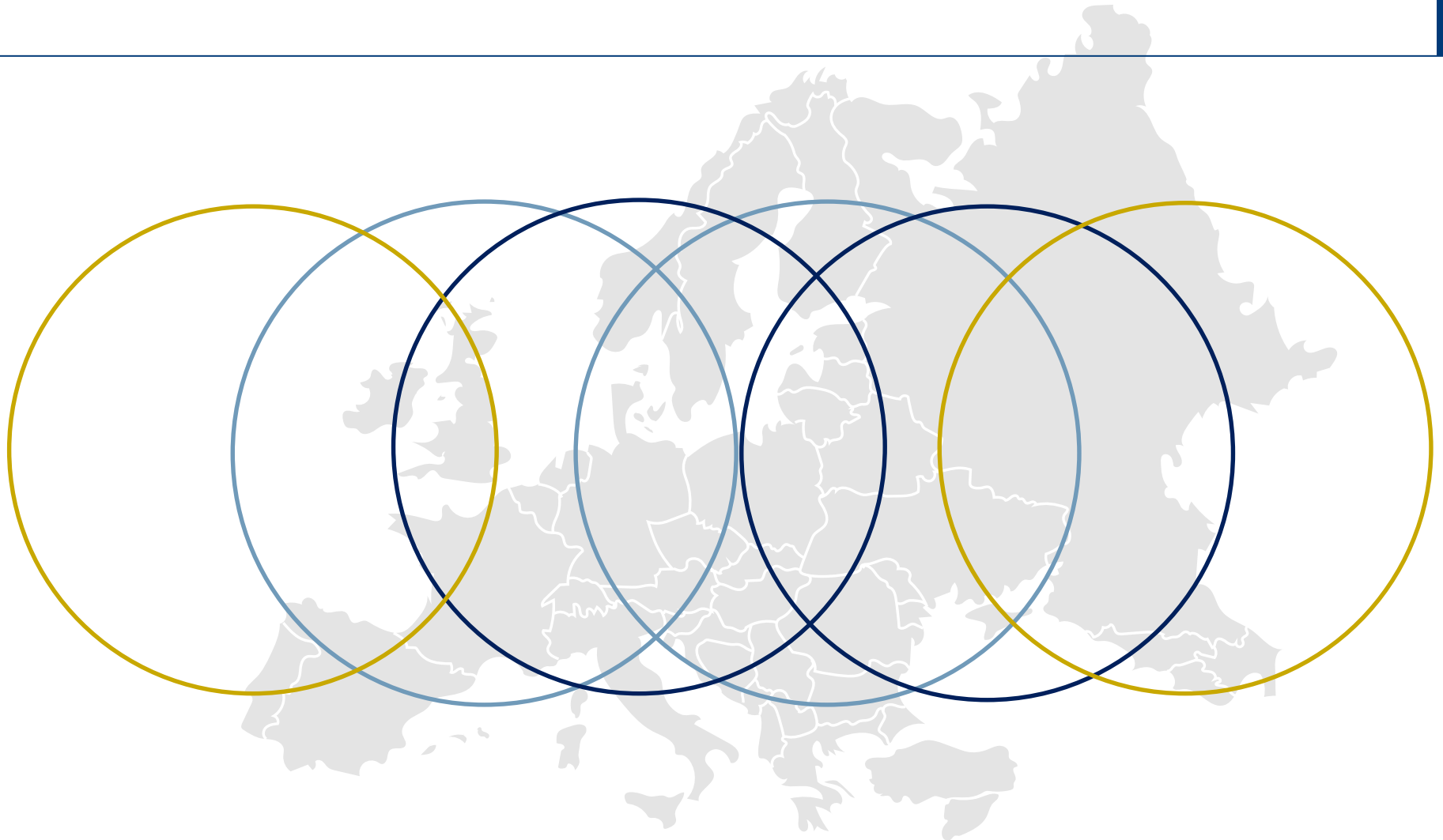




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Divorce in Europe: the Role of the Notary in 33 European Countries

Le Divorce en Europe : le Rôle du Notaire dans 33 Pays Européens



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Introduction

The functions and missions of judges and notaries may appear, at first sight, very different and their contours well defined. Nevertheless, the evolution of family law over the last few decades highlights an increasing overlap between these professions.

The matter of Divorce provides us with a clear example, with its causes and consequences, and gives us an interesting and promising path.

Let's follow this path. The *dejudicialisation* is actually the result of a process: By reviewing its history (1), we'll identify a logical outcome (2).

1. Divorce history

The history of divorce is the result of social evolution behind which the law has constantly adapted. Divorces were initially prohibited for a long time in many countries, following the Christian precepts which governed the rights of the majority of Western countries; they gradually appeared at the end of the 18th century, with the secularization of societies and the promotion of individual freedoms. Indeed, in this context, human will became more important than the divine will and the idea of perpetual unions appeared outdated.

Divorce started to be employed during the French Revolution, and subsequently, at the end of the 19th century and at the beginning of the 20th century. It was a limited remedy, provided for unions too ill to survive: divorce was only admitted on the ground of a fault (infidelity - violence - abandonment of family - etc.); and it only occurred at the request of the injured party.

This disunion was solely contentious and then, required the presence of a judge to determine the seriousness of the misconduct and patrimonial and extra-patrimonial consequences of the divorce (particularly in presence of minor children).

Social developments (longer life expectancy, emancipation of women, less emphasis on religion, etc.) have gradually eliminated the need for fault, and the sole spouses' common will has become sufficient for divorce.

However, many legislations have been slow to admit divorce by mutual consent and have continued to require fault to pronounce the divorce, thus leading spouses to give to their common will the necessary appearance of a fault.

European legislations have finally admitted divorce by mutual consent but have not reconsidered the real nature of this new form of divorce. Most of them have simply added the divorce by mutual consent to the list of causes

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of dissolution of marriage. Nevertheless, within the framework of this new kind of divorce, the judge's role has changed: they ratify a contract freely concluded between the spouses, rather than render a judgment.

This global analysis of the evolution of family law shed light on the real nature of divorce by consensual agreement and on the mission assumed by judges within the procedure: they ensure the free and informed consent of the spouses and control the legality of their agreement.

Judges are, of course, entirely legitimate in this mission. However, when there is no dispute to resolve, notaries are also a pertinent authority, able to assume this mission. This observation paves the way for a transfer of competences and for the *dejudicialisation* of divorce.

2. The dejudicialisation of divorce : a logical outcome

Extra-judicial proceedings, and among them, "divorce without a judge", are consequences of several phenomena: "contractualisation" of family law, promotion of individual rights, decline of public order. Of course, it is also a public authorities response to free up the burden in Courts, given the increasingly conflictual family relations (due to successive marriages and a longer life expectancy: for a long time, marriage was dissolved by death and rarely by divorce).

Thus, in many States, spouses can now divorce by contract, without a judge.

If spouses are free enough to engage by themselves in marriage, asking why they could not freely divorce in terms agreed between them is a valid point. Nevertheless, very few states rely entirely on the spouses willingness and completely disengage public authorities from divorce process. Rather than a disappearance, we are witnessing a substitution of the judge by another public authority: the notary. Already called "out-of-court magistrate" by the European Court of Human Rights¹, do they not have all the qualities to replace overworked judges, and assume a central role in the European movement of *divorces without a judge*?

The objective of this study is to draw the contours of *divorces without a judge* in Europe.

We will first see that different models are possible; notary's missions actually depend on the political objectives of the State (I).

Then, since there are several possible models, we must recognize the limits to this movement: in certain circumstances, the judge must be called upon (II).

¹ ECHR, *Ana Ionita vs Roumanie*, 21 mars 2017

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I. Divorce before a notary: the possibilities

Divorces before a notary are not based on the same model everywhere, and the missions of the notary are different, more or less active, according to each States.

In some countries, their mission is only to register a divorce convention already negotiated between the spouses, without a real control by the notary. In this model, the State allows a large space for party's autonomy (A).

In others countries, the role of the notary is much more active: they have to control the convention and finally pronounce the divorce. Sometimes, before pronouncing the divorce, the notary is also in charge of mediation. In these cases, the notary is truly an "out-of-court magistrate" (B).

A. The notary registers the convention of divorce

FRANCE, GREECE

The French and Greek systems allow spouses to negotiate and decide, provided they are assisted by their own attorney. Here, the divorce is based on the principle of party's autonomy and the notary registers the convention at the end of the process. The notary's intervention is needed to make the divorce enforceable, but not to verify if the contract is well-balanced, and even less to give legal advice to the parties, or assume a role of a mediator or conciliator.

For this reason, in others countries (Italia, Portugal, Russia, Belarus, Ukraine, Georgia), this role of "registrar authority" is assumed by other entities, like the civil registry officer, and not necessarily by the notary.

In this model, the parties are informed and counseled by their respective attorney, which is generally mandatory; and their consent is protected by a public order, closer to contractual/consumer law than family law (the convention has to respect some legal formalism, and the divorce can be granted only after a cool-off period: 15 days in France, 10 days in Greece, one month in Estonia, Russia and Belarus...).

In short, the role of the notary is minimal here; he is simply asked to register and authenticate the agreement, in order to give effect to the divorce agreement, but not to conciliate, nor even to verify the consent or to advise the parties. This is particularly true in France, where the registration by the notary of the convention of divorce does not necessarily have the character of an authentic instrument. "*The notary does not have to check the content or the balance of the agreement*", according to the circular from the French Minister of Justice. He may alert the lawyers to a clause that is contrary to public policy, but his task is mainly to check the formal conditions required by the law, and compliance with the cool-off period.

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In others countries, notaries do more than register the divorce, they “pronounce” it and their mission and surveillance powers are much more important.

B. The notary pronounces the divorce, by authentic act, as an “out-of-court magistrate”

SPAIN, ROMANIA, LATVIA, SLOVENIA

1°) The notary controls the convention and pronounces the divorce

In Spain and Romania, the notary not only registers the convention of divorce, he also controls its legality, the consents of the spouses and finally pronounces the divorce, in a notarial instrument.

Here, the spouse’s will is not enough to divorce, an independent public authority, as the notary, has also to verify that the convention is well balanced and respect the rights of both spouses.

In this model, the notary pronounces the divorce, by drafting a real authentic act.

For example, in Romania, the notary assumes a legal control of the spouses agreement, regarding child custody and access, maintenance, alimony, homestead, etc.

In Spain, the spouses are advised by a lawyer, whose intervention is mandatory, but the notary has to control the legality of the agreement and especially verify that it is not seriously damaging or discriminatory for a spouse. Here, the spouses’ lawyers lead the negotiation and try to conciliate them; in others states, the notary plays directly the role of a mediator.

2°) The notary takes part to the negotiation between the spouses and then, pronounces the divorce

In Slovenia, the agreement between the spouses is drawn up by the notary, with no need for lawyers. In Estonia, in non-judicial processes, legal representation by attorney is not mandatory as well. The notary is considered as an independent authority, neutral and impartial, able to guarantee a well-balance contract.

In Latvia, the notary not only pronounces the divorce, they also help spouses reach an agreement (on assets division, maintenance, access right etc.), in a notarial deed. Thus, the Latvian notary tries to conciliate spouses, in order to avoid a judicial procedure.

Indeed, divorce without a judge is possible only when there is no dispute between spouses.

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II. Divorce without a judge: the limits

There are two types of limits. First, internal limits defined by the State itself, in its domestic law: the contract is sometimes not admitted regarding extra-patrimonial issues (A). Second, external limits set by another country, at the moment of the recognition of the divorce (B).

A. Internal limits regarding extra-patrimonial issues

Even in the frame of a judicial divorce, the spouses can often conclude agreements before a notary, about the consequences of the divorce. These agreements avoid lengthy court disputes that delay and increase the cost of divorce proceedings and put a strain on personal relationships. These conventions are common in patrimonial issues, but not really for extra-patrimonial matters (1). Furthermore, in many states, divorce without a judge is not possible in presence of minor children (2).

1°) Agreements regarding extra-patrimonial matters

Many States allow agreements between spouses concerning patrimonial consequences of the divorce (and especially for division of matrimonial property). These conventions are mostly concluded before a notary², at any time (before, during or after the divorce before a Court³).

However, agreements regarding extra-patrimonial questions are more limited, and sometimes forbidden before the divorce. It is mostly the case in the States where divorcing without a judge is possible:

*In Spain, agreements about maintenance in presence of minor children are not possible before the divorce.

*In Italia, private transactions about parental responsibility, access rights to the child, maintenance and alimony, have to be sent to the Public Prosecutor or to the Court.

*In France, the spouses can't conclude, in advance, before a potential divorce, conventions about alimony and compensatory allowance.

By contrast, in some States, when the divorce occurs before a Court, these conventions are permitted:

*In Germany, spouses can conclude before or during the divorce, agreements on division of common property, compensatory allowance, alimony, family homestead. These conventions must be drawn up by a notary to be valid. Same thing in Slovenia where agreements on alimony have to be settled in a notarial instrument.

² In Belarus, Russia, Ukraine, Germany, Belgium, France, Lithuania...

³ For divorces by mutual consent, these agreements are concluded before the divorce

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*In Eastern Europe, the spouses can even reach an agreement about parental responsibility, access right and maintenance, during a judicial procedure of divorce, but only if this agreement is notarized⁴. However, it is important to notice that, even if these notarized conventions are possible during the divorce, the divorce is necessarily granted by a judge, in presence of minor children, in Latvia, Russia, Belarus and Ukraine⁵.

2°) Divorce granted by a Court in presence of minor children

Among the States who allow divorce without a judge (Spain, Latvia, Slovenia, France, Greece, Belarus, Italia, Portugal, Russia, Ukraine, Georgia, Estonia, Romania), few allow it when spouses have minor children (Romania, Latvia, Greece, France, Estonia, Georgia).

Generally speaking, in presence of minor children, the divorce happens before a Court (Spain, Russia, Italia, Belarus, Ukraine, Slovenia⁶).

Does it mean that the magistrate is the only authority able to appreciate the best interest of the child? Perhaps for most States, but not for all: in Romania for example this power of appreciation belongs to the notary. When spouses have minor children, they have no choice, they cannot divorce by mutual consent before the civil registry offices, only before a notary.

Finally, whatever the case, it seems important, for many states, to give an opportunity to children to be heard by an independent public authority, regarding parental responsibility issues.

This condition is also important to ensure that the divorce decision will be recognized overseas.

B. External limits : the recognition of non-judicial divorces abroad

Two key considerations seem essentials for the recognition of a divorce decision issued abroad: the instrument in which the divorce was granted (1) and the hearing of the child (2).

1°) The instrument in which the divorce was granted

The most classical way to divorce is of course before a Court, and this form of divorce will be easily recognized overseas. However, most States also recognize divorces not granted by a judge but by another authority. In the States where there is no extra-judicial divorces, very few of them consider that judicial divorce is a public policy rule⁷.

⁴ Latvia, Russia, Belarus, Ukraine

⁵ But not in Latvia, where spouses can divorce without a judge even if they have minor children

⁶ In Portugal also, the agreement between spouses about parental responsibility must be submitted to the judge.

⁷ However, Turkey declared that they did not recognize "administrative" decisions of divorce; the decision must be a judgment.

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Thus, a divorce granted by a public authority, as a notary or a civil registry officer, can be recognized. The authentic instrument is a valid document, with the same effects than a judicial decision.

It is not the same, however, when the divorce is granted through a private instrument countersigned by lawyers and filed in the official records of a notary (as in France). If, under the European regulation 2019/1111, such agreements on divorce are recognized by other member states⁸, there is no certainty outside its scope. Obviously, non-members states are not bind by this rule and can refuse to recognize these agreements. Furthermore, even for member states, there is no obligation to recognize the consequences of the divorce (regarding matrimonial regime liquidation, compensatory allowance...) because the regulation 2019/1111 applies only to the principle of the divorce, and not its consequences.

Concisely, among all the possible instruments used in non-judicial divorces, it is easy to say that authentic instruments present the best safeguards for legal certainty and the best chances for international recognition.

Nevertheless, the hearing of the child in the frame of non-judicial divorces remains a major challenge.

2°) The hearing of the child

As mentioned, many countries do not allow spouses to divorce without a judge when they have minor children, in order to give children the possibility to be heard by the judge. Therefore, it is fair to ask if these States would recognize the consequences of a divorce in which the child was not given the opportunity to be heard, by the judge, or at least, by another public authority.

Under the EU regulation 2019/1111, there is precisely a specific ground for refusal of recognition when the authentic instrument was formally drawn up or registered, or the agreement was registered, “without the child who is capable of forming his or her own views having been given an opportunity to express his or her views”⁹. On this ground, some countries committed to this value¹⁰, could refuse to give effect to a divorce in which no authority had heard the child.

In conclusion, regarding non judicial divorces, divorces before a notary, granted by an authentic instrument, in the absence of minor children, present the best chances for international recognition.

Moreover, even in presence of minor children, it could be asked to the notary to contribute to the hearing of the child, instead of the judge. Indeed, the hearing of the child by the notary could be an interesting safeguard for the best interest of the child¹¹.

⁸ According to the article 65 of the EU regulation 2019/1111: “Authentic instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required”; and according to the article 2, an agreement means “a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State in accordance with Article 103 for that purpose”.

⁹ Article 68.3.

¹⁰ As Germany

¹¹ As it is the case in Romania

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Outlook

As an outcome of this analysis, we will examine the relevance of this movement of dejudicialisation and the function of notaries. Substituting judges in this non-contentious mission, notaries give a successful and efficient example of the development of voluntary jurisdictional proceedings.

Some thoughts can be noted:

Regarding the place of the contract

The evolution of family law is clear; the place of contractual freedom and autonomy of will is growing. More and more often, the contract will be the law of the parties.

Need of guidance: The freedom given to the parties to determine their agreements makes essential to have a qualified legal professional to inform them about the legal rule, the various possible choices and the consequences of these choices.

Impartiality: In this context of mutual agreement between spouses, contracts replace judgments, and therefore, the legal adviser drafting the contract has to be impartial.

Need for public authority to monitor the legality: proper application and compliance with the law in the contract must be monitored before the conclusion of the contract (ex-ante) and not after, as part of a litigation (ex-post).

Regarding the place of the authentic notarial instrument

Enforceability and probative value: the notarial authentic instrument (as an *instrumentum*) appears to be the perfect substitute for the court decision. It has the same probative value and enforceability as a final judgment.

Registration in public registers: Many court decisions have to be published in public registers relating to personal status (adoption - recognition of filiation - divorce - registered partnerships - etc.). The notarial instrument provides much greater legal certainty than private deeds, and the same as judgments.

Conservation: Conservation of these documents must be ensured, which is the very essence of the notarial act.

Cross-border circulation: As a public document, circulation of authentic notarial instrument is ensured within the European Union, and even beyond, in the same way as a judgment.

Interprofessional collaboration: similarities between magistrates and notaries (by their status, training, deontology,

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discipline, etc.) suggests, beyond the subject of divorce, greater possibilities for collaboration between them.

Notaries can carry out contractual processes, as mediators, and judges can be called upon on an ad hoc basis: when an unsolved difficulty requires a judicial decision. The *Division of property* procedure in France is an example of that collaboration between the two professions.

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Conclusion

In divorce matters, where there is no dispute to be resolved, the transfer of competences is simple. Divorce without a judge is a model to be followed: it improves public service, adapts to citizens' expectations, and frees up the burden in Court. In the absence of litigation, judges provide a limited added value and even contribute to an unjustified lengthening of proceedings.

This study about Divorce without of judge reveals:

- *A flexible model*: various models are possible, depending on legal situations, political and sociological realities, in each country.
- *A model for the future*: it adapts to most situations and perfectly follows the evolution of the law (increasing place of individual liberties, autonomy of the will and contractualisation of legal relationships).

This remarkable model, offered only by Continental Law, based on the permeability of the functions of judge and notary, in the context of non-contentious legal activities, is possible because of the proximity of our professional status and public functions.

We must undoubtedly maintain and cultivate this permeability, this proximity, dare we say it, this fraternity of our professions, which are perfectly complementary and belong to the same family.

