durée du délai légal aussi bien pour la séparation que pour le divorce doit être de trois mois depuis la date du mariage.

Ce délai ne sera pas nécessaire pour introduire la demande de divorce du moment où l'on justifie l'existence d'un risque pour la vie, l'intégrité physique, la liberté, l'intégrité morale ou la liberté et l'indemnité sexuel de l'époux requérant ou des enfants en commun ou de n'importe quel membre du mariage

Articles 81 et 86 Code civil

20. La perte de capacité juridique d'un époux (régime de protection juridique, aliénation mentale…) a-t-elle une incidence sur sa capacité à introduire une demande en divorce ou à être défendeur à une telle demande ?

Le code civil ne prévoit aucune norme sur cette question.

Dans notre système juridique l'action du divorce était configurée doctrinalement comme une action d'état, absolument personnelle, imprescriptible et irrévocable, ce qui empêchait, au vue de la doctrine et des Tribunaux, la reconnaissance de la capacité à introduire une demande en séparation ou divorce au curateur de l'époux sous régime de protection, de manière à ce que ni l'époux ni le curateur puissent introduire une demande en séparation ou divorce. C'est la position maintenue par la Cour de Cassation selon l'Arrêt du 27 février 1999 qui a été contesté par la voie de la cassation devant la Cour Constitutionnelle qui, par

contre, a reconnu la capacité à introduire une demande en séparation à la mère curatrice dans son Arrêt 311/2000, du 18 décembre.

Admise la capacité à introduire une demande en séparation, la Cour de Cassation a eu l'occasion de se manifester maintenant sur la capacité à introduire une demande en divorce dans son Arrêt du 21 septembre 2011, et a reconnu de même aux parents-curateurs la capacité à introduire une demande en divorce.

21. Existe-t-il une cause unique ou des causes multiples de divorce dans l'État ?

La nouvelle Loi supprime les causes de divorce et octroie un pouvoir déterminant à **la volonté unilatérale des deux époux** pour décider sur la dissolution du mariage. Le législateur a considéré que *le droit à rester marier ne peut pas être soumis à la démonstration de la concurrence d'une quelconque cause, car la cause déterminante n'en est que la fin de cette volonté exprimée lors du mariage et donc il suffit que l'un des époux ne désire plus la continuité du mariage pour qu'il puisse introduire la demande en divorce, sans que le défendeur puisse refuser la demande* (Exposé sur les Causes de la Loi).

Cette configuration de la volonté, en tant que cause unique du divorce, a amené quelques auteurs à parler de divorce répudiation.

La Cour de Cassation considère que, la déclaration des causes n'étant pas requise, l'Ordre juridique protège le droit à l'intimité de l'époux requérant.

A1. Le divorce pour altération définitive du lien matrimonial (irretrievable breakdown of mariage)

22. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

La cause unique en est la volonté de l'époux de mettre fin à son mariage. La demande de l'un des époux est suffisante, même s'il y a opposition de l'autre époux, pour que le divorce soit accordé; c'est la procédure qui varie (commun accord ou contentieux).

- divorce par consentement mutuel: les deux époux le demandent, tous les deux, ou bien l'un des époux avec le consentement de l'autre, et il existe un accord sur les mesures qui découlent de la rupture et qui sont présentées sous forme de proposition de convention.

- divorce contentieux: il existe un désaccord qui peut retomber sur la demande de rupture du lien (il n'empêche pas sa déclaration judiciaire) ou sur les mesures à adopter après la rupture qui, en l'occurrence, seront adoptées par le juge pour cause de non accord entre les époux.

23. Donnez les statistiques les plus récentes (si elles existent) relatives nombre de demandes présentées sur chaque fondement.

Vid.Anexe II, III, IV et V

24. Dans les motifs de rupture, quelle est la place faite au consentement mutuel des époux ?

Le consentement mutuel des époux détermine, en premier lieu, la voie de procédure de la séparation ou du divorce ; et en deuxième terme, en l'occurrence, ce sont les époux eux-mêmes qui s'accordent sur les conséquences de la rupture. Cela étant, leur demande en séparation ou en divorce doit comporter une proposition de convention régulatrice qui comprenne les mesures concernant les enfants, le logement familial, les prestations…

Art.81 et 86 Cc

Art.777 LEC

25. En cas de consentement mutuel des époux, la requête doit-elle être présentée par les deux époux agissant ensemble ou est-il possible pour l'autre d'accepter le principe du divorce en cours d'instance ?

La requête de séparation ou de divorce peut être présentée par les deux époux agissant ensemble ou par l'un des époux avec le consentement de l'autre

Art.81 et 86 Cc

Art.777 LEC

26. En cas de consentement mutuel, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

Le consentement mutuel doit porter sur la demande de séparation ou de divorce et sur les conséquences de la rupture. Si l'accord sur toutes les mesures à adopter n'existe pas, il faudra envisager la procédure contentieuse.

Le juge fait un suivi des pactes accordés par les époux et, s'ils ne portent pas atteinte aux enfants ou graves dommages à l'un des époux, il donnera son approbation. S'il considère qu'ils sont nuisibles ou préjudiciables, il déniera par décision motivée, l'approbation des mesures et les époux devront réaliser une nouvelle proposition pour son approbation, limitée aux termes non approuvés par la Cour.

Une fois la nouvelle proposition présentée ou le délai de présentation écoulé, le juge décidera de ce qui serait pertinent. Si la nouvelle proposition n'est pas approuvée ou si elle n'existe pas, la mesure sera adoptée par voie judiciaire et cette décision pourra faire l'objet d'une requête. Par contre, l'arrêt ou le jugement, qui approuve dans sa totalité la proposition de convention ne pourra faire l'objet d'une requête, que dans l'intérêt des enfants mineurs, par le Procureur de la République.

27. Dans les motifs de rupture, une place est-elle faite à la notion de faute dans la relation conjugale ? Si oui, dans quelle mesure la faute demeure-t-elle prise en compte au titre des motifs de rupture ?

Actuellement la place n'est pas faite à la notion de faute dans les jugements de séparation et de divorce ; il n'existera même pas de preuve dans la procédure qui permette d'attribuer les

motifs de la rupture à l'un ou l'autre des époux, en conséquence, le critère n'a aucune importance dans la détermination des conséquences ou des effets du divorce.

Il existe uniquement la référence à la faute ou à la mauvaise foi dans les hypothèses de nullité matrimoniale et de donations en vue du mariage (art.1343):

L'article 95 Cc établit, dans son deuxième alinéa, que si la sentence de nullité déclare la mauvaise foi d'un époux, celui qui aura agi de bonne foi pourra opter par appliquer lors du règlement du régime économique matrimonial, les dispositions concernant le régime de participation, et celui de mauvaise foi n'aura pas droit à participer aux bénéfices obtenus par son conjoint ; la même protection-sanction est estimée par l'article 98 Cc qui détermine que le conjoint de bonne foi, dont le mariage a été déclaré nul, aura le droit à une indemnité si la cohabitation conjugale a existé, au sens des circonstances de l'article 97 Cc. L'article 1343 considère la faute comme cause de révocation de la donation en vue du mariage.

28. Dans les motifs de rupture, quelle place est faite à la séparation des époux ?

k) La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?

l) Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit-elle être continue ?

A l'encontre de la réglementation précédente qui exigeait la séparation en tant qu'étape préalable et de réflexion, avec de longs délais qui pouvaient avoir une durée de trois ans, à l'heure actuelle il n'existe pas de séparation préalable pour la rupture définitive du lien. Ni séparation préalable ni périodes de séparation.

La virtualité pratique que comporte la séparation est que, au moment de prendre la décision sur les conséquences de la rupture, les juges et les tribunaux considèrent d'une importance significative les pactes et les pratiques qui, à l'égard des enfants, ont été développés lors de la séparation préalable.

Les statistiques montrent qu'il existe toujours une tendance (environ 11%) qui opte par la séparation légale avant d'exécuter l'action de divorce (vid.grille), l'autre tendance s'engage directement dans la rupture du lien matrimonial.

A2. Le divorce pour causes multiples

29. Donnez les statistiques les plus récentes (si elles existent) sur le nombre de demandes introduites sur le fondement de chacune des différentes causes de divorce.

a. Le divorce par consentement des époux

30. Le divorce par consentement existe-t-il à titre autonome ou est-il une forme du divorce pour altération définitive du lien matrimonial ?

31. Les époux doivent-ils être séparés avant d'introduire la demande ? Si oui depuis combien de temps ?

32. Cette cause de divorce implique-t-elle que la requête soit présentée par les deux époux agissant ensemble ou comprend-elle également la possibilité pour l'autre d'accepter le principe du divorce en cours d'instance ?

33. Dans le cadre de cette procédure, les époux doivent-ils également être d'accord sur les effets du divorce ou bien le juge dispose-t-il du pouvoir de statuer sur les effets ?

b. Le divorce pour altération définitive du lien matrimonial

34. Sur quels fondements l'altération définitive du lien matrimonial est-elle établie ?

35. Dans cette procédure quelle est la place laissée au consentement mutuel des époux ?

36. Dans cette procédure, quelle place est laissée la séparation des époux ?
- **La séparation est-elle suffisante pour établir la rupture irrémédiable du lien matrimonial ?**
- **Combien de temps la séparation doit-elle avoir duré avant de pouvoir être invoquée ? La période doit elle être continue ?**

37. Une demande initiale de divorce pour altération définitive du lien matrimonial peut-elle être convertie en divorce par consentement ou en divorce pour faute ? Si oui, quelles sont les passerelles possibles ?

c. Le divorce pour faute

38. Quelles sont les fautes qui peuvent être invoquées au soutien d'une demande en divorce ?

39. Existe-t-il des exigences spécifiques relatives à la preuve de la faute ?

40. Le juge dispose-t-il d'une marge de manœuvre pour décider d'un partage des torts bien que la faute ne soit invoquée que par l'un des époux?

41. La réconciliation des époux a-t-elle un impact sur la possibilité d'invoquer au titre de la faute un comportement antérieur à la réconciliation ?

42. La faute dans le mariage peut-elle engager la responsabilité civile de son auteur et permettre à la victime d'obtenir des dommages et intérêts ? Si oui s'agit-il d'une action spécifique distincte des règles de responsabilité civile de droit commun ?

L. Les effets du divorce

43. Les époux disposent-ils de la possibilité de régler les effets du divorce (et aussi la date d'effet du divorce) au moyen d'une convention
- **avant le mariage ;**
- **pendant le mariage ;**

- **pendant la procédure de divorce ?**

- **avant le mariage et pendant le mariage :**

Avant le mariage et pendant le mariage les époux peuvent stipuler ou remplacer le régime économique du mariage ou n'importe quelle autre disposition, en raison de celui même, par un contrat de mariage. Le contrat de mariage ne peut pas comprendre la convention qui règle la séparation ou le divorce, par contre il peut comprendre les pactes qui incident sur sa future configuration ou, le cas échéant, sur le jugement de séparation ou de divorce (la renonciation à la prestation compensatoire, une indemnité par année de mariage, le quantum de la prestation compensatoire…, l'attribution du logement familial en cas de séparation ou de divorce…). Ces pactes seront nuls s'ils sont contraires à la loi, aux bonnes mœurs ou s'ils limitent l'égalité de droits qui correspond à chacun des époux.

- **pendant la procédure de divorce et après :**

-Les époux peuvent pactiser les conséquences de leur séparation ou divorce sur ladite Convention régulatrice qui a un contenu minimum inclus dans l'article 90 Cc (mesures en rapport avec les enfants, les pensions alimentaires et/ les prestations compensatoires, le logement familial). Cette convention régulatrice doit être soumise à l'homologation du juge qui déclare la séparation ou le divorce, et pourra être modifiée conjointement par les époux, ou par l'un des époux avec le consentement de l'autre, en présentant une nouvelle proposition de convention régulatrice : la modification pourra être sollicitée par un seul des époux si une altération substantielle des circonstances se produit (contentieux)

La dâte d'effet du divorce: l'article 89 Cc établit que la dissolution du mariage par divorce ne pourra avoir lieu que par jugement, qui tel le déclare, et produira des effets à partir de la date à laquelle le jugement prend force de chose jugée

44. Si oui, le juge dispose-t-il d'un droit de regard sur la convention passée par les époux ?

Les époux, pour informer leur demande en séparation ou divorce par consentement mutuel, devront y ajouter la proposition de convention régulatrice qui comportera au moins le contenu minima de l'article 90Cc. Ces pactes pourront provenir du contrat de mariage passé avant ou pendant le mariage. Cette proposition de convention doit être **homologuée par le juge** qui devra veiller à ce que les mesures proposées par les époux ne nuisent pas à l'intérêt des enfants ou ne soient pas gravement nuisibles à l'un des époux.

Pour modifier la convention régulatrice accordée par les époux et homologuée par le juges ou les mesures judiciaires accordées par le jugement, les époux peuvent présenter conjointement de commun accord ou l'un des époux avec le consentement de l'autre une nouvelle proposition de convention qui sera à nouveau soumise à l'approbation du juge.

Il existe donc un contrôle judiciaire préalable des mesures conventionnelles adoptées par les époux au moment de la séparation ou du divorce et ultérieurement.

45. Si le juge a un droit de contrôle, quels sont les critères qui lui permettent soit de solliciter une modification, soit de modifier directement l'accord ?

- Les époux présentent la proposition de convention au juge pour son homologation.

- Le juge dénie l'approbation des mesures si elles sont nuisibles aux enfants mineurs ou handicapés, ou portent un grave préjudice à l'un des époux, par conséquent, les critères sont l'intérêt de l'enfant et le préjudice porté à l'un des époux.

- Les époux présentent une nouvelle proposition portant sur les termes déniés par le juge.

- S'il n'y a pas de nouvelle proposition ou si elle est toujours nuisible aux enfants ou cause grave dommage à l'un des époux, le juge établira les mesures convenables portant sur les points non approuvés de la convention régulatrice.

46. Si une procédure de rupture *a minima* (séparation de corps) existe dans l'État, quels en sont les effets tant entre les époux qu'à l'égard des enfants ?

De manière générale on peut affirmer que la séparation et le divorce produisent les mêmes effets tant entre les époux qu'à l'égard des enfants, à l'exception de ceux qui émanent de la permanence du lien conjugal dans le cas de la séparation et qui doivent s'adapter à la cessation de la vie en commun.

-Pour ce qui est des effets à l'égard des enfants il n'y a **aucune différence** entre le jugement de séparation et celui du divorce. Les rapports parents/enfants sont atteints par la rupture de la cohabitation des parents, hypothèse qui concerne les deux cas (séparation et divorce). Pour preuve la régularisation du Code civil qui dans sa rubrique « Des effets communs à la nullité, la séparation et le divorce » établit les mêmes effets dans les deux cas. (art.90 et suivants)

-En ce qui concerne les époux, quelques effets sont différents et sont déterminés par le maintien du lien conjugal et par la cessation de la vie en commun.

a) Le maintien du lien conjugal permet l'époux de solliciter une pension alimentaire (dans la procédure matrimoniale ou ailleurs) au sens de l'article 143 du Code civil qui reconnaît le droit aux aliments aux époux, aux ascendants, aux descendants et aux frères, s'ils se trouvent en situation de nécessité. Droit exclu des hypothèses de divorce.

b) La cessation de la vie en commun: le jugement de séparation produit la cessation de la vie en commun des époux et empêche la possibilité de lier des biens de l'autre époux à l'exercice de l'autorité ménagère (art.83Cc.) La société conjugale, au cas où elle existerait, disparaît avec la cessation de la vie matrimoniale et chacun des époux reprend ses biens à lui.

c) De même, et c'est aussi le cas à l'égard des enfants, il existe des effets qui sont communs à la séparation et au divorce: l'attribution du logement familial et du ménage, la contribution aux charges du mariage et des aliments, la liquidation, le cas échéant, du régime économique matrimonial, la prestation compensatoire.

La séparation entraîne des conséquences aussi bien sur le domaine personnel que sur le patrimoine ; elle anéanti la présomption de paternité du mari (art.116 Cc) et la possibilité

d'acquérir la nationalité pour raison de séjour légal et continu pendant un an ; elle dissout la société des acquêts (art.1392.3 Cc) et le régime de participation (art.1415 Cc), elle exclut l'appel à la succession héréditaire (art.834Cc) fait disparaître le consentement du mari pour que la femme se soumette aux techniques de procréation assistée (rt.6.3 LTRHA), elle rend inutile le consentement pour l'adoption réalisée par l'autre conjoint (art.177.2.1Cc).

a. Les effets du divorce en matière extrapatrimoniale

i. Les effets du divorce entre les époux

47. À quelle date le divorce rompt-il définitivement le mariage ?

Art.89 Cc La dissolution du mariage n'aura lieu que par le jugement qui prononce le divorce et produira ses effets à partir de date à laquelle il prend force de chose jugée.

C'est ainsi donc que le jugement de divorce produira son effet général, dissoudre le lien matrimoniale existent jusqu'à ce moment-là, une fois qu'il aura pris force de chose jugée. A partir de cette date les conjoints ne sont plus mariés entre eux et acquièrent l'état civil de divorcé. Les devoirs réciproques s'interrompent et ils peuvent contracter mariage à nouveau (entre eux, ou avec d'autres personnes du même ou de différent sexe.

48. La liberté matrimoniale des ex-époux est-elle soumise à conditions ? (quand sont-ils autorisés à se remarier, peuvent-il se remarier ensemble…)

La liberté matrimoniale n'est pas soumise à conditions dans le Droit espagnol. A partir de la date à laquelle le jugement prend force de chose jugée, ils récupèrent leur liberté et peuvent contracter mariage entre eux (art.88.2 Cc) ou avec d'autres personnes du même sexe ou de différent sexe.

49. Dans les États où le mariage produit des effets sur le nom des époux, quels sont les effets corrélatifs du divorce ?

En Droit espagnol, le mariage n'entraîne aucune conséquence sur le nom des époux.

50. Le divorce produit-il des effets

- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ;**
- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

- **au regard de la nationalité éventuellement acquise par l'un des époux en raison du mariage ?**

  - Le divorce n'a pas de conséquences sur la nationalité acquise par séjour légal et continu en Espagne pendant un an pour le conjoint d'une personne de nationalité espagnole.

  - La séparation de fait ou légale empêche l'acquisition de la nationalité par séjour légal et continu pendant un an au conjoint d'une personne de nationalité espagnole (art.22.2.d) Cc).

- **au regard du titre de séjour acquis par l'époux étranger en vertu du mariage ?**

    - Le conjoint ayant acquis le titre de séjour en Espagne pour cause familiale et les membres de sa famille regroupés avec lui, garderont le titre de séjour même si la rupture du lien matrimonial, qui a été le motif du regroupement, a lieu (art.16 LO 4/2000 du 11 janvier, Droits et libertés des étrangers en Espagne et leur intégration sociale).

    - La séparation légale empêche le regroupement familial (art.17 LO 4/2000, du 11 janvier, Droits et libertés des étrangers en Espagne et leur intégration sociale).

ii. Les effets du divorce à l'égard des enfants

A l'égard des enfants, il existe quelques particularités sur les territoires qui ont leur propre droit civil. De manière générale ils maintiennent les principes qui régissent le Code civil en la matière, mais ils s'écartent de sa régulation concernant la garde et la surveillance des enfants. Nous pouvons signaler, pour faire la synthèse du panorama de ces territoires, que en Catalogne, s'il y a des enfants mineurs, les parents devront faire accompagner la proposition de convention d'un plan de parentalité qui comprenne tous leurs engagements sur la garde des enfants ; en Valence et en Aragon on a établi la garde partagée en alternance en tant que modèle préférentiel pour les hypothèses contentieuses.

51. L'État distingue-t-il la question de l'exercice de l'autorité parentale/*parental responsibility* de celle de la résidence de l'enfant ? Si oui, de quelle façon et quelles en sont les conséquences pour l'exercice de l'autorité parentale ?

En Droit espagnol on fait la différence entre la titularité de l'autorité parentale qui correspond aux parents en raison de la filiation, l'exercice de l'autorité parentale qui implique la prise de décisions sur les questions remarquables de la vie du mineur, et la garde et surveillance qui concerne l'entretien au quotidien du mineur. Quand les parents cohabitent cette différence est comprise dans la référence générique faite sur l'autorité parentale.

Dans ce sens là, le Code civil, en réglant l'exercice de l'autorité parentale, établit en tant que règle générale le coexercice par les parents et le caractère exceptionnel de l'exercice unilatéral dans des hypothèses telle l'absence, l'incapacité ou l'impossibilité ; de même, dans les cas de désaccords réitérés ou s'il existe une cause qui nuise gravement l'exercice de l'autorité parentale, le juge pourra l'attribuer totalement ou partiellement à l'un de parents ou partager entre eux ses fonctions (art.156 Cc). Si les parents ne cohabitent pas, le juge devra faire apparaître sur le jugement que l'exercice en est conjoint ou partagé entre les géniteurs, parce que, autrement, on appliquerait l'alinéa six de l'article 156, qui établit que dans le cas de non cohabitation, l'autorité parentale sera exercée par celui avec lequel l'enfant demeure ; alinéa malheureux qui montre une conception de la rupture correspondant à des temps révolus et qui oblige les juge a se prononcer en tout cas.

Dans les situations de séparation ou de divorce, la règle générale est l'exercice partagé de l'autorité parentale et l'attribution de la garde et surveillance a) de manière exclusive à l'un

des parents, en établissant pour l'autre un régime de communication et d'hébergement ; b) la garde partagée ou en alternance qui implique aussi une co-titularité sur la garde et la surveillance des enfants.

Si les circonstances le font nécessaire, on pourra attribuer l'exercice de l'autorité parentale au père ou à la mère gardien totalement ou partiellement, par convention régulatrice (art.90.A)Cc) ou par le jugement de séparation ou de divorce (art.92.4 Cc) ; dans ce cas-là on pourra établir un régime de communication et d'hébergement avec le parent non exerçant (art. 160Cc) ou, si elle s'oppose à l'intérêt du mineur, annuler celle qui existe et n'en accorder aucune (art.94 Cc).

La perte ou la privation de la titularité de l'autorité parentale ne pourra être accordée que par sentence, soit dans une procédure matrimoniale de nullité, séparation ou divorce (art.92.3 Cc), soit dans une procédure *ad hoc* sur la privation de l'autorité parentale (art.170 Cc).

De manière générale et d'un point de vue pratique, on peut dire que dans les procédures de consentement mutuel et contentieuses de séparation et de divorce, la règle générale est l'exercice partagée de l'autorité parentale avec ses variantes de garde exclusive ou partagée ; l'attribution de l'exercice de l'autorité parentale à l'un des parents a un caractère exceptionnel et les juges et les Tribunaux la décrètent dans des situations pathologiques de conflit persistent : désaccords réitérés, violence de genre et violence dans la sphère domestique **,**abus, désintéressement manifeste dans l'accomplissement de ses obligations paternelles-filiales de versement de la pension ou du régime de visites… En maintes occasions, elle constitue le pas préalable à la privation de l'autorité parentale, mesure draconienne et presque définitive qui suppose le maintien des obligations pour le père sanctionné et la perte de tous les droits.

52. Le divorce produit-il des effets automatiques quant à l'exercice de l'autorité parentale sur les enfants ?

Non, aucun

53. L'exercice de l'autorité parentale peut-il être déterminé par une convention parentale ?

Oui, les parents peuvent s'accorder sur la proposition de convention qui accompagne la demande de séparation ou de divorce, ou ultérieurement, sur la modification des mesures déjà adoptées, des mesures sur *la surveillance des enfants assujettis à l'autorité parentale des deux, l'exercice de celle-ci, et, le cas échéant, le régime de communication et d'hébergement des enfants avec le parent qui ne demeure pas habituellement avec eux (art.90.A) Cc).*

Expressément l'art. 92.4 Cc signale que les parents *pourront accorder sur la convention que l'autorité parentale soit exercée totalement ou partiellement par l'un des conjoints.*

Tel que nous l'avons déjà indiqué, l'exercice peut être conjoint (règle générale), unilatéral ou partagé entre les deux parents. Et bien, dans la pratique, dans les cas de consentement mutuel, les conjoints se limitent à s'accorder sur la garde et surveillance, dans ses modalités d'exclusivité et de partage et maintiennent l'exercice partagé de l'autorité parentale ; dans les cas exceptionnels (résidence à l'étranger, voyages fréquents), on attribue l'exercice

unilatéral de l'autorité parentale dans le but de faciliter les consentements précis à la vie de l'enfant.

54. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

Le juge doit approuver les accords adoptés par les époux à l'égard de leurs enfants, excepté s'ils sont nuisibles aux enfants ou portent de graves dommages à l'un des époux. L'exercice conjoint de l'autorité parentale en est la règle générale et son exception devra être justifiée et ne pas aller à l'encontre de l'intérêt de l'enfant. Si le juge considère que la mesure est nuisible, il demandera aux parties sa modification et si la proposition maintient toujours son caractère de nuisibilité le juge édictera une mesure qui remplace la proposition faite par les parents.

L'accord des parents en est prioritaire et, seulement s'il comprenait des mesures contraires à la loi, comme par exemple le renoncement à l'autorité parentale, au contact avec les enfants…, le juge dénierait l'approbation de la proposition.

55. Le juge peut-il aménager l'exercice de l'autorité parentale ? Si oui, doit-il être obligatoirement saisi d'une telle demande par l'un ou l'autre des parents ?

Le juge peut décider, dans l'intérêt des enfants, que l'autorité parentale soit exercée totalement ou partiellement par l'un des conjoints (art.92.4Cc) et il n'est pas nécessaire la demande d'une partie ; la mesure devra être motivée et fondée sur l'intérêt supérieur de l'enfant.

56. Quels sont les critères qui permettent au juge de fonder une décision d'aménagement de l'exercice de l'autorité parentale ? Un parent peut-il se voir privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale en raison d'un comportement conjugal ?

Les critères sur lesquels la décision du juge peut être fondée sont deux : l'intérêt du mineur et la faisabilité de l'exercice de l'autorité parentale. Les décisions judiciaires qui ont opté par l'attribution de l'exercice à caractère exclusif et unilatéral, ont été fondées sur : a) le manquement persistant aux obligations parentales (aliments, être en leur compagnie) si la privation de l'autorité parentale devient une mesure contraire à l'intérêt du mineur, disproportionnée ou prématurée ; b) si la relation entre les parents est très détériorée et il n'existe pas de volonté pour surmonter les mésententes, afin d'éviter les désaccords et les tensions ; c) dans les hypothèses de manque de capacité, préparation ou disposition du parent pour assurer une tâche si importante ; d) l'inexistence de la relation parent-enfant ou si celle-ci est conflictuelle.

Par ailleurs il faut signaler que la suspension de l'exercice de l'autorité parentale ou du régime de communication et d'hébergement peut être décrétée dans les hypothèses de violence de genre (art.65 et 66 de la Loi Organique de Protection intégrale contre la violence de genre) ; mesure spécialement conseillée :

a) Lors de l'édicte d'une interdiction de communication entre l'inculpé et la victime l'exercice de l'autorité parentale devra être suspendu, car l'exercice de l'autorité parentale exige la codécision dans toutes les questions qui dépassent l'autorité de garde et qui dans les hypothèses d'incommunication est non-viable. Dans ces cas-là si l'on considère favorable à l'intérêt de l'enfant de continuer avec le régime de communication et d'hébergement, la remise et la récupération des mineurs devront être effectuées par un tiers ou sur le point de rencontre familial.
b) lors de l'édicte d'une mesure d'éloignement à l'égard de la mère et ses enfants, les fonctions parentales attribuées au présumé inculpé devront être suspendues.

57. Un parent privé de l'exercice de l'autorité parentale ou du droit d'autorité parentale peut-il néanmoins obtenir un droit de contact, de visite et/ou d'hébergement avec l'enfant ?

Expressément le code civil inclut cette possibilité dans l'article 160 Cc : *les parents, même s'ils n'exercent pas l'autorité parentale, ont le droit d'être en contact avec leurs enfants mineurs,* un droit de contact qui, au vue de l'art. 94 Cc, comprend le droit à leur rendre visite, communiquer avec eux et à être en leur compagnie.

S'il est privé du droit d'autorité parentale, non; il perd la chance de contacter, visiter ou d'héberger ses enfants (art.111 Cc)

58. Quelles sont les modalités de résidence de l'enfant qui peuvent être légalement envisagées ? (Résidence habituelle, résidence alternée, enfant confié à un tiers…)

Le Droit espagnol admet la résidence habituelle, appelée garde ou surveillance exclusive, et la résidence en alternance, désignée par garde partagée ou alternative. Si les parents ne peuvent pas s'occuper des mineurs il est prévu, à titre exceptionnel, l'attribution de la garde à un tiers; ainsi l'art.103.1ª 2ème alinéa Cc établit que *à titre exceptionnel, les enfants pourront être confiés aux grands-parents, à des familiers ou à d'autres personnes qui y consentiraient et, s'il n'y en avait pas, à une institution adéquate, qui se verrait attribuer les fonctions tutélaires qu'elle assurera sous la tutelle du juge.*

En ce qui concerne le type de garde, il faut donner quelques précisions. En Espagne, l'introduction de la garde partagée dans le Code civil fut spécialement problématique à cause de l'existence de groupes de pression sociale (lobbys) notamment puissants qui soutenaient des positions diverses. D'une part, le collectif des pères séparés et divorcés défenseurs d'une garde partagée réglée en tant que modèle préférentiel, et d'autre part, un secteur des collectifs féministes, qui était pour la restriction de ce modèle de garde aux hypothèses de consentement mutuel des parents. Cet affrontement maintenu tout au long de la démarche parlementaire de la norme a laissé son empreinte sur la transcription légale du caractère exceptionnel de la garde partagée contentieuse, entourée de cautèles et de limites (art.92.8 Cc)

Il faut donc différencier, d'une part les décisions sur la garde des enfants que les parents peuvent adopter sur la convention, en toute liberté pour opter par un modèle ou un autre, et d'autre part les décisions que le juge peut prononcer dans son jugement qui est limité dans le Code civil par :

- -la demande de partie

- -le rapport favorable du Procureur de la République

Et il doit fonder sa décision sur le fait que seulement de cette façon l'intérêt du mineur est protégé.

La mise en oeuvre de cette régularisation a été à tel point polémique que les recours en cassation sont nombreux à être admis ces dernières années au vue de l'article 92 Cc, et ils ont consolidé des critères de jurisprudence sur l'application de la garde partagée, qui donnent au juge les normes pour décider s'il est pertinent de les adopter en tant que régime de garde, dans les cas concrets. Ces critères sont : *les pratiques précédentes des parents dans leurs rapports avec le mineur et leurs aptitudes personnelles ; les vœux manifestés par les mineurs compétents ; le nombre d'enfants ; l'accomplissement de la part des parents de leurs devoirs à l'égard des enfants et le respect mutuel dans leurs rapports personnels ; le résultat des rapports exigés légalement, et, en définitive, n'importe quel autre critère qui supposerait pour les mineurs une vie appropriée dans une cohabitation qui devra, forcément, être plus complexe que celle qui existait lors de la cohabitation des parents* (Arrêts de la Cour d'Appel 10 et 11 mars 2010, 7 juillet 2011, 25 octobre 2012, entre autres).

En plus de cette évolution jurisprudentielle, il faut signaler que le caractère favorable en due forme du rapport du Procureur de la République pour que le juge puisse établir une garde partagée, a été déclaré inconstitutionnel par le Tribunal Constitutionnel Arrêt du 17 octobre 2012, qui considère qu'il interdit la fonction juridictionnelle du juge qui ne pourrait accorder la garde partagée que si le Procureur de la République le considérait pertinent.

En ce qui concerne les Communautés autonomes, qui sont compétentes pour légiférer en matière civile, face aux problèmes soulevés par la mise en œuvre de la régularisation du Code civil, ont décidé de promulguer leurs propres lois en la matière ; ainsi l'Aragon et la Valence considèrent la garde partagée en tant que modèle préférentiel à défaut d'accord des parents, à mon avis, ils méconnaissent la réalité sociale espagnole où il existe encore un fort pourcentage de familles qui représentent le modèle traditionnel; par contre la Catalogne, à mon avis plus judicieuse, a établit une liste de critères dont la concurrence amènera le juge vers le régime de garde le plus adéquat pour chacune des familles, l'exclusive ou la partagée, sans accorder aucune préférence. Critères pareils dans la loi de la Valence et de l'Aragon. Des critères tels que (art.233-11 Cc de la Catalogne) :

a) Le lien affectif entre les enfants et chacun des géniteurs, ainsi que les relations avec le reste des personnes qui cohabitent dans les différents foyers
b) L'aptitude des parents à garantir le bienêtre des enfants et la possibilité de leur fournir un environnement adéquat à leur âge.
c) L'attitude de chacun des géniteurs relative à la coopération avec l'autre afin d'assurer la plus grande stabilité des enfants, notamment pour garantir de façon adéquate les relations de ceux-ci avec les deux géniteurs.
d) Le temps accordé par chacun des géniteurs, avant la rupture, à la surveillance des enfants, et les tâches qu'ils avaient effectivement accomplies en vue de leur bienêtre.
e) L'avis exprimé par les enfants
f) Les accords en prévision de la rupture
g) L'emplacement des domiciles et les horaires et activités des enfants et des géniteurs.

59. Les modalités de résidence de l'enfant, le droit de contact, de visite et/ou d'hébergement avec l'enfant, peuvent-il être déterminés par une convention parentale ? Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

A titre général, l'art.90 Cc établit que les parents devront inclure dans la Convention régulatrice annexée à la demande de séparation et de divorce des mesures sur la surveillance des enfants assujettis à l'autorité parentale des deux, l'exercice de celle-ci et, le cas échéant, le régime de communication et d'hébergement des enfants avec le géniteur qui ne demeure pas habituellement avec eux.

Cette convention donnera aux parties plusieurs options (art.92.5 Cc):

- la garde exclusive, l'un des deux est titulaire de la garde et l'autre du régime de communication et d'hébergement
- la garde partagée en alternance : les parents se relaient dans la situation de garde et de titulaire du régime de communication et d'hébergement

Le juge dans sa décision du type de garde adoptera les cautèles dues à l'efficacité dans l'accomplissement du type de garde établi.

En Catalogne, tel que nous l'avons signalé en début de l'épigraphe, les questions concernant la garde des enfants doivent être comprises par le plan de parentalité qui contiendra les engagements assumés par rapport à la garde, la surveillance et l'éducation des enfants (233-9) :

- le lieu ou les lieux où les enfants vivront habituellement.
- les tâches que chacun des géniteurs assumera par rapport aux activités quotidiennes des enfants.
- la formule qui doit être utilisée pour le changement de garde
- le régime de relation et de communication avec les enfants pendant les périodes où l'un des géniteurs ne les aura pas avec lui et pendant les vacances
- le type d'éducation et les activités extrascolaires, formatives et les loisirs
- la manière de se passer l'information sur les enfants
- la manière de prendre les décisions concernant le changement de domicile et toute autre question remarquable

En Aragon, le plan de parentalité s'appelle Convention de Relations Familiales (art.77 Código de Derecho foral de Aragón) A titre général, l'art.90 Cc établit que les parents devront inclure dans la Convention régulatrice annexée à la demande de séparation et de divorce des mesures sur la surveillance des enfants assujettis à l'autorité parentale des deux, l'exercice de celle-ci et, le cas échéant, le régime de communication et d'hébergement des enfants avec le géniteur qui ne demeure pas habituellement avec eux.

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En Aragon, le plan de parentalité s'appelle Convention de Relations Familiales (art.77 Código de Derecho foral de Aragón) et en Valence, Convention de la Vie de famille (art.4 de Ley de Relaciones Familiares)

Deuxième partie.

Coïncidant en partie avec la 54

Le juge doit approuver les accords passés entre les conjoints à l'égard des enfants mineurs, sauf s'ils sont nuisibles à l'égard des enfants ou portent graves dommages à l'un des conjoints. Si le juge considère que la mesure est nuisible, il demandera aux parties de la modifier et si la proposition garde toujours un caractère nuisible, le juge édictera une mesure qui remplace la proposition des parents.

L'accord des parents est prioritaire et, seulement s'il comprenait des mesures contraires à l'intérêt du mineur, comme par exemple une alternance journalière dans la garde partagée, refus de contact avec les enfants…, le juge dénierait l'approbation de la proposition.

60. Des mesures sont-elles à la disposition du juge afin de garantir les liens entre l'enfant et chacun de ses parents après divorce ? Si oui, lesquelles ? Des sanctions sont-elles prévues si un parent ne respecte pas son obligation de maintenir les relations avec l'enfant ?

Première partie

En principe, le juge, peut adopter les cautèles qu'il considère pertinentes pour l'accomplissement efficace du régime de garde (art.92.5 Cc) ; par exemple, établir des suivis

périodiques du déroulement des relations familiales à la charge de l'Equipe Technique de la Cour, établir des régimes progressifs de contact entre le géniteur et les enfants… De plus, à titre général, l'art. 158 Cc habilite le juge à l'adoption, d'office, ou à l'instar de l'enfant lui-même, d'un parent ou du Procureur de la République, toute disposition nécessaire et convenable, en rapport avec l'autorité de garde, afin d'éviter aux enfants des troubles nuisibles.

En particulier s'il existe un risque d'enlèvement du mineur par l'un des conjoints ou par un tiers, les mesures ci-dessous, pourront être prises (art.103.1ª Cc):

- défense de quitter le territoire national, sauf autorisation judiciaire préalable
- défense de délivrance du passeport au mineur ou retrait du passeport s'il avait déjà été livré.
- soumission à l'autorisation judiciaire préalable de tout changement de domicile du mineur

Deuxième Partie.

En cas de non accomplissement des obligations qui découlent de la garde des enfants ou du régime de communication et d'hébergement des amendes coercitives mensuelles pourront être imposées le temps qu'on considère nécessaire (art.776.2ª LEC). De plus, le non accomplissement réitéré des obligations dérivées du régime de visite, aussi bien de la part du géniteur surveillant- qui les entrave ou qui y fait obstacle-que de celui qui ne prend pas en charge les enfants lors des périodes qui lui sont attribuées-, pourra donner lieu à la modification du régime de visites (art.776.3ª LEC).

g. Les effets patrimoniaux du divorce

61. Le règlement des effets patrimoniaux du divorce doit-il s'effectuer dans le cadre d'une instance unique en divorce ou bien peut-il faire l'objet d'une procédure distincte qui serait concomitante ou consécutive ?

Les effets patrimoniaux qui font suite à la séparation ou au divorce se règlent : les uns dans le cadre de la propre procédure de séparation ou divorce, en vertu du jugement ou dans le cadre de la convention régulatrice (charges familiales, pension alimentaire, pension compensatoire, compensation par le travail ménager), et les autres, comme la liquidation du régime économique conjugal, peuvent se régler :

- par consentement mutuel, dans la convention régulatrice ou ultérieurement ; dans la pratique, il est fréquent d'inclure dans la Convention régulatrice les règles ou les bases d'une future liquidation ; la liquidation concomitante à la séparation ou au divorce n'est donc pas obligatoire, même si l'on pouvait déduire autre chose de la rédaction littérale de l'article 90.E Cc.