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STATES WITH JUDICIAL DIVORCES ONLY

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium	
Marriage	Are prenuptial agreements allowed?	Yes	Yes	Yes	
		Yes	Yes	Yes	
	Can these contracts fix in advance some aspects of a potential divorce?	Yes, the spouses may make agreements, including before the divorce, on their matrimonial property, on the obligation to maintain for the time after the divorce, on the compensation of pensions.	Yes, these conventions are able to fix in advance some aspects of a potential divorce, submitted always to the Court's judgement on its validity, regarding interests of those more vulnerable at the moment of divorce.	Yes, the spouses may make agreements, including before the divorce, about Alimony and their matrimonial property	These conventions can only relate to the marital property consequences. Maintenance obligations for example cannot be the subject of prior agreement. Yes, these conventions must be set up by a notary. Then, they are published in a notarial register of Marriage contracts. Such registration is mandatory.
	Does the notary have a role in their setting up and/or publication? According to which terms?	Yes, these conventions (prenuptial agreements and divorce agreements) must be authenticated by a notary.	Yes, "ad solemnitatem" form: they must be authorized by a notary.	No	No
	Does the notary have a role in the marriage celebration?	No Only before the registrar of births	No	No	No
	Does the notary have a role in the marriage publication?	No	No	No	No

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium	
The divorce preparation	legislation provide for an upstream analysis of the patrimonial situation of the spouses?				
	To which extent?	Extrajudicial agreements authenticated by a notary, on the patrimonial situation and the consequences of the divorce, in case of a non contentious divorce. Such agreements concern the division of common goods, maintenance, pension equalization, parental custody, etc.	Determination of compensation, calculation of support payments and property division.	Agreements about division of property. If the spouses disagree about the division, it will be done before a Court.	Inventory of the patrimonial assets, division of co-owned property. However, the notary does not determine the calculation of support payments.
	Are the services of a notary a mandatory step during the divorce process?	No, notary's involvement is not mandatory in the divorce process.	The transfer of immovable assets or shares must be authenticated before a notary.	No	No, optional.
	Does the notary have a particular mission?	The spouses may enter into a divorce agreement which is drawn up by a notary. The notary does not have a special mission but gives independent legal advice to both parties.	They "notarize" the transfer of immovable property.	Legal advices about the divorce agreement.	Legal advice, Draft the agreements on the division of property.
	Intervention of others legal professionals?	During the divorce proceeding, the parties have to be represented by at least one lawyer. However, no participation of a lawyer is necessary for drawing up an agreement before a notary.	Lawyers, patrimonial experts, judge, prosecutor (if there are minors or people with modified capacity involved), and also government social services, if needed	Lawyers	Lawyers and mediators (optional)
	Appointment of the notary	By the parties	By the parties	By the parties	By the parties if they agree, By the judge, if they disagree

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium	
The divorce judgment	Does the notary intervene in the frame of the divorce judgement?	No, marriage can be dissolved only by judicial decision on the petition of one or both spouses. The notary's role is limited to the drawing up and authentication of divorce agreements.	No	No	The divorce is always pronounced by a judge. However, for divorce by mutual consent, the division of matrimonial property is prepared by a notary.
	What are the various forms of divorce?	Divorce by mutual consent or contentious divorce, but always by judicial decision on the petition of one or both spouses.	Judicial divorces only	Judicial divorces only, on the petition of one or both spouses: - on the ground of a fault; - after a separation period of 3 years; - by mutual consent	Judicial divorces only: *Irretrievable breakdown of the marriage *Divorce by mutual consent
	How is the divorce granted?	By judicial decision only	By judicial decision only	By judicial decision only	By judicial decision only
	Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium	
The consequences of divorce	Does the notary intervene after the divorce is granted?	Yes, but optional	Yes, to transfer immobile assets or shares (exclusive competence of the notary)	Yes, sometimes	<p>*In case of divorce by mutual consent, the notary intervenes in advance, before the divorce, in order to prepare the liquidation of the matrimonial regime and the division of the estate.</p> <p>*In case of a contentious divorce, the notary is generally involved during or after the divorce procedure, in order to handle the liquidation of the matrimonial regime and the division of the assets.</p> <p>*If the parties do not agree with the division as proposed by the notary, the court will have to settle the matter.</p>
	If yes, what are their missions?	<p>*The parties can agree on maintenance for the time after the divorce, in a notarial deed.</p> <p>*The transfer of immovable property after divorce must be authenticated before a notary.</p>	They "notarize" the transfer of immobile assets or shares.	Division of the assets	<p>Liquidation of matrimonial property regime and the division of common property.</p> <p>The notary is the only competent authority to handle the division of property.</p>
	Appointment of the notary	By the parties	By the parties	By the parties	<p>By the parties, when there is no dispute between them.</p> <p>In case of dispute, by the judge.</p>
	Frame of their mission (usual role or specific power)	Usual role, as a public official	Usual role	Usual role	<p>The notary has specific powers that are appointed to him by law, to handle all aspects of the divorce, (except for the pronouncement of the divorce).</p> <p>In case of a divorce by mutual consent, the notary performs these tasks before the divorce is granted by the judge; in case of a contentious divorce, the notary performs these tasks afterwards.</p>
	Are other legal professional still involved in the divorce procedure?	The parties may be represented by lawyers, but their involvement is not mandatory.	Lawyers and experts may still be involved in the divorce consequences, if parties ask for them.	Lawyers, before the Court, if an amicable division is not possible.	<p>The notary has the exclusive competence to handle the property consequence of the divorce.</p> <p>Parties may at this stage be represented by lawyers; The role of the judge here is to intervene if the notary needs certain issues to be clarified before being able to come to a division of the property.</p>

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium
Median cost of a divorce	<p>*The cost depends on the complexity of the case, the way the parties decide to settle the divorce, and the value of their property.</p> <p>*At least one lawyer is involved. Lawyer fees are regulated by law.</p> <p>*Notarial agreement reduce the court costs and the length of the procedure.</p> <p>*Notary fees are regulated by law and determined on the basis of the value of the transaction.</p> <p>*The transfer of real estate in the context of divorce is exempt from real estate transfer tax</p>	-	<p>Approximately 1000 euros</p> <p>+ lawyers's fees, and notarial fees for the division of the assets, depending on their value</p>	<p>The cost, both concerning the fees and the taxes, depends on the volume of the estate, and whether there is real estate involved.</p> <p>The notary fees are regulated by law.</p>
The notary and the foreign divorce				
Does the divorce granted by a notary is recognized?	Yes, decisions by administrative authorities or notaries are recognized.	Yes, after an exequatur procedure before the Andorran Superior Court of Justice. The divorce must be inscribed in the Andorran Civil registry.	* Yes, under the scope of the EU Regulation 2019/1111 *Outside the EU, yes if some conditions are fulfilled (the divorce decision respects the Austrian fundamental values, spouses have been heard by the judge, austrian authorities were not competent, etc.)	Yes, if the decision comply with the requirements for recognition.
Role of the notary in the reception of a divorce granted overseas	No	No specific role	No specific role	No
Role of the notary in the recognition if the divorce granted overseas	No	No	No	No

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Germany	Andorra	Austria	Belgium	
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes EU Regulation 1259/2010	No	Yes EU Regulation 1259/2010	*Yes (EU Regulation 1259/2010): *Yes, outside the scope of the EU regulation: spouses can choose the law of their nationality or the Belgian law.
	Is it possible to choose the jurisdiction? When?	No EU Regulation 2019/1111	No	No EU Regulation 2019/1111	No, neither the Belgian PIL-Code, nor the Brussels-IIter Regulation
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes if the determination had been made according the EU Regulation 1259/2010	-	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010, or the rules on recognition in the Belgian PIL.
Current laws	About the role of the notary in the divorce procedure BGB (German Civil Code): Sec. 1410 BGB (1957): The marriage contract (divorce contract) must be recorded by a notary. Sec. 1585c BGB (2008): Agreements on the obligation to maintain for the time after the divorce, that are entered into before the divorce becomes final and absolute must be notarially recorded. [Sec. 311b BGB (2002), Sec. 925 BGB (1969): The transfer of immoveable property after the divorce must be authenticated before the notary	No law about the role of the notary in the divorce procedure.	-	Judicial Code, Articles 1210 and further.	

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

		Germany	Andorra	Austria	Belgium
Prospective	Effectiveness of the divorce system Are reforms required?		Divorce system in Andorra shows enough effectiveness.	The missions of the notary should be extended.	The divorce by mutual consent is quite effective in practice. The divorce before a judge was revised in 2012, to make this procedure more effective, for example by enabling the notary to obtain information from third parties. It works well in practice and there is currently no need to make adjustments.
	Benefits of the notary intervention in the divorce procedure	Amicable agreements avoid lengthy court disputes that delay and increase the cost of divorce proceedings and put a strain on personal relationships. At the same time, the burden on civil courts is reduced by the notary's intervention.	-	-	The notary is an impartial and independent legal advisor, who works towards the best solution for both spouses. In the current divorce by mutual consent the notarial procedures is more time-efficient than the procedure before the court.
	Possible opportunities of improvements that could be made in the system		A notary intervention may help to improve the system, as people in our times is more attached to friendly solutions, far from rigidity of judge's decisions.	The intervention of the notary within the divorce procedure is recommended. It would reduce the delays before Court.	It could be improved if in cases without (minor) children, the notary could deal with every aspect of the divorce, including pronouncing it.

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Lithuania	Hungary	Serbia	Kosovo	
Marriage	Are prenuptial agreements allowed?	Yes	Yes	Yes	
	Can these contracts fix in advance some aspects of a potential divorce?	Yes, these conventions can relate to the division of property in case of divorce, mutual maintenance, aspects of child support, alimony, etc.	-	Yes	No, only the contracts on division, administration and disposition of the joint marital property are allowed.
	Does the notary have a role in their setting up and/or publication? According to which terms?	The contract is concluded in notarial form only, in the presence of both spouses. Then, the contract is registered in the Register of marriage contracts: the notary transmits the data directly to the Marriage Register manager by electronic means of communication.	The marriage contract is drawn up in the form of a notarial deed, and then registered in a national register.	*The marital agreement is concluded in the form of a notarized instrument. *The notary has to warn the party on the consequences of the agreement. *There is no register of marriage, but if the contract refers to immovable property, the rights must be registered at the Land Registry.	Notarization of the agreement of the spouses regarding the division, administration and disposition of the joint marital property. Legal advice
	Does the notary have a role in the marriage celebration?	No	No	No	No
	Does the notary have a role in the marriage publication?	No	No	No	No
	The divorce exists since...	1940	1895	1844	-

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Lithuania	Hungary	Serbia	Kosovo	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	Optional (if the spouses ask for it)	No	Optional	Yes, but not by a notary
	To which extent?	A mutual agreement of the spouses (about residence and maintenance of the minor children, maintenance of one the spouse, adjustment of the community property, etc.) certified by a notary may be brought to the court granting divorce. However, this agreement is not mandatory.	-	In case of divorce by mutual consent, spouses may conclude, before the notary, a written agreement on common or individual exercising of parental right and an agreement on settlement of joint estate and submit such an agreement with the petition for divorce by mutual consent to the court (the agreement is subject to control by the court)	Agreement about the division of joint property.
	Are the services of a notary a mandatory step during the divorce process?	No. However, Since 2020, family disputes are mediated before going to the court, and notaries are qualified to mediate any civil dispute.	No, optional. The notary is entitled to draw up into notarial deed the agreement presented by the parties jointly or approve the settlement (as a solution of their previous legal dispute) presented by the parties jointly. The notary may use some kind of mediation methods between the parties.	No	Only if the spouses want to reach an agreement about the division, administration or disposition of their immovable property. If the spouses do not find a compromise, the division, administration and / or disposition of the joint property will be done by the court.
	Does the notary have a particular mission?	Conclusion of agreements between the spouses, and possibly, mediation	Conclusion of agreements between the spouse, Mediation. The notary may draft agreements of the parties that could be used before the court and make the court procedure faster and cheaper.	Draft agreements between the spouses; Gives legal advices	The notary plays the role of a neutral legal advisor in notarizing the notarial acts required by the spouses. The notary may also be involved in asset identification and asset valuation operations, provided that the notary is authorized to do so by both spouses.
	Intervention of others legal professionals?	-	The spouses could involve a lawyer, expert, notary, mediator to prepare settlements, draft agreements, which will be used in the divorce procedure, but it not mandatory.	-	Lawyers, Mediators (if the spouses agree in advance on a mediation procedure).
	Appointment of the notary	By the parties	By the parties, but in case of settlement procedures the residence of the parties/ one party shall establish the competence of the given notary.	By the parties, at their own discretion	By the parties

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Lithuania	Hungary	Serbia	Kosovo	
The divorce judgment	Does the notary intervene in the frame of the divorce judgement?	No. The divorce is granted by judicial decision only.	No, divorce before a notary is not possible. However, same-sex partners separation can be done before a notary.	No	No
	What are the various forms of divorce?	Judicial divorces only: - By mutual consent, if: 1) over a year has elapsed from the commencement of the marriage; 2) the spouses have made a contract in respect of the consequences of their divorce (property adjustment, maintenance payments for the children, etc.); 3) both the spouses have full active legal capacity. - On the application of one of the spouses filed with the court of the district where the applicant resides, if at least one of the following conditions are satisfied: 1) the spouses have been separated for over a year; 2) after the formation of the marriage one of the spouses has been declared legally incapacitated by the court; 3) one of the spouses has been declared missing by the court; 4) one of the spouses has been serving a term of imprisonment for over a year for the commission of a non-premeditated crime. - Divorce on the ground of the fault of one or both of the spouses	Judicial divorces only. However, by the Hungarian Civil Code the spouses shall agree, in a notarial deed, in the following matters: termination of the marital community of property between the parties; accommodation of the minor children; contact with the minor children; support and maintenance of the divorced spouse and/or minor children. If there are no agreement in the above mentioned questions, the court shall decide in that matters.	Judicial divorces only: - at the request of one spouse, or both spouses; - divorce by mutual consent, in which the spouses conclude a written separation agreement. In such a case the court hands down a single decision by which it resolves all the personal, family and property relations between the spouses.	Judicial divorces only: - One spouse or both by mutual agreement may request a divorce; - One spouse may request divorce when marital relations have seriously and continuously become disordered or when due to other reasons the marriage has irretrievably broken down.
	How is the divorce granted?	By the judge	By the judge	By the judge	By the judge
	Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

	Lithuania	Hungary	Serbia	Kosovo	
The consequences of divorce	Does the notary intervene after the divorce is granted?	No, property may be divided before a notary, but before (not after) going to the court for a divorce case.	Yes	No	Yes, if the spouses ask for it.
	If yes, what are their missions?	-	If the court did not make decision in certain questions, the parties could make further settlements and agreements before a notary, especially on their common properties or minor children. Furthermore, if several circumstances change after the divorce, they are entitled to make new agreements (e.g. raising the amount of support and maintenance, etc.). The intervention of the notary is not mandatory (the spouses can find a lawyer to draft their agreement or choose the court settlement procedure also).	-	The spouses can use the notarial services for the division of joint property, during the marriage and after its termination by divorce.
	Appointment of the notary	By the parties	By the parties	-	By the parties
	Frame of their mission (usual role or specific power)	Usual role	Usual role	-	Usual role
	Are other legal professional still involved in the divorce procedure?	If the court decision is not executed properly, a bailiff may intervene if it is needed to, for example, by recovering monetary compensation awarded by the Court.	Lawyers and mediators but not mandatory	-	Lawyers if the spouses did not find any compromise for the division of property (judicial procedure in this case)
	Median cost of a divorce	-	Fees for a divorce lawsuit is ≈ EUR 80 + fees for division of the marital common estates: 6% of the value is payable. + attorney's fees, subject to free agreement.	Around 50 euros + Lawyer's fees	Approximately: court fees can range from 50 euros to 150 euros; notary fees depend on the value of the spouses' property and can range from 20 euros to 1000 euros.

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

		Lithuania	Hungary	Serbia	Kosovo
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?		Yes	Yes A decision of another authority which is equivalent to the court decision in the country where it was taken shall also be considered a foreign court decision.	Yes
	Role of the notary in the reception of a divorce granted overseas	No specific role	*If the division of the property located in Hungary is to be carried out, a notary may draw up a contract terminating the marital community of property and inform the registration authorities to record the changes; *If a Hungarian notary has a language license of a foreign language, then the notary could translate the grant of divorce and could submit the petition to the registrar in order to register the divorce.	No role	No role
	Role of the notary in the recognition if the divorce granted overseas	No	No	No	No
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010	No	No
	Is it possible to choose the jurisdiction? When?	No EU Regulation 2019/1111	No EU Regulation 2019/1111	No	No
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010	-	-
Current laws	About the role of the notary in the divorce procedure	Civil Code, Law on the notarial profession; Civil procedure code	-	-	-

1. Judicial divorces with notary's intervention

Germany, Andorra, Austria, Belgium, Lithuania, Hungary, Kosovo, Serbia

		Lithuania	Hungary	Serbia	Kosovo
Prospective	Effectiveness of the divorce system Are reforms required?	Since 2020, compulsory mediation applies to the settlement of family disputes. Notaries may provide mediation services if they are in the mediators list.	The Hungarian divorce system handles the marriage as a valuable legal institution and the effective Hungarian constitution provides extra legal guarantees for defending the marriage as a basis of the family life and breeding children.	Divorce before a notary is being considered but there is no draft reform yet.	-
	Benefits of the notary intervention in the divorce procedure	Mediation	-	-	-
	Possible opportunities of improvements that could be made in the system	-	Notarial involvement would be possible in a divorce procedure provided that there would be no dispute between the spouses. However the Hungarian Constitution should be amended for creating such opportunity	Divorce before a notary would be quicker and more effective	There is a space and opportunity for an extrajudicial procedure of divorce. It would be more effective and easily accessible to all citizens.

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Bulgaria	Croatia	Malta	Switzerland	UK	
Marriage	Are prenuptial agreements allowed?	Yes	No	Yes	Yes	There only exists one form of marriage contract and it gives the right to parental responsibility and the right for a spouse to live in the matrimonial home.
	Can these contracts fix in advance some aspects of a potential divorce?	The matrimonial contract shall contain agreements about property relations as: <i>the rights of the parties over the property; the property consequences in case of divorce; the support of the spouses during the matrimony, as well as in case of divorce, etc.</i> The matrimonial contract shall not contain provisions in case of death.	No	There are instances, whereby the parties would agree beforehand that certain aspects agreed to within the pre-nuptial or post-nuptial agreement would remain unchanged in case of a divorce. However, it is not possible for a couple to make provisions of how the estate is to be liquidated in the eventuality of divorce.	No	The marriage contract only gives the right to parental responsibility and the right for a spouse to live in the matrimonial home.
	Does the notary have a role in their setting up and/or publication? According to which terms?	Yes, the matrimonial contracts shall be concluded personally by the parties in writing with a notary certification of the contents and the signatures.	No	Pre-nuptial deed is published by a notary, and does not require court authorization.	-	The notary does not prepare nor attest any contracts in relation to the marriage.
	Does the notary have a role in the marriage celebration?	No	No	No	No	No
	Does the notary have a role in the marriage publication?	No	No	No	No	No
The divorce exists since...	Divorce has always existed as an institute in the Bulgarian legislation; it is currently regulated by the current Family Code instituted in 2009.	1946	Since the 01 October 2011 (by virtue of Act 14 of 2011)	The Swiss Civil Code of 10 December 1907 (entered into force on 1 January 1912)	1857	

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

	Bulgaria	Croatia	Malta	Switzerland	UK	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	No	*The notary does not have a role in the preparation of the divorce. *In situations when spouses have underage child, before initiating the divorce procedure before court, they must participate in compulsory marital counseling before the competent social welfare center.	*The notary does not participate in any stage of the divorce process; *By law, the partition of the community of acquests shall be made by assigning one-half of the assets and liabilities comprised in the community to each of the spouses.	Only for the liquidation of matrimonial property regime (if appropriate)	No. There is no matrimonial regime in the UK. In England, there is no community of property, so the patrimonial situation of the spouses is determined by the Court's discretion.
	To which extent?	-	During the compulsory marital counseling spouses are consulted in order to make an amicable decision on family relations, on the regulation of their property relations and the support payments of the spouse.	Liquidation of matrimonial property	Liquidation of matrimonial property	
	Are the services of a notary a mandatory step during the divorce process?	No	No	No	No	No
	Does the notary have a particular mission?	-	-	-	-	No
	Intervention of others legal professionals?	-	Spouses are free to engage legal professionals, for legal consulting and preparing the needed documentation for the agreement.	Lawyers have exclusive competence over divorce matters. If the spouses have companies or other complex financial instruments to partition, they may engage the services of an accountant for the registration of company share transfers and similar matters.	Lawyers and mediators	Solicitors
	Appointment of the notary	-	-	Notaries are not involved.	A notary can be appointed by the judge to set up the liquidation of matrimonial property	-

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

	Bulgaria	Croatia	Malta	Switzerland	UK
Does the notary intervene in the frame of the divorce judgement?	No	No	No	No	No The notary does not intervene within the scope of the divorce judgment.
What are the various forms of divorce?	Two forms of termination of marriage through divorce: 1) Divorce by mutual consent (both spouses apply for the divorce) 2) Divorce by claim based on a deep and irreparable breakdown of the marriage(the application is submitted by one of the spouses). Both are divorces before a Court.	Divorce before a Court may be filed: - by one spouse in a lawsuit, - and both spouses by a proposal for an amicable divorce.	Divorce may be obtained upon a demand made either jointly by the two spouses, or by one of them against the other spouse. The spouses must have lived apart from each other for a period of, at least four years. A Divorce decree is pronounced by the judge at the Civil Court (Family Court).	Judicial divorces only: - On joint application, when both spouses apply for divorce; - On unilateral request, when only one spouse applies for divorce (after two years of separation or when the continuation the marriage is unbearable)	Judicial divorces: - on the ground of the fault; - after a separation for 2 years, if both spouses agree to the divorce, or five years if one spouse refuses; - if one spouse "accept the blame".
How is the divorce granted?	By the judge	By the judge	By the judge	By the judge	By the judge
Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?	Divorce before a notary is not possible	Divorce before a notary is not possible	Divorce before a notary is not possible	Divorce before a notary is not possible	Divorce before a notary is not possible

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

		Bulgaria	Croatia	Malta	Switzerland	UK
The consequences of divorce	Does the notary intervene after the divorce is granted?	No	No	No	No	No
	If yes, what are their missions?	-	-	-	-	-
	Appointment of the notary	-	-	-	-	-
	Frame of their mission (usual role or specific power)	-	-	-	-	-
	Are other legal professional still involved in the divorce procedure?	Lawyers and mediators could be involved.	Court and lawyers can be involved	-	-	Lawyers and judges
	Median cost of a divorce	States fees: approximately BGN 200; Lawyer's fees: minimum amount of 600 BGN; Divorce by mutual consent: BGN 400	Approximately 300 euros	The fees may vary considerably depending on the complexity of the particular case. A normal divorce case without any complication would however cost between €700 - €1000.		*If the divorce is uncontested, the fees will amount to approximately £550: *If the divorce is contested, the additional fees - which mainly comprise solicitor fees and court fees - can vary from hundreds to several tens of thousands of pounds, depending on the complexity of a given case.

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

		Bulgaria	Croatia	Malta	Switzerland	UK
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes, if the foreign court or body is competent as per the provisions of the Bulgarian law	Outside the scope of European regulations and international conventions: Foreign decision on divorce made by notary is recognized in Croatia under the condition that in the country in which it was made, notary decision on divorce was equated with a court decision, ie a court settlement.	Outside the scope of an European regulation, a decision of a foreign court or a decision or other official act of equivalent effect of a foreign competent authority shall be recognized, if the decision is issued by a court or a competent authority of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen.	*Yes, according the usual conditions of recognition	Yes, if the divorce is effective under the law of the country in which it was obtained.
	Role of the notary in the reception of a divorce granted overseas	No role	No role	No role	No role	No role
	Role of the notary in the recognition if the divorce granted overseas	No role	No role	In case where immovable property and/or other assets situated in Malta were transferred to one of the spouses, a lawyer has to be engaged to take care of the procedure. In case of immovable property, the services of a notary are also required.	No role	No role

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

		Bulgaria	Croatia	Malta	Switzerland	UK
International private law	Is it possible to choose the applicable law in a divorce procedure?	No	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010	No	No
	Is it possible to choose the jurisdiction? When?	No	No EU Regulation 2019/1111	No EU Regulation 2019/1111	No	No
	Is the determination of the law or jurisdiction recognized when it was made overseas?	The spouses may choose a law applicable to their property relations, if this is allowed by their common national law, or by the law of the State where their common habitual residence is located; or by the law which both of the spouses are in the closest connection to.	Yes if the determination had been made according to the EU Regulation 1259/2010	Yes if the determination had been made according to the EU Regulation 1259/2010	Yes, if the choice is in accordance with the law of the State of domicile or habitual residence of one of spouses	-
Prospective	Effectiveness of the divorce system Are reforms required?	Introduction of a procedure of divorce before a notary is being considered.	-	Draft reform to remove the four year period of separation requirement, before divorce.	No reform considered at this time.	In its current form, the system of divorce in the UK appears to be effective. It is however a "fault-based" system which requires one spouse to not only initiate proceedings but also to allege fault on behalf of the other.
	Possible opportunities of improvements that could be made in the system	-	Amicable divorces before notaries would relieve the judges and help them to concentrate on cases where there is a dispute between the parties.	If notaries are given competence to publish deeds of divorce, this would considerably reduce the workload from courts of law. The spouses could choose to divorce amicably by means of a public deed upon obtaining prior authorization from a court.	No reform in progress	

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey	
Marriage	Are prenuptial agreements allowed?	Yes	No	No	Yes	Yes
		<i>Before and during the marriage</i>				
	Can these contracts fix in advance some aspects of a potential divorce?	Spouses may by an agreement regulate all their property relations related to actual or future property.	No	No	Yes, The spouses can agree on the division of property and/or compensation in advance, before the divorce.	-
	Does the notary have a role in their setting up and/or publication? According to which terms?	Marital agreement shall be concluded in a written form and must be certified by a notary When it refers to immovable property, it shall be registered at the Land registry.	-	No role	The notary can draft a contract on the regime of property of the spouses, as an authentic instrument. He also gives legal advices to the parties.	There are two different forms of a marriage contract: <ul style="list-style-type: none"> • Pre-nuptial agreement: made by or approved by a public notary. • Marital property regime: The spouses can inform the marriage officer of the regime that they want to choose when they apply for the marriage.
	Does the notary have a role in the marriage celebration?	No	No	No	No	No
	Does the notary have a role in the marriage publication?		No	No	No	No
The divorce exists since...	-	-	1950	-	1926	

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey
Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	No	No	No	Yes, there is an optional upstream analysis of the patrimonial situation of the spouses.	No Compensation and other payments will be decided in the final judgement, but the court may take some measures as well as a temporary alimony.
To which extent?	-	-	-	The spouses can agree on the division of property and/or compensation, before the divorce.	
Are the services of a notary a mandatory step during the divorce process?	No	No	No	No	No, but it can be asked to the notary for establishing a power of attorney
Does the notary have a particular mission?	-	Non	-	-	Power of attorney, if needed
Intervention of others legal professionals?	Lawyers and mediators	Lawyers	If the spouses have joint minor children, the conciliation procedure is conducted by the center for social work.	Not mandatory.	Lawyers and experts, but not mandatory
Appointment of the notary	-	-	-	-	-

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey
Does the notary intervene in the frame of the divorce judgement?	No	No	No	No	No
What are the various forms of divorce?	<p>Judicial divorce:</p> <ul style="list-style-type: none"> - at the request of one spouse, if the relationships in the marriage have seriously and permanently been disturbed or if the purpose of marriage cannot be realized for some other reasons. - by mutual consent, at the request of both spouses (based on their agreement) 	Judicial divorces only	<p>Judicial divorces:</p> <ul style="list-style-type: none"> - by mutual consent; - at the request of one spouse, when cohabitation became unbearable or when the marital union is in fact stopped for more than a year. 	<p>Judicial divorces:</p> <ul style="list-style-type: none"> - at the request of both spouses; - at the request of one spouse (in this case, the Court has to examine if the marriage is seriously disrupted, if there is a fault, etc. 	<p>Judicial divorces only,</p> <ul style="list-style-type: none"> *on special grounds (adultery; plots against life, misbehavior or indignity; crime; mental illness, etc.) *on general grounds: breakdown of marriage; consensual divorce (the marriage must have lasted for at least one year)
How is the divorce granted?	By the judge	By the judge	By the judge	By the judge	By the judge
Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.	No, divorce before a notary is not possible.

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey	
The consequences of divorce	Does the notary intervene after the divorce is granted?	Yes but optional	No	Yes	No	-
	If yes, what are their missions?	Spouses may amicably divide the joint property	-	An agreement for division of the joint property can be concluded with the notary public.	-	-
	Appointment of the notary	By the parties	-	By the parties	-	-
	Frame of their mission (usual role or specific power)	Usual role	-	Usual role	-	-
	Are other legal professional still involved in the divorce procedure?	No	Lawyers	Court and lawyers are involved if there is no agreement for division of the joint property	-	Lawyers
	Median cost of a divorce	Notary's fees are determined by the value of the property. If it cannot be determined, not more than 300E.	Approximately 500 euros	It depends on the value of the property, the complexity of the case, etc.	-	at least 5.000 TR (approximately 600 US dollars)

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedonia, Tcheque Rep., Turkey

	Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey	
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes	No	Depends on the bilateral and international conventions.	Yes	No, the Turkish Court of Appeals does not accept administrative decisions for recognition. It must be a judgment. However, the new amendments of art. 27/A of Civil Registration Act has provided a direct registration (without any requirement of a court decision) of divorce decisions and other decisions that terminates marriage (including administrative divorce decisions).
	Role of the notary in the reception of a divorce granted overseas	-	No role	Depends on the bilateral and international conventions.	No role	-
	Role of the notary in the recognition if the divorce granted overseas	-	No	No	No	No
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes, before the divorce	Yes	No	No	No, except if the referred foreign law allows this choice of law
	Is it possible to choose the jurisdiction? When?	No	Yes	No	No	No
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes, they can choose their national law, by a written agreement.	Yes if the determination had been made according the EU Regulation 1259/2010	No	Yes, if the applicable law allows it.	Yes if the conditions of recognition are fulfilled (in particular if it is not contrary to turkish public order)

2. Judicial divorces without notary's intervention

Bulgaria, Croatia, Malta, UK, Switzerland, Montenegro, Slovakia, Macedoniae, Tcheque Rep., Turkey

		Montenegro	Slovakia	Macedonia	Tcheque Rep.	Turkey
Current laws	About the role of the notary in the divorce procedure	"Official Gazette RCG", br. 68/2005 i "Official Gazette CG", br. 49/2008 i 55/2016 i 84/2018)	-	-	-	-
Prospective	Effectiveness of the divorce system Are reforms required?	-	The current system is effective. However, non-judicial divorce should be considered.	-	The current system is satisfactory but the divorce before a notary could be considered.	No need to reform at this time, but consensual divorces before a notary could be considered.
	Possible opportunities of improvements that could be made in the system	-	-	If the notaries would be involved in the divorce procedure, the procedure would be much faster especially for divorces by mutual consent, without joint minor children.	-	-

Divorce in Europe: the Role of the Notary
in 33 European Countries

Le Divorce en Europe : le Rôle du Notaire
dans 33 Pays Européens

STATES WHERE NON JUDICIAL DIVORCES ARE ALLOWED

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

		Spain	Latvia	Slovenia
Marriage	Are prenuptial agreements allowed?	Yes	Yes	Yes
	Can these contracts fix in advance some aspects of a potential divorce?	Yes, as long as they are not contraries to the equality of the spouses, the law, or public policy.	Yes, they can for example fix in advance the division of the joint property	Yes, in the form of notarial instrument, by spouses without children and when no-fault divorce is implemented.
	Does the notary have a role in their setting up and/or publication? According to which terms?	Yes -the contract must be drawn up by a notary -then the deed is registered at the Civil registry	Yes -the contract must be drawn up by a notary; -the contract is registered by the notary or by the spouses in a specific public register	Yes - the contract must be drawn up by a notary - the contract is published in a specific registry established by the notary chamber.
	Does the notary have a role in the marriage celebration?	Yes <i>Since 2015</i>	No	No
	Does the notary have a role in the marriage publication?	Only to notify the marriage to the civil registry	No	No
	The divorce exists since...	<i>July 13, 1981.</i>	<i>1921</i>	<i>Divorce before a notary since 2019</i>

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

	Spain	Latvia	Slovenia	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	Not mandatory	Not mandatory	Not mandatory
	To which extent?	<ul style="list-style-type: none"> - The agreement about economic regime is set up by the notary; -The agreement on the others aspects of the divorce has to be approved by a notary. - However, when minor children are involved, the notary does not have competence to set up agreement regarding maintenance payments (only the judge can approve these payments). 	-	-
	Are the services of a notary a mandatory step during the divorce process?	No	<p>The services of a notary are not mandatory.</p> <p>The spouses can conclude private agreements on division of division of the joint property, custody of minor children, right of access and child's means of support. The notarial deed is not mandatory, the agreement will be submitted to the court.</p>	<ul style="list-style-type: none"> - Non contentious divorces, with no minor children, are granted by notary; - In the others cases, the divorce is granted by the judge, but the spouses have to reach an agreement on the care, upbringing and maintenance of joint children, division of co-owned property, maintenance of the spouse, in the form of an enforceable notarial instrument.
	Does the notary have a particular mission?	The notary must control the legality of the agreements, and their conformity to public policy	<p>Conciliation;</p> <p>The notary can help the spouses to reach an agreement.</p>	-
	Intervention of others legal professionals?	Yes, when the divorce is granted by the notary, the spouses have to be assisted by at least a common lawyer	Mediator, lawyers, but they are not mandatory	Lawyers, but they are not mandatory
	Appointment of the notary	By spouses But it can only be the notary of the common residence of the spouses, or the notary of the domicile of one of the spouses	By spouses	Notary's jurisdiction is determined by the Family Code

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

	Spain	Latvia	Slovenia	
The divorce judgment	<p>Does the notary intervene in the frame of the divorce judgement?</p>	<p>Yes, - for non-contentious divorces; - in the absence or minor children - in this case, legal representation by a lawyer is mandatory;</p>	<p>Yes, the notary initiates the divorce case, runs the proceedings, and settles the divorce on the basis of a joint application of both spouses. Finally, the divorce proceeding is concluded with a notarial deed (divorce certificate).</p>	<p>Yes, - for spouses without joint children over whom they exercise parental care; - for non-contentious divorces; - when the spouses agree on the consequences of divorce.</p>
	<p>What are the various forms of divorce?</p>	<p>- Non contentious divorces, with no minor children, are granted by notary; - In the others cases, the divorce is granted by the judge, with the intervention of Public Prosecutor when there are minors or vulnerable adults involved.</p>	<p>-Divorce before a court when mutual agreement has not been achieved; -Divorce before a notary, on a no-contestation basis (mutual agreement of the spouses), if spouses do not have a joint minor child and joint property; or, if they have entered into a written agreement regarding custody of the joint minor child, right of access, child's means of support and division of the joint property. The notary can also provide consultations and bring closer the opinions of both parties (conciliation).</p>	<p>- Non contentious divorces before notary, with no minor children, - Before a court, in the others cases.</p>
	<p>How is the divorce granted?</p>	<p>By the judge or by the notary</p>	<p>- By notary, on a no-contestation basis, not earlier than after 30 days since initiating a divorce case. - By the judge, when mutual agreement has not been achieved</p>	<p>- By notary, for consensual divorces, if the spouses don't have minor children; - By the judge, if they have</p>
	<p>Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?</p>	<p>The divorce is granted by a notary when they agree on the decision to divorce, when they have legal capacity, and when they don't have minor children. In the others cases, they have to divorce before a court.</p>	<p>When a mutual agreement has not been achieved, the spouses have to go to the Court.</p>	<p>When the spouses have minor children, they have to go to court; When there is no dispute, they divorce before a notary.</p>

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

	Spain	Latvia	Slovenia	
The consequences of divorce	Does the notary intervene after the divorce is granted?	When the divorce is granted by a judge, there is no intervention of the public notary (in that case, the liquidation of the matrimonial property regime is made by the judge); When the divorce is granted by a notary, the liquidation of the matrimonial property regime is usually made within the regulatory agreement, but the spouses can decide to postpone it.	Yes	Yes
	If yes, what are their missions?	Division of the assets, transfer of property. If the spouses ask for it, the deed is published at the Land Registry	The notary: - Updates data in the national register of natural persons; - registers fact of divorce electronically; - issues a divorce certificate. The spouses may also authorize the notary to participate in property right registration (at the Land Register), but the notary is not involved in property division by law.	Within eight days of the signing of the notarial act, the notary shall send the notarial act to the administrative unit which shall enter the divorce in the civil register.
	Appointment of the notary	Outside the scope of the divorce, the parties can freely choose the notary. During the divorce process, only the notary of the residence of the spouses is competent.	By the parties	By the parties
	Frame of their missions (usual role or specific power)	Usual role	Usual role The spouses may also especially authorize the notary to register property rights	Usual role
	Are other legal professional still involved in the divorce procedure?	No	No	No Possibly lawyers but it is not mandatory
	Median cost of a divorce	*Notary fees in order to grant the divorce: between 200 euros and 300 euros	Divorce settled by a notary: between 120 EUR and 150 EUR, including taxes and duties. Additional costs include preparation of spouses' agreement, which is calculated on the basis of the value of spouses' joint property (not less than 105 EUR, including taxes and duties). State fee for settling a divorce case by court is 145 EUR. + advocate and lawyers' fees.	Notarial act on the agreement of the spouses: 200 EUR. Agreement on the division of co-owned property depends of value of property.