- à défaut d'accord entre les conjoints, la liquidation de tout régime matrimonial qui, en raison d'un contrat matrimonial ou d'une décision de justice, détermine l'existence d'une masse commune de biens et de droits assujettis à des charges déterminées et à des obligations, sera réalisée par le biais d'une procédure judiciaire différente concomitante ou consécutive réglée par les articles 806 et suivants LEC.

i. Les effets entre les époux

62. Au moment de la rupture du mariage, les ex-époux bénéficient-ils d'un droit à obtenir l'un de l'autre

28. une compensation financière,
29. une créance alimentaire,
30. une compensation de droits à pension de retraite,
31. des dommages-intérêts
32. ou d'autres sommes ou droits patrimoniaux ?

A titre général, et indépendamment du type de régime économique matrimonial ayant pu exister, le Droit espagnol reconnaît la pension compensatoire (art.97 ss); dans le cas où le régime financier aurait été le régime de la séparation, le Code civil reconnaît la compensation par le travail ménager (art.1438 Cc).

Notes sur la compensation pour le travail ménager :

La compensation pour le travail ménager est réglée par versement unique et elle est liée à la liquidation du régime de séparation des biens.
Le régime de séparation des biens apparaît réglé par cinq ordonnances juridiques espagnoles, et ces ordonnances n'admettent pas toutes la compensation, et celles qui l'admettent ne lui attribuent pas la même nature. Ainsi, en Navarre, en Aragon et aux Baléares il n'existe aucun type de compensation pour le conjoint qui a apporté son travail pour contribuer aux charges du mariage (loi 103,b) du Recueil de Droit Civil de Navarre ; Arts 187 et 189 du Code de Droit *Foral* de l'Aragon et l'art.3 du Recueil de Droit civil des Baléares).

Par contre, le Code civil catalan, dans son art. 232-5.1, établit que « Dans le régime de séparation des biens, si l'un des conjoints a travaillé dans les tâches ménagères substantiellement plus que l'autre, il a droit à une compensation économique due à ce travail, pourvu que, au moment de l'extinction du régime (…) l'autre conjoint ait obtenu une croissance patrimoniale supérieure au vue de ce qui est établi dans cet alinéa ».

Au sens de cette règle, celle qui est comprise dans l'article 13.2 de la Loi de la Communauté Autonome de Valence 10/2007, du 20 mars, de Régime Economique Matrimonial de Valence, admet la compensation pour le travail ménager, qui est aussi considéré une forme de contribution à la levée des charges du mariage (art.12) et dont les critères d'évaluation sont les suivants : « 1. On tiendra compte, à titre d'orientation et au minimum, des critères ci-après d'évaluation du travail ménager, sans que cela porte atteinte à la pondération que l'autorité judiciaire correspondante réalisera ou à l'accord auquel les conjoints pourraient arriver : le coût de tels services sur le marché du travail, les revenus que le conjoint qui s'occupe de ces services n'aurait pas obtenus dans l'exercice de sa profession ou son métier en conséquence du temps accordé au travail ménager dans toutes ses modalités énumérées dans l'article précédent, ou les revenus obtenus par le conjoint bénéficiaire de tels services dans la mesure où la prestation de la part de l'autre conjoint lui a permis de les obtenir ».

Finalement, l'art. 1438 Cc, qui établit que "le travail ménager (…) comporte le droit d'obtenir une compensation que le juge signalera, à défaut d'accord, au moment de l'extinction du régime de séparation ». Selon le TS Sentence du 14 juillet 2012, *le droit à obtenir la compensation pour avoir contribué l'un des conjoints aux charges du mariage avec son*

travail ménager pendant le régime de séparation de biens ex art. 1438 Cc, requiert que, une fois le régime accordé, on ait contribué aux charges du mariage uniquement avec le travail réalisé pour le ménage. Il y est donc exclu qu'il soit nécessaire, pour obtenir la compensation, que le patrimoine de l'autre époux ait connu une croissance.

Référence faite à la compensation pour ce travail ménager, nous allons porter notre regard sur la pension compensatoire, conséquence propre à la séparation ou au divorce, si besoin est, nous préciserons quelques aspects de la compensation pour le travail ménager.

63. Cette demande doit-telle être faite dès l'introduction de l'instance ou peut-elle être demandée en cours d'instance ?

Ladite pension compensatoire peu être établie par consentement mutuel des deux époux, dans leur proposition de convention régulatrice, ou par le juge dans le prononcé de séparation ou divorce, à la demande d'une partie. Dans ce cas-là elle doit être sollicitée dans la demande ou dans la contestation reconventionnelle de séparation ou divorce dès l'introduction de l'instance.

La compensation pour le travail ménager peut s'obtenir par le prononcé de séparation ou divorce, sans qu'il soit nécessaire d'attendre la phase de liquidation du régime financier.

64. La demande peut-elle être introduite par l'un ou l'autre des époux après le prononcé du divorce ? Si oui, cette action est-elle enfermée dans un délai ?

Non, il n'est pas possible d'introduire la pension compensatoire à un moment postérieur.

65. L'un des époux peut-il être dispensé de fournir cette compensation (ou indemnisation, aliments …)? Si oui, pour quels motifs ?

66. L'un des époux peut-il être privé du droit d'obtenir cette compensation (ou indemnisation, aliments…) ? Si oui pour quels motifs ?

Le droit à la prestation compensatoire en Droit espagnol nait si la séparation ou le divorce produit un déséquilibre financier par rapport à la situation de l'autre qui implique une détérioration de la situation existante pendant le mariage. Donc, le manque de déséquilibre empêche la naissance du droit et, en conséquence, il y exclut la compensation. Une fois le déséquilibre patrimonial constaté, la fixation du montant dépend des circonstances particulières du mariage.

De plus la prestation compensatoire est refusable, de sorte que si avant la célébration du mariage ou pendant le mariage, les conjoints avaient renoncé à son obtention, elle sera rejetée, sauf si l'on démontre que de nouvelles circonstances à relever sont survenues ; circonstances qui n'ont pas été prévues et qui ne pouvaient pas être raisonnablement prévues au moment de passer l'accord.

On ne reconnaît pas le droit à la prestation compensatoire dans les hypothèses de courte durée du mariage.

Donc à titre général, la compensation est rejetée par le manque de déséquilibre financier, par la renonciation préalable et la courte durée du mariage. On ne tient pas compte de la

perte de la compensation en tant que sanction pour des comportements déterminés des conjoints.

Toutefois on considère en tant que cause d'extinction de la prestation la cohabitation du conjoint créancier ou son nouveau mariage et, donc, cela empêcherait aussi la génération du droit à la prestation (art.101 Cc)

67. L'établissement ou le rétablissement d'un équilibre financier entre les situations patrimoniales respectives des ex-époux est-il recherché ?

La doctrine de la Cour de Cassation en matière de prestation compensatoire établit que la compensation naît pour mitiger le déséquilibre produit par la rupture matrimoniale sur l'un des conjoints par rapport à la situation de cohabitation matrimoniale ; **ce n'est pas un outil d'équilibre patrimonial, ni un mécanisme d'égalisation patrimoniale indiscriminée entre les conjoints** (STS 25/11/2011).

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68. Les règles en matière de compensation financière, d'aliments ou autres obligations patrimoniales après divorce sont-elles connectées à celles qui organisent la liquidation du régime matrimonial ou à celles de droit des biens (*property law*) équivalentes ?

Non.

69. Les causes de divorce ont-elles une incidence sur les conséquences du divorce en matière patrimoniale ? Si oui dans quelle mesure ?

Non

70. Quelles formes les obligations patrimoniales entre ex-époux peuvent-elles prendre ? Si les formes sont multiples, sont-elles déterminées par la cause de divorce ?

La compensation pourra prendre la forme d'une pension temporaire ou pour un temps indéfini, ou d'une prestation unique, selon la convention ou la sentence le déterminent (art.97 Cc). A n'importe quel moment on pourra accorder le remplacement de la pension fixée judiciairement en conformité avec l'art.97 Cc par la constitution d'une rente à vie, l'usufruit de biens déterminés ou le versement d'un capital en biens ou en argent.

La cause de divorce n'est pas importante

71. Votre droit permet-il à l'autorité compétente d'attribuer à un des époux la propriété, la jouissance ou le bail du logement familial ? Si oui, à quelles conditions ?

En Droit espagnol, à défaut d'accord entre les conjoints, l'utilisation du logement familial est attribué aux enfants mineurs ou incapacités et au conjoint en la compagnie duquel ils seraient restés. S'il n'y a pas d'enfants ou ils ont atteint la majorité d'âge, le juge peut attribuer l'utilisation du logement, pour un temps qu'on fixera de manière prudente, au conjoint non titulaire, pourvu que, en vue des circonstances, il s'avère conseillable et son intérêt porte sur le plus nécessité de protection.

Dans le but d'attribuer l'utilisation du logement familial, le titre qui octroie le droit à occuper le logement est indifférent : droits royaux, droits personnels ou par simple tolérance ; que le logement appartienne soit à la société des acquêts, soit aux conjoints pro indiviso, soit à un seul conjoint, soit à un tiers.

Pour disposer du logement dont l'utilisation correspond au conjoint non titulaire, il sera requis le consentement mutuel des deux conjoints ou en son défaut l'autorisation judiciaire.

72. Le montant et les modalités des obligations patrimoniales entre ex-époux peuvent-elles être déterminés par une convention matrimoniale ?

Les conjoints, avant et durant le mariage, peuvent établir des accords financiers en prévision de la rupture; ainsi les contrats de mariage peuvent établir la modalité, le montant, la durée et l'extinction de la prestation compensatoire (art. 1325 Cc).

La proposition de convention régulatrice, en annexe à la demande de séparation ou de divorce, peut établir le montant que l'on considère approprié, avec une limite dans le temps ou pour un temps indéterminé (art.90 Cc).

73. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord.

L'intervention judiciaire reste à l'écart des accords qui correspondent au domaine du droit dispositif. Le juge ne peut pas intervenir dans l'évaluation ni le renoncement, ni dans la fixation de la modalité ni dans le montant accordé par les parties.

74. Afin de calculer le montant dû, les époux sont-ils tenus de révéler l'intégralité des éléments qui constituent leur patrimoine (revenus, capital, biens, pensions, allocations…) ou bien peuvent-ils en être dispensés ?

Il n'existe pas dans la Lec de prévision normative de cette nature, il est uniquement établit que dans la procédure contentieuse de séparation ou de divorce, si l'on sollicite des mesure à caractère patrimonial, le demandeur devra annexer à la demande *les documents dont il dispose qui permettent d'évaluer la situation financière des conjoints et, le cas échéant, des enfants, tels les déclarations des revenus, les fiches de paye, les certificats bancaires, les titres de propriété ou les certifications des registres (art.770 Lec).*

C'est la régulation des moyens de preuve des articles 299 et suivants qui est appliquée :

Chacune des parties pourra solliciter l'exhibition des documents qui ne se trouveraient pas à sa disposition et qui feraient référence à l'objet de la procédure ou à l'efficacité des moyens de preuve (art.328.1 Lec).

75. Si aucune dispense n'est prévue, quelles sont les conséquences d'un refus de délivrer ces éléments ?

Dans le cas d'un refus injustifié, le Tribunal pourra formuler une requête pour que les documents, dont la délivrance a été sollicitée, soient apportés à la procédure, du moment où les caractéristiques de ces documents, les autres preuves présentées, le contenu des prétentions formulées par le demandeur et les déclarations qui les prouvent, le conseillent (art.329.2Lec).

Le Tribunal pourra aussi attribuer une valeur de preuve à la copie simple présentée par le demandeur de la délivrance ou la version qui aurait été faite du contenu du document (art.329.1.Lec)

76. Quels sont les critères pris en compte pour évaluer le montant dû ? (le train de vie du ménage avant divorce, les besoins des ex-époux qu'ils soient présents et/ou futurs, l'âge, l'état de santé, l'employabilité, le principe selon lequel chaque époux devrait satisfaire à ses propres besoins …)

Les critères sont établis par le Code civil dans son art.97 Cc; ces critères ont une double fonction, d'une part, ils agissent en tant qu'éléments intégrants du déséquilibre et, d'autre part ils permettent de fixer le montant de la pension. Ce sont :

1. Les accords passés entre les conjoints
2. L'âge et la santé
3. La qualification professionnelle et les probabilités d'accès à un emploi
4. Le temps consacré à la famille dans le passé et à l'avenir
5. La collaboration par son travail aux activités commerciales, industrielles ou professionnelles de l'autre conjoint
6. La durée du mariage et la cohabitation matrimoniale
7. La perte éventuelle du droit à une pension
8. La fortune et les ressources financières et les besoins de l'un et de l'autre des conjoints
9. Toute autre question remarquable

77. Le montant de la compensation ordonnée peut-il être révisé ? Si oui pour quels motifs et à quelle échéance (régulière, en fonction des besoins…).

Une fois que la pension et les bases de son actualisation sont fixées par le jugement de séparation ou divorce, elle ne pourra être modifiée que par des altérations substantielles de la fortune de l'un ou l'autre des conjoints (art.100Cc.)
Le droit à la pension ne cesse pas par le seul fait de la mort du débiteur. Néanmoins, les héritiers de celui-ci pourront solliciter au Juge la réduction ou la suppression de celle-là, si la fortune héréditaire ne peut pas satisfaire aux besoins de la dette ou porte atteinte à leur droit à la succession légitime. Une fois la prestation compensatoire éteinte du fait du décès du débiteur, on reconnaît au titulaire de la prestation compensatoire le droit à recevoir la pension de veuve ; dans l'hypothèse que le montant de la pension de veuve soit supérieur à la prestation compensatoire, celle-là sera diminuée jusqu'à atteindre le montant de cette dernière. Si, moyennant divorce, il se produisait une concurrence des bénéficiaires de la pension, celle-ci serait reconnut à un montant proportionnel au temps de cohabitation de

chacun d'entre eux avec le de cujus, en tout cas on garantit 40 pour cent en faveur du conjoint survivant ou, le cas échéant, de celui qui, sans en être conjoint cohabiterait avec le de cujus au moment du décès et serait bénéficiaire de la pension de réversion (art.174.2 LGS).

ii. Les effets à l'égard des enfants

78. L'obligation d'entretenir financièrement l'enfant est-elle liée à l'autorité parentale, à la résidence de l'enfant, à un autre critère ?

L'obligation d'entretenir les enfants est liée à la filiation ; article 110 du Code civil : *le père et la mère même s'ils ne détiennent pas l'autorité parentale, sont obligés de veiller aux enfants mineurs et leur fournir des aliments.* La garde des enfants a une incidence sur la quantité de la prestation des parents car on considère que le travail qu'elle suppose est une contribution en nature.

79. Par quels moyens l'État organise-t-il le maintien de cette obligation à l'égard du parent qui ne vit pas avec l'enfant (pension alimentaire, mise à disposition de biens ou de capital) ?

Le Droit espagnol établit, de manière générale, que l'entretien sera réalisé sous forme de pension alimentaire dont le quantum sera établi à proportion des ressources des parents et des circonstances économiques et besoins des enfants à tout moment (art.145,146,93 Cc). Pour s'assurer de son efficacité le juge peut adopter les garanties, les dépôts, les retenus ou autres mesures préventives convenables (art.103.3ª et 158 Cc).

On considérera comme contribution à ces charges familiales le travail investi par l'un des époux sur la garde des enfants soumis à l'autorité parentale (art.103.3ª in fine).

Le conjoint ou géniteur qui manquerait de façon réitérée aux obligations du versement de la quantité qui lui correspond pourra être l'objet de sanctions coercitives (art.776.Lec) ; les amendes mensuelles pourront atteindre 20% de la prestation et l'amende unique 50% de ladite prestation (art.711Lec).

80. Les modalités de l'exercice de cette obligation d'entretien, peuvent-elles être déterminées par une convention parentale ?

Les parents devront inclure dans leur proposition de convention une mesure concernant la pension des enfants, ainsi que les bases de son actualisation et des garanties le cas échéant (art.90.d Cc)

81. Si oui, le juge dispose-t-il d'un droit de regard sur cette convention, et de quelle marge de manœuvre dispose-t-il pour soit solliciter une modification, soit modifier directement l'accord ?

L'accord des conjoints relatif à l'entretien des enfants sera approuvé par le juge, excepté s'il est nuisible aux enfants ou porte de graves dommages à l'un des conjoints. Le refus de l'accord devra être fait par résolution motivée, et en l'occurrence, les conjoints devront se soumettre à la considération par le juge de la nouvelle proposition pour qu'elle soit approuvée, si convenable. Si ce n'est pas le cas, c'est le juge qui prendra la décision

convenable en la matière. A partir de l'approbation judiciaire ils pourront être effectifs par la voie de la contrainte. Le juge pourra établir les garanties réelles et personnelles que l'accomplissement de la convention requiert (art.90 Cc in fine)

III. LE DROIT PROCEDURAL

82. Le divorce et le règlement de ses conséquences peut-ils être obtenu en dehors d'une instance judiciaire ?

83. Si oui, quels sont les organes compétents pour connaître de la demande ? La procédure administrative est-elle la seule possibilité offerte au couple ou bien s'agit-il d'une alternative à une procédure judiciaire ?

Non, expressément, l'article 89 Cc établit que la *dissolution par divorce ne pourra avoir lieu que par sentence qui le déclare.*

Toutefois, comme il a été signalé précédemment, il existe un avant-projet de loi qui comprend la possibilité d'obtenir le divorce notarial en des hypothèses déterminées.

84. Après l'introduction de l'instance les époux sont-ils tenus de respecter une période de réflexion ? Si oui, quelle en est la durée ?

C'est la juridiction civile qui est compétente dans l'action de divorce et de ses effets. Il n'y a pas de prévision différente pour les hypothèses de divorce transnational.

Concrètement, l'article 45 Lec dispose que les Tribunaux d'Instanc sont compétents pour connaître en instance les affaires civiles qui ne sont pas attribuées légalement à d'autres juridictions. De son côté, l'art. 769 Lec établit que, en principe, il correspondra à ces tribunaux de prononcer le jugement dans les procédures matrimoniales.

Dans différents chef lieu il existe des tribunaux d'instance spécialisés en la matière (art.46 Lec et 98 LOP) ; c'est le cas des Tribunaux des affaires familiales qui se verront attribuer la compétence en affaires matrimoniales et de relations parents-enfants.

Toutefois, depuis l'entrée en vigueur de la Loi Organique 1/2004 de Mesures de protection contre la violence de genre, les Tribunaux de violence sur la femme (art.87.ter.apdo.2° LOPJ) seront compétents pour connaître différentes affaires d'ordre civil, et en ce qui nous intéresse, les procédures d'anéantissement, séparation et divorce, ou l'adoption et modification de mesures d'une importance familiale remarquable. Ces tribunaux, encadrés dans la juridiction pénale, seront compétents pour connaître ces affaires de manière exclusive, lorsque les requis ci-après, y concourent simultanément (art. 87.ter.apdo 3° LOPJ)

- que la femme ait été victime d'un acte de violence de genre
- que le conjoint homme ait été imputé en tant qu'auteur, inducteur ou coopérant nécessaire dans la réalisation d'actions de violence de genre
- qu'on ait entrepris auprès du Tribunal de Violence sur la femme des actions à signification pénale par délit ou faute en conséquence d'un acte de violence sur la femme, ou on ait adopté un mandat de protection

Donc, la compétence appartient aux Tribunaux d'Instance, aux Tribunaux aux affaires familiales ou de Violence sur la femme.