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

		Spain	Latvia	Slovenia
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes	Yes	Yes
	Role of the notary in the reception of a divorce granted overseas	No, but the notary must verify the registration of the divorce in the civil registry, before celebrating a new marriage	No	No
	Role of the notary in the recognition if the divorce granted overseas	No	No	No
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010	No
	Is it possible to choose the jurisdiction? When?	No EU Regulation 2019/1111	No EU Regulation 2019/1111	No
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010	Spouses may choose the law which shall apply to their property relations if the law originally applicable to their property relations allows such a choice
Current laws	<i>Royal Decree of July 24, 1889, Civil Code articles 82, 87, 89, 95, 100. Law of May 28, 1862, on the Notary Public, Article 54</i>	<i>1) The Civil Law, adopted on 28.01.1937; In force since: 01.09.1992; Available: https://likumi.lv/ta/id/225418-civillikums 2) The Notariate Law, adopted on: 01.06.1993.; In force since: 01.09.1993. Available: https://likumi.lv/ta/id/59982-notariata-likums</i>	<i>Družinski zakonik / Family Code (Uradni list RS, Official Gazette, Nr. 15/17, 21/18, 22/19, 67/19 and 200/20) http://www.pisrs.si/Pis.web/pbDocPdf?idPredpisa=ZAKO7556&type=doc&lang=EN</i>	

1. Divorces before a notary

1.1. The notary makes a decision regarding the divorce

		Spain	Latvia	Slovenia
Prospective	Effectiveness of the divorce system Are reforms required?	The notarial divorce is effective and could be allowed, even in the presence of minor children	Divorce system is efficient and no fundamental reforms are required.	- Notarial divorce is effective; - when the spouses agree on the divorce, and when there is no dispute, there is no need for a lawsuit before a court
	Benefits of the notary intervention in the divorce procedure	Control upon the legality of the agreement; Processing speed	- the notary intervention considerably alleviates the procedure and reduce the number of divorce applications received by the court; - notarial divorce is also considerably faster, legally simpler and financially more advantageous	Reduce court time and backlogs
	Possible opportunities of improvements that could be made in the system	The notarial divorce could be extended to the spouses with minor children	Make compulsory the notarial instrument form for agreements on division spouses' property, joint custody of a minor child, access rights and child's means of support.	-

1. Divorces before a notary

1.2. The divorce agreement is registered by a notary

	France	Greece	
Marriage	Are prenuptial agreements allowed?	Yes	Yes <i>However these conventions are unusual</i>
	Can these contracts fix in advance some aspects of a potential divorce?	No, they can only relate to the marital property consequences. <i>Maintenance obligations for example cannot be the subject of prior agreement.</i>	These contracts can relate to the division of common property, within the limits of matrimonial public order.
	Does the notary have a role in their setting up and/or publication? According to which terms?	The notarial deed is mandatory. The contract can be modified by the spouses during the marriage. The contract will be mentioned on the marriage certificate.	The notarial deed is mandatory. Then, the contract is published in a specific register
	Does the notary have a role in the marriage celebration?	No	No
	Does the notary have a role in the marriage publication?	No	No
	The divorce exists since...	1804	-

1. Divorces before a notary

1.2. The divorce agreement is registered by a notary

	France	Greece	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	*In case of a judicial divorce, there is no obligatory involvement of the notary in the preparatory phase. Parties are however free to contact a notary in order to draft an agreement on the division of real estate property. Before the divorce, the convention can be relate to the patrimonial consequences of the divorce only, and not to extra patrimonial consequences. *In case of a divorce by mutual consent, the liquidation of the marital property regime has to be made before the divorce.	No
	To which extent?	Liquidation of the marital property regime, agreement about compensatory allowance (only during the divorce and not before)	-
	Are the services of a notary a mandatory step during the divorce process?	The liquidation of matrimonial property regime and the division of common property have to be dawn up by a notary when the spouses have immovable property. Then, the notarial deed is published at the Land Registry.	Yes for a divorce by mutual consent.
	Does the notary have a particular mission?	Legal advices. However, the notary has no role of mediator.	For consensual divorces, they notarize the agreement previously signed and registered at the Tribunal's registry
	Intervention of others legal professionals?	Both spouses must be represented by their own attorney	Yes, both spouses must be represented by their own attorney. They draft the application for divorce and give legal advices to the parties
	Appointment of the notary	By the parties if they agree, by the judge if they disagree	By the parties, at their own discretion

1. Divorces before a notary

1.2. The divorce agreement is registered by a notary

	France	Greece	
The divorce judgment	<p>Does the notary intervene in the frame of the divorce judgement?</p>	<p>The French notary doesn't make a decision about the divorce. He checks and registers a private agreement signed by the spouses and countersigned by their respective attorneys. The dissolution of the marriage occurs between spouses the day the divorce's agreement is registered by the notary.</p>	<p>Yes, in the case of divorce by mutual consent, the notary notarizes the agreement between spouses.</p>
	<p>What are the various forms of divorce?</p>	<p>- Judicial divorce: *Divorce by mutual consent before a judge (when minors are involved and when they request to be heard by a judge, or when a spouse is protected by a procedure of guardianship). *divorce because of irretrievable breakdown of the marriage (on the petition of one spouse, after a year of separation); *when both spouse agree on the divorce but disagree on the consequences; *divorce on the ground on a fault</p> <p>-Non-judicial divorce: when parties agree on the terms and conditions of the divorce, no judge will be required. A private agreement is signed by the spouses and countersigned by their respective attorneys, and then registered by the notary in order to be enforceable. Spouses have a fifteen-day cooling-off period before signing the agreement. Both spouse must be represented by their own attorney.</p>	<p>- Judicial divorce, when there is a dispute (divorce because of irretrievable breakdown of the marriage, fault divorce)</p> <p>- Divorce by mutual consent, before a notary</p>
	<p>How is the divorce granted?</p>	<p>- By the judge for judicial divorces; - For non-judicial divorce, the dissolution of the marriage is effective when the notary registers the agreement.</p>	<p>- By the judge, when there is a dispute; - In the case of a divorce by mutual consent, the notary registers the agreement on the divorce after a ten days cooling-off period</p>
	<p>Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?</p>	<p>No, there is no choice: when there is no dispute between the spouses, and when the children did not ask to be heard by a judge, the divorce by mutual consent is not granted by a judge.</p>	<p>No, the divorce by mutual consent is before a notary, and before a judge when there is a dispute.</p>

1. Divorces before a notary

1.2. The divorce agreement is registered by a notary

	France	Greece	
The consequences of divorce	Does the notary intervene after the divorce is granted?	In case of a divorce by mutual consent, the notary intervenes in advance, before the divorce, in order to prepare the liquidation of the matrimonial regime and the division of the estate. In case of a judicial divorce (when there is a dispute between spouses), the notary is generally involved during of after the divorce procedure, in order to handle the liquidation of the matrimonial regime and the division of the assets.	Yes, sometimes
	If yes, what are their missions?	The liquidation of matrimonial property regime and the division of common property have to be dawn up in a notarial deed, in presence of immovable property.	A notarial deed is required for the transfers of property
	Appointment of the notary	By the parties, when there is no dispute between them. In case of dispute, by the judge.	By the parties
	Frame of their missions (usual role or specific power)	Usual role. When the notary is appointed by the judge, his/her mission is framed by the judge.	-
	Are other legal professional still involved in the divorce procedure?	No	-
	Median cost of a divorce	Notarial fees for a divorce without a judge: approximately 50 euros. The notary fees are regulated by law. The cost, concerning the fees and the taxes for division of the estate, depends on the value of the estate. +Lawyers fees, freely negotiated between the parties.	Notarial fees for a divorce by mutual consent: 150-200 euros. + Lawyers fees: approximately 500 euros (non judicial divorce) or 1000 euros (judicial divorce)
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes	Yes
	Role of the notary in the reception of a divorce granted overseas	No	No
	Role of the notary in the recognition if the divorce granted overseas	No	No

1. Divorces before a notary

1.2. The divorce agreement is registered by a notary

	France	Greece	
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010
	Is it possible to choose the jurisdiction? When?	No EU Regulation 2019/1111	No EU Regulation 2019/1111
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010
Current laws	About the role of the notary in the divorce procedure	<i>loi du 25 Ventôse an XI - décret n°76-941 du 26 novembre 1971. loi n°2016-1547 du 18 novembre 2016 - entrée en vigueur le 1er janvier 2017.</i>	<i>Civil code, article 1441</i>
Prospective	Effectiveness of the divorce system Are reforms required?	Divorce without a judge is simpler, quicker and reduces the delays to get the divorce.	The current system is satisfactory. The notary could assume others missions like conciliation.
	Benefits of the notary intervention in the divorce procedure	-	Simplicity and effectiveness of the procedure
	Possible opportunities of improvements that could be made in the system	The agreement registered by the notary is not necessarily an authentic deed nowadays. His role could be amplified by law.	Conciliation by a notary could be a mandatory step.

2. “Administrative divorces” (before the civil registry offices)

		Belarus	Italia	Portugal	Russia	Ukraine	Georgia
Marriage	Are prenuptial agreements allowed?	Yes	Yes	Yes	Yes <i>(before the marriage, and at any time during the marriage)</i>	Yes	-
	Can these contracts fix in advance some aspects of a potential divorce?	Yes, these contracts can fix the rights and obligations of spouses for mutual maintenance, including after the divorce; the division of common property; etc. They may be made by mutual consent during the marriage and after its dissolution by entering into a written Agreement	No	No	Yes, the spouses can determine by contract the property that will be transferred to each of the spouses in the event of divorce, and any other provisions concerning the property relations of the spouses.	Yes, the spouses can determine by contract in advance the division of property in case of divorce, and some provisions about Alimony.	-
	Does the notary have a role in their setting up and/or publication? According to which terms?	Yes, the contract has to be set up by the notary	The contract is set up by a notary	Prenuptial agreement in a notarial form is not mandatory. Others legal professionals are competent to establish these contracts.	The marriage contract is subject to notarization.	Yes, the contract has to be set up by the notary. The notary verify the capacity of the parties, and give them legal advices.	-
	Does the notary have a role in the marriage celebration?	No	No	No	No	No	-
	Does the notary have a role in the marriage publication?	No	No	No	No	No	-
	The divorce exists since...	1917 (BSSR) 1991 (Republic of Belarus)	December 1st of 1970	1910	-	1969	-

2. “Administrative divorces” (before the civil registry offices)

	Belarus	Italia	Portugal	Russia	Ukraine	Georgia	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	No, the spouses may provide for the division of common joint property but it is not mandatory	No	No	-	Optional	No role
	To which extent?	Division of the joint property; agreement on monetary compensations, Alimony, etc	-	-	-	The spouses can ask for some legal advices about the division of property	-
	Are the services of a notary a mandatory step during the divorce process?	Voluntary	No	No, the intervention of a notary is never mandatory in the Portuguese divorce procedure.	-	No, except if a signature needs to be certified by a notary	No
	Does the notary have a particular mission?	He certifies the agreements between spouses	-	In the frame of the divorce by mutual consent, the notary can be asked by the parties to help them to submit their application for divorce before the civil registry offices (drafting application for divorce, agreements related to parental responsibility, child custody, maintenance, etc.) <i>Agreements about parental responsibility have to be submitted to the Court.</i>	-	-	-
	Intervention of others legal professionals?	Mediators (the spouses have the right to a voluntary settlement of the dispute with the participation of a mediator)	Lawyers	Lawyers, mediators	-	Lawyers (optional)	-
	Appointment of the notary	By the parties	-	By the parties, at their own discretion, only for divorce by mutual consent	-	-	-

2. “Administrative divorces” (before the civil registry offices)

	Belarus	Italia	Portugal	Russia	Ukraine	Georgia
Does the notary intervene in the frame of the divorce judgement?	No	No	No	No	No	No
What are the various forms of divorce?	<ul style="list-style-type: none"> - Divorce by mutual consent: by the body registering acts of civil status, when the spouses do not have common minor children and when there is no dispute about property - Divorce before a Court: ordinary or special 	<ul style="list-style-type: none"> *The spouses can divorce by mutual consent: <ul style="list-style-type: none"> - before at least one lawyer. However, if the spouses have minor children their convention must be sent to the Public Prosecutor; - before the Civil registrar, in the absence of minor children *If there is no consensus about the divorce, the spouses have to divorce before a Court 	<ul style="list-style-type: none"> - Divorce by mutual consent before the civil registry offices: - Judicial divorce when there is no consensus between the spouses. In this case, the judge determine Alimony, maintenance, parental responsibility, child custody, etc. 	<ul style="list-style-type: none"> -Divorce by mutual consent: by the civil registry offices; when the spouses do not have common minor children -Divorce by judicial proceeding, if the spouses have common minor children, or if they disagree about the divorce 	<ul style="list-style-type: none"> - Divorce by mutual consent: by the civil registry offices; when the spouses do not have common minor children -Divorce by judicial proceeding, if the spouses have common minor children, or if they disagree about the divorce 	<p>There are only 2 ways to obtain the divorce and none of them is conducted by a notary.</p> <p>*If there is no any dispute between the spouses about the matrimonial property and/ or common children, divorce process is conducted by the civil registration authority;</p> <p>*If there is a dispute between the spouses, the divorce shall be obtained through the court proceedings. The Court take measures to reconcile the spouses (period of a maximum of 6 months) and then pronounce the divorce.</p>
The divorce judgment						
How is the divorce granted?	<ul style="list-style-type: none"> - <u>For mutual consent divorces, when the spouses do not have common minor children:</u> By the body registering acts of civil status, not earlier than one month and not later than two months from the date of filing a joint application for divorce. - <u>For divorces before a Court:</u> by the judge, after a three-month period of conciliation (for reconciliation or reaching an agreement on common minor children and the division of property, etc.) 	<ul style="list-style-type: none"> *By transaction between the spouses with the intervention of at least one lawyer (sent to the Public Prosecutor in presence of minor children); *By the Civil registrar (when there is no minor children), *By the judge 	<ul style="list-style-type: none"> *By the judge, when there is a dispute *By the civil registry offices, for consensual divorces 	<ul style="list-style-type: none"> - By the civil registry office, after a month from the date of application for divorce, when both spouses apply for divorce; - By the judge, when there is no mutual consent, or when the spouses have minor children. <p>However, the spouses have the right to submit an agreement on children to the Court.</p>	<ul style="list-style-type: none"> - By the civil registry office, after a month from the date of application for divorce, when both spouses apply for divorce; - By the judge, when there is no mutual consent, or when the spouses have minor children. 	<ul style="list-style-type: none"> *By the judge if there is no mutual consent between the spouses; *By the civil registration authority when both spouses apply for the divorce (mutual consent)
Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?	No, it is not possible to divorce before a notary, only by civil registry offices or before Court.	No, it is not possible to divorce before a notary, only by civil registry offices or before Court.	No, it is not possible to divorce before a notary, only by civil registry offices or before Court. However, the notary can counsel the spouses during the procedure of divorce by mutual agreement.	No, it is not possible to divorce before a notary, only by civil registry offices or before Court.	No, it is not possible to divorce before a notary, only by civil registry offices or before Court.	No, it is not possible to divorce before a notary

2. “Administrative divorces” (before the civil registry offices)

	Belarus	Italia	Portugal	Russia	Ukraine	Georgia
Does the notary intervene after the divorce is granted?	Yes, sometimes	Yes	Yes	Yes, but optional	Yes, but optional	No
If yes, what are their missions?	They certify the agreements on the division of joint property, children, payment of Alimony, etc. They also issue certificates of ownership.	The agreements between spouses about division of real estate property are set up by the Notary in order to be published at the Land Registry	The notary can establish: - the division of common property; - an inventory	- They certify property division agreements, alimony agreements, and agreements about children. - They also apply for registration of the transfer of ownership of real estate.	-The spouses can conclude agreements before notary (but it's optional), regarding property division, alimony, including about children. - They also apply for registration of the transfer of ownership of real estate	-
Appointment of the notary	By the parties, at their own discretion	By the parties	By the parties, at their own discretion. However, when the spouses disagree about that choice, the appointment of the notary has to be justified by any connecting link. The notary is never appointed by the judge.	By the parties, at their own discretion	By the parties, at their own discretion	-
Frame of their missions (usual role or specific power)	Usual role (certifying transactions and issuing certificates)	Usual role	Usual role	-	Mission defined by law	-
Are other legal professional still involved in the divorce procedure?	Lawyers (optional), Mediators, And if the spouses cannot reach an agreement, the Court.	Lawyers	Lawyers	-	Lawyers (optional)	-
Median cost of a divorce	There is a specific tariff for notary fees. Lawyers and mediators fees are determined by agreement of the parties.	Fees dépend on the complexity of the divorce (between 10 000 € and 15 000 - 20 000 €) + special fee for judicial divorce (98,00 €)	*Divorce by mutual consent (without a judge): 280 euros + 625 euros for division of joint property + taxes Lawyers and notaries fees are optional *Divorce before a Court: minimum judicial fees of 306 euros + lawyers fees	-	Register fees: approximately 5 euros; +Lawyers fees depend on the complexity of the case	-

The consequences of divorce

2. "Administrative divorces" (before the civil registry offices)

		Belarus	Italia	Portugal	Russia	Ukraine	Georgia
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes, since then the divorce documents had been issued by the competent authority in the State of origin.	Yes EU Regulation 2019/1111	Yes EU Regulation 2019/1111	No (not applicable to Russian family relations)	Yes	-
	Role of the notary in the reception of a divorce granted overseas	No	No	No	No	Sometimes the notary is asked to certify the signature of a traductor	No
	Role of the notary in the recognition if the divorce granted overseas	No	No	No	No	No	No
International private law	Is it possible to choose the applicable law in a divorce procedure?	*No, if an international treaty already defines the applicable law *in the absence of international treaty defining the applicable law, the parties can choose the applicable law.	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010	The parties can choose by contract, during the marriage, the Russian law, for the property located in Russia	Yes, at any time. The spouses can choose between: - their common national law; - the law of their residence; - the law with which they jointly have the closest connection	No
	Is it possible to choose the jurisdiction? When?	*No, if an international treaty already defines the competent jurisdiction. *If there is no international treaty, the parties can choose the jurisdiction in a prenuptial agreement which can be concluded before or after the marriage	No EU Regulation 2019/1111	No EU Regulation 2019/1111	-	-	No
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes, if the foreign norms are not contrary to the legislation of Belarus.	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010	-	Yes	-

2. "Administrative divorces" (before the civil registry offices)

		Belarus	Italia	Portugal	Russia	Ukraine	Georgia
Current laws	About the role of the notary in the divorce procedure	Code of the Republic of Belarus on Marriage and Family of July 9, 1999 No. 278-Z (ed. of 18.12.2019) (with amendments and additions that entered into force on 01.08.2020); Law of the Republic of Belarus of July 18, 2004 No. 305-Z "On Notaries and notarial activities".	-	Code of Civil Procedure (Law no. 41/2013 of 26 June) Notarial inventory regime (Act 117/2019 of 13 September) Statute of the Notariat (Decree-Law n° 26/2004 of 4 February) Notarial Code (Decree-Law 207/95 of 14 August)	Civil Code of the Russian Federation (parts one, two, three and four) (with amendments and additions) Family Code of the Russian Federation of December 29, 1995 N 223-FZ		The Civil Code of Georgia (1997) The Law of Georgia On Private International Law (1998)
	Effectiveness of the divorce system Are reforms required?	The current system is effective, although the divorce procedure could be simplified	-	-	-	Draft reform to entitle notaries to register marriages and pronounce divorces	-
Prospective	Possible opportunities of improvements that could be made in the system	Since 2020, the notary can certify agreements between spouses about children care	Divorce before a notary would be quicker and simpler than the current system	The intervention of the notary would improve the current system; the divorce procedure would be quicker and more effective, and it would reduce the delays before court and civil registry offices.	-	Advantages of notary's intervention: - legal advices; - reduce court time and backlogs - reduce family conflicts, ease relations between separating spouses	-

3. Divorces before both non-judicial authorities (notaries and civil registry offices)

	Estonia	Romania	
Marriage	Are prenuptial agreements allowed?	Yes	Yes <i>Before and during the marriage</i>
	Can these contracts fix in advance some aspects of a potential divorce?	Yes, in addition to the division of joint property and set-off of acquired assets, the spouses can also enter into agreements, before or during the marriage, regarding alimony, the right of access to a child, etc.	No, only the issues related to the liquidation of matrimonial property.
	Does the notary have a role in their setting up and/or publication? According to which terms?	*Transactions related to real estate have to be made by notary. *Agreements regarding alimony or right of access to the child do not require notarial form. *The notarial form is also necessary to get an enforceable title	-Notarial deed is mandatory for these contracts; -Then, the contract is registered in a national register
	Does the notary have a role in the marriage celebration?	Yes	No
	Does the notary have a role in the marriage publication?	Yes	No
	The divorce exists since...	1923	1864

3. Divorces before both non-judicial authorities (notaries and civil registry offices)

	Estonia	Romania	
The divorce preparation	Role of the notary in the preparation of the divorce process: Does the legislation provide for an upstream analysis of the patrimonial situation of the spouses?	The notary's intervention is optional	No role
	To which extent?	Division of marital assets, if the spouses ask for it	-
	Are the services of a notary a mandatory step during the divorce process?	*Notarial authentication is necessary for division agreement related to real estate, shares in a private limited company or membership in a building association. *Some agreements have to be notarized (contracts concerning compensation or support payments for example).	Yes, if the divorce by mutual consent is in presence of minor children
	Does the notary have a particular mission?	Notary's task is to clarify the legal consequences and warn the parties, however conciliation is generally not part of the mission.	
	Intervention of others legal professionals?	Possibly lawyers, but they are not mandatory. The notary is considered as an impartial advisor to both parties.	Legal representation by attorney is not compulsory
	Appointment of the notary	By the parties	The competence of the notary is limited by law. The rules of jurisdiction give competence to: - the notary of the last common habitual residence of the spouses; - or the notary of the place where the spouses split up

3. Divorces before both non-judicial authorities (notaries and civil registry offices)

	Estonia	Romania	
The divorce judgment	<p>Does the notary intervene in the frame of the divorce judgement?</p>	<p>Yes, the notary may grant the divorce upon agreement of the spouses on the basis of a joint written petition of the spouses. The notary can also witness agreements between the divorcees.</p>	<p>Yes, - in the case of a divorce by mutual consent; - and even in presence of minor children</p>
	<p>What are the various forms of divorce?</p>	<ul style="list-style-type: none"> - Divorce before a Court, if the spouses disagree about the divorce or the circumstances relating to the divorce. - Divorce by mutual consent, granted by notary or by vital statistics office if the spouses make a joint written petition 	<ul style="list-style-type: none"> - Divorce by mutual consent: *before a judge (if a spouse is protected by a procedure of guardianship) * before a notary (if the spouses have minor children) * before the civil registry offices (in the absence of minor children) - Contentious divorce: always before a Court (divorce on the ground of a fault for example)
	<p>How is the divorce granted?</p>	<ul style="list-style-type: none"> *By the judge, if the spouses disagree on the divorce; *By the notary or by the vital statistics office if there is no dispute between the spouses. In that case, divorce shall not be granted earlier than one month and later than three months from the date of submission of an application. 	<ul style="list-style-type: none"> - By the judge - By the notary - or by the Civil registry offices <p>In the case of a divorce granted by the notary or the civil registry offices, the divorce is granted after a 30 days cooling-off period</p>
	<p>Do citizens have the choice between a divorce granted by a notary and a divorce granted by a judge?</p>	<p>In case of dispute, the spouses have to go to the Court; If they agree about the divorce and its consequences, they can choose between the notary and the vital statistics office</p>	<p>Yes, if there is no dispute, the spouses can choose.</p>

3. Divorces before both non-judicial authorities (notaries and civil registry offices)

	Estonia	Romania	
The consequences of divorce	Does the notary intervene after the divorce is granted?	Yes, sometimes	Yes
	If yes, what are their missions?	Division of jointly owned property	The notary informs the civil registry offices to register the divorce. If necessary, they draw up the division of jointly owned property and then, publish it at the Land Register.
	Appointment of the notary	By the parties	By the parties
	Frame of their missions (usual role or specific power)	Usual role	Usual role
	Are other legal professional still involved in the divorce procedure?	Possibly lawyers, but they are not mandatory	No
	Median cost of a divorce	Divorce before a notary: 76,80 euros + notary fees for the division of the joint property, depending on the value of the property (0,4%) + state fee (0,11%)	Notary fees are approximately 150 euros.
The notary and the foreign divorce	Does the divorce granted by a notary is recognized?	Yes	Yes <i>However, the transcription of the divorce is requested.</i>
	Role of the notary in the reception of a divorce granted overseas	No specific role, but the notary must verify the registration of the divorce in the civil registry, before celebrating a new marriage	-
	Role of the notary in the recognition if the divorce granted overseas	No	No
International private law	Is it possible to choose the applicable law in a divorce procedure?	Yes EU Regulation 1259/2010	Yes EU Regulation 1259/2010
	Is it possible to choose the jurisdiction? When?	No EU Regulation 2019/1111	No EU Regulation 2019/1111
	Is the determination of the law or jurisdiction recognized when it was made overseas?	Yes if the determination had been made according the EU Regulation 1259/2010	Yes if the determination had been made according the EU Regulation 1259/2010

3. Divorces before both non-judicial authorities (notaries and civil registry offices)

	Estonia	Romania
Current laws	<p>About the role of the notary in the divorce procedure</p> <p>§ 641 of Family Law Act (RT I 2009, 60, 395; RT I, 27.10.2020, 15) Vital Statistics Registration Act (RT I 2009, 30, 177; 22.12.2019) Notaries Act (RT I 2000, 104, 684; RT I, 22.12.2020, 36)</p>	<p>Public Notaries and Notarial Activity Law no. 36/1995 - art. 139 Regulation for the application of the Law of public Notaries and Notarial Activity no. 36/1995, approved by the Ministry of Justice no. 233/C/2013 - art. 267 and art. 269-275 Civil Procedure Code - art. 1094 - 1102</p>
Prospective	<p>Effectiveness of the divorce system Are reforms required?</p> <p>The current system is efficient and quick</p>	
	<p>Benefits of the notary intervention in the divorce procedure</p> <p>Notaries are the most prepared to explain the legal consequences compared to any other official</p>	<p>The current system is satisfactory</p>

Divorce in Europe: the Role of the Notary
in 33 European Countries

Le Divorce en Europe : le Rôle du Notaire
dans 33 Pays Européens

RÉPONSES AUX QUESTIONNAIRES ***PAYS PAR PAYS***

Les réponses sont dans la langue de l'auteur

RESPONSES TO QUESTIONNAIRES ***COUNTRY-BY-COUNTRY***

The responses are in the language of the author

MEMBER NOTARIAT OF: GERMANY

Author: BundesNotarKammer

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Spouses may conclude a marriage contract in order to regulate the patrimonial consequences of the marriage. This marriage contract can be concluded before contracting the marriage or after, Sec. 1408 German Civil Code (Bürgerliches Gesetzbuch - "BGB"). The marriage contract must be recorded by a notary, and both parties must be present, Sec. 1410 BGB. Such an agreement can also be concluded in preparation of a divorce (divorce agreement).

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

According to Sec. 1408 of the BGB, the spouses may provide for their matrimonial property arrangements by contract and in particular even after entering into marriage terminate or alter the matrimonial property regime. This may have significant impact on claims in the event of a divorce. In addition, the spouses may 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 (i.e. authenticated), Sec. 1585c BGB.

Furthermore, an agreement on the compensation of pensions is possible. If the agreement is concluded before the divorce becomes final, it must be authenticated before a notary in order to be valid (Section 7 of the German Pension Equalisation Act).

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

According to Section 1410 BGB, the marriage contract must be authenticated by a notary, and both parties must be present. This also applies to divorce agreements. An agreement on the obligation to pay maintenance that comes into force before the divorce becomes final and absolute must be notarially recorded, Sec. 1585c BGB. If the agreement on the equalisation of pensions is concluded before the divorce becomes final, it must be authenticated by a notary in order to be valid, Sec. 7 of the German Pension Equalisation Act (Versorgungsausgleichsgesetz - "VersAusglG").

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No, the notary does not have a role in the marriage celebration. The marriage is entered into only if the parties contracting the marriage declare before the registrar of births that they wish to enter into the marriage.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No, the notary does not have a role in the marriage publication.

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Historically, divorce law in Germany shows a variety of forms, ranging from the free annulment of marriage to the prohibition of all divorces. For most of the 20th century, the German civil law provided only for a restricted number of grounds for divorce, for example adultery. In 1977, German divorce law has been reformed. Since then, the ground for divorce is not fault or guilt, but the objective failure of the marriage.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE? IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

In most cases, agreements on the patrimonial situation and the consequences of the divorce are reached during the divorce procedure. Such agreements can have three different forms:

- If the spouses cannot reach an amicable agreement, the judge has to decide on the patrimonial situation and the consequences of divorce by way of a court decision.
- Alternatively, the spouses can reach an agreement with the help of their lawyers. The agreement is then recorded by the judge during the divorce proceeding.
- In case of an amicable divorce, the spouses can reach an extrajudicial agreement (with or without lawyers) which is authenticated by a notary. This has the same formal value as the two aforementioned forms.

Different to the options involving a judge, an agreement authenticated by a notary can already come into force before a request for divorce is filed. This is useful in cases where the spouses already separate, but do not yet want to divorce or do not yet fulfil the prerequisites of a divorce (e.g. one year of separation).

Such agreements can concern inter alia the (permanent) division of common goods, maintenance, pension equalisation, parental custody and questions on succession.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

No, the notary's involvement is not mandatory in the divorce process. If the legal requirements for the divorce are fulfilled, the parties can proceed directly to court and do not have to consult with a notary first.

However, it is possible for spouses to enter into a divorce agreement which is drawn up by the notary. Such agreements can concern inter alia the matrimonial property regime, division of common goods, maintenance, pension equalisation, parental custody and questions on succession. If a settlement is reached beforehand, lengthy court disputes that increase the cost of the divorce proceedings can be avoided, thereby also unburdening civil courts. Furthermore, the divorce agreement may be a good solution if the spouses do not proceed to the divorce directly but live separately for a certain period of time before divorce proceedings start.

The notary does not have a special mission but gives independent advice to both parties.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

In the preparation of a divorce, the parties often choose to consult with lawyers. During the divorce proceeding, the parties need to be represented by at least one lawyer. Concerning the drawing up of a divorce agreement in front of a notary, no participation of a lawyer is necessary.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE'S

If a notary is involved, he/ she is chosen by the parties. The notary's task at this stage consists in drawing up and authenticating the divorce agreement.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES

MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

The notary does not intervene in the frame of the divorce judgment. A marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses, Sec. 1564 BGB. The notary's role is limited to the drawing up and authentication of divorce agreements.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Spouses can either divorce amicably or contentiously.

A marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses, Sec. 1564 BGB.

A marriage may be dissolved by divorce if it has broken down. This is usually the case no less than one year after separation, Sec. 1565 BGB.

The party filing for divorce needs to be represented by a lawyer, Sec. 114 (1) German Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit - "FamFG"). If the other spouse simply agrees to the divorce, he or she needs no own lawyer (which saves money), Sec. 114 (3) Nr. 3 FamFG, and the judge can grant the divorce within short notice. If the other spouse does not agree to a divorce, the judge has to decide whether the legal prerequisites of a divorce are met. In this case, the second spouse also needs to be represented by a lawyer, Sec. 114 (1) FamFG.

If one of the spouses furthermore requests a decision in an ancillary proceeding, divorce and ancillary proceedings are to be argued and decided together (this is called "joinder"), Sec. 136 (1), 141 S.1 FamFG. Ancillary proceedings are proceedings on the equalisation of pension rights, maintenance and support proceedings, proceedings concerning the marital home and household objects, and proceedings concerning marital property law matters, Sec. 167 (2) FamFG. The divorce cannot be granted as long as the topics of the ancillary proceedings have not been settled. Each party needs its own lawyer, Sec. 114 (1) FamFG.

These aspects can be settled in different forms:

- If the spouses cannot reach an amicable agreement, the judge has to decide on the patrimonial situation and the consequences of divorce by way of a court decision.
- Alternatively, the spouses can reach an agreement with the help of their lawyers, which is then recorded by the judge during the divorce proceeding.

Alternatively, the spouses can decide the issues of the ancillary proceeding in an extrajudicial agreement which is authenticated by a notary. This has the same binding value as the aforementioned forms. This reduces the court fees, since the court then only needs to decide on the divorce itself. It furthermore reduces the fees for lawyers, because the spouse only agreeing on the divorce does not need his or her own lawyer. In addition, this is usually faster than if the court has to decide the ancillary proceedings.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

The divorce is not possible before a notary.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

There is no mandatory intervention of the notary after the divorce is granted. According to Sec. 137 FamFG, divorce and ancillary proceedings are to be argued and decided together. Therefore, the judicial decision covers all issues of the ancillary proceedings, if they have not been resolved in a divorce agreement prior to the judicial divorce decision.

However, the parties can agree on maintenance for the time after the divorce (Section 1585c BGB) and may choose the form of notarial authentication for their agreement. Furthermore, if after the divorce immovable property is transferred, this transfer must be authenticated before the notary (Section 311b BGB, Section 925 BGB).

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The notary is chosen by the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary intervenes in his/ her role as public official.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

At this stage, the parties may be represented by lawyers. However, the involvement of other legal professionals is not mandatory.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

- The costs due for a divorce depend on which way the parties decide to settle the divorce as well as on the wealth of the spouses.
- The divorce itself needs to be in the form of a court decision with at least one lawyer involved.
- Court fees are calculated on the basis of the value of the proceeding, following the rules of the Act on Court fees in Family Proceedings (Gesetz über Gerichtskosten in Familiensachen – "FamGKG"). The value in litigation of the divorce is determined by taking into account how complicated the case is and how much the spouses earn and possess, Sec. 43 FamGKG.
- The minimum fees for a lawyer are regulated in the Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz – "RVG"), providing for detailed rules on how to determine the value in litigation and how to calculate the lawyers fees based on this value. The rules for family proceedings can be found in RVG-VV 3100 ff.
- In most cases, ancillary proceedings are also decided by the court.
- In that case, the value of all ancillary proceedings (equalisation of pension rights, maintenance and support proceedings, proceedings concerning the marital home and household objects, and proceedings concerning marital property law matters) add to the value in litigation, Sec. 44 FamGKG. The court fees are thus higher than for a divorce alone. Nevertheless, deciding several proceedings together is cheaper than deciding them separately. Ancillary proceedings either have a fixed value or the fee depends on the amount claimed.
- Also for the fees of the lawyers, the value of ancillary proceedings adds to the value in litigation. As described above, the fees are calculated according to the RVG. If the divorce proceeding includes ancillary proceedings, both spouses need to be represented by their own lawyer as described above.
- However, it is also possible to conclude a notarial agreement and thus already settle the ancillary matters. This can considerably reduce the court costs (as the ancillary proceedings are no longer part of the court proceeding) and the length of the procedure.
- The fees for a notarial divorce agreement must be determined in each individual case. The fees are regulated in the German Law on court and notary fees (Gerichts- und Notarkostengesetz, "GNotKG") and depend on the underlying value. The notarial fee is determined on the basis of the value of the transaction. The assets of both spouses, the value of transferred objects, the agreements on maintenance as well as on pension equalisation are taken into account. In principle, for wealthier spouses, the divorce agreement is more expensive than for less wealthy spouses.
- There are no specific taxes that generally arise in the context of divorce. However, depending on the individual case, gift tax or income tax may apply. The transfer of real estate in the context of divorce is exempt from real estate transfer tax.
- Registration fees do not generally arise. Although a marriage property register exists in Germany, registration of a marriage contract or divorce agreement is not a requirement for its validity but only for its opposability to third parties. Therefore, its practical applicability is very limited.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

According to the EU Regulation Brussels II bis (Regulation No 2201/2003) a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required (Art. 21 Brussels II bis). Since the term “court” covers all types of competent authorities (Art. 2 No. 1 Brussels II bis Regulation) and the term “judgment” according to Art. 2 No. 4 Brussels II bis Regulation covers every decision on divorce, not only judicial divorces by judgment are covered by the agreement, but also divorces granted in corresponding notarial or administrative proceedings.

Outside of the scope of the Brussels II bis Regulation, the FamFG applies. According to Section 107 FamFG, judgments annulling, terminating, or dissolving a marriage in a foreign country shall only be recognized when the department of justice of the Land has established that the prerequisites for recognition are fulfilled. The term “decision” in Section 107 FamFG is to be interpreted broadly. It also includes decisions by administrative authorities or notaries. Accordingly, if the conditions for recognition are fulfilled, the divorce before a notary in a foreign country can be recognised in Germany.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The notary does not have a specific role in the processing or reception of a divorce that was granted overseas. However, if the spouses have immovable property situated in Germany, it can be transferred before a notary.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No, the notary does not have a role in the recognition procedure. According to Section 107 FamFG, the department of justice of the Land is the competent authority for the recognition procedure.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Art. 14 para. 1 of the German Introductory Law to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch - “EGBGB”) grants spouses the possibility of a choice of law. However, the following specific choice of law options are of greater practical importance:

According to Art. 5, 6 Rome III Regulation (Regulation EU No. 1259/2010), the spouses may agree to designate the law applicable to divorce and legal separation. Furthermore, EU Regulation 1103/2016 provides for the choice of law concerning the matrimonial property regime (Art. 22). Additionally, the Hague Protocol on the law applicable to maintenance obligations (concluded 23 November 2007), allows for a choice of the applicable law (Art. 7, 8).

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

The choice of jurisdiction in the field of matrimonial matters and the matters of parental responsibility is possible to the extent provided for in Regulation 2201/2003. Concerning the matrimonial property regime, the choice of jurisdiction is possible to the extent provided for in Regulation 1103/2016 (Art. 7). Regulation 4/2009 on matters relating to maintenance obligations provides for the possibility of choice of law in Art. 4.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

The determination of the law or jurisdiction made overseas is recognised according to the Regulations mentioned above.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

BGB (German Civil Code):

Sec. 1410 BGB (1957): The marriage contract (divorce contract) must be recorded by a notary.

Sec. 1585c BGB (2008): Agreements on the obligation to maintain for the time after the divorce, that are entered into before the divorce becomes final and absolute must be notarially recorded.

[Sec. 311b BGB (2002), Sec. 925 BGB (1969): The transfer of immovable property after the divorce must be authenticated before the notary - this is not a regulation specifically for divorce but applied to all transfers of immovable property.]

VersAusglG (German Pension Equalisation Act):

Section 7 VersAusglG (2009): An agreement on the compensation of pensions that is concluded before the divorce becomes final must be authenticated before a notary in order to be valid.

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

The involvement of notaries within the framework of a divorce agreement has significant benefits. In view of the often large number of controversial issues, the complexity of family law provisions and the resulting long duration of court proceedings in the event of a contentious dispute, it is recommended to reach amicable agreements. These agreements avoid lengthy court disputes that delay and increase the cost of divorce proceedings and put a strain on personal relationships. At the same time, the burden on civil courts is reduced by the notary's intervention.

Furthermore, the drafting of an amicable agreement directs the view into the future and promotes the spouses' understanding of the changed situation.

MEMBER NOTARIAT OF: ANDORRA

Author: Joan-Carles RODRÍGUEZ MIÑANA

Preamble: marriage

In Andorra, there is a form of contract that regulate patrimonial consequences of the marriage. It is called “capítols matrimoniais” (in English: “marriage conventions”). They are established by the spouses or future spouses (with the possibility of other people interested, for instance, in providing some asset to the future family) and the highest form of celebration is preconised for this particular form of contracting (“ad solemnitatem” form, that means, **they must be authorised by a notary**).

That conventions are able to fix in advance some aspects of a potential divorce, submitted always to the Court’s judgement on its validity, regarding interests of those more vulnerable at the moment of divorce: sons, weaker consort...

Once authorised by the notary (remember: that conventions are not valid without notary’s intervention), the notary must send a communication to the Civil Register, in order to publish it.

In Andorra, notaries have no role in marriage celebration nor publication.

Divorce exists in Andorra since Qualified Law on Marriage, of 30th June 1995 (QLM).

1. Divorce preparation

If one of the spouses demands for it, Andorran legislation regarding marriage (QLM) provide for an upstream analysis of the patrimonial situation of the spouses who intend to divorce, mainly for the determination of compensation, calculation of support payments and property division.

Some legal professionals intervene at this step of the divorce setup, as lawyers, patrimonial experts, judge, prosecutor (if there are minors or people with modified capacity involved), and also government social services, if needed.

Notary just intervene if it is necessary to transfer immobile assets or shares, as notaries in Andorra have by law the exclusivity of authorising this kind of transfers.

Notary is always appointed by the ones who ask for its services (and so pay for them).

2. Divorce judgement

Andorran notaries have competence on public faith relating all private law relationships to establish or declare without jurisdictional organs intervention (art. 1.1 Andorran Law on notaries).

So, Andorran notaries does not intervene in the frame of the divorce judgement (except to witness agreements between divorcees, if not related to minors or people with modified capacity and not already established them in front of the judge).

In Andorra, there is just one type of divorce. Divorce before a notary is not possible in Andorra.

3. Divorce's consequences

As it is already said, Andorran notaries just intervene if it is necessary to transfer immobile assets or shares, as notaries in Andorra have by law the exclusivity of authorise this kind of transfers. Notary is always appointed by the ones who ask for its services (and so pay for them).

In this tasks, Andorran notaries intervene in the frame of their usual role.

Lawyers and experts may still be involved in the divorce consequences, if parties ask for them if they think they are useful.

As Andorran notaries intervene in the frame of their usual role, their fees are as usual.

4. Notary and the foreign divorce

Foreign divorces are accepted in Andorra. If they affect an Andorran national and, therefore, they must be inscribed in Andorran Civil Registry, there is a process for recognition ("exequatur") in front of the Andorran Superior Court of Justice.

Andorran notaries are used to every day welcome people from different nationalities and always act with fully respect of their respective personal legislations.

As it is already said, Andorran Superior Court of Justice is the one in charge of recognition of foreign jurisdictional decisions affecting Andorran nationals; if they not affect Andorran nationals, foreign procedures are respected in Andorra by themselves.

5. Questions on international private law

In Andorra, it is no possible to choose applicable law nor jurisdiction.

6. Current laws

There is no law in Andorra that assign power to Andorran notaries regarding divorces, as Andorran notaries have in this particular issue exactly the same competences as outside divorces matters.

7. Conclusions and prospective

Divorce system in Andorra shows enough effectiveness.

However, notary intervention may help to improve it, as people in our times is more attached to friendly solutions, far from rigidity of judge's decisions.

NOTARIAT MEMBRE DE : AUTRICHE

Auteur : Katharina HAIDEN-FILL

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE ?

Les couples fiancés ou les époux ont la possibilité de conclure un pacte matrimonial pour régler le régime des biens. Il est également possible de conclure un accord préliminaire en cas de divorce pour régler la répartition des biens et la pension alimentaire après le mariage.

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Oui

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Les accords préliminaires en cas de divorce concernant le partage du domicile conjugal ou de l'épargne conjugale sont soumis à l'acte notarié. Les accords sur l'entretien post-marital ou le partage post-marital des objets d'usage doivent être faits par écrit (document privé).