85. Dans le cadre d'une procédure judiciaire en divorce, quelle est la juridiction nationale compétente pour statuer ? Cette juridiction est-elle également compétente pour statuer sur les effets du divorce ? Une compétence juridictionnelle particulière est-elle prévue dans l'hypothèse d'un divorce transnational ?

Non.

86. Les époux sont-ils tenus ou incités avant l'instance ou en cours d'instance à s'orienter, à titre préalable, vers un mode alternatif de règlement des conflits ?

La 15/2005, lors de la réforme de la séparation et le divorce, a établi la médiation en tant que *ressource volontaire alternative de solution des litiges familiaux par la voie du consentement mutuel avec l'intervention d'un médiateur, impartial et neutre.* Pour répondre à la cohérence il a faculté les parties pour pouvoir demander au Juge, à n'importe quel moment de la procédure, la suspension des actuations judiciaires pour se tenir à la médiation familiale (art.770.7ª Lec). De son côté, le juge, au sens de l'article 158 Cc, qui lui permet d'adopter toute mesure dans l'intérêt des mineurs, pourrait renvoyer d'office les parents à une séance d'information sur la médiation.

Récemment la loi 5/2012, du 6 juillet, de Médiation dans les Affaires Civiles et de Commerce incorpore au Droit espagnol la Directive 2008/52/CE du Parlement Européen et du Conseil du 21 mai 2008, sur certains aspects de la médiation en affaires civiles et commerciales. A l'égard de la médiation familiale, il faut souligner : le caractère volontaire de la médiation (art.6.1), qui est maintenu à tout moment, car personne n'est obligée à rester dans la procédure de médiation ni à conclure un accord (art.6.3) et qu'elle est entreprise d'un commun accord (art.16.1).

87. L'autorité compétente peut-elle, pendant la procédure de divorce, prendre des mesures provisoires relatives

- **au logement familial,**
- **aux enfants,**
- **à l'obligation alimentaire entre époux,**
- **aux conséquences de violences conjugales ?**

Le conjoint qui sollicite la séparation ou le divorce pourra demander sur la demande ce qu'il considère opportun sur les mesures provisoires à adopter, et de même le conjoint défendeur qui pourra sur la réponse à la demande solliciter l'adoption de mesures provisoires.

Les conjoints peuvent aussi soumettre à l'approbation du juge l'accord auquel ils seraient arrivés sur les mesures provisoires: ledit accord ne sera pas inaliénable par rapport aux prétentions respectives des parties ni par rapport à la décision que le Tribunal pourrait adopter en ce qui concerne les mesures définitives.

Le juge, à défaut d'accord des deux conjoints approuvé judiciairement, adoptera, par audience de ceux-là, des mesures à caractère provisoire, qui cessent quand elles sont remplacées par les mesures adoptées dans la convention régulatrice approuvée par le juge ou par le jugement (art.773 Lec)

Ces mesures provisoires sont réglées par le Code Civil (art.103 Cc) et portent sur:

a) Les enfants : attribuer la garde et surveillance des enfants à titre exclusif ou partagé et fixer le régime de communication et d'hébergement pour le conjoint qui n'en a pas la garde ; ou attribuer la garde à un tiers. Quand il existe un risque d'enlèvement des mineurs on pourra interdire la sortie du territoire national, sauf autorisation judiciaire ; défense de livraison du passeport ou son retrait ; autorisation judiciaire pour le changement de domicile.

b) Logement familial: à déterminer, en tenant compte de l'intérêt du familier le plus nécessité de protection, quel conjoint doit continuer dans l'utilisation du logement familial et, l'inventaire fait, les biens et les objets du ménage familial qui restent dans le logement et ceux qui seront emportés par l'autre conjoint. S'il existe des enfants mineurs, c'est leur intérêt qui a le plus besoin de protection, s'il n'y a pas d'enfants il faudra prouver l'intérêt le plus digne de protection.

c) fixer la contribution de chaque conjoint aux charges familiales du mariage (aliments, Litis expensas, crédit foncier…). On peut demander une pension d'aliments comme mesure provisoire dans la procédure du divorce (STS 30 Octobre 2012)

d) Mesures relatives à l'administration et la disposition des biens communs et privatifs; dans la pratique il n'est pas fréquent d'inclure dans les mesures provisoires cette demande, car l'article 808 permet d'entreprendre la procédure de liquidation du régime financier une fois la demande de séparation ou divorce admise.

En ce qui concerne l'existence de violence conjugale:

Au sens manifesté par la n°84, le Tribunal de Violence sur la Femme (juridiction pénale) est compétent pour signifier le Mandat de Protection et connaître la procédure d'anéantissement, de séparation ou de divorce ou les mesures parents-enfants si les critères requis sont accomplis. L'autorité judiciaire est faculté pour l'adoption de mesures à caractère civil qui, à titre de mesures préalables, règlent la situation juridique des conjoints pendant trente jours et, si lors de ce délai une procédure de famille est intentée par la victime, elles sont reportées sur trente jours à compter à partir de la présentation de la demande. A terme elles devront être ratifiées, modifiées ou laissées sans effet, et seulement dans le premier cas la comparution ne sera pas nécessaire.

Par rapport au contenu des mesures civiles, en présence d'enfants mineurs, le juge sera obligé d'adopter toutes les mesures civiles auxquelles se réfère l'alinéa sept de l'article 544 ter LECr :

- attribution de l'usufruit du logement familial qui suivra le critère général d'être attribuer au conjoint dans la compagnie duquel sont les enfants.

- déterminer le régime de garde, visites, communication et hébergement

- le régime de prestation d'aliments aux enfants mineurs (et aux majeurs si les présupposés fixés dans l'alinéa deux de l'article 93 du code civil y concouraient) et au conjoint en situation de besoin, s'il existe la possibilité chez le débiteur, au sens de ce qui est établi dans les articles 142 et suivants du Code civil.

- ainsi que toute disposition que l'on considère opportune afin d'écarter le mineur d'un risque ou de lui éviter des dommages ; en ce sens-là, on peut citer les mesures prévues dans l'article 103 et dans l'article 158 du Code civil, s'il existe un risque d'enlèvement d'un mineur par un parent ou par un tiers :

  a) défense de sortie du territoire national, sauf autorisation judiciaire préalable
  b) défense de livraison de passeport au mineur ou retrait du passeport délivré
  c) soumission à une autorisation judiciaire préalable pour tout changement de domicile du mineur

88. Quelles sont les possibles voies de recours contre la décision relative au divorce, que celle-ci soit judiciaire ou administrative ?

Ce sont les juges du Tribunal d'instance, des affaires familiale ou de Violence sur la femme qui sont compétents pour prononcer la sentence qui déclare la séparation ou le divorce et approuve la convention régulatrice proposée par les conjoints (consentement mutuel) ou déclare la séparation ou le divorce et établit ses effets (contentieux) et pour connaître la procédure de modification de mesures.

La Audiencia Provincial (Tribunal de Grande Instance/ Tribunal Departamental ?) connaîtra les recours en appel, présentés le cas échéant, contre les sentences définitives qui terminent l'instance, et, dans ce cas aussi, par la voie du régime général du recours en appel des procédures civiles.

La voie de l'accès en cassation des sentences prononcées dans les procédures d'anéantissement, séparation ou divorce s'ouvre à travers l'art. 477.2.3 Lec qui établit que les sentences en cassation prononcées par les Audiencias Provinciales feront l'objet d'un recours en cassation, *lorsque la résolution du recours présente un intérêt en cassation* et l'on considère qu'un recours présente *intérêt en cassation quand la sentence objet du recours s'oppose à la doctrine juridictionnelle de la Cour de Cassation ou statue des points ou des questions sur lesquels il existe une jurisprudence contradictoire des Audiencias Provinciales ou applique des normes qui ne seraient pas plus de cinq ans en vigueur, pourvu que, dans cette dernière hypothèse, il n'existe pas de doctrine jurisprudentielle du Tribunal de Grande Instance relative aux normes précédentes du même contenu ou pareil.* (art.477.3 LEC)

89. Un tiers (ministère public, avocat de l'enfant, service social, service de protection de la jeunesse…) peut-il intervenir

- **à l'instance en divorce ;**

- **à l'instance relative à l'autorité parentale, si elle est distincte de l'instance en divorce ?**

Si oui, sur quels fondements ?

Le Procureur de la république intervient par précepte à l'instance en séparation ou divorce quand il existe des enfants ou des incapacités (art.749 Lec) car en Droit espagnol on attribue au Procureur de la République avec un caractère général, la tutelle et la défense des intérêts des enfants et de l'incapacité (art.3.apdo6 y 7 EOMF).

Donc, seulement les conjoints et le Procureur de la République.

Le juge pourra solliciter le rapport des experts qualifiés en due forme et en tout cas, il compte sur le soutien des Equipes Techniques Psychosociaux Assignés aux Tribunaux ; il est fréquent de demander une expertise psychologique pour déterminer l'intérêt de l'enfant dans les cas concrets.

De son côté, le juge devra veiller à l'accomplissement du droit du mineur à être entendu (art.92.2Cc.) et, en ce sens –là l'enfant devra être entendu, en tout cas, dans les procédures contentieuses, personnellement ou moyennant un tiers, ou à la demande du juge dans les procédures de consentement mutuel (vid.infra)

90. L'enfant a-t-il la possibilité de donner son avis dans le cadre de la procédure de divorce, que celle-ci soit administrative ou judiciaire, et dans la procédure relative à l'autorité parentale si elle est distincte ? Le cas échéant quelles sont les modalités de cette audition ? Peut-il être assisté ou accompagné dans son audition et par qui ?

L'article 770.4 Lec signale que *quand il y aurait des enfants mineurs ou incapacités, ils seront entendus s'ils sont capables de discernement et, en tout cas, s'ils sont âgés de plus de douze ans ;* donc, leur audition est obligée dans les procédures contentieuses, laissant au critère du tribunal de décider dans les cas de consensus. Lors des examens le juge garantira que le mineur puisse être entendu dans les conditions adéquates pour la sauvegarde de ses intérêts, sans interférences d'autres personnes, et demandera exceptionnellement l'aide des experts quand cela sera nécessaire. L'audition du mineur ne doit jamais se pratiquer lors de l'audience ni lors de la comparution et il faudra essayer, pour éviter des mises en justice inutiles des mineurs, ne pas solliciter leur présence si ce n'est à la demande expresse du Tribunal. L'audition doit se dérouler de manière séparée et dans un lieu où le mineur se trouve le plus confortable e détendu possible ; en définitive il faut éviter toute formalité qui puisse le déranger. Il ne faut pas non plus la réaliser en présence des parties, seulement le Procureur de la République et le Juge ou magistrat y seront présents (dans quelques cas la présence d'un technicien du cabinet psychosocial est conseillée).

La STC 152/2005, du 6 juin, a déclaré la nullité des actuations et la rétroaction des actes le moment antérieur à la signification de la sentence en appel dans une procédure de séparation pour avoir fait abstraction, le Tribunal Départementale (la Audiencia Provincial), de l'audition du mineur.

Par ailleurs, il faut permettre la présence effective du Procureur de la République dans l'examen des mineurs afin qu'il puisse personnellement les écouter ou les interroger, pour connaître s'ils expriment en liberté, leur avis sur le conflit qui concerne leur sphère

personnelle et familiale, et intéresser, le cas échéant, l'adoption de mesures de protection qu'il estime nécessaires (STC 17/2006, du 30 janvier).

IV. RECONNAISSANCE DES DÉCISIONS DE DIVORCE PRONONCÉES A L'ÉTRANGER

91. Quelles sont les conditions de reconnaissance des décisions relatives

z) à la rupture du lien matrimonial ?

aa) aux effets pécuniaires du divorce ?

bb) à la liquidation des intérêts patrimoniaux des époux ?

cc) à la responsabilité parentale ?

dd) aux obligations alimentaires entre parents et enfants ?

Qu'en est-il s'il s'agit d'une décision émanant d'un État tiers à l'Union européenne et dont la reconnaissance est demandée dans votre pays ?

En synthèse on peut noter que, en Espagne, il existe trois voies de reconnaissance des décisions prononcées relatives au mariage :

1. Décisions prononcées par des Etats membres (sauf le Danemark) : Règlement 220°1/2003, applicable à la rupture du lien, et le cas échéant, aux décisions sur la responsabilité parentale. Règlement 4/2009, applicable aux obligations alimentaires entre parents et enfants.
2. Décisions qui rentrent dans le domaine de Conventions Internationales bilatérales, ce qui est prévu pour cette voie en concret
3. Pour le reste des Prononcés, la voie de l'exequatur prévue dans l'article 954 Lec.

Par rapport à cette procédure il faut faire quelques précisions :

- La reconnaissance et/ou l'exequatur doivent être introduits devant le Tribunal d 'Instance (art.85.5° LOPJ y art.955 LEC 1881).

- en aucun cas, pour la délivrance de l'exequatur, le Chargé du Registre consulaire du domicile à l'étranger des conjoints, n'est compétent (Con.DGRN, 21 novembre 2005).

- seulement après avoir obtenu l'exequatur de la sentence étrangère on pourra saisir l'inscription de la sentence sur le Registre civil espagnol.

- on peut octroyer l'exequatur à une sentence étrangère de divorce même si le mariage auquel il fait référence, n'est pas inscrit sur le Registre civil Espagnol ; dans ce cas-là il faut faire accompagner la demande d'exequatur de la sentence de divorce de la certification du mariage original.

- Si la sentence de divorce n'obtient pas la reconnaissance en Espagne conformément aux procédures légalement fixées, les sujets seront toujours unis par le mariage en Espagne et auprès des autorités espagnoles.

Les conditions de l'article 954 Lec 1881:

a) Qu'il s'agisse de l'exercice d'une action personnel

b) Absence de défaut dans la procédure d'origine : la Cour d'appel considère que le défaut qui fait obstacle à la reconnaissance est l'absence motivée, fondamentalement par le manque de notification en temps utile et en due forme du défendeur. En conséquence, le défaut par convenance, propre de celui qui, nonobstant avoir été notifié et assigné en temps utile et en due forme ne se présente pas devant le Tribunal qui le saisi, n'empêchera pas la reconnaissance
c) Licéité de l'obligation : ce titre comprend la condition de conformité de la sentence, dont la reconnaissance est prétendue, aux principes qui intègrent l'ordre public espagnol.
d) Authenticité de la décision prononcée dans l'Etat d'origine : on y intègre trois conditions : la force de chose jugée, sa transcription sur document public et son authenticité

92. Dans quels cas une décision étrangère pourrait ne pas être reconnue dans votre pays pour violation de l'ordre public ? Donnez quelques exemples.

La décision n'est pas reconnue si quelques unes des conditions prévues dans l'article 954 Lec ne sont pas accomplies. Concrètement, et pour ce qui est de la condition de conformité avec l'ordre public espagnol, la Cour d'Appel a eu l'occasion de se manifester à cet égard sur les demandes de reconnaissance de divorce de mariage polygame et de répudiation.

La répudiation suppose une contravention des droits à la défense de l'épouse, parce qu'elle est toujours unilatérale. Cela étant, tout arrêt étranger de répudiation, de manière générale, contrevient l'ordre public international espagnol (art.954.2° et 3° Lec 1881) et, par conséquent, elle n'obtiendra pas la reconnaissance/exequatur et n'aura pas d'effet en Espagne.

Toutefois, une décision étrangère de répudiation, pourrait exceptionnellement avoir des effets en Espagne dans ces cas :

a) la femme accepte l'anéantissement du mariage par répudiation, et renonce à la protection de ses droits de défense sur la procédure menée à l'étranger, protection qu'elle a le droit de faire valoir aussi lors de l'exequatur en Espagne. Donc, si l'épouse, elle-même, dicte l'exequatur en Espagne de la décision étrangère de répudiation, l'exequatur doit être octroyé (ATS 21 avril 1998)

b) si la femme demande, pour des raisons économiques et de rapidité procédurale, à être répudiée à l'étranger (répudiation type khole informée par l'épouse après le paiement d'une compensation économique).

Dans les deux cas il est entendu qu'il n'y a pas de « contravention concrète » de l'Ordre public international espagnol.

Comme conclusion, on pourrait signaler qu'il n'existe pas pour autant un refus de la répudiation en tant qu'institution inégalitaire, mais plutôt un contrôle de l'existence de la discrimination dans le cas concret.

La répudiation est dans la majorité des cas révocable; pendant un délai de réflexion (idda) l'homme peut révoquer sa décision de répudier sa femme (Mudawana 3m). Et bien, cette répudiation révocable contrevient le principe de la stabilité de l'Etat civil, et pour cela un

Arrêt étranger de répudiation révocable contrevient l'ordre public international espagnol, et pour que celui-ci intervienne il faut qu'il reste révocable au moment d'informer la reconnaissance. Si le délai, pendant lequel le mari pouvait révoquer la répudiation, s'était écoulé sans qu'il l'eût fait, la répudiation deviendrait définitive et l'ordre public international espagnol ne devrait pas intervenir (ATS 18 de mayo de 2004).

93. Les décisions de divorce prononcées à l'étranger relatives à vos ressortissants sont-elles soumises à des modalités de publicité sur vos registres internes (transcription, mention en marge des actes de l'état-civil…) et si oui, quelles sont ces modalités de publicité ?

Les sentences passées en forme de chose jugée prononcées par les Organes Judiciaires Espagnols en séparation, anéantissement ou divorce, seront enregistrées sur le Registre civil apposées en marge de l'inscription de mariage. Sur ces inscriptions on fera figurer la Cour ou le Tribunal qui a prononcé la Sentence, la date de la sentence, le dossier prononcé et la portée de la décision. Ses inscriptions seront réalisées en vertu du témoignage du Secrétaire judiciaire de l'organe qui a prononcé la décision, avec déclaration de force de chose jugée.

A différence de l'inscription, qui a une valeur de preuve privilégiée, sont susceptibles de notation en marge du mariage, les demandes de séparation, anéantissement ou divorce qui auraient été recevables.

S'il s'agit d'une décision prononcée par un organe juridictionnel appartenant à un Etat membre de l'Union Européenne (et sauf s'il s'agit d'un pays qui ne participe pas à l'adoption du Règlement), il sera applicable le Règlement 2201/2003 du Conseil du 27.11.2003 concernant la compétence, la reconnaissance et l'exécution des décisions judiciaires en matière matrimoniale et de responsabilité parentale. En conformité avec cette norme on peut réaliser directement l'inscription, pourvu que la demande soit accompagnée du formulaire spécifique prévu dans l'article 39 du Règlement.

S'il s'agit d'une décision prononcée par le tribunal d'un Etat avec lequel il n'existe pas de convention de reconnaissance de prononcés en la matière, il faudra que, au préalable, on ait obtenu l'exéquatur correspondant, ou la reconnaissance d'efficacité, décision qui devra être annexée à la sentence étrangère

On peut apposer en marge de l'inscription de mariage les accords ou conventions que les conjoints stipulent comme valables pour leur relation financière (contrat matrimonial). Son inscription est contenue dans l'article 1.333 du Cc et 266 du RRC. C'est un acte volontaire, car il n'aura lieu qu'à la demande de la personne intéressée.

94. Dans l'affirmative, ces modalités de publicité sont-elles obligatoires ou facultatives et qui doit demander la réalisation de cette publicité ?