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Non

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

En 1783, Joseph II a délivré pour la première fois un brevet de mariage, qui faisait la distinction entre le sacrement de mariage de l'Église et le mariage civil de l'État. À partir de ce moment, les non-catholiques pouvaient au moins divorcer par consentement mutuel et donc se remarier. Cela ne s'appliquait pas aux catholiques. Ce n'est que pour les non-catholiques que les dispositions du droit du mariage de l'ABGB s'appliquent à partir de 1812. Après l'annexion de l'Autriche en mars 1938, le Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Reichsgebiet (Ehegesetz) du 6 juillet 1938 est entré en vigueur dans tout le Grand Reich allemand. La loi a sécularisé le droit du divorce et l'a uniformisé entre les confessions. L'EheG a établi une distinction entre le divorce pour faute (faute conjugale), comme l'adultère ou le «refus de procréer», et le divorce pour d'autres motifs, comme la maladie mentale d'un conjoint ou le fait de souffrir d'une maladie contagieuse ou dégoûtante. La loi actuelle sur le mariage remonte à l'EheG de 1938 avec différentes modifications.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Les conjoints peuvent conclure un accord de divorce pour partager les biens. S'ils ne parviennent pas à un accord, ils peuvent déposer une demande de partage judiciaire dans l'année qui suit le divorce, ou déposer une action en partage par la suite.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Non

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Avocats

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIIÉE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Le notaire peut conseiller les parties sur la rédaction de la convention de divorce et fournir une assistance extrajudiciaire. Toutefois, le notaire ne peut pas représenter les parties à la procédure de divorce devant le tribunal.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Non

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Le mariage est divorcé par décision de justice. Un conjoint peut demander le divorce si le mariage a été rompu irrémédiablement en raison d'une faute conjugale grave ou d'un comportement déshonorant ou immoral de la part de l'autre conjoint (article 49 du Marriage Act). De même, un conjoint peut demander le divorce si la rupture est due au comportement de l'autre conjoint résultant d'une maladie mentale ou d'une déficience comparable (§ 50 EheG). Un conjoint peut également demander le divorce si l'autre conjoint est atteint d'une maladie infectieuse ou dégoûtante grave dont on ne peut espérer la guérison dans un avenir prévisible (§ 52 EheG). Il existe ensuite la possibilité de demander le divorce en raison d'une séparation durable de la communauté domestique pendant au moins 3 ans (§ 55 EheG). Dans le cas des variantes susmentionnées, il suffit que l'un des époux demande le divorce et dépose une requête en divorce auprès du tribunal. Dans ces cas, le mariage est divorcé par jugement du tribunal.

Si les deux conjoints sont d'accord, ils peuvent également divorcer par consentement mutuel en soumettant une convention de divorce au tribunal (§ 55a EheG). Dans ces cas, le mariage est divorcé par ordonnance du tribunal non contentieux.

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Le notaire peut certifier un contrat pour le partage des biens matrimoniaux.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

partage des biens

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

L'intervention du notaire dans l'accord de partage est volontaire. Il est choisi par les parties.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

fonction habituelle

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

Si les conjoints divorcés ne sont pas d'accord sur le partage des biens matrimoniaux, ils peuvent demander une procédure de partage judiciaire. Les biens seront ensuite divisés par le tribunal.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Les frais forfaitaires pour un divorce judiciaire sont :

Pour un divorce contesté : 333 euros pour la demande de divorce.

Pour la procédure suivant le divorce contesté, les frais sont les suivants :

- Procédures relatives au partage des biens et de l'épargne conjugale : 358 euros
- Procédure relative à l'indemnisation de la participation d'un époux à l'acquisition de l'autre : 287 euros
- Demande de fixation d'aliments : 5 pour mille de la valeur de l'attribution juridiquement contraignante ou juridiquement efficace par décision ou transaction

Pour un divorce à l'amiable :

- 312 euros pour la demande de divorce
- en plus pour le règlement nécessaire à l'audience 312 euros
- le cas échéant, pour l'accord sur le transfert de propriété de biens immobiliers ou la création d'autres droits 468 euros
- Les honoraires du notaire ou de l'avocat intervenant dans la procédure de partage sont basés sur la valeur des biens à partager.

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Une décision étrangère relative à la séparation sans dissolution du lien matrimonial, au divorce ou à l'annulation d'un mariage ainsi qu'à la détermination de l'existence ou de la non-existence d'un mariage est reconnue en Autriche en raison de § 97 de la loi sur les litiges, si elle est juridiquement contraignante et qu'il n'existe aucun motif de refus de reconnaissance. La reconnaissance peut être jugée indépendamment en tant que question préliminaire sans nécessiter une procédure spéciale. La reconnaissance de la décision doit être refusée si

1. elle est manifestement en contradiction avec les valeurs fondamentales du système juridique autrichien (ordre public) ;
2. l'audition légale de l'un des conjoints n'a pas été respectée, à moins qu'il ne soit manifestement d'accord avec la décision
3. la décision est incompatible avec une décision autrichienne ou une décision antérieure remplissant les conditions de reconnaissance en Autriche, par laquelle le mariage en question a été séparé, divorcé, déclaré invalide ou par laquelle l'existence ou la non-existence du mariage a été établie ;
4. l'autorité de reconnaissance n'aurait pas eu de compétence internationale si le droit autrichien avait été appliqué.

En outre, le **Règlement (CE) n° 1347/2000 du Conseil du 29 mai 2000 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs** doit être respecté ainsi que des traités multilatéraux et bilatéraux.

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Un choix de loi est possible et autorisé conformément au règlement de l'UE sur les régimes matrimoniaux.

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

Voir règlement de l'UE sur les régimes matrimoniaux

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Voir règlement de l'UE sur les régimes matrimoniaux

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

Actuellement, le divorce n'est possible qu'au tribunal. En particulier dans le cas de divorces à l'amiable, l'intervention obligatoire d'un juriste spécialisé dans les contrats, de préférence un notaire, pour le règlement du divorce serait souhaitable. Les accords de divorce rédigés par les parties sans conseil juridique entraînent souvent des problèmes d'exécution et des procédures judiciaires ultérieures sur le partage. Comme le système judiciaire est de toute façon envahi par les procédures de droit de la famille, il est conseillé d'envisager une procédure de divorce avec un notaire. Puisque nous avons un système qui fonctionne très bien, celui du notaire comme commissaire de justice dans les procédures d'homologation, il serait bon d'envisager de l'étendre aux divorces.

MEMBER NOTARIAT OF: BELARUS

Author: Maria KARALEVA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Yes, there are a marriage contract and an agreement on the division of property that is the common joint property of the spouses.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

Yes, the marriage contract can determine the next (Article 13 of the Code of the Republic of Belarus on Marriage and Family, hereinafter- Family Code):

- the rights and obligations of spouses for mutual maintenance, including after the divorce;
- the procedure for the division of property that is the common joint property of the spouses;
- jointly acquired property that will be transferred to each of the spouses after the divorce;
- conditions for changing the regime of common joint property of spouses established by legislative acts by establishing shared ownership or ownership of each of the spouses for all property that is subject to classification as common joint property in accordance with legislative acts, or for certain types of such property;
- conditions regarding the impossibility of recognizing the property of each of the spouses as their common joint property, if during the marriage, at the expense of the common property of the spouses or the personal property of the other spouse, investments are made that significantly increase the value of this property (major repairs, reconstruction, etc.);
- types of disputes between spouses (former spouses) arising from marital and family relations, which can be submitted by them to an arbitration court or for settlement with the participation of a mediator (mediators);
- other issues of relations between spouses (the procedure for each of them to bear family expenses, etc.), parents and children, if this does not violate the rights and legitimate interests of other persons and does not contradict the law.

The division of property that is the common joint property of the spouses, unless otherwise provided by the Marriage Contract in respect of this property, may be made by mutual consent of the spouses both during the marriage and after its dissolution by entering into a written Agreement by the spouses (former spouses) on the division of property that is the common joint property of the spouses, which is subject to notarization.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

Both the marriage contract and the agreement on the division of common joint property are subject to mandatory notarization.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

NO

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

In the marriage and family legislation of the Republic of Belarus, the norms on the divorce have been in place since the country gained independence in 1991. They passed from the legislation of the BSSR. In the XX century, cases of divorce were considered according to the norms of the Decree on December 19, 1917. "On the Dissolution of Marriage", the Civil Procedure Code of the BSSR of 1923, the Code of Laws on Marriage, Family and Guardianship of the BSSR of 1927.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:**DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?**

No, the Family Code provides for the division of common joint property only if the spouses themselves declare it (Article 41).

IF YES, TO WHICH EXTENT: TERMORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Both the court, and in the Marriage Contract, and in the Agreement on the division of property that is the common joint property of the spouses, the division is made only of the property that the spouses themselves ask to divide.

According to part four of Article 24 of the Family Code, in case that one of the spouses is transferred items which value exceeds the share due, the other spouse is awarded appropriate monetary compensation.

The amount of alimony is established by law (Article 92 of the Family Code), the spouses can change it in a big part by concluding an agreement on the payment of alimony, if the financial situation of the spouse paying alimony worsens, their amount can be reduced by the court (articles 92 and 98 of the Family Code). Alimony is collected from the parent with whom the children do not remain to live. If the children remain with each of the parents, alimony from one of the parents in favor of the other, less well-off, if the amount of alimony is not determined by a Marriage Contract, an agreement on children or an Agreement on the payment of alimony, is established in a fixed amount of money collected monthly and determined by the court in relation to the amounts established by this article, taking into account the material and marital status of the parents (part three of Article 92 of the Family Code).

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

Applying to a notary for certification of a marriage contract or an agreement on the division of property that is the common joint property of the spouses is voluntary.

Do other legal professionals intervene at this step of the divorce setup, for example lawyers, experts, etc?

According to the second part of Article 36 of the Family Code, the court explains to the spouses the right to a voluntary settlement of the dispute with the participation of the mediator (s), including their right to participate in an information meeting with the mediator.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The spouses independently choose which notary to apply to when they decide to conclude a marriage contract or an agreement on the division of property that is the common joint property of the spouses.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

Under Belarusian law, a notary does not participate in the divorce procedure itself, but only certifies agreements between spouses or former spouses.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

According to articles 35.1-37 of the Family Code, a marriage in the Republic of Belarus is terminated by a court or by bodies registering acts of civil status. The divorce by the body registering acts of civil status is carried out by mutual consent of the spouses who do not have common minor children and a dispute about property. When applying to the body registering acts of civil status, the spouses must confirm that they do not have common minor children and a dispute about property (part one of Article 35.1 of the Family Code). Divorce is performed by the body registering acts of civil status within the period agreed with the spouses, but not earlier than one month and not later than two months from the date of filing a joint application for divorce (part three of Article 35.1 of the Family Code).

There are 2 procedures for divorce by the court: ordinary and special.

Under the ordinary procedure, according to article 36 of the Family Code, the divorce is carried out by the court in the order of claim proceedings.

When accepting a claim for divorce, the court grants the spouses a three-month period for taking measures for reconciliation and reaching an agreement on common minor children and the division of property, and also explains to the spouses the right to a voluntary settlement of the dispute with the participation of the mediator (s), including their right to participate in an information meeting with the mediator.

After the expiration of the three-month period, the marriage is terminated if the court finds that the further joint life of the spouses and the preservation of the family have become impossible. When deciding on the dissolution of a marriage, the court takes measures to protect the interests of minor children and the disabled spouse.

When considering the statement of claim, the court takes measures aimed at preserving the family, and has the right to postpone the trial of the case, assigning the spouses an additional period for reconciliation within six months.

In accordance with article 37 of the Family Code without providing a period for reconciliation, a marriage is terminated by a court at the request of one of the spouses, if the other spouse:

- is recognized as missing in the manner prescribed by law;
- is recognized as legally incompetent;
- is iconvicted of committing a crime to imprisonment for a term of not less than three years.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

A divorce before a notary is impossible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

After the divorce, the former spouses can apply to a notary for certification of the Agreement on the division of property that is the common joint property of the spouses, the Agreement on children, the Agreement on the payment of alimony, the issuance of certificates of ownership of shares in the property acquired by the spouses during the marriage.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The notary certifies the listed agreements and issues certificates in accordance with the procedure. provided for by the Law of the Republic of Belarus of July 18, 2004 "On notaries and notarial activities". Former spouses independently choose which notary to apply to.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary certifies transactions and issues certificates as part of his ordinary role.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

Former spouses can seek the help of a lawyer, they can resort to mediation, or if they cannot reach an agreement, they can go to court instead of a notary.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

In accordance with paragraph 3 and paragraph four of paragraph 35 of the Notary Fees for notarial acts and the provision of legal and technical services by notaries, approved by the resolution of the Council of Ministers of the Republic of Belarus of December 27, 2013. No. 1145 (hereinafter referred to as Notary fees), for the certification of a Marriage contract, a tariff of 600 percent of the basic amount established in the Republic of Belarus on the date of certification of the contract is charged, for the preparation of a draft contract, if such a service is provided by a notary, in the amount of 200 percent of the basic amount established in the Republic of Belarus on the date of certification of the contract. Today, the basic amount is 29 BYN (about 10€).

The notary fee for certifying an agreement on the division of property that is the common joint property of the spouses is 500 percent of the basic amount (point 2 of the Notary fees). The notary fee for drafting the agreement is 100 percent of the base amount (paragraph two of paragraph 35 of the Notary fees).

For the issuance of a certificate of ownership of the shares of funds in deposits (deposits), accounts, unpaid wages and equivalent payments, pensions, acquired by the spouses during the marriage, a notary fee is paid in the amount of 3 percent of the amount of property for which the certificate is issued.

For the issuance of a certificate of ownership of shares in other property acquired by the spouses during the marriage - 200 percent of the basic value.

State fee for consideration of the case of divorce by the court:

consideration of the statement of claim:

- 2.1. on the termination of marriage - 4 basic values;
- 2.2. on the termination of remarriage - 8 basic values;

The Notary Chamber of Belarus does not have information on the amount of payment for lawyers and mediators. The amount of remuneration is determined by agreement of the parties.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

According to article 236 of the Family Code, documents issued by the competent authorities of foreign states to certify acts of civil status committed outside the Republic of Belarus in compliance with the legislation of the relevant states in respect of citizens of the Republic of Belarus, foreign citizens and stateless persons are recognized as valid in the Republic of Belarus in the presence of consular legalization, unless otherwise provided by the legislation of the Republic of Belarus and international treaties of the Republic of Belarus.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Belarusian notaries do not have such competence

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

There is a restriction on the application of the legislation on marriage and family of foreign States – such application cannot take place if it would contradict the legislation of the Republic of Belarus. In addition, Belarus has established the priority of international treaties over national legislation on marriage and family, that is, if an international treaty of the Republic of Belarus establishes rules other than those contained in the legislation on marriage and family, the rules of the international treaty apply.

Some international treaties of the Republic of Belarus contain conflict-of-laws rules on the applicable law.

Thus, the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, concluded in Minsk on 22.01.1993 (as amended on 28.03.1997) and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, concluded in Chisinau on 07.10.2002, set out which legislation should determine the personal and property legal relations of spouses, and which legislation should be guided by the dissolution of marriage. Similar provisions are found in the agreements on legal assistance with the Republic of Poland, the Republic of Lithuania, the Republic of Latvia, Hungary, the Czech Republic and some other countries.

Thus, if an international treaty defines the applicable law, there is no reason for the spouses to choose another law to be applied.

The law on marriage and Family establishes the applicable law for the dissolution of marriage. In the Republic of Belarus, the termination of marriages of Belarusian citizens with foreign citizens, as well as marriages between foreign citizens, if at least one of them permanently resides on the territory of Belarus, must be carried out in accordance with the legislation of the Republic of Belarus. In connection with the termination of marriage, the spouses have the opportunity to settle property and non-property relations between themselves and with their children by concluding a number of contracts: a marriage contract, an agreement on children, an agreement on the payment of alimony, an agreement on the division of property. The marriage and family law applies to these contracts. At the same time, in the civil legislation (Civil Code) there is a reservation that it can be applied to marriage and family relations, but only to those that are not regulated by the marriage and family legislation.

Taking into account the above, since there are no conflict-of-laws rules in the legislation on marriage and family, in the absence of an international treaty defining the applicable law, the possibility of applying foreign law to the contractual relations of the spouses is determined by the conflict-of-laws rules of civil law.

According to the Civil Code, the parties to the contract may, at the conclusion of the contract or in the future, choose by agreement between themselves the law that is subject to application to their rights and obligations under this contract, if this does not contradict the law. The parties to the contract may choose the applicable law, both for the contract as a whole and for its individual parts. However, the civil legal capacity of an individual in relation to transactions made in the Republic of Belarus is determined by the legislation of the Republic of Belarus, and the right of ownership of real estate is determined by the law of the country where the real estate is located.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

As a rule, international treaties define not only the applicable law, but also the competence of the institution of the relevant party (jurisdiction). If the jurisdiction is defined in an international treaty, the spouses have no reason to choose another one, taking into account the priority of international treaties. In the absence of an international treaty, the jurisdiction to terminate a marriage is in some cases determined by the law on marriage and family. Thus, according to the marriage and family legislation, the termination of marriages between foreign citizens is carried out in diplomatic missions and consular offices of foreign states and is recognized on the terms of reciprocity as valid in the Republic of Belarus.

Also, the competent authorities of Belarus will not terminate a marriage between stateless persons who do not have permanent residence in Belarus.

Conversely, the termination of marriages between citizens of Belarus, as well as between citizens of Belarus and foreign citizens, if both spouses reside on the territory of Belarus, is carried out by the competent authorities of Belarus.

If the jurisdiction for the termination of marriage is not defined by an international treaty or mandatory norms of the law on marriage and family, it can be chosen by the spouses in a contract (Prenuptial agreement), which can be concluded both before and after the wedding.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Unless otherwise defined by international treaties or mandatory norms of the legislation of Belarus, the definition of a law or jurisdiction may be recognized. The limits of such recognition are the contradiction of foreign norms to the legislation of Belarus.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Code of the Republic of Belarus on Marriage and Family of July 9, 1999 No. 278-Z (ed. of 18.12.2019) (with amendments and additions that entered into force on 01.08.2020);

Law of the Republic of Belarus of July 18, 2004 No. 305-Z "On Notaries and notarial activities".

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

We think that the divorce system in the country is quite effective. Under certain conditions, the divorce procedure can be simplified (without a court). It is possible to contact the mediator.

There are many possibilities for contractual constructions, although not directly dissolving the marriage, but related to the termination of the marriage (marriage contract, agreement on children, division of property, alimony). The legality of these agreements is guaranteed by a notary.

Even if the relations are complicated by a foreign element, it is possible to settle both the national and foreign components at the same time, without resorting to the complexities of applying foreign law. Thus, a marriage contract, for example, may provide that the rights and obligations under it become binding on the parties only after the conclusion of a similar contract between the parties in another country.

lly regarding the intervention of the notary in the procedure.

The divorce procedure itself does not cause any particular complaints and was recently supplemented with the possibility of an out-of-court divorce, which is why the practice of its application is now being developed. The powers of notaries in the field of certifying contracts between spouses were expanded in 2020 (it became possible to certify an Agreement on children with a notary).

We believe that when considering disputes between spouses, the rights of third parties should not be affected in any way.

MEMBER NOTARIAT OF: BELGIUM

Author: An SIBIET

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Yes, the notary is the competent authority to draft marital contracts – Article. 1392 Civil Code.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE?

Yes, some aspects can be taken into account already in the marital contract, but they can only relate to the marital property consequences. Maintenance obligations for example cannot be the subject of prior agreement.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

Yes, the notary drafts the marital contract in the form of an authentic instrument. They are published in the Central Register of Marriage Contracts, kept by the Federation of Notaries. Such registration is obligatory.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

At a very early stage in the existence of Belgium, divorce was made possible by applying the provisions in the Code Napoleon.

1. The divorce preparation

Please bear in mind that in Belgium there are two types of divorce, and for both types the role of the notary is different (see the second question under point 2).

Does the notary have a role in the preparation of the divorce process, that is:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Yes, an inventory of the patrimonial assets is the standard; however, most parties choose not to have one drawn up (it is not a legal obligation). In case of a divorce by mutual consent, the parties have usually already drawn up a list of the assets as they need to agree on the division, but also in case of a divorce before the judge, the parties have usually already made their own inventory.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Calculation of support payments is usually not a part of the inventory; the notary can advise the parties in case of a divorce by mutual consent (see below), but it is not up to the notary to determine the payments.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC.?

No, there is no obligatory involvement of the notary in the preparatory phase. Parties are however free to contact a notary for legal advice and in case of a divorce by mutual consent, the notary will be the one drafting the actual agreements on the division of property.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Parties are always free to consult a lawyer or they may opt for mediation.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The notary is freely chosen by the parties in case of a divorce by mutual consent, and is either freely chosen by the parties in case of a divorce before a judge, or appointed by the judge if parties cannot agree on a notary. In case of a divorce before a judge, one of the parties needs to request the notary to commence the division. The notary has the exclusive competence to handle the division of the marital property in case of a divorce before the judge (see below).

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No, it is always a judge pronouncing the divorce – even if it concerns a divorce by mutual consent and the division of matrimonial property is prepared by a notary, it is the judge deciding on the actual separation of the couple.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM) THERE ARE TWO TYPES:

- Irretrievable breakdown of the marriage (Article 229 of the Civil Code)
- Divorce by mutual consent (Article 230 of the Civil Code).

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Divorce before a notary is not possible. In case of divorce by mutual consent, it is still the judge pronouncing the divorce.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

If there is a divorce by mutual consent, the notary intervenes in advance, before the divorce is pronounced by the judge, as the notary prepares the division of the estate.

If there is a divorce because of irretrievable breakdown of the marriage, the notary is involved after the judge has pronounced the divorce to handle the division of the assets. It is always the notary handling these aspects in this type of case, see Article 1210 Judicial Code. If the parties do not agree with the division as proposed by the notary, the court will have to settle the matter.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

The role of the notary is a very active one, including all the aspects mentioned here above, as he is the only competent authority to handle the division of property, see Articles 1214-1224 Judicial Code.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

One of the parties has to request the notary to start the procedure. The notary also has the possibility to retrieve information from third parties, in case one of the parties is not willing to cooperate, see Article 1214 par. 4 Judicial Code. The notary can always be chosen, only if the parties do not even agree on which notary to choose, the judge will appoint a notary, Article 1210 par.1 Judicial Code.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary has specific powers that are appointed to him by law, to handle all aspects of the divorce, except for the actual pronouncement of the divorce, Art. 1210 Judicial Code. In case of a divorce by mutual consent, the notary performs these tasks before the divorce is granted by the judge, in case of a divorce before a judge the notary performs these tasks afterwards.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

The notary has the exclusive competence to handle the property consequence of the divorce, see Article 1210 of the Judicial Code. Parties may at this stage be represented by lawyers; however, the lawyers do not play an active role in the decision-making process, Article 1214 par. 1 Judicial Code. The role of the judge here is to intervene if the notary needs certain issues to be clarified before being able to come to a division of the property.

Parties can also oppose the determinations of the notary, and the judge will then finally decide on the division as proposed by the notary.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

The cost, both concerning the fees and the taxes, depends on the volume of the estate, and whether there is real estate involved. The notary fees are regulated by law and cannot be deviated from.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes, Belgium recognises foreign divorces, also if they are granted by a notary, if they comply with the requirements for recognition in Article 27 of the Belgian PIL-Code.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The notary does not play a role in the processing of reception of a divorce that was granted overseas. In Belgium, the procedure for recognition and enforcement is laid down in Articles 22-30 of the PIL-Code (involving courts).

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Yes, this is possible, according to Article 55 par. 2 of the Belgian PIL code, the options are as follows: the law of the State of both spouses' nationality when the action is introduced, or Belgian law.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No, neither the Belgian PIL-Code, nor the Brussels-Ilbis Regulation (nr. 2201/2003) contain a choice of forum clause.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Yes, if the rules on recognition in the Belgian PIL-Code are respected, see Article 22 of the Belgian PIL-Code for judgments, and Article 27 of that same Code for authentic instruments.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Judicial Code, Articles 1210 and further.

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

The divorce by mutual consent is quite effective in practice. It could be improved if in cases without (minor) children, the notary could deal with every aspect of the divorce, including pronouncing it. This would entail that parties no longer need to go through the (fully written) procedure before the court for this type of divorce.

The divorce before a judge was revised in 20212, to make this procedure more effective, for example by enabling the notary to obtain information from third parties. It works well in practice and there is currently no need to make adjustments.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

The intervention of the notary is of added value for the parties during a divorce. The notary is an impartial and independent legal advisor, who works towards the best solution for both spouses. In the current divorce by mutual consent the notarial procedures is more time-efficient than the procedure before the court.

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

See above.

MEMBER NOTARIAT OF: BULGARIA

Authors: Meglena TSATSAROVA, Lidiya KAMULDZHIEVA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

The property relations between the spouses could be regulated by a contractual regime. According to Art. 39, para. 1 of the Family Code the matrimonial contract shall be concluded personally by the parties in writing with a notary certification of the contents and the signatures.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE? Yes.

Art. 38. (1) The matrimonial contract shall contain agreements only about property relations between the parties, as:

1. the rights of the parties over the property, which has been acquired during the matrimony;
2. the rights of the parties over the property, possessed by them before the matrimony;
3. the ways of management and disposition with the property, including the family home;
4. the participation of the parties in the expenses and obligations;
5. the property consequences in case of divorce;
6. the support of the spouses during the matrimony, as well as in case of divorce;
7. maintenance of the children from the matrimony;
8. other property relations, as far as this does not contradicts this Code provisions.

(2) The property relations between the parties may be provided for by reference to some of the legal regimes. An agreement for pre-matrimonial property of one of the parties to become in matrimonial property regime shall not be admitted.

(3) The matrimonial contract shall not contain provisions in case of death. The restriction shall not refer to the provisions about the spouses' shares in case of termination of agreed matrimonial property regime.

(4) For the unsettled by the matrimonial contract property relations, the legal regime of matrimonial property shall be applied.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

See the answer to the 1st question.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Divorce has always existed as an institute in the Bulgarian legislation; it is currently regulated by the current Family Code instituted in 2009.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

The Bulgarian Family Code regulates three property regimes between spouses. The applicable property regime shall be registered at the Registry Agency. The registration is performed ex officio on the basis of a notice from the municipality the register of which keeps the civil marriage certificate.

Where no property regimes between spouses has been entered into the register the regime of community of property governs transactions between each spouse and a third party.

Matrimonial Community of Property

In this case the properties acquired during marriage as a result of joint contribution become equally owned by both spouses in common, regardless of the fact in whose name they have been acquired. The joint contribution may be expressed in the input of resources, labour, care of the children and housework. Rights in rem acquired before the marriage, as well as those acquired during marriage by inheritance or gift belongs to the spouse who has acquired them. Personal property are also the chattels acquired by either spouse during marriage, which serve ordinary personal needs or the exercise of a profession or occupation. As well, personal property are the rights in rem acquired during marriage by either spouse who is a sole proprietor for the purpose of engaging in business activities and included in his or her business. Furthermore, personal property are the rights in rem acquired during marriage exclusively with personal property. Spouses dispose jointly with common property. Each spouse is free to dispose with his or her personal property in a transaction with a third party or the other spouse. Any action of disposal with the marital home which is the personal property of either spouse shall be carried out with the consent of the other spouse, where the spouses have no other housing which is common property or personal property of either. The matrimonial community of property shall be terminated: upon the dissolution of the marriage; by the court during marriage provided there exist compelling reasons to do so; in case the spouses choose the regime of separation of property or conclude a marriage contract. Spouses have equal shares upon termination of the community of property. They are jointly liable for debts incurred to meet family needs.

Statutory Regime of Separation of Property

According to this regime the rights acquired by each spouse during marriage remain his or her personal property. Spouses are jointly liable for debts incurred to meet current family needs.

A Marriage Contract

Marrying partners may settle their property relations in a marriage contract. They may conclude such contract also during marriage. The conclusion, the amendment and the termination of the marriage contract shall be specified in the civil marriage certificate and registered at the Registry Agency. The marriage contract contains arrangements concerning only property relations of spouses. Therefore, any provisions regulating personal relations between spouses are not valid. A clause envisaging the transformation of prenuptial property of either party into common matrimonial property is not valid too. As well, the marriage contract may not include clauses concerning the event of death. The marriage contract shall be concluded by the parties in person and given in writing with notarized content and signatures. A marriage contract enters into force from the date of marriage. When concluded during marriage, the contract takes effect from the date of conclusion of the contract or any other

date specified therein. A marriage contract may be terminated: at the mutual consent of the parties; at the claim of either spouse in the event of material change of circumstances, where the contract presents a serious threat to the interests of this spouse, the children under age or the family; upon dissolution of marriage, except for the clauses settling the effects of termination and intended to apply afterwards.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

No

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Not necessarily, but in most cases- a lawyer chosen by the client.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCILLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

N/A

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Bulgarian law knows two forms of termination of marriage through divorce:

- 1) Divorce by mutual consent
- 2) Divorce by claim based on a deep and irreparable breakdown of the marriage

In divorce by mutual consent both spouses apply for the divorce to the district court. The admissibility of the application is the marriage lasted at least three years preceding the date of application for divorce. Spouses must submit a signed agreement on Article 101 of the Family Code, which are required to resolve issues of custody, personal relationships and support of children born out of marriage and property relations between them, the use of family housing, maintenance of spouses and surname of husband. About the causes of the divorce by mutual consent of the spouses, it is declared a serious and firm mutual consent of the spouses to end the marriage. The Court did not examine the reasons for husbands to end the marriage.

In divorce by claim based on a deep and irreparable breakdown of the marriage, the application shall be submitted by one of the spouses. The district court of the domicile of the defendant has the jurisdiction to hear the appeal. The court is obliged to decide on official blame for the breakdown of the marriage, as well as custody, personal relationships and support of children born out of marriage and property relations between them, the use of the family home and more.

In divorce by claim spouses may declare that they want the court to rule on the question of guilt and the present Agreement, which are required to resolve all other issues. Reasons for judgment on admission of fault divorce is a deep and irreparable breakdown of the marriage. The term "deep and irreparable breakdown of the marriage" has no legal definition.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?
N/A.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

No

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE? N/A

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER? N/A

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

When the hypothesis of divorce because of dissolved matrimony is applicable the court shall admonish the spouses towards reconciliation through mediation or another way for voluntary settling the dispute. Lawyers could be also involved upon request on the parties in all three types of divorce.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

The first amount you have to pay is the state fee for filing a divorce case. It is BGN 25. When the case is over, another fee of BGN 50 is paid. If the spouses have minor children, a separate fee equal to 2 percent of the alimony for 3 years is paid. The amount will vary depending on the alimony, but on average this fee will be around BGN 100.

The lawyer's fee is negotiable, but clients should expect a minimum amount of BGN 600. The amount is usually divided between the spouses, but it is possible that only the "guilty" party pays the fee. If the divorce case is conducted by mutual consent, then the fee starts from BGN 400, which is a significant relief of the price, mostly because it will be, as a rule, divided equally between the two spouses.

There is a possibility that additional administrative fees may arise in the course of the case. For example, summoning one party through the State Gazette. This is done if the party cannot be found at his / her permanent or current address. Such a fee amounts to BGN 20. If the person lives abroad, the fee may be increased, the amount of which is determined by the court.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes according to the regulations stated in Art. 80 from the Bulgarian Code of Private International Law in connection to Art. 117 and Art. 118.

"Agreement on choice of applicable law

Art. 80. (1) The choice of applicable law under Art. 79, Para 4 shall be in a written form and shall be with a date and with the signature of the spouses.

(2) The conclusion and the validity of the agreement of choice shall be governed by the chosen law.

(3) The choice may be made before or after the conclusion of the marriage. The spouses may amend or cancel the choice of applicable law. If the choice was made

before the conclusion of the marriage, it shall become effective from the moment of conclusion of the marriage, except the parties agreed otherwise.

Conditions for recognition and admission of execution

Art. 117 from the Code of Private International Law states the conditions and order for recognition and admission of execution of foreign awards and other acts. "The awards and acts of foreign courts and of other bodies shall be recognized if:

1. the foreign court or body is competent as per the provisions of the Bulgarian law, but not if only the citizenship of the claimant or his/her registration in the state of the court was the ground for competence upon proprietary disputes;
2. a copy of the claim has been served on the defendant, the parties have been regularly summoned and the main principles of the Bulgarian law regarding their defence had not been offended;
3. between the same parties, on the same ground and for the same claim there is no entered in force decision of a Bulgarian court;
4. between the same parties, on the same ground and for the same claim there is no pending litigation before a Bulgarian court, started before the foreign suit on which the decision is imposed and the recognition and execution of which is pretended;
5. recognition or admission of execution shall not contradict the Bulgarian public policy.

Jurisdiction at recognition

Art. 118. (1) The recognition of the foreign award shall be performed by the body before which it is submitted.

(2) In case of dispute regarding the conditions for recognition of the foreign award, a declaratory judgment may be demanded at the Sofia City Court."

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS? ?

N/A

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS? ?

N/A

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Bulgarian Code of Private International Law states the following:

"Divorce

Art. 82. (1) The divorce between spouses of the same foreign citizenship shall be governed by the law of the state, which citizens are they at the moment of submission of the application for divorce.

(2) The divorce between spouses of different citizenship shall be governed by the law of the state, where their common habitual residence is located at the moment of submission of the application for divorce. In event the spouses have no common habitual residence, the Bulgarian law shall be applied.

(3) In event that the foreign law does not admit the divorce and at the moment of submission of the application for divorce one of the spouses is a Bulgarian citizen or has a habitual residence in the Republic of Bulgaria, the Bulgarian law shall be applied."

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

Bulgarian Code of Private International Law states the following:

“Personal and property relations between spouses

Art. 79. (1) The personal relationships between spouses shall be governed by their common national law.

(2) The personal relations between spouses who have different citizenship shall be governed by the law of the state, where their common habitual residence is located, and if such does not exist – by the law of the state, which both of the spouses are in closest connection to.

(3) The property relations between spouses shall be governed by the law applicable to their personal relations.

(4) The spouses may choose a law applicable to their property relations, if this is allowed by the law as defined under Para 1 and 2.”

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

N/A

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

In 2019 the Bulgarian Notary Chamber initiated a conference with Mrs. Valerie Velin as a representative of the High Council of the French Notariat in order to present to the Bulgarian public how in France is applied the procedure of divorce before a notary. After the seminar the Chamber had a number of meetings and conversations on the topic as a result of which there was written a project for the amendment of the current legal basis (the Civil Code and the Family Code). It has not been presented officially to the institutions yet since the texts have to be still upgraded with precision.

MEMBER NOTARIAT OF: CROATIA

Author: Darja BOŠNJAK

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

No

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

No

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Divorce was introduced as legal instrument with the Elemental Act on Marriage which came in force 9th April 1946. All subsequent laws contained provisions on divorce.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

No

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Yes, in situations when spouses have underage child before initiating the divorce procedure before court they must participate in compulsory marital counseling before the competent social welfare center. During the compulsory marital counseling spouses are consulted in order to make an amicable decision on family relations, taking special care to protect family relations in which the child participates, and they get acquainted with the legal consequences of not reaching an agreement and initiating court proceedings to decide on the child's personal rights.

Also, spouses can, regardless of the existence and age of the children, agree on the regulation of the property relations of the spouses and the support payments of the spouse.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

If spouses agree, they can permanently divide the matrimonial property as well as calculate the monthly support payments for one of them or for their child, which will live with one of the spouse after the divorce.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

No

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Spouses are free to engage the legal professionals, to be exact they can hire a lawyer for the legal consulting and preparing the needed documentation for the agreement.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

N/A

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Family Act prescribes that divorce may be filed by one spouse in a lawsuit, and both spouses by a proposal for an amicable divorce.

The court will make a decision on divorce: 1. if both spouses propose divorce on the basis of an agreement 2. if it finds that the marital relationship is severely and permanently disrupted or 3. if a year has passed since the dissolution of the marital union.

So, in accordance with the applicable provisions of the Family Act there are two types of divorce in Croatia, and that is an amicable divorce and a divorce on the lawsuit of one of the spouses. In both cases, the divorce is granted by the court. The difference is in the court procedure that precedes the court's decision on divorce, where in the case of an amicable divorce the court makes a decision in a non-litigious procedure while in a divorce initiated by a lawsuit of one spouse the court makes a decision in litigation proceeding.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

N/A

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

N/A

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

N/A

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

N/A

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

Courts and lawyers can be involved if the agreement set between spouses during divorce, especially agreement on support payments, is not respected by one of the spouses.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

In divorce proceeding lawyer is entitled to a fee for first-instance procedure, regardless of the number of actions he has taken, in the amount of 2.000,00 kuna + VAT (cca 267 EUR). Court fees depend on the type of the divorce, in case of amicable divorce the fee is 100,00 kuna (cca 13,50 EUR) and in the case of the lawsuit the fee is 200,00 kuna (cca 27 EUR).

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

In the matter of recognition of foreign decisions relating to divorce which are not regulated by international conventions or EU law (primarily Council Regulation (EC) No 2201/2003), the procedure and requirements are prescribed by art. 65 to art. 73 of the Private International law Act.

Foreign decision on divorce made by notary can be recognise in Croatia under the condition that in the country in which it was made, notary decision on divorce was equated with a court decision, ie a court settlement. Beside that condition, foreign decision on divorce must fulfil certain other requirements to be recognise in Croatia.

These requirements are:

- the decision must be final (res judicata);
- the right of a person to participate in the proceedings in which the decision has been made must not have been violated;
- there is no exclusive jurisdiction of a court or other body of the Republic of Croatia in that matter;
- foreign jurisdiction must not have been established exclusively on the basis of the presence of the person or their property in the state of the court, and that presence is not directly related to the subject matter of the proceedings;

- there must not be a final decision (res judicata) of a Croatian court or a decision of a foreign court which already became final in the same matter;
- the recognition of such a decision must not be contrary to the public order of the Republic of Croatia.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

N/A

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

N/A

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

In accordance with the to art. 36 of the Private International law Act divorce is governed by the law chosen by the spouses. Spouses can choose one of the following laws:

1. the law of the State in which both spouses have their habitual residence at the time of the election, or
2. the law of the State in which they had their last common habitual residence, if one of them still has his habitual residence in that State, or
3. the law of the State of which at least one of them is a national at the time of the election, or
4. Croatian law.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Agreement on the applicable law made overseas by the spouses is recognised to the extent prescribed by the art. 36 of the Private International law Act. (see answer above).

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

N/A

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED.

As Croatian notaries do not have any competencies in divorce procedure it is hard for us to evaluate the effectiveness of the divorce system. But in general we can point out the benefits of transfer of jurisdiction in the amicable (consensual) divorce from courts to notaries. Based on experience from other undisputed proceedings that have been transferred to the jurisdiction of Croatian notaries (e.g. succession proceedings), we can point out the fact that when courts are relieved of such cases, that

allows them to concentrate on cases where there is a dispute between the parties. Also, there are benefits for the public expenditure, due to the smaller number of cases there is less need in financing the court apparatus, i.e. existing funds could be allocated to cases where a court decision is necessary as there is no agreement between the parties. Also, in divorce proceedings, there is a level of discretion that is desirable for the parties involved and that could be achieved to a greater extent if consensual divorce were conducted by a notary.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE.

N/A

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

See answer above.

MEMBER NOTARIAT OF: SPAIN

Author: Antonio Juan GARCIA AMEZCUA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Indeed, the spouses can, before or after celebrating the marriage, agree on issues relating to their matrimonial property regime.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

Any economic regime is extinguished as a result of divorce. In the pacts related to the economic regime, some of the consequences of the termination of the regime can be regulated, as long as they are not contrary to the equality of the spouses, the law, or public order.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

Marriage agreements must be executed before a Notary Public and in a public deed, at which time they will take effect between the spouses, and then be registered in the Civil Registry, whose publication produces effects against third parties.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

Yes. The Notary is one of the persons designated by law to celebrate the marriage (since 2015) and to instruct the prior marriage file (since May 1, 2021)

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

Only to notify the Civil Registry of the celebration, by sending the authorized copy of the deed (telematic transmission is foreseen, but not yet possible)

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Apart from a brief period during the second republic (1932), the stable regulation of divorce in Spain occurs by virtue of the Law of July 13, 1981.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Sometimes, the spouses, prefer to solve the patrimonial situation before divorcing, to address only personal issues in the divorce. In this case, they can address patrimonial issues through agreements signed before a Notary Public. On other occasions, if there are no minor children, the divorce can be carried out both in the personal situation and in the patrimonial situation, in a fully notarial manner.

IF YES, TO WHICH EXTENT: TERMORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

The agreements are concluded between the spouses, although when the economic regime is settled before the Notary Public, he must control the legality of the agreements.