Les actes concernant l'état civil des personnes seront inscrits sur le Registre civil (art.325 Cc). Dans les hypothèses où les Tribunaux espagnols interviennent, ces inscriptions seront pratiquées en vertu du témoignage du Secrétaire Judiciaire de l'organisme qui a dicté la décision, avec la déclaration de force de chose jugée. Dans le cas de la mise à jour des actes de l'état civil, prévue dans le Règlement 2201/2003, elles seront réalisées à la demande de la personne intéressée.

95. Quelles sont les effets de cette publicité ou de cette absence de publicité ?

Le jugement de divorce ne portera atteinte à des tiers de bonne foi qu'à partir de son inscription sur le Registre civil (at.89 Cc).

96. Désirez-vous ajouter quelques remarques spécifiques concernant votre droit national ?

Non.

SWEDEN

Sweden

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I. GENERAL

A. National law

1. What are the current sources of law for divorce (case law, statutes, …)?

The conditions for divorce are regulated in Chapter 5 of the Swedish Marriage Code (= *Äktenskapsbalken*) of 1987. The divorce procedure itself in regulated in Chapter 14 of the Marriage Code. In both respects, the rules are relatively clear and simple. As a result, there are no Supreme Court precedents (= Sweden's highest court) concerning the divorce rules' interpretation and application. A few judgments from the courts of appeal (= second instance) can, nevertheless, be identified as of some relevance. Issues ancillary to a divorce claim, for example on parental responsibility and property division, have on the other hand given rise to important Supreme Court precedents.

In Sweden, preparatory materials to national legislation – *travaux préparatoires* – are regarded as an important source for the interpretation of legislation, in particular statements made in the Bills of the Government to Parliament. In respect of divorce, the most important travaux préparatoires are found in the Government Bill 1973:32 (*Kungl. Maj:ts proposition med förslag till lag om ändring i giftermålsbalken*).

2. Give a brief history of the main developments of your national divorce law

In an enactment of 1915 – The 1915 Act on the Celebration and Dissolution of Marriage – a new outlook on the conditions to divorce was introduced into Swedish law, namely "deep and permanent breakdown of the marriage". This ground was made available in cases where the spouses had lived apart for at least one year following a judicial decree, normally upon the spouses' joint application, on legal separation. A divorce could be acquired immediately on certain fault-based grounds (adultery, desertion), which had already previously been

recognized in Swedish law. In addition, divorce could be obtained immediately if the spouses had lived apart for three years due to the breakdown of the marriage.

The current Swedish rules on divorce were adopted in the 1973 divorce law reform, which entered into force on 1 January 1974. Through this – radical – reform all special divorce grounds were abandoned. A spouse's wish to dissolve the marriage became alone sufficient to obtain a divorce. This means each spouse's unilateral right to dissolve the marriage by divorce. Apart from the wish of a spouse or both spouses to dissolve the marriage by divorce, Swedish law does not know any other legal grounds for divorce. In 1987, these rules were transferred (unaltered) to the new Swedish Marriage Code.

3. Are prospective reforms currently under consideration?

No. The divorce law of Sweden is regarded to function well in society and to be approved of by the general public. It has, however, been discussed whether divorce proceedings should be moved from courts, and transferred into an administrative procedure.

4. Is divorce the only ground for marriage dissolution or is there any other possibility to enforce marriage breakdown?

In connection with the 1973 divorce law reform, the institutions of legal separation and marriage annulment were abolished, and have not been reintroduced into Swedish law. This means that divorce remains the only possibility of enforcing a marriage breakdown.

5. If any, provide statistical data regarding divorce and legal separation?

In 2010, 23.593 divorces were granted in Sweden to be compared with 50.730 marriages concluded that year in Sweden (Sweden's population was approximately 9.4 million inhabitants). This was the fifth year in a row demonstrating an increased divorce trend in Sweden, and in this case an increase with 6 % compared to 2009 (i.e. approximately 1.400 divorces). The highest divorce rates ever recorded in Sweden are from 1974, i.e., the year when the 1973 divorce law reform entered into force. In 1974, altogether 26.802 divorces were granted. Since 1976, approximately 20.000 divorces have been granted pro year in Sweden.[990]

6. Does your national law admit marriage (or registered partnership) for same-sex couples? If yes, are the grounds for divorce and divorce proceedings identical to the ones for heterosexual couples?

[990] Statistics Sweden, www.scb.se (visited 14 November 2012).

Since 1 May 2009, the Swedish Marriage Code permits same-sex marriages to be concluded in Sweden; from that date on no partnerships can be registered in Sweden. Same-sex couples who had previously registered a partnership in Sweden – an option which was made available in Sweden starting from 1 January 1994 but restricted to couples of the same sex – can (if they wish) convert their partnership into marriage through a simple administrative procedure. The same rules on divorce (conditions and proceedings) apply to all marriages and registered partnerships (which have not been converted into marriage).

B. Conflict of Laws

7. How is marriage defined in your national law?

Swedish law does not contain any specific definition on marriage. Since Sweden's same-sex marriage reform, carried out in 2009, the national legislation reflects a gender-neutral marriage concept, restricted to two persons united with each other through their marriage.[991] Sweden's liberal divorce law reflects an outlook on marriage as a voluntary union between two spouses to be dissolved at the request of either spouse.

B1. Grounds for divorce

a). Rome 3 is applicable

8. With regard to Art. 5 (choice of the applicable law by spouses) and 7 (formal validity of the agreement on the choice of applicable law) of Rome III Regulation, what are the formal requirements set by your national law for the choice of the applicable law for divorce or legal separation?

9. With regard to Art. 13 of Rome III Regulation, are the following marriages considered as valid ones under your national law? 1° marriage between same sex persons, validly celebrated abroad; 2° private marriage; 3° polygamous marriage …

b). Rome 3 is not applicable

10. What is the applicable law for divorce (*lex fori,* common national law, common residence or last common residence law…) ? Do the national conflict of law rules refer sometime to foreign law?

In connection with Sweden's 1973 divorce law reform (see above Q 2), also the national rules of private international law and divorce were revised. Since 1 January 1974, whenever a divorce claim is tried by a Swedish court, the court shall examine the divorce application in

[991] Swedish Marriage Code Ch. 1 § 1.2.

accordance with Swedish law, it is, the provisions of the Swedish Marriage Code. This means a *lex fori*-approach.

Two exceptions apply, however, from a pure lex fori-approach but these are of an extremely limited practical relevance. Both require, to start with, that both spouses are foreign nationals (without Swedish nationality). In the first case, if the respondent spouse objects to the divorce *and* neither spouse has been habitually resident in Sweden for at least one year, a Swedish court may not grant the divorce application (in accordance with Swedish law), if the law of the state where the spouses or one of them is a national does not permit the divorce. In the second case, focusing on situations where the law of the respondent spouse does not permit the divorce, the court may abstain from granting the application against the wish of the respondent spouse. Decisive for the court's decision in this case concerning whether to deny the application should be regard to special interests of the respondent spouse or the spouses' joint children, speaking against divorce. These rules are found in the Swedish Act (1904:25 p. 1) on Certain International Legal relations Concerning Marriage and Guardianship, Ch. 3 § 4.

It should, furthermore, be emphasized that the exceptions from the application of Swedish law are not meant to carry with them the application of foreign law to the granting of a request on divorce. Foreign law is in these cases only "being taken into account" as a restriction to the granting of a divorce in accordance with the *lex fori*. The taking account of foreign law can only result in the refusal of the divorce claim.

The very limited practical importance of these provisions is demonstrated by the fact that an application for divorce in accordance with the *lex fori,* in the situations covered by the two exceptions, appears never to have been denied by a Swedish court, with reference to the content of a foreign law. The explanation is the outlook taken in Swedish law which regards the right to divorce as a fundamental right of each spouse.[992] Two judgments of the Supreme Court of Sweden, *NJA 1988 p. 308 and NJA 1991 A 2,* demonstrate the "mission impossible" of a foreign spouse in trying to prevent a Swedish divorce decree, in accordance with the Swedish Marriage Code, in a competent Swedish court.

11. Is parties' will taken into account in order to determine the applicable law for divorce?

No, the parties' are not permitted to dispose of the law applicable to divorce in Sweden. The *lex fori*-approach applies, with the above-mentioned marginal exceptions (Q 10).

12. If parties may choose the applicable law, how shall this choice be expressed and when?

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[992] See M. Jänterä-Jareborg,"Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe", *Japanese and European Private International Law in Comparative Perspective*, 2008, p. 340.

(The Q lacks relevance for Swedish law.)

B2. Consequences of divorce

13. What is the applicable law for financial consequences of divorce (maintenance, compensation, damages etc.)? National legal provisions, EU regulation, international convention?

The Maintenance Regulation of the European Union, including The Hague Protocol on the Law Applicable to Maintenance, is applicable in Sweden since June 2011. Since the rules on the law applicable are to be applied universally by each EU member state participating in the cooperation in question, they have replaced the application of other choice of law rules regarding *maintenance* in Swedish law.

National rules on choice of law tend to reflect the underlying values of the corresponding substantive law provisions of each state. Sweden's divorce law reform of 1973 not only eliminated all fault-based (guilt-based) divorce grounds from Swedish law. In addition, the 1973 law reform deprived the notion of a spouse's fault (guilt) to the marriage breakdown of all legal relevance as regards the consequences of the divorce. Statements made in Swedish *travaux préparatoires* even indicate that the application of any foreign law granting relevance to a spouse's quilt to the divorce could be regarded as contradictory to Swedish public policy (*ordre public*).[993] It is, however, not certain that Swedish courts would today be prepared to follow this position, not least with regard to the "europeanisation" of private international law requiring a much more open interpretation of public policy.

Swedish law lacks rules on the law applicable to compensation or damages due to divorce. As legal consequences of a divorce such issues should, probably, be governed by the law applicable to the divorce. There is, however, no published Swedish case law on the issue. Since these consequences of a divorce are not covered by any international instrument applicable in Sweden, it cannot be excluded that a Swedish court would find any foreign rule obliging a guilty spouse to pay compensation or damages to the other spouse as contrary to Swedish public policy. This would enable the court to refuse to apply the foreign law and, as a consequence, to deny the request.

14. What is the applicable law for matrimonial assets settlement (matrimonial regimes etc.)

In 1990, Sweden adopted the Act (1990:272) on International Issues Regarding the Spouses' Property Relations. (Later on the enactment was extended to cover also the property relations in non-marital cohabitation.) Unless the spouses have agreed otherwise, their

[993] See *Prop*. (Government Bill) 1973:158, p. 105 f and SOU (*Statens Offentliga Utredningar*) 1987:18, p. 228.

matrimonial property regime is governed by the law of the state where the spouses become habitually resident upon the marriage (§ 4.1). If however, both spouses during the marriage become habitually resident in another state, the law of the new state of habitual residence takes over, *in whole*, once the spouses have been resident in that state for at least two years (§ 4.2). Upon the spouses' change of habitual residence, the applicable law changes automatically, in whole, if both spouses earlier during the course of the marriage have been habitually resident there or if both spouses are nationals of that state. In rare cases – where the spouses have never been habitually resident in the same state – the law of the state demonstrating the closest connection to the spouses is to be applied.

The main rule is party autonomy, i.e., the spouses' (or future spouses') right to choose the law applicable to their matrimonial property regime. To qualify for a valid choice, either one of the parties, at the time of the agreement, must have been a national of or habitually resident in the state whose law is chosen (§ 3).

In so-called inter-Nordic situations, special rules govern the choice of the applicable law to the spouses' matrimonial property regime.[994] These rules are, largely, in line with Sweden's above described general choice of law rules regarding matrimonial property relations.

15. What is the applicable law for parental responsibility?

The 1996 Hague Convention on the protection of children has recently been ratified by Sweden and will become applicable in Sweden on 1 January 2013. In cases where Swedish authorities will exercise jurisdiction under the Convention, the *lex fori* shall be the law applicable (Art. 15). Normally, the *lex fori* will at the same time be the law of the habitual residence of the child. In cases not covered by the 1996 Hague Convention, the law of the habitual residence of the child will normally be applied. In the absence of legislation on the law applicable to issues on parental responsibility, Swedish case law has, namely, moved towards giving preference to the child's habitual residence also in this respect.[995]

16. What is the applicable law for maintenance regarding children? National legal provisions, EU regulation, international convention?

The Maintenance Regulation of the European Union, including The Hague Protocol on the Law Applicable to Maintenance, is applicable in Sweden since June 2011. Since the rules on the law applicable are to be applied universally by each EU member state participating in the cooperation in question, they have replaced the application of the national choice of law

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[994] See M. Jänterä-Jareborg, "Inter-Nordic Exceptions in EU Regulations on Matters of Family and Inheritance Law", *Confronting the Frontiers of Family and Succession Law, Liber Amicorum Walter Pintens*, 2012, pp. 745-749.

[995] It should, however, be pointed out that the notion of parental responsibility, as understood in the 1996 Hague Convention and the Brussels II bis Regulation, is a broad one. Contrary to what applies to issues relating to the care of the child's person (custody, access rights, residence), issues of property administration still in national Swedish law leave certain scope for the application of the law of the child's nationality. See the Swedish Act (1904:25 p. 1) on Certain International Legal Relations Concerning Marriage and Guardianship, Ch. 4.

rules regarding maintenance in Swedish law. Sweden is not a party to any international Conventions regulating the law applicable to maintenance obligations.

B3. Role of the judge (or any competent authority)

17. Is the judge under compulsory obligation to look for the applicable conflict of law rule and is he abided by it?

It is held unanimously that if the substance of the dispute concerns a mandatorily regulated area of law, judged by the standards of Swedish domestic law, then it is the duty of the judge to take into account the foreign connecting factors and the applicable conflicts rule, irrespective of the pleadings of the parties. Before applying the conflicts rule and the foreign law that this rule may refer to, the judge should draw the parties' attention to the applicable conflicts rule and the applicability of a foreign law, and in this manner enable the parties' to adjust their claims to the correct legal framework.

On the other hand, opinions remain divided concerning disputes which according to Swedish domestic law are regulated in a dispositive manner, i.e., permitting the parties to replace the applicable rules by other rules and to settle the dispute in accordance with their own preferences. Some authors claim that the conflicts rules of the forum should even in this case be applied *ex officio* by the court. Other authors are of the opinion that the conflicts rules are in this case applicable only upon the request of the party. Case law has supported, largely, the theory of the necessity of a party request. At the same time it is widely held that it is the court's duty to bring to the parties' attention the possible applicability of a foreign law, through the conflicts rules of the forum, whenever the pleadings of the parties indicate the existence of a relevant foreign connecting factor. This duty of the court mitigates the differences between the two approaches.

In Swedish domestic law, issues on parental responsibility are regarded to be indispositive, whereas issues on maintenance and property division are regarded to be dispositive.

It can be argued that the conflicts rules in an EU Regulation should always be applied *ex officio*, without having regard to the nature – dispositive or indispositive – of the corresponding domestic law rules in Swedish law. It is, namely, only by regarding these rules as mandatory that the aimed unity of result – and other purposes of the union conflicts rules – can be achieved.[996]

18. If the national conflict of law rule refers to the application of foreign law, what is the role of the judge regarding foreign law rules? Shall he research the applicable foreign law rule? How is the content of this rule established?

[996] See M. Jänterä-Jareborg, "Foreign Law in National Courts, A Comparative Perspective", *304 Recueil des Cours 2003*, pp. 367-370.

The relevant provision in this respect is found in the Swedish Code of Procedure, Chapter 35 § 2.2. According to this provision, if foreign law is to be applied and the judge does not know its content, he or she may request a party to prove the content of the foreign law.[997] The provision reflects a "mixed approach" to an issue of great practical relevance. It is always permitted that a judge makes use of his or her own knowledge of the applicable foreign law, and also that a judge may carry out necessary investigations on the content of foreign law. The judge may, equally, require the parties – and in particular the party relying on foreign law – to provide information on its content. It is a currently a common practice in Sweden that the court transfers the task of providing information on foreign law to the parties.

The court shall decide whether the information and proof of the foreign law is sufficient enough to provide the legal basis for the court's decision in substance. The court also decides what the foreign law's true content is, on the basis of the provided information and its own knowledge of it.

II. SUBSTANTIVE LAW

A. Grounds for divorce

19. Must marriage have last for a specific period of time before divorce can validly be claimed?

No specific time limits exist under Swedish law. Theoretically, it is possible to apply for divorce immediately after the marriage was concluded, and cases are known in Sweden where a divorce application was submitted only a couple of days after the marriage ceremony. Under certain circumstances, however, Swedish law stipulates an obligatory reconsideration period of six months, but to be counted from the date of the application for divorce. This requirement has as such nothing to do with the length of the marriage but is justified solely out of concerns for the children under the age of 16 years or out of concern for the other spouse when he or she is opposes the divorce application.

20. Does the lack of legal capacity of one spouse (protection regime, mental illness…) have consequences on his/her legal capacity to introduce a divorce claim or to defend to the proceedings validly?

From the point of view of Swedish law, the answer is most probably affirmative, but is not explicitly regulated in legislation or addressed in any Supreme Court precedent. On the other hand, an appellate court judgment gives at hand that the spouse's lack of legal or

[997] See M. Jänterä-Jareborg, ibid. p. 296.

mental capacity is of relevance in this case.[998] When such a capacity is missing, for example due to severe dementia, a personal representative should be appointed for the spouse regarding his or her application for divorce, or response to the divorce application of the other spouse.

21. Does your national law provide for a sole ground or for multiple grounds for divorce?

[If national law provides for sole ground for divorce (irretrievable breakdown of marriage) answer part A1, if not answer part A2 only]

As indicated above (Q 2) since Sweden's 1973 divorce law reform, the sole ground for a divorce application is the spouses' – or only one spouse's – wish to dissolve the marriage by divorce. If the spouses jointly apply for the divorce, it will be granted immediately by the court, unless there is a child under the age of 16 years which makes a reconsideration period of six months obligatory. If the other spouse objects to the divorce, a reconsideration period of six months will, equally, start running from the date of the application.

Swedish law considers marriage to be a voluntary union between two persons to be dissolved as soon as the spouses or one of them no longer is interested in the continuation of the marriage, *whatever the reason*. It follows that Swedish law on divorce does not, strictly speaking, fit into the "scheme" of this Questionnaire.

A1. Divorce on the sole ground of irretrievable breakdown of the marriage

22. How is irretrievable breakdown established, and if any what are the grounds for irretrievable breakdown?

As indicated above, Swedish law accepts both a consensual divorce as well as a "unilateral divorce" by respecting the wishes of both spouses – or only one spouse – not to continue with the marriage. The application for divorce as such is sufficient for the court to proceed and to grant the divorce. Apart from the making of the application for divorce, no requirements exist regarding an "irretrievable breakdown of the marriage". It should also be emphasized that Swedish law does not use any such terminology but, in fact, regards requirements like this to be superfluous and, even, out-dated.

23. If any, give recent statistics about the percentage, number of claims introduced on the different grounds for breakdown.

[998] See *RH 2008:33*. See A. Agell & M. Brattström, *Äktenskap, Samboende, Partnerskap*, Fifth Edition, 2011, pp. 46 f.

This Q lacks all relevance from the point of view of Swedish law, see above Q 22. For divorce statistics in Sweden, see above Q 5.

24. How is consent between spouses taken into account regarding the grounds of irretrievable breakdown?

As has been pointed out above, this section of the Questionnaire does not fit into the underlying ideology of the Swedish law on divorce. It can, nevertheless, be mentioned that if both spouses are in agreement about the divorce, meaning that they submit a joint divorce application – or in the case of an application by one spouse, the other spouse admits it – then the divorce will be granted without any requirement of a reconsideration period. If there are children under the age of 16 years, the spouses cannot under any circumstances set the requirement of a reconsideration period aside. In that case, a six month reconsideration period is mandatory under Swedish law (Swedish Marriage Code, Chapter 5 § 1).

25. In case of mutual consent of the spouses, shall the divorce application be made by both spouses acting together or is it possible for one spouse to accept the divorce during the course of proceedings?

Both ways are possible under Swedish law and treated equally, see above Q 24.

26. In case of mutual consent of the spouses, are the spouses required to agree on the consequences of divorce or is the judge entitled to decide on these consequences?

In Swedish law, the parties are free to agree upon the consequences of a divorce.
An agreement on the consequences of the divorce is not a requirement for the granting of a divorce under Swedish law. The judge becomes involved in the consequences of a divorce only when the parties cannot agree and wish to have them decided by the court. Taking such issues to court remains exceptional in the Swedish system.

27. Is fault between spouses taken into account regarding the grounds for irretrievable breakdown of marriage? If yes to what extend?

No. See answers to Q 2 and Q 21-22.

28. How is separation between spouses taken into account regarding grounds for irretrievable breakdown?

a) Is separation sufficient to establish irretrievable breakdown?

As indicated above, Q 2, and Q 21-22, this aspect lacks relevance from the point of view of Swedish divorce law.

b) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

See above. The only aspect of relevance regarding Swedish law in this connection might be the following. Each spouse is always entitled to an *immediate divorce* – without a preceding period of reconsideration – when the spouses have lived apart for at least two years, Swedish marriage Code Chapter 5, § 4. This means that even if there are children under 16 years of age or the other spouse objects to the divorce, the court shall grant the divorce immediately upon application.

A2. Multiple grounds for divorce

29. If any, give recent statistics about the percentage, number of claims introduced on every different ground for divorce.

a. Divorce by consent

30. Does divorce by consent exist as an autonomous ground for divorce or is it a specific form of divorce for irretrievable breakdown of marriage?

31. Must the spouses be separated before introducing the claim? If yes, for how long?

32. Does divorce by consent imply mutual consent and joint request or is it possible for one spouse to introduce the claim against the other who will be invited to consent in the course of proceedings?

33. Does divorce by consent imply general consent on every of its aspects and consequences or does it leave a margin of appreciation to the judge to hold about its consequences?

b. Divorce on the ground of irretrievable breakdown of the marriage

For comments on the Swedish approach, making these issues irrelevant, see above.

34. How is irretrievable breakdown established?

35. How is consent between spouses taken into account regarding irretrievable breakdown?

36. How is separation between spouses taken into account regarding irretrievable breakdown?

a) Is separation sufficient to establish irretrievable breakdown?

b) How long must separation have last before it could be raised as a ground for irretrievable breakdown? Does it need to be a continuous period of time?

37. Can an initial claim on the ground of irretrievable breakdown be converted into a divorce by consent or in a divorce on the ground of fault in the course of proceedings? If yes what are the bridges between these proceedings?

c. Divorce on the ground of fault

38. What are the fault grounds for divorce?

39. Are there some specific requirements regarding proof of fault in this proceeding?

40. Does the judge keep a margin of appreciation to pronounce a judgement against both parties when fault is claimed by only one party?

41. Does parties' reconciliation prevent them to invoke earlier facts as ground for divorce?

42. Can fault between spouses be considered as a tort and open a claim for damages to the benefit of the innocent spouse? If yes, is the claim for damages on the ground of fault between spouses distinct from a 'classical' tort law action?

B. Consequences of divorce

43. Do spouses have the possibility to settle the consequences of divorce (as well as the date at which the divorce will be effective) by an agreement

- **Before marriage;**
- **During marriage;**
- **During the divorce proceedings?**

In these respects restrictions apply in Swedish law. Firstly, spouses are not permitted to settle the consequences of divorce by an agreement *prior to the marriage. During the marriage*, agreements on the consequences of divorce are permitted prior to a contemplated divorce. During the divorce proceedings, the spouses are free to settle the consequences of their divorce. In the case the spouses reach an agreement on the consequences of their divorce

during the divorce proceedings, it is common that they wish the contents of their agreement to be included in the court's divorce decree.

The spouses cannot set the date when their divorce becomes effective. This date is always the date when the divorce becomes final, i.e., when the court's divorce decree can no longer be appealed, Swedish Marriage Code Chapter 5 § 6.

44. If yes, may the judge scrutinize the spousal agreement?

Under Swedish law the financial consequences of a divorce are limited to issues of maintenance, between the spouses and in relation to their children, and the property division between the spouses. In both respects, party autonomy applies meaning that the spouses are free to settle these issues according to their own preferences. Of relevance is also that according to Swedish law, after divorce each spouse shall be responsible for his or her own support, Swedish Marriage Code Chapter 5 § 7.1.

It falls outside the mandate of a court to scrutinize these agreements, unless the court is requested to do so by a spouse who claims that the agreement is unreasonable. Agreements on parental responsibility (custody, visitation rights, the child's residence) are always subject to approval by the competent authority.

45. If the judge has a power of scrutiny, which elements allow the judge either to require the spouses to reconsider the agreement, or to directly modify it?

As pointed out under Q 44, an agreement comes under the scrutiny of a judge only upon request of a spouse who claims that the agreement is unreasonable. In the case of an agreement on spousal maintenance, the court's scrutiny will focus on the circumstances which existed when the agreement was concluded and the overall circumstances, Swedish Marriage Code Chapter 6 § 11.2. An agreement found to be unreasonable against this background will then be adjusted by the court. Similarly, the court may adjust an unreasonable agreement on property division made prior to the divorce, Swedish Marriage Code Chapter 12 § 3.2.

46. If a proceeding of legal separation (without dissolution of marriage) exists in your system, what are its consequences regarding spouses and their common children?

Not of relevance for Swedish law, see above Q 4.

a. The personal consequences of divorce

i. The consequences of divorce between spouses

47. When does divorce officially break off the marriage?

The marriage is dissolved officially when the decree of divorce becomes legally effective, it is, non-appealable, Swedish Marriage Code Chapter 5 § 6. Once the divorce decree is final in the said manner, the court which decreed the divorce shall inform the Swedish authority in charge of the population records[999] of the divorce. This authority shall then register the divorce. The date of registration does not carry with it any special legal effects such as making the divorce "official".

48. Is matrimonial freedom of the ex-spouses subjected to limitations? (when are they authorized to remarry, can the remarry each other …)

No such limitations exist under Swedish law.

49. If marriage has consequences on the family name of spouses, what are the correlative effects of divorce?

A marriage has no automatic consequence on the family names of the spouses. On the other hand, a marriage entitles a spouse to acquire the other spouse's family name, Swedish Act on Names[1000] § 9. It follows that each spouse either maintains unaltered the family name he or she had before the marriage, or replaces that name by the other spouse's family name in which case the spouses shall have a common family name. A divorce has no impact on a spouse's right to continue to use the family name of the other spouse.

50. Does divorce have effects regarding

- **Citizenship eventually granted to the foreign spouse by marriage;**
- **Residence permit granted to the foreign spouse by marriage?**

A foreign citizen's (or stateless person's) marriage to a Swedish citizen does not as such entitle the foreign spouse to acquire Swedish citizenship. The foreign spouse is subject to the general rules on the acquisition of Swedish citizenship, Act (2001:82) on Swedish Citizenship, §§ 11-12. The foreign spouse must apply to become a Swedish citizen and fulfil the general requirements. The applicant's marriage to a Swedish citizen may, however, enable him or her to acquire Swedish citizenship even if the general requirements are not fulfilled, § 12. A subsequent divorce will not have any impact on the thus acquired Swedish citizenship, which remains unaltered.

A foreign spouse who has received a residence permit in Sweden due to the marriage to a person resident or with residence permit in Sweden risks losing it, if the marriage is dissolved by divorce *before* the foreign spouse has resided in Sweden for at least two years

[999] This authority is The National Taxation Agency (= *Skatteverket*).
[1000] Act (1982:670).

unless the spouses have previously cohabited with each other on a permanent basis, Swedish Foreigners' Act[1001] Chapter 5 §§ 3.1, 3a.1, 8 and16. In these cases, namely, the marriage entitles the foreign spouse only to a temporary residence permit in Sweden which must be renewed.[1002] The foreign spouse can qualify for a permanent residence permit in Sweden only after two years lawful residence in Sweden. A prerequisite is that the marriage continues, unless there are special reasons for making an exception, for example that the relationship was terminated due to family violence. These restrictions do not apply to a foreign spouse who is a citizen of a member state to the European Union, the EES or Switzerland.

ii. The consequences of divorce regarding children

51. Does your system distinguish the exercise of parental responsibility from the issue of residence of children? If yes, how and what are the consequences on the exercise of parental responsibility?

Swedish law distinguishes between the exercise of parental responsibility and the child's residence. If the parents are not cohabiting but share rights of custody, the child's residence must be established to be with either one of the parents or, alternatively, on an alternate basis with each of them. Only a parent with custodial rights can be vested with the residence of the child.

52. Does divorce produce automatic effects regarding parental responsibility?

In case of divorce, the parents continue *ex lege* to share the custody of their child, Swedish Children and Parents Code, Chapter 6 § 3.2. The court shall in the divorce decree remind the parents of that their joint custody of the child continues in spite of the divorce.

Exceptionally, however, the court may take measures to terminate the parents' joint custody upon divorce. In connection with divorce proceedings the court may order that the custody of the child is to be attributed to only one of the parents, provided that joint custody would be manifestly contrary to the best interests of the child, Swedish Children and Parents Code, Chapter 6 § 5.3. The court may also overrule the parents' agreement on sole custody, provided that its finds joint custody to be in the best interests of the child and provided that not both parents object to joint custody.

53. Can the exercise of parental responsibility be subject to a parental agreement?

[1001] Act (2005:716).

[1002] The foreign spouse qualifies for a permanent residence permit from the beginning if the spouses have lived together abroad in a permanent manner, § 8.1.

Yes, and the competent authority to approve of such agreements is in the first place the local **social welfare board**, and not a court. Under Swedish law parental agreements are encouraged, and an aim is to keep parental disputes out of court to the extent possible. The great majority of the cases in Sweden are solved amicably by the parents out of court, often under supervision of the social welfare board. The parents are free to agree on the exercise of parental responsibility, but subject to the test of the best interests of the child. If the parents have agreed on joint custody rights the **social welfare board** shall confirm the agreement unless it is *manifestly* against the child's best interests, Chapter 6 § 6.2. In respect of agreed sole custody for one parent only, the social welfare board can refuse to approve of the agreement if it regards the agreement not to be in accordance with the child's best interests. It is, however, generally assumed that the parental agreement is in the best interests of the child and it is unusual that their agreement would not be confirmed by the competent authority. The agreement is legally valid if in writing *and* approved of by the local social welfare board, Swedish Children and Parents Code, Chapter 6 § 6.1.

Where only one of the parents has custody rights and the parents agree on joint custody, the **court** may, upon their application, order joint custody in accordance with the parental agreement, Swedish Children and Parents Code, Chapter 6 § 4. It is only when joint custody would, in the court's opinion, be manifestly against the child's best interests that the court is not bound to follow the parental agreement. Similarly, if the parents agree on sole custody rights to one of the parents the court can, upon their application, order sole custody in accordance with the agreement, if it considers this solution to be in the child's best interests.[1003] The court may also overrule the parents' agreement on sole custody, provided that its finds joint custody to be in the best interests of the child and provided that not both parents object to joint custody. This means that joint custody can not be ordered by the court when both parents are against it, Swedish Children and Parents Code, Chapter 6 § 5.2.

In disputes on parental responsibility the court has the duty to encourage and promote parental agreement, Swedish Code of Procedure Chapter 42 § 6 p. 5 and § 17.1 For this purpose, the court can refer the parents to cooperation discussions under the regime of the social welfare board or appoint a special mediator, but not against the wishes of the parties.[1004]

54. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

As has been pointed above under Q 53, not only courts but, primarily, social welfare boards are involved in Sweden as regards the scrutiny of agreements between the parents regarding parental responsibility. Both authorities must base their decisions on the best interest of the child. This means that the social welfare board in certain cases cannot confirm the parents'

[1003] A. Singer, *Barnets bästa. Om barns rättsliga ställning i familj och samhälle*, 2012, p. 126.
[1004] A. Singer, ibid., p. 151.

agreement, because this requirement in its opinion is not met (in practice very few). Similarly, the court cannot in certain cases order in accordance with the parents' agreement. The competent authorities' margin of appreciation regarding parental agreements is described above under Q 53.

Both the social welfare board and the court should take all efforts to encourage the parents to reach an agreement, since parental agreements are generally regarded to be in the best interests of the child. In its scrutiny of the reached agreement, the competent authority should balance between the notion that parental agreement generally works in the best interests of the child and the risk that this agreement might not in all respects voluntary on behalf of one of the parents. The competent authority must also take into account the special circumstances of the family which may indicate that the agreement does not meet the best interests of the child. If the parents cannot reach an agreement which the social welfare board is able to confirm, the parents need to take the issue to court.

When an issue on parental responsibility is taken to court, the court shall not decide upon the issue until the social welfare board has had the opportunity to provide any relevant information to the court, Swedish Children and Parents Code, Chapter 6 § 19. The social welfare board, in turn, has the duty to supply any such information. If the social welfare board disapproves of the parental agreement, the court shall order an investigation to take place on the child's situation in order to find the best solution for the child. The court may lay down guidelines for this investigation, to be carried out by the board or a suitable expert, and also set a deadline for it. The procedure followed is the same as when the parents are in disagreement with each other.[1005]

55. Is the judge vested with the power to organise the exercise of parental responsibility? If yes, does he compulsorily need to be requested to hold on this issue by one or the other parents?

Continued joint custody rights to the parents after their divorce constitutes the main rule under Swedish law. As pointed out (Q 52), this follows automatically of the law, Swedish Children and Parents Code, Chapter 6 § 3.2. In connection with divorce proceedings the court may, however, find reason to order that the custody of the child is to be attributed to and exercised by only one of the parents, provided that joint custody would be manifestly contrary to the best interests of the child, Swedish Children and Parents Code, Chapter 6 § 5.3. The court may also overrule the parents' agreement on sole custody, provided that it finds joint custody to be in the best interests of the child and provided that not both parents object to joint custody.

The court's competence remains under Swedish law limited to *a)* the attribution of custody to both or only one of the parents, *b)* deciding on the rights of contact between the child

[1005] A. Singer, ibid., p. 127.

and the parent with whom the child is not residing, and *c)* deciding on the child's residence. The court cannot order on the exercise of any specific issues related to parental responsibility, for example the child's education or religious upbringing or where (geographically) the child is to live.

56. What are the elements enabling the judge to hold a modification of the exercise/right of parental responsibility? May one parent be deprived of his/her exercise of parental responsibility considering his/her misbehaviour toward the other parent?

The child's best interests is the guiding principle under Swedish law for all decisions regarding both the attribution and the exercise of parental responsibility, Swedish Children and Parents Code, Chapter 6 § 2a. If the parents hold joint custody rights but cannot reach an agreement on how the custody rights are to be exercised, or are in disagreement on a specific aspect of the child's custody, the ultimate option is that the court dissolves the joint custody of the parents and orders sole custody of the child to one of the parents. The court may, nevertheless, order joint custody of the child against the wish of one of the parents but not if both parents are opposed to this, Swedish Children and Parents Code, Chapter 6 § 5.2. Joint custody is, generally, not regarded as a suitable solution in situations where one of the parents is guilty of violence towards the child or the other parent. This can apply even when time has passed after the incident(s) took place, because it risks negatively affecting the parents' ability to jointly exercise parental responsibility.

57. May parent(s), once deprived of the exercise/right of parental responsibility, still be vested with contact, visit and/or residence of his/her/their children?

Swedish law puts great emphasis on the child's need of contact with the parent with whom the child is not residing, Swedish Children and Parents Code, Chapter 6 § 2a. It follows that depriving a parent of custodial rights to the child, by court order, does not automatically result in that parent losing his or her contact rights with the child. On the contrary where possible, contact rights should be vested on that parent, but taking into account the reasons for the parent's loss of the custody rights. Where necessary, these rights may be subject to various kinds of conditions, such as supervised contact rights in the presence of a third person, for example a representative of the local social welfare board, or conditions regarding the place where the contact rights may be exercised, Swedish Children and Parents Code, Chapter 6 § 15.3. Swedish courts are generally very reluctant to exclude a child's contact with a parent altogether, since such an outcome prevents the child from establishing or maintaining a good and close contact with the parent.

Only a parent with rights of custody can be vested with the right to have the child residing with him or her.

Also in cases where the child has been placed in care outside of its home, due to the parents' inability to care for the child adequately or their neglect or abuse of the child, the local social welfare board in charge of the placement of the child has the duty to ensure, as far as possible, that the child's need for contact with its parents is met (Swedish Care of Young Persons Act, § 14). It is up to this authority to decide how the child's right to contact with the parents is to be exercised. It may also decide that the child's residence shall not be disclosed to the parents but kept secret from them. It should be noticed that in all of these cases under Swedish law the parents, normally, retain their legal custody rights to the child even if the child is placed into care by the competent authority without the parents' consent.[1006]

58. Which arrangements are legally available to parents in order to organise residence of children after divorce? (Usual residence with visit and contact, shared residence, residence granted to a third party…)

Subject to the best interests of the child, the parents are free to decide with which of them the child shall reside after the divorce, Swedish Children and Parents Code, Chapter 6 § 14. They may, consequently, agree upon residence with one of the parents or upon shared residence with each of them on an alternate basis. They may also agree that the child is to reside with a third person. In that case, however, the child's placement with that third person (a private home) is to be approved of by the local social welfare board, Swedish Social Services Act, Chapter 6 § 6. An arrangement whereby the child is to reside with only one of the parents – or with a third person – does not in any way affect the other parent's (or parents') custody rights, with the exception of matters of daily care. If the child resides with only one of the parents or with a third person, the child continues to have a right to contact with the parent(s).

59. May arrangements regarding the residence of the child be decided by a parental agreement? If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

Parents who share the custody of the child may enter into an agreement concerning the child's residence. Such agreements are also strongly encouraged under the Swedish system. Their agreement becomes binding if in writing *and* confirmed by the local social welfare board, Swedish Children and Parents Code, Chapter 6 § 14a.2. If the parents cannot reach an agreement on the child's residence, a court may upon application of one or both parents decide with which of the parents the child is to reside, or if the child is to reside on an alternate basis with each of them, Swedish Children and Parents Code, Chapter 6 § 14a. The

[1006] See K. Boele-Woelki & M. Jänterä-Jareborg, «Protecting Children Against Detrimental Family Environments under the 1996 Hague Convention and the Brussels II Bis Regulation», *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr*, 2010, p. 127.

court may order alternate residence also against the wishes of one of the parents but not against both parents' wishes.

The court shall base its decision on the best interests of the child. The court's powers are, however, limited to deciding *with which parent* the child is to live and do not include deciding *where* the child shall live. If the parents cannot agree on the latter aspect, the court may need to dissolve the joint custody of the parents in favour of sole custodial rights to one of them. A parent with sole custody rights is, basically, free to decide where the child is to live.