When the divorce is celebrated before a Notary Public, the regulatory divorce agreement must be approved by the Notary, but the Notary must ensure that there are no agreements that are seriously prejudicial or discriminatory for one of the spouses. When the divorce is notarized, the spouses are assisted by a lawyer or lawyers, who are the ones who usually draw up the regulatory agreement and put the spouses in agreement as to possible compensation.

Regarding maintenance payments, the Notary does not have competence, when there are minor children, to determine the divorce, it will be the judicial authority, with the intervention of the Public Prosecutor, who intervenes to approve said payments.

If the children are of legal age and in some way depend on the spouses, the divorce can be carried out in a notarial manner, but the older children must intervene and show their conformity to the agreement, without prejudice to the power of the Notary to ensure the non-existence of agreements that are seriously prejudicial or discriminatory for the intervening parties.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

No, they are optional. And in no case should the Notary perform any prior act, even when the divorce is notarized.

DO OTHER LEGAL PROFESSIONNALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

When the divorce is notarized, the intervention of a lawyer is necessary, whether it is common for the spouses, or independent for each of them.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The Notary's mission is to control the legality of the agreements and the non-existence of agreements that are seriously damaging or discriminatory for the spouses or intervening parties mentioned above.

The competence of the Notary is determined by the Law, since it can only be that of the common domicile or of one of the spouses.

2. The divorce judgement

DOES THE NOTARTY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

As indicated, divorce can be celebrated in a notarial or judicial manner.

When it is celebrated by judicial means, the Notary does not have any intervention and it is the Judge who makes the decision on the divorce, with the intervention of the Public Prosecutor when there are minors or people with some special protection regime.

When the divorce is notarized, the one who approves the divorce is the Notary, but according to certain rules:

- Only the common domicile or one of the spouses is competent.
- It can only occur in the event of a non-contentious divorce, that is, in the event that both spouses agree on the decision to divorce.
- The spouses are those who present, advised by a lawyer, whose intervention is mandatory, the divorce agreement called regulatory agreement, limiting the work of the Notary to control the legality of the agreement and verify the absence of agreements that are seriously damaging or discriminatory for the spouses or intervening parties mentioned above.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

I think it's already answered.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Only when it is non-contentious and there are no minors.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

If the divorce is carried out in court, it usually includes the liquidation of the matrimonial property regime, and in this case, there is no intervention of the Notary Public. If, on the other hand, the divorce is carried out before a Notary Public, the latter intervenes in matters relating to the liquidation of the matrimonial property regime, they are usually substantiated within the regulatory agreement, unless the spouses decide to the contrary who decide to postpone said liquidation to a later time.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

The spouses determine the division of assets and assets that will belong to each of them after the divorce. The mission of the Notary is to record in the public deed of divorce what the true will of the spouses is, since the transfer of property is carried out in accordance with the theory of title and manner, having the public deed in which it is the regime liquidates the effect of transferring ownership.

Advertising of transmissions in Spain is voluntary, although such advertising protects against third parties. They are the successful bidders of the goods, who must be in charge of the registration in the appropriate Registries.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

If the divorce is granted before a Notary and the liquidation of the financial system occurs within the divorce, the rules of jurisdiction regarding the Notary are the same as for divorce.

If the liquidation of the regime occurs at a time after the divorce and outside of this procedure, the notary can freely choose the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

In both cases, the Notary Public acts in his usual function, which is the extrajudicial field, since as indicated, he can only act in non-contentious cases and within the framework of his usual activity.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

In the post-divorce stage, they do not usually intervene, except for non-compliance by the parties of the agreements adopted.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

Notary, lawyer and registry fees vary when there is a settlement of the matrimonial property regime based on the inventoried wealth.

Attorneys' fees can also vary based on whether the divorce is contentious or non-contentious.

Regarding notary fees, when it is simply a matter of divorce, they can be estimated between two hundred euros (€ 200.00) and three hundred euros (€ 300.00).

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

The determination and existence of divorce, whether notarized or not, is an internal matter of the country in which it was granted and therefore its effects will be recognized in Spain, provided that it is registered in the corresponding Civil Registry.

The art. 107.2 CC after the reform operated by Final Provision 1 of the Voluntary Jurisdiction Law, provides that: "Legal separation and divorce shall be governed by the European Union or Spanish rules of Private International Law".

The EU rules are, on the one hand, Regulation 1259/2010 establishing enhanced cooperation in the field of law applicable to divorce and legal separation; and on the other hand, the regulations relating to the law applicable to the different effects of divorce and separation.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Except in the case that you are going to celebrate a new marriage or process the previous file for its celebration, of one of the divorced spouses, in which you must verify the registration of the divorce in the corresponding Civil Registry, the Notary does not have any role.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

According to article 5 of EU Regulation 1259/2010:

"1. The spouses may agree to designate the law applicable to divorce and legal separation, provided that it is one of the following laws:

- a) the law of the State in which the spouses have their habitual residence at the time of the conclusion of the agreement;
 - b) the law of the State of the last place of habitual residence of the spouses, provided that one of them still resides there at the time the agreement is entered into;
 - c) the law of the State whose nationality is one of the spouses at the time the agreement is entered into, or
 - d) the law of the forum.
2. Without prejudice to the provisions of section 3, the agreement that designates the applicable law may be concluded and modified at any time, but no later than the date on which the claim is filed before a court.
3. If the law of the forum so establishes it, the spouses may also designate the applicable law before the court in the course of the procedure. In this case, the court will register the designation in accordance with the law of the forum. "

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

We understand that the agreement is possible before or during the marriage, as long as it respects the parameters of the aforementioned article 5.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Again we must go to EU Regulation 1259/2010 which in its articles 6 and 7 determines:

Article 6. Consent and material validity

1. The existence and validity of an agreement to choose the applicable law and its clauses will be determined in accordance with the law by which the agreement would be governed by virtue of these Regulations if the agreement or clause were valid.
2. However, the spouse who wishes to establish that they did not give their consent may avail themselves of the law of the country in which they have their habitual residence at the time the claim is filed with the court if the circumstances indicate that they do not it would be reasonable to determine the effect of your conduct in accordance with the law specified in paragraph 1.

Article 7 Formal validity

1. The agreement referred to in article 5, sections 1 and 2, will be formulated in writing and will be dated and signed by both spouses. Any transmission made by electronic means that provides a durable record of the agreement shall be deemed to have been made in writing.
2. However, if the legislation of the participating Member State in which both spouses have their habitual residence on the date of conclusion of the agreement establishes additional formal requirements for that type of agreement, those requirements will apply.
3. If, on the date of conclusion of the agreement, the spouses have their habitual residence in different participating Member States and if the laws of both States have different formal requirements, the agreement will be formally valid if it meets the requirements of one of the two laws .
4. If, on the date of conclusion of the agreement, only one of the spouses has his or her habitual residence in a participating Member State and if the legislation of that State establishes additional formal requirements for that type of agreement, those requirements shall apply.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Royal Decree of July 24, 1889, text of the edition of the Civil Code articles 82, 87, 89, 95, 100.

Law of May 28, 1862, on the Notary Public, Article 54

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

We understand that the system has improved, and that in the future if the notarial divorce shows, as it is doing, its effectiveness, the cases can probably be extended to those in which there are minor children, always with a prior report from the prosecutor's office.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

It reports agility to the procedure and does not diminish the control of legality.

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

We understand that the notarial procedure is well regulated.

NOTARIAT MEMBRE DE : ESPAGNE

Auteur : Antonio Juan GARCIA AMEZCUA

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

En effet, les époux peuvent, avant ou après la célébration du mariage, s'entendre sur des questions relatives à leur régime matrimonial.

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Tout régime économique s'éteint à la suite d'un divorce. Dans les pactes relatifs au régime économique, certaines des conséquences de la fin du régime peuvent être réglementées, pour autant qu'elles ne soient pas contraires à l'égalité des époux, à la loi ou à l'ordre public.

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Les accords de mariage doivent être signés devant un notaire public et dans un acte public, date à laquelle ils prendront effet entre les époux, puis être inscrits au registre de l'état civil, dont la publication produit des effets contre les tiers.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Oui. Le notaire est l'une des personnes désignées par la loi pour célébrer le mariage (depuis 2015) et instruire le dossier de mariage antérieur (depuis le 1er mai 2021)

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Uniquement pour notifier l'état civil de la célébration, en envoyant la copie autorisée de l'acte (une transmission télématique est prévue, mais pas encore possible)

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

Hormis une brève période pendant la seconde république (1932), la réglementation stable du divorce en Espagne intervient en vertu de la loi du 13 juillet 1981.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Parfois, les époux préfèrent résoudre la situation patrimoniale avant le divorce, pour ne traiter que des problèmes personnels lors du divorce. Dans ce cas, ils peuvent aborder les questions patrimoniales par des accords signés devant un notaire.

En d'autres occasions, s'il n'y a pas d'enfants mineurs, le divorce peut être pratiqué à la fois dans la situation personnelle et dans la situation patrimoniale, de manière entièrement notariale.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

Les accords sont conclus entre les époux, bien que lorsque le régime économique est réglé devant le notaire, celui-ci doit contrôler la légalité des accords.

Lorsque le divorce est célébré devant un notaire public, l'accord de divorce réglementaire doit être approuvé par le notaire, mais le notaire doit s'assurer qu'il n'y a pas d'accords qui soient gravement préjudiciables ou discriminatoires pour l'un des époux. Lorsque le divorce est notarié, les époux sont assistés par un ou plusieurs avocats, qui sont généralement ceux qui rédigent généralement la convention réglementaire et mettent les époux à un accord quant à l'indemnisation éventuelle.

En ce qui concerne les pensions alimentaires, le notaire n'a pas compétence, lorsqu'il y a des enfants mineurs, pour déterminer le divorce, ce sera l'autorité judiciaire, avec l'intervention du procureur de la République, qui interviendra pour approuver lesdits paiements.

Si les enfants sont majeurs et dépendent en quelque sorte des époux, le divorce peut être effectué de manière notariée, mais les enfants plus âgés doivent intervenir et démontrer leur conformité à la convention, sans préjudice du pouvoir du notaire de garantir l'inexistence d'accords gravement préjudiciables ou discriminatoires pour les parties intervenantes.

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Non, ils sont facultatifs. Et en aucun cas le notaire ne doit accomplir un acte antérieur, même lorsque le divorce est notarié.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Lorsque le divorce est notarié, l'intervention d'un avocat est nécessaire, qu'elle soit commune pour les époux, ou indépendante pour chacun d'eux.

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

La mission du notaire est de contrôler la légalité des accords et l'inexistence d'accords gravement préjudiciables ou discriminatoires pour les conjoints ou intervenants mentionnés ci-dessus.

La compétence du notaire est déterminée par la loi, puisqu'elle ne peut être que celle du domicile commun ou de l'un des époux.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Comme indiqué, le divorce peut être célébré de manière notariale ou judiciaire.

Lorsqu'il est célébré par voie judiciaire, le notaire n'a aucune intervention et c'est le juge qui prend la décision sur le divorce, avec l'intervention du procureur de la République lorsqu'il y a des mineurs ou des personnes bénéficiant d'un régime de protection spécial.

Lorsque le divorce est notarié, celui qui approuve le divorce est le notaire, mais selon certaines règles:

- Seul le domicile commun ou l'un des époux est compétent.
- Elle ne peut se produire qu'en cas de divorce non contentieux, c'est-à-dire dans le cas où les deux époux s'entendent sur la décision de divorcer.
- Les époux sont ceux qui présentent, conseillés par un avocat, dont l'intervention est obligatoire, l'accord de divorce dit accord réglementaire, limitant le travail du notaire pour contrôler la légalité de l'accord et vérifier l'absence d'accords gravement dommageables ou discriminatoires pour les époux ou intervenants mentionnés ci-dessus.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Je pense que c'est déjà répondu.

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

Seulement quand il n'y a pas de litige et qu'il n'y a pas de mineurs.

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Si le divorce est prononcé devant un tribunal, il comprend généralement la liquidation du régime matrimonial, et dans ce cas, il n'y a pas d'intervention du notaire. Si, en revanche, le divorce est opéré devant un notaire, ce dernier intervient dans les matières relatives à la liquidation du régime matrimonial, elles sont généralement justifiées dans la convention réglementaire, à moins que les époux n'en décident le contraire qui en décident reporter ladite liquidation à un moment ultérieur.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

Les époux déterminent le partage des biens et des biens qui appartiendront à chacun d'eux après le divorce. La mission du notaire est de consigner dans l'acte public de divorce quelle est la véritable volonté des époux, puisque le transfert de propriété est effectué conformément à la théorie du titre et de la manière, ayant l'acte public dans lequel il est le **régime liquide à l'effet du transfert de propriété**.

La publicité des transmissions en Espagne est volontaire, bien qu'une telle publicité protège contre les tiers. Ils sont les adjudicataires des marchandises, qui doivent être en charge de l'enregistrement dans les registres appropriés.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

Si le divorce est prononcé devant un notaire et que la liquidation du système financier intervient dans le cadre du divorce, les règles de compétence concernant le notaire sont les mêmes que pour le divorce.

Si la liquidation du régime intervient à un moment postérieur au divorce et en dehors de cette procédure, le notaire peut librement choisir les parties.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Dans les deux cas, le notaire public agit dans sa fonction habituelle, qui est le domaine extrajudiciaire, puisque comme indiqué, il ne peut agir que dans des cas non contentieux et dans le cadre de son activité habituelle.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

Dans la phase post-divorce, ils n'interviennent généralement pas, sauf en cas de non-respect par les parties des accords adoptés.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Les frais de notaire, d'avocat et de greffe varient en cas de règlement du régime matrimonial basé sur le patrimoine inventorié.

Les honoraires d'avocat peuvent également varier selon que le divorce est contentieux ou non contentieux.

Concernant les frais de notaire, lorsqu'il s'agit simplement d'un divorce, ils peuvent être estimés entre deux cents euros (200,00 €) et trois cents euros (300,00 €).

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

La détermination et l'existence d'un divorce, qu'il soit notarié ou non, est une affaire interne du pays dans lequel il a été accordé et, par conséquent, ses effets seront reconnus en Espagne, à condition qu'il soit enregistré dans le registre civil correspondant.

L'art. 107.2 CC après la réforme opérée par la disposition finale 1 de la loi sur la juridiction volontaire, établit que: «La séparation de corps et le divorce sont régis par l'Union européenne ou les règles espagnoles de droit international privé».

Les règles de l'UE sont, d'une part, le règlement 1259/2010 qui établit une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps; et d'autre part, les règlements relatifs à la loi applicable aux différents effets du divorce et de la séparation.

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Sauf dans le cas où vous allez célébrer un nouveau mariage ou traiter le dossier précédent pour sa célébration, de l'un des époux divorcés, dans lequel vous devez vérifier l'enregistrement du divorce dans l'état civil correspondant, le notaire n'a pas n'importe quel rôle.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Selon l'article 5 du règlement UE 1259/2010:

«1. Les époux peuvent convenir de désigner la loi applicable au divorce et à la séparation de corps, à condition qu'il s'agisse de l'une des lois suivantes:

- a) la loi de l'État dans lequel les époux ont leur résidence habituelle au moment de la conclusion de la convention;
- b) la loi de l'État du dernier lieu de résidence habituelle des époux, à condition que l'un d'eux y réside toujours au moment de la conclusion du contrat;
- c) la loi de l'État dont la nationalité est l'un des époux au moment de la conclusion du contrat, ou
- d) la loi du for.

2. Sans préjudice des dispositions de l'article 3, l'accord qui désigne la loi applicable peut être conclu et modifié à tout moment, mais au plus tard à la date du dépôt de la demande devant un tribunal.

3. Si la loi du for le prévoit, les époux peuvent également désigner la loi applicable devant le tribunal au cours de la procédure. Dans ce cas, le tribunal enregistrera la désignation conformément à la loi du for. ».

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

Nous comprenons que l'accord est possible avant ou pendant le mariage, à condition qu'il respecte les paramètres de l'article 5 précité.

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Encore une fois, nous devons aller au règlement UE 1259/2010 qui, dans ses articles 6 et 7, détermine:

Article 6. Consentement et validité matérielle

1. L'existence et la validité d'un accord pour choisir la loi applicable et ses clauses seront déterminées conformément à la loi par laquelle l'accord serait régi en vertu du

présent règlement si l'accord ou la clause était valide.

2. Toutefois, l'époux qui souhaite établir qu'il n'a pas donné son consentement peut se prévaloir de la loi du pays dans lequel il a sa résidence habituelle au moment où la demande est déposée auprès du tribunal si les circonstances indiquent qu'il le fait. non, il serait raisonnable de déterminer l'effet de votre conduite conformément à la loi spécifiée au paragraphe 1.

Article 7 Validité formelle

1. L'accord visé à l'article 5, sections 1 et 2, sera formulé par écrit et sera daté et signé par les deux époux. Toute transmission effectuée par des moyens électroniques qui fournit un enregistrement durable de l'accord sera réputée avoir été faite par écrit.
2. Toutefois, si la législation de l'État membre participant dans lequel les deux époux ont leur résidence habituelle à la date de conclusion de l'accord établit des exigences formelles supplémentaires pour ce type d'accord, ces exigences s'appliqueront.
3. Si, à la date de conclusion de l'accord, les époux ont leur résidence habituelle dans différents États membres participants et si les lois des deux États ont des conditions de forme différentes, l'accord sera formellement valable s'il satisfait aux exigences de l'un des les deux lois.
4. Si, à la date de conclusion de l'accord, un seul des époux a sa résidence habituelle dans un État membre participant et si la législation de cet État établit des exigences formelles supplémentaires pour ce type d'accord, ces exigences s'appliquent. .

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

Arrêté royal du 24 juillet 1889, texte de l'édition des articles 82, 87, 89, 95, 100 du Code civil.

Loi du 28 mai 1862 sur le notaire, article 54

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

Nous comprenons que le système s'est amélioré, et qu'à l'avenir si le divorce notarié montre, comme il le fait, son efficacité, les cas peuvent probablement être étendus à ceux dans lesquels il y a des enfants mineurs, toujours avec un rapport préalable du procureur.

POUR LES PAYS CONCERNÉS : SUR LA VALEUR AJOUTÉE DE L'INTERVENTION DU NOTAIRE DANS LE PROCESSUS DE DIVORCE ;

Il rend compte de l'agilité de la procédure et ne diminue pas le contrôle de la légalité.

SUR L'OPPORTUNITÉ (OU NON) D'AMÉLIORATIONS QUI POURRAIENT ÊTRE APPORTÉES À VOTRE SYSTÈME, NOTAMMENT AU REGARD DE L'INTERVENTION DU NOTAIRE DANS LA PROCÉDURE.

Nous comprenons que la procédure notariale est bien réglementée.

NOTARIADO MIEMBRO DE : ESPAÑA (ESP)

Autor: Antonio Juan GARCIA AMEZCUA

Preámbulo: matrimonio

En su país, ¿el notario tiene alguna función en el momento del matrimonio, es decir:

¿EXISTEN FORMAS DE CONTRATOS QUE REGULEN LAS CONSECUENCIAS PATRIMONIALES DEL MATRIMONIO?

En efecto, los esposos, pueden antes o después de celebrar el matrimonio, pactar las cuestiones relativas al su régimen económico matrimonial.

¿PUEDEN ESTOS CONTRATOS FIJAR DE ANTEMANO ALGUNOS ASPECTOS DE UN DIVORCIO POTENCIAL?

Todo régimen económico se extingue como consecuencia del divorcio. En los pactos relativos al régimen económico, se pueden regular algunas de las consecuencias de la extinción del régimen, siempre y cuando no sean contrarias a la igualdad de los cónyuges, a la ley, o al orden público.

EN CASO AFIRMATIVO, ¿TIENE EL NOTARIO UN PAPEL EN SU CREACIÓN Y / O PUBLICACIÓN Y EN QUÉ TÉRMINOS?

Las capitulaciones matrimoniales deben celebrarse ante Notario y en escritura pública, momento en el que surtirán efectos entre los cónyuges, para después inscribirse en el Registro Civil, cuya publicación produce efectos frente a terceros.

¿TIENE EL NOTARIO ALGÚN PAPEL EN LA CELEBRACIÓN DEL MATRIMONIO?

Si. El Notario es una de las personas designadas por la ley para celebrar el matrimonio (desde 2015) y para instruir el expediente previo matrimonial (desde