An alternate residence implies that the child's residence with each parent is of approximately the same duration. Approximately one fourth of all children in Sweden to divorced or separated parents live with both parents on an alternate basis. Even if research remains limited concerning how alternate residence affects the child, the experiences in Sweden appear, largely, positive. With the exception of very small children, the social welfare boards appear to encourage parents' to agree on alternate residence.[1007] Swedish courts appear, on the other hand, to be more hesitant in this respect.[1008]

60. Are legal provisions available to the judge to guaranty the relationships between parents and child after divorce? If yes, what are they? Are sanctions provided if one parent does not fulfil his/her duty to maintain relationship with his/her child?

To start with, Swedish law emphasises the child's need of a close and good contact with both parents, Swedish Children and Parents Code, Chapter 6 § 2a. The parents have the joint responsibility to ensure, to the extent possible, the child's need of contact with the non-residential parent, Swedish Children and Parents Code, Chapter 6 § 15.2. The residential parent or the parent with sole custody of the child has the duty to provide such information to the other parent which can contribute to the exercise of the contact rights, Chapter 6 § 15.3. If the residential parent prevents the child's right to contact with the other parent and the other parent requests sole custody of the child, there is a risk that the custody (and residence) will be transferred to the latter.

The non-residential parent has a duty of contact with the child. If, however, the non-residential parent neglects this duty, no sanctions are available under Swedish law to force that parent into contact with the child. The only legal consequence is that if this parent shares custody rights to the child, he or she may risk losing those rights due to failure to exercise contact with the child, if the other parent brings the case to court and requests sole custody rights, *i.a.,* on this ground.[1009]

[1007] Lecture on alternate residence and children's welfare by Dr of Medicine, Child Psychologist Malin Bergström, Uppsala Faculty of Law 14 November 2012.
[1008] Oral information by judges of *Uppsala District Court*, 14 November 2012.
[1009] A. Singer, *Barnets bästa. Om barns rättsliga ställning i familj och samhälle*, 2012, p. 136.

The non-residential parent wishing to exercise contact rights with the child or wishing to extend the existing contact rights, can request this at court and have the court order on contact rights, Swedish Children and Parents Code, Chapter 6 § 15a.1. The court shall make its decision on the basis of the child's need of contact with that parent. That parent (but not the child) can also take measures of enforcement, if the contact right order by the court or agreed between the parents is not respected by the residential parent, Swedish Children and Parents Code, Chapter 21. Since a law reform carried out in 2006, also the local social welfare board may initiate court proceedings to establish contact rights between the child and a parent, Swedish Children and Parents Code, Chapter 6 § 15a.1.[1010]

The parents' agreement on the child's contact rights with the non-residential parent is binding, if in writing and confirmed by the social welfare board, Swedish Children and Parents Code, Chapter 6 § 15a.3.

b. Post-marital financial consequences

61. Does the settlement of financial consequences of marriage breakdown is made in a single divorce proceeding or can it be dealt through a distinct one, either concomitant or subsequent?

Under Swedish law, an application for divorce may also include claims relating to the legal consequences of the divorce including its financial consequences, Swedish Marriage Code Chapter 14 § 5. If this is the case, or when such claims are made during the divorce proceedings, the court shall assess these claims in connection with the divorce proceedings. Because the assessment of these issues may take a longer time than what is required for the granting of the divorce, it is common that the court first grants the divorce, in the form of a so-called part-judgment (*deldom*) and then proceeds with the remaining issues, all within the same proceedings.

Alternatively, the spouses may in the form of an agreement settle the financial consequences of the divorce outside of court, parallel to the divorce proceedings. The spouses may agree on these issues also in advance, in anticipation of the divorce. Upon their application, the court can confirm their agreement in the divorce decree.

Swedish law permits the spouses also to agree on the financial consequences of the divorce after the divorce decree. The spouses are also permitted to initiate legal proceedings on the financial consequences of the divorce after the divorce decree.

[1010] A follow-up study carried out in 2011 showed however, that it was highly unusual for a social welfare board to make use of this option. A. Singer, *ibid*., p. 137.

What is essential in a comparative perspective is that Swedish law does not make the granting of a divorce in any way dependant on a settlement concerning the financial consequences of the divorce.

i. Consequences between spouses

62. At the time of marriage breakdown are ex-spouses entitled the one regarding the other to :

- **Compensation,**
- **Maintenance,**
- **Compensation of rights to pension benefits,**
- **Damages**
- **Any other payment or property rights?**

Swedish law provides, exceptionally, for **inter-spousal maintenance claims** upon divorce, but only on a needs basis. It does not provide for any compensation or damages of any kind.

Two factors are of special relevance for understanding the position taken in Swedish law. *First*, fault to marriage breakdown lacks all legal relevance for both the right to divorce and for the financial consequences of the divorce. *Second*, unless otherwise agreed between the spouses (for example in the form of a matrimonial property agreement) *all* the spouses property (including the assets owned before the marriage or acquired as a gift or inheritance during the marriage) will be included in the property division due to the divorce. This is the main rule under Sweden's default regime of deferred community of property and involves a very broad notion of sharing.

If yes, please answer the following questions:

63. Does the maintenance/compensation/damage issue must be claimed at the time of the initial request or can it be made in the course of divorce proceeding?

An application for divorce may also include various kinds of claims related to the granting of a divorce, such as a spouse's claim to post-divorce maintenance. Where the application for divorce has already been submitted, such claims may be made orally to the court or, alternatively, in writing without separate summons, Swedish Marriage Code, Chapter 14 § 5.

64. Can the maintenance/compensation/damages claim be introduced by one or the other spouse after the divorce being granted? If yes, is this action enclosed in a specific period of time?

Swedish Marriage Code does not stipulate any explicit time limits for initiating court proceedings after a divorce decree, for example regarding the right to maintenance. On the other hand, the starting point of the law is that divorce terminates any inter-spousal maintenance obligation, Swedish Marriage Code, Chapter 6 § 7. Where necessary a spouse can be granted maintenance from the other spouse during a transitional period following the divorce. A court can retrospectively grant maintenance only for the preceding three years, counted from the date of the application for maintenance, Swedish Marriage Code, Chapter 6 § 9, unless the maintenance debtor consents to a longer period of time.

65. May one of the spouse be discharged from providing for maintenance/ compensation/damages, to the other? If yes, on which grounds?

This question appears, strictly speaking, to be of no relevance from the point of view of Swedish law. Under Swedish law, divorce terminates as a rule the inter-spousal rights and duties of maintenance, Swedish Marriage Code, Chapter 6 § 7. Swedish law does not provide for compensation or damages.

The only provision of relevance in this context might be the provision on the adjustment of a judgment or a spousal agreement on maintenance, Swedish Marriage Code, Chapter 6 § 11, due to changed circumstances *or* because of the agreement being found unreasonable by the court in the light of the circumstances of its conclusion and the overall circumstances.

66. May one of the spouses be deprived from obtaining maintenance/ compensation/damages, from the other? If yes, on which grounds?

This question appears to be of no relevance from the point of view of Swedish law. As has been pointed out above, the starting point is that neither spouse has a right to maintenance from the other spouse after divorce, Swedish Marriage Code, Chapter 6 § 7. So the only way in which a spouse can be "deprived" from obtaining post-divorce maintenance is where such maintenance has exceptionally been granted and the spouse paying maintenance is, afterwards, discharged from the duty to pay, because the court finds reason to adjust the agreement (see answer to Q 65).

67. According to legal provisions or case law, is balance between the two ex-spouses personal assets sought?

The question appears to lack relevance from the point of view of Swedish law, considering that according to the main rule all the spouses' property belongs to the so-called deferred community property regime (see above Q 61). The net sum of each spouse's property is to be shared equally by the spouses upon the termination of the matrimonial property regime, for example, due to divorce.

By way of exception the spouses can, however, also have so-called separate property (= personal assets) that are not to be taken into account in the property division. If only one of the spouses has separate property to be excluded from the division whereas all the other spouse's property is to be included, the outcome may be too unequal. In such a case a court may order a lump sum payment from the spouse with (more) separate property to the other spouse, Swedish Marriage Code Chapter 6 § 8 and Chapter 11 § 6.

68. Are the rules organising compensation/maintenance/damages, connected to the rules organising the liquidation of matrimonial assets, or to equivalent ones relating to property law?

As mentioned earlier, Swedish law permits only spousal claims on maintenance, and not claims on compensation or damages. In assessing whether a spouse claiming post-divorce maintenance exceptionally qualifies for it, the court needs to take into account the outcome of the matrimonial property division, as well as all the other means of the spouse claiming maintenance, Swedish Marriage Code Chapter 6 § 7. It follows that in this sense there is, indeed, a link between the rules on post-divorce maintenance and the rules governing the liquidation of the matrimonial property.

The main rule is that *all* the spouses' property is to be taken into account in the liquidation of the deferred community property regime, which applies as the default regime in Swedish law, Swedish Marriage Code Chapter 7 § 1 and Chapter 9 § 1. Spouses may, however, have property that is not included in the regime, for example because of their matrimonial property agreement or because the property has been given to a spouse by a third person under condition that it shall be exempted from any property division. If the property of one of the spouses is exempted, the property division may risk resulting in an unfair outcome. This outcome can be corrected by the court granting, upon the needy spouse's application, a lump sum maintenance payment as compensation, Swedish Marriage Code Chapter 6 § 6 and Chapter 11 § 6.

69. Do the grounds for divorce have an incidence on an award of compensation/maintenance after marital breakdown? If yes, to what extent?

The Q lacks relevance from the point of view of Swedish law, as explained above.

70. What shape compensation/maintenance or other financial obligations between the spouses may take? If multiple shapes are available, are they determined according to the grounds for divorce?

A maintenance payment is normally a periodic monetary payment, available only during a transitional period of time, Swedish Marriage Code Chapter 6 § 8. In some cases the court may order a lump sum to be paid by one spouse to the other in order to correct an unequal

outcome of the liquidation of the matrimonial property regime (see above Q 67) or in order to enable the spouse in need of maintenance to afford a pension insurance.

71. Does you national law allow the competent authority to allocate the family home to one spouse for property, use or renting?

As regards property division following a divorce, special rules apply to the allocation of the joint dwelling of the spouses, i.e., the family home, Swedish Marriage Code Chapter 11 § 8. The spouse who is most in need of the family home shall be entitled to receive it in his or her portion, but with a corresponding deduction of this portion. If the value of the family home exceeds the value of the spouse's portion, a monetary compensation for the other spouse becomes necessary. If the family home is of little value, no such deduction is made. This could be the case where the spouses rent the family home, unless the rental value is notable.[1011]

When assessing the spouses' need to be allocated the family home, preference is normally given to the custodial parent with whom the children will be residing. If the parents share custody rights and the children will reside with both parents on an alternate basis, then other factors become decisive, for example, ownership of the family home in favour of the owner spouse. An additional requirement is that the take-over right can be regarded as reasonable, which might not be the case if the family home is owned by the other spouse alone as his or her "separate property" (personal property).[1012]

It falls outside the powers of the competent authority to order that the family home shall be used or rented by a spouse, after the property division has been carried out. Only the spouse in whose portion the family home is allocated will be able to make such dispositions in favour of the other spouse. In divorce proceedings the court may make interim orders regarding the right to live in the family home, but only until the property division has been carried out, Swedish Marriage Code Chapter 14 § 7.1.

72. May amount and modes of fulfilling the financial obligations between spouses be determined by spousal agreement?

Yes. The spouses are free to agree on the amount and modes in respect of post-divorce maintenance. To be enforceable, the agreement must be in writing and witnessed by two persons, Swedish Code of Execution, Chapter 3 § 19.

73. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the spouses to reconsider the agreement, or to directly modify it?

[1011] See A. Agell & M. Brattstrom, *Äktenskap, Samboende, Partnerskap*, Fifth Edition 2011, p. 212.
[1012] Agell & Brattström, ibid., pp. 210 f.

Agreements on post-divorce maintenance are not scrutinized by the court. This applies also when the agreement, upon request of the spouses or a spouse, is included in the divorce judgment. On the other hand, a spouse if free to initiate court proceedings for the purpose of having the agreement adjusted – or even set aside – by the court, on the basis that the agreement is unreasonable in view of the circumstances which existed at the time of its conclusion and the overall circumstances, Swedish Marriage Code Chapter 6 § 11. In one case, for example, the Swedish Supreme Court declared the agreement to be invalid under general contractual grounds (full faith and credit) because the husband had failed to produce relevant information on his ability to pay maintenance whereby the wife had renounced her right to maintenance.[1013] Likewise, according to the same provision in the Swedish Marriage Code, the agreement may (upon application) be adjusted by the court due to a change in the circumstances.

74. In order to evaluate the amount of compensation/maintenance/damages, are the spouses under duty to fully disclose the elements making up their assets (incomes, capital, assets, pension, benefit…) of can they be discharged from full and frank disclosure?

Under Swedish law, divorce terminates the inter-spousal duty of maintenance. The duty to full disclosure in order to evaluate the amount of maintenance eventually to be paid to a spouse does not, at the outset, fit into this kind of a system. On the other hand, if a spouse has misled the other spouse regarding his or her ability to pay maintenance or, alternatively, need of maintenance, any agreement between the parties on the issue may be set aside by the court or adjusted, if found unreasonable, Swedish Marriage Code Chapter 6 § 11. For this reason, it is not either possible to claim that a spouse under Swedish law can be discharged from a full and frank disclosure.

On the contrary, one of the general legal effects of marriage under Swedish law is the spouses' mutual duty to supply each other with information necessary to assess the financial circumstances of the family, Swedish Marriage Code Chapter 1 § 4. This includes issues of relevance for the duty to maintain. In connection with the spouses' divorce this provision should, therefore, be read in conjunction with another provision in the Swedish Marriage Code, namely Chapter 9 § 3, which stipulates the duty for each spouse, upon liquidation of the marital property regime, to give account of his or her property and also to disclose all other information of relevance for the property division.[1014]

75. If no discharge does exist, what are the consequences of the refusal by one of the spouses to disclose financial elements of his/her assets?

[1013] *NJA 1961 p. 124.*

[1014] See M. Jänterä-Jareborg, "Swedish National Report" (answer to Q 63), *European Family Law in Action, Volume II: Maintenance Between Former Spouses*, 2003, pp. 106 f.

For the purposes of property division upon divorce, a spouse may apply to court to have a property division executor appointed, Swedish Marriage Code Chapter 17 § 1. This option is of particular relevance when the spouses cannot agree on how their property should be divided or when one of the spouses refuses to cooperate. Upon application by the appointed property division executor the court can oblige a spouse on oath, under the penalty of a fine, to disclose his or her assets for the purposes of an inventory of the spouses' assets, Swedish Marriage Code Chapter 17 § 5.

An agreement between the spouses on maintenance may be set aside by a court if the agreement was not based on correct information, see above under Q 73. A new property division may need to be carried out if it turns out that a spouse has not disclosed assets which should have been included in the property division.

76. What are the criteria taken into account in order to evaluate the amount of the due compensation/maintenance/damages? (former household way of life, needs of the ex-spouses either actual and/or future, age, health or ability to find a job, self-sufficiency …)

To start with, the claimant spouse must be in the need of maintenance due to the lack of own means which are sufficient enough to provide a basic maintenance after divorce. The respondent spouse must, in turn, have the ability to provide post-divorce maintenance. These factors alone, however, are not sufficient to grant the needy spouse maintenance from the other spouse. It is required, in addition, that the claimant spouse's lack of means and need of maintenance *is a result of the marriage as such* and that it is reasonable to oblige the other spouse to provide maintenance. Conditions such as the duration of the marriage and whether the needy spouse's work at home caring for the children, makes it extra difficult for (usually) her to find employment, as well as factors such as the needy spouse's age and illness, are taken into account. Marriages of a short duration (five years or less) do not, therefore, normally, qualify for post-divorce maintenance.

As has been pointed out earlier, post-divorce maintenance is exceptional under Swedish law and, where granted, normally meant to be only of a provisional duration – one to four years following the divorce – the aim being to enable the needy spouse to find gainful employment or to obtain education enabling future self-sufficiency. The transitional nature of post-divorce maintenance applies also in the case of long marriages. For example, in the Supreme Court judgment *NJA 1982 p. 821*, the husband was obliged to pay maintenance for the wife retroactively for a period of two years following the divorce until the date when the wife had acquired full-time employment. The marriage had lasted 28 years, three children were born in it and the wife had been the 'homemaker' during most of the marriage. Under extraordinary circumstances, having regard to the factors identified above, the court may grant maintenance for a longer period or even life-long, Swedish Marriage Code Chapter 6 § 7.3. This was the outcome in the Supreme Court judgment *NJA 1983 p. 826*. The marriage had in this case lasted 22 years, the wife had been the homemaker making it possible for the

husband to make a career and obtain a high income-level but she was now ill and without any education making her entry into labour market extremely difficult. The court granted the wife life-long maintenance from the husband.

The spouses' standard of living during the marriage is not a factor of relevance when the court decides on issues of maintenance.[1015]

77. May the amount of compensation/maintenance/damages be revised? If yes, on which grounds and to which term (regularly, considering the needs of the petitioner …)?

If a spouse wishes to have the agreed maintenance – or the maintenance granted by a court decree – revised, the former spouses are free to agree on the matter. If they cannot reach an agreement, the spouse who wishes to have a revision must initiate court proceedings.

Both an agreement on maintenance and a judgment on maintenance can be adjusted by the court if there is reason to do so due to changed circumstances, Swedish Marriage Code Chapter 6 § 11.1. The requirement of "change" may relate either to a spouse's need of maintenance or to the other spouse's ability to pay maintenance. Restrictions apply regarding the court's powers to revise the previously agreed or ordered maintenance, unless both parties agree otherwise. Payments already made cannot be reduced or cancelled. An increase the previously determined amount of maintenance can only be granted if there are extraordinary reasons for doing so. A maintenance payment in the form of a lump sum may not be adjusted if the adjustment is contested by either party, Swedish Marriage Code Chapter 6 § 11.1.

A regular "revision "of maintenance between former spouses does not fit well into the Swedish system, considering that post-divorce maintenance as such is exceptional and where granted normally of a provisional nature. The general (automatic) index-adjustment of maintenance is of much greater relevance.

ii. Consequences regarding children

78. Is the obligation to maintain the child linked either to parental responsibility, or to the residence of the child, or to any other element?

Both parents have the duty to maintain their children, irrespective of whether they share custody rights to the child, Swedish Children and Parents Code Chapter 7 § 1.1. The non-residential parent has the duty to pay a maintenance allowance (child support) for the child's needs, in accordance with his or her ability, normally in the form of a periodical amount, paid

[1015] See M. Jänterä-Jareborg, "Swedish National Report" (answer to Q 69), *European Family Law in Action, Volume II: Maintenance Between Former Spouses*, pp. 183 f.

monthly in advance, Swedish Children and Parents Code Chapter 7 § 2 and § 7.1. When the child resides with both parents on an alternate basis, i.e., spends approximately the same time living with both parents, then no maintenance allowances are due, the assumption being that each parent fulfils his or her maintenance obligation while having the child residing with him or her. It has been claimed that the popularity in Sweden of alternate residence arrangements for children has to do with the fact that the parents, by agreeing on alternate residence for the child, do not need to pay anything to the other parent for the child's needs.

The link to the child's residence becomes even more clear when regard is had to the non-residential parent's right to reduction when taking care of the child for a longer period of time. For this parent to become entitled to a deduction of the stipulated amount of maintenance, the child must stay with him or her for an un-interrupted period of at least five days, Swedish Children and Parents Code Chapter 7 § 4.1.

79. By which means does your system organise maintenance of the child by the parent who is not usually living with him/her (maintenance order, supply of assets for the benefit of the child, supply of capital, trust…)?

The most common solution is that the *parents agree* on child support, i.e., the amount which the non-residential parent is to pay for the child's needs. Normally the agreement stipulates a certain sum of money, to be paid monthly in advance. The amount to be paid should depend on the child's need and the parent's ability to pay maintenance, Swedish Children and Parents Code Chapter 7 § 1.1. It has, however, become very common in Sweden that the non-residential parent only pays as maintenance allowance the amount of money safeguarded (subsidiarily) by the Swedish state as a minimum maintenance support for a child. This amount is currently (2012) 1.273 Swedish crowns pro month, corresponding to approximately 140 Euros. The aim of the state maintenance support system is to safeguard each child this minimum amount when the non-residential parents pays nothing, or pays less than this fixed minimum amount. Regrettably, in practice this amount has become the standard amount of maintenance paid by the non-residential parent. As a result, the provisions of the Swedish Children and Parents Code regarding the criteria for child maintenance are in practice set aside,[1016] and the child risks receiving much less than what its needs are and what is the ability of the non-residential parent to pay. It has also become uncommon in Sweden to bring cases on child maintenance to court.

Other kinds of agreements than those concerning monthly payments in advance are unusual in Sweden, which may have to do with the fact that they are subject to special requirements regarding both form and approval by a competent authority. A special provision is found in the Swedish Children and Parents Code, Chapter 7 § 7.2 focusing on agreements on future maintenance to be paid by means of a lump sum or for periods exceeding three months. Any

[1016] See A. Singer, *Barnets bästa, Om barnets rättsliga ställning i familj och samhälle*, 2012, p. 170.

such agreement is subject to special form requirements and must also to be approved of by the local social welfare board. Furthermore, maintenance in the form of a lump sum must be paid to the social welfare board, if the child is under the age of 18 years, Chapter 7 § 7.4.

Any other modes of payment require a court order *and* special reasons, Swedish Children and Parents Code, Chapter 7 § 7.3.

80. May methods provided to carry out maintenance obligation regarding children be determined by parental agreement?

Yes, but with the restrictions mentioned above under Q 80.

81. If yes, is the judge vested with the power to scrutinize this agreement, and does he have a margin of appreciation either to ask the parents to reconsider the agreement, or to directly modify it?

Parental agreements on monthly payments to the child are not subject to the automatic scrutiny of any competent authority. In respect of lump sum payments and payments for longer periods than three months, the agreement is subject to the scrutiny of and the approval by the social welfare board (see above Q 79). Court adjustments of agreed maintenance are dependant on a parent taking the issue to court, requesting for the court to adjust the amount of maintenance. The court may adjust the agreed maintenance either due to changed circumstances or because it regards the agreement to be unreasonable in view of the circumstances which existed when it was concluded and the overall circumstances, Swedish Children and Parents Code, Chapter 7 § 10.

III. PROCEDURE

82. May divorce be granted and its personal and financial consequences settled outside legal proceedings?

Under Swedish law, a divorce decree can only be granted in the form of a court decree. All the personal and financial consequences of divorce may, on the contrary, be settled outside court proceedings.

83. If yes, which is the competent authority to know about these issues? Is that administrative proceeding the sole one or it is an alternative to legal proceedings?

In Sweden, the *social welfare board* of each municipality plays a very central role regarding issues on *parental responsibility*, i.e. custody rights, visitations rights and the child's residence. Its duty is to encourage the parents agree on these issues and, once an agreement is

reached, to scrutinize the agreement and confirm it, if it finds the agreement to be in the best interest of the child. (See above Q 53). Such an agreement is binding on all. This procedure is of a purely administrative nature and it can be seen as the preferable alternative to taking the case to court. Only cases where the conflict level between the parents is very high should be taken to courts.

The parents are free to agree on *maintenance* to the child. If the agreement concerns a lump sum or periods exceeding three months, their agreement must be approved of by the *social welfare board* to become binding (see Q 79 and Q 81). A parent can always initiate court proceedings instead of striving to reach an agreement with the other parent on child maintenance. It is, however, unusual in Sweden to have child maintenance determined by a court.

As regards *maintenance to a spouse* following divorce, party autonomy applies and the spousal agreement does not need to be scrutinised and approved of by any competent authority. The parties are, however, free to take the issue to court, would either one of them wish to do so.

The spouses are free also to agree on the *division of their property*; the agreement is not subject to any requirements of approval by a competent authority. If, however, the spouses cannot agree on the property division or the property division is complicated, the spouse or either one of them can apply to court to appoint a *property division executor* or, if necessary, several property division executors, Swedish Marriage Code Chapter 17 § 1. This application is, normally, made in connection with the divorce proceedings. If the spouses or a spouse is not satisfied with the property division executor's decision on the property division, the dissatisfied spouse must initiate court proceedings against the other spouse within four weeks, Swedish Marriage Code Chapter 17 § 8.2.

84. In your system, which is the court legally competent to grant divorce? Is that Court equally competent to hold about its consequences? Do transnational divorce proceedings fall within the competence of a particular Court?

The competent court to grant the application for divorce is the district court (= first instance court) in the place where either one of the spouses resides, Swedish Marriage Code Chapter 14 § 3. If neither spouse is habitually resident in Sweden but Swedish court has jurisdiction to examine the application, the application shall be considered by the Stockholm District Court (= *Stockholms tingsrätt*).

In domestic cases, the competent divorce court may also consider the consequences of the divorce, Swedish Marriage Code Chapter 14 § 5. In transnational cases, the divorce court's competence to examine the consequences of a divorce is not self-evident, but depends on the issue in question, the circumstances of the case and on whether an international instrument applies covering issues of jurisdiction.

85. After the petition for divorce is presented, must the spouse respect a cooling-off period? If yes, how long is that period of time?

A six-month period of reconsideration is required, which starts to run from the making of the application for divorce, in the following cases, as stipulated in the Swedish Marriage Code Chapter 5 §§ 1-2. a) Both spouses request a period of reconsideration. b) The spouses or one of them has the custody of a child who is under the age of 16 years and who is living with the spouses or a spouse on a permanent basis. c) Where the other spouse objects to the divorce. The purpose of the reconsideration period is to prevent hasty divorces with regard to the spouses themselves and the interests of children under the age of 16 years. After the required period of six months has passed, but within one year of the divorce application, the spouses or either one of them make a separate application for the divorce, Swedish Marriage Code Chapter 5 § 3. Unless this application is made within the stipulated time, the original divorce application lapses.

86. Are the spouses under duty or invited, when divorce proceeding is initiated or afterward in the course of process, to turn to alternative dispute resolution?

Since the 1973 divorce law reform in Sweden (see above Q 2) all mediation and counselling services relating to divorce are voluntary in Sweden and the spouses cannot be required to participate in them. This position was taken due to much criticism of the previously mandatory mediation. Currently, the municipalities in Sweden are responsible for providing family counselling services, for example for couples contemplating divorce, Swedish Social Services Act, Chapter 5 § 3, to enable them to solve their conflicts.

On the other hand, so-called co-operation discussions in disputes on parental responsibility, carried out by the local social welfare board, play an important role, even if they also take place on a voluntary basis, Swedish Children and Parents Code, Chapter 6 §§ 17a and 18. If discussions in this form have not preceded the court proceedings, the court may initiate them and also give instructions regarding issues of relevance. The purpose of these discussions is to enable the parents to understand the children's needs and to strive to reach a parental agreement on all issues of parental responsibility, having regard also to the children's wishes. If the parents cannot reach an agreement, the dispute must be decided by court.

The experiences in Sweden of the co-operation discussions under the supervision of the social welfare board are very positive. 80 % of the parents reached an agreement if the discussions were initiated before taking the dispute to court. When the custody dispute had already been taken to court, 50 % of the parents reached an agreement.[1017] It should,

[1017] See A. Singer, ibid., p. 145.

however, be pointed out that in the majority of all cases in Sweden the parents are able to reach an agreement without instructed cooperation discussions in the regime of a social welfare board or through court intervention.[1018]

Since a law reform carried out in 2006, the court may also appoint a special mediator to enable the parents to reach an agreement on issues of parental responsibility, Swedish Children and Parents Code, Chapter 6 § 18a. This option is to be used in case the court has failed to reach an agreement between the parents but still considers a parental agreement to be within reach. The court may also give special instructions to the mediator.

87. May the competent authority during the course of divorce proceeding make interim orders on

- **the family home,**
- **the children,**
- **maintenance between the spouses,**
- **the consequences of marital abuse ?**

During the course of divorce proceedings, the court may make interim orders concerning maintenance (to the spouse/children), custody of and contact with the children as well as the child's residence, the right to continue to reside in the spouses' joint home until the property division takes place, and the prohibition of mutual visits between the spouses, Swedish Marriage Code Chapter 14 § 7 and Swedish Children and Parents Code, Chapter 6 § 20 and Chapter 7 § 15. Normally, the court considers such issues, even for the purposes of interim orders, only at the request of a spouse.

88. Is appeal available against the divorce order or against an out of court divorce decision?

Yes. Once the district court grants the divorce, the decree on divorce can be appealed to the second instance court (Court of Appeal). The appeal must be lodged within three weeks counted from the date the district court delivered its judgment. A spouse may wish to appeal against the divorce decree, for example, because he or she no longer consents to the divorce. In that case, the court must set the divorce decree aside and declare the beginning of a six month period of reconsideration. If no appeal has been lodged within the three week period following the district court's divorce decree, the divorce decree becomes final, and the marriage is officially dissolved from that date on, Swedish Marriage Code Chapter 5 § 6.

As has been pointed out above, no out of court proceedings on the divorce itself are possible under Swedish law.

[1018] A. Singer, ibid., p. 150.

89. Does a third-party (public prosecutor, child's solicitor, social services, institution aiming at protecting children…) have the right to intervene

- **in divorce proceeding,**
- **in proceedings on parental responsibility if separated from the divorce proceeding?**

If yes, on which grounds?

A third party intervention takes place upon the initiative of the court during the course of the divorce proceedings. Such initiatives by court are common in Sweden in respect of issues relating to parental responsibility, in particular when the parents are not in agreement. The court may not decide the dispute before the social welfare board has been given the opportunity to come with information. The social welfare board, in turn, has the duty to provide the court with information about the children's situation. The same applies if the court proceedings on parental responsibility are carried out separately from the divorce proceedings.

Outside of court any parental agreement on parental responsibility requires the approval of the social welfare board, before the agreement becomes legally valid. This need of approval by a competent authority can be seen as a form of intervention right.

In Sweden not only public authorities but also the general public are under the duty to report to the social welfare board of circumstances which have come to their knowledge and which may require that the social welfare board intervenes to protect the child, for example in the cases of suspicions of child abuse or maltreatment of a child, Swedish Social Services Act Chapter 14 § 1. The information which the social welfare board receives in this manner may become of special importance also regarding decisions on parental responsibility due to the parents' divorce.

90. Are the child's views assessed in legal proceeding for divorce (and/or parental responsibility) or in out of court divorce processes? If yes, what are the methods used for assessing the child's views? May he/she be assisted in this assessment and by whom?

When assessing issues of custody, contact rights or the child's residence (for example, in connection with divorce proceedings) the wishes of the child should be taken into account by the court to the extent possible, Swedish Children and Parents Code, Chapter 6 § 2a.2. This duty of the court does not, however, entail that the court or a judge personally should hear the child. Usually, the child's views are reported to the court by a person specially appointed by the social welfare board for hearing the child, Swedish Children and Parents Code, Chapter 6 § 19. The child may, however, be heard directly by the court if there are special reasons for doing so and it is apparent that the hearing of the child in court will not

harm the child.[1019] The social welfare board, too, has a corresponding duty to take the child's wishes into account before confirming any parental agreement or when supervising investigations on the child's situation when the parents disagree.

The child's views are not assessed regarding the divorce issue itself but only regarding its consequences for the child, such as the attribution and exercise of parental responsibility.

RECOGNITION OF FOREIGN DIVORCE DECISIONS

91. What are the conditions for legal recognition of foreign decisions about:

oo) the termination of marriage,

pp) financial consequences of divorce,

qq) the settlement of matrimonial assets,

rr) parental responsibility,

ss) children's maintenance?

What are the conditions for legal recognition in your country of divorce decisions from a Third State (= outside the European Union) ?

a) As regards *termination of the marriage*, Sweden is bound by the Brussels II bis Regulation in relation to EU member states. Sweden is also a party to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations. In all other cases[1020] the conditions for the recognition of foreign decisions on the termination of the marriage are assessed in accordance with Sweden's generally applicable rules found in an enactment called Act on Certain International Legal Relations Concerning Marriage and Guardianship,[1021] as revised in connection with Sweden's 1973 divorce law reform, Chapter 3 §§ 7-9. The foreign decree on marriage termination must be final and it must have been decreed in a state to which at least one of the spouses had reasonable connection in the form of citizenship or habitual residence or in some other form. With the exception of divorce decrees originating from a state to which at least one of the spouses was connected through citizenship, an exequatur by a specific Court of Appeal in Sweden (Svea Court of Appeal in Stockholm) is normally necessary before a spouse may remarry in Sweden (Chapter 3 § 9.1).

b) Sweden is bound by the EU's Maintenance Regulation, applicable in relation to other EU member states, and by the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance which the EU recently acceded to. Sweden is a party to the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. Arrangements based on an agreement of reciprocity exist in relation to most states of the USA. The recognition of foreign decisions on

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[1019] Act (2009:404).

[1020] Exceptions apply in relation to judgments on marriage termination originating from Denmark, Finland, Iceland or Norway. The recognition of such judgments follows normally the provisions of an inter-Nordic Convention, called the Inter-Nordic Marriage Convention, originally from 1931.

[1021] Act (1904:26 p. 1).

maintenance requires statutory support in Swedish law, which does not exist apart from the situations covered by above-mentioned international instruments which are binding on Sweden. It follows that in relation to most states of the world, their decrees on post-divorce maintenance are not recognized in Sweden.

No international instruments apply currently in Sweden in respect of the recognition of foreign decisions on the *property relations of the spouses*.[1022] But on the other hand, Swedish private international law legislation contains "autonomous", generally applicable rules on such recognition, found in an enactment entitled Act on International Issues Concerning Spouses' and Cohabitees' Property Relations,[1023] §§ 13-14. The starting point is that a foreign decision on such issues is recognized in Sweden on condition that the foreign decision is final and that it has been decreed in the state whose law is applicable to the matrimonial property relations of the spouses or in a state where the respondent spouse was habitually resident. The enforcement of the foreign decision must be preceded by exequatur, by the Svea Court of Appeal in Stockholm, § 16.

c) The answers to b) in respect of the property relations of the spouses apply also in respect of the *settlement of matrimonial assets*.

d) As regards *parental responsibility*, Sweden is bound by the Brussels II bis Regulation in relation to EU member states. Sweden has recently ratified the 1996 Hague Convention on Child Protection which includes provisions on the recognition of decisions from the other contracting states. Sweden is a party to the 1980 European Convention on, *inter alia*, recognition and enforcement of decisions on child custody. The recognition of foreign decisions on parental responsibility requires statutory support in Swedish law, which does not exist apart from the situations covered by the above-mentioned international instruments.[1024] It follows that in relation to most states of the world, their judgments on parental responsibility are not recognized in Sweden.

e) The recognition of foreign decisions on maintenance to children is subject to the conditions set up in the international instruments mentioned above under b). If the foreign decision is not covered by these instruments[1025] it is not recognized in Sweden.

Please only mention the national general rules and not bilateral conventions signed by your country.

92. Can a foreign divorce decision be denied recognition in your country because of violation of public order? Please provide some examples.

[1022] The exception is the Inter-Nordic Marriage Convention, originally from 1931 (see above).
[1023] Act (1990:272).
[1024] Exceptions apply in relation to decisions from the other Nordic states.
[1025] A special maintenance recovery Convention of 1962 applies between the five Nordic states.

Theoretically, a foreign divorce decision could be denied recognition in Sweden on the basis of public policy. Explicit provisions to this effect exist in the Brussels II bis Regulation, in the 1970 Hague Convention and in the Swedish autonomous provisions (from 1973) which are generally applicable, Chapter 7 § 4.[1026] Private decisions on divorce, without involvement of a public authority, at minimum level in the form of the confirmation of the divorce through registration, cannot be recognized in Sweden. Case law could be considered to indicate that the respondent spouse, i.e., the spouse who did not initiate the divorce proceeding, must have been given the chance to be heard.[1027] The fact that the divorce was initiated by the husband in a foreign legal system where a woman's right to divorce is inferior to that of the husband would not as such appear to qualify as a ground to refuse the recognition, not even if the wife objects to the recognition. The liberal Swedish position has to do with Sweden's own liberal divorce law, permitting unilateral divorces (see above Q 2). It cannot be excluded that developments in international human rights law will result in a more strict posture in Sweden. In that case, foreign divorces which breach against a spouse's or both spouses' human rights will not be recognized in Sweden.[1028]

93. Are the foreign divorce decisions related to the citizens of your country subject to publicity measures (registration in official register, registration in official documents : birth certificate, marriage certificate or any others …)? If yes, what are the publicity requirements?

Swedish citizens who have obtained a foreign divorce decree are expected to register it at the Swedish authority in charge of population records.[1029] This requires an application by the concerned citizen to the competent authority, i.e., the authority in charge of population records (civil status records), and normally also a personal visit to this authority whereby the applicant shall deliver for registration purposes the final divorce decree in original or in the form of an authenticated copy. Also other foreign decisions – or any family law status created abroad concerning Swedish citizens – should be registered in Sweden, at the same authority, upon the citizens' initiative. A foreign divorce decree, when recognized in Sweden, applies from the date it became final in its state of origin.

94. If yes, is registration a facultative or mandatory requirement? Who is in charge of this necessary procedure?

See answer above, to Q 93. It is up to the concerned person to apply for the registration.

95. What are the consequences of registration or lack of registration?

[1026] Act (1904:26 p. 1).
[1027] See Supreme Court judgments *NJA 1988 p. 528* and *NJA 1989 p. 95*.
[1028] See M. Jänterä-Jareborg, «Transnationella familjer ur ett internationellt privaträttsligt perspektiv – särskilt avseende äktenskap», *Familj, Religion, Rätt*, 2010, pp.238 f.
[1029] The authority in charge of the population records in Sweden is *Skatteverket*, i.e., the National Taxation Agency.

If the concerned citizen omits to apply for registration of relevant changes in his or her family status, these changes will not be registered in the Swedish population records (civil status records). The citizen's previous family status is, instead, considered to apply until the citizen provides sufficient evidence on the change in any legal context where his or her family status is of relevance. Under Swedish law, registrations of family law status do not as such have any constitutive effect or become legally binding. The registrations admitted and carried out by the competent authority into the civil status records are still, normally, respected by other authorities in Sweden as reflecting the correct state of family law status. That means that they are given a high *evidentiary value*, for example, as the point of departure regarding all kinds of decisions where a person's family status is of relevance. Other authorities are not, however, bound by a civil status registration. In contexts of migration into Sweden and family reunification, the Swedish Migration Agency has occasionally made another assessment on a person's family status than the registration authority. The correctness of the registration may be disputed by the parties themselves. If the registration authority refuses to change an allegedly false registration, the concerned persons can initiate court proceedings on the issue.

A Swedish citizen who wishes to remarry in Sweden after a foreign divorce will, normally need to apply for an exequatur of the foreign divorce decree; it is not sufficient to be registered as divorced in the Swedish civil status records. Exceptions may follow of international instruments, such as the Brussels II bis Regulation providing for automatic recognition.

96. Are there any special remarks you would you like to add with regard to your national law about marriage breakdown?

No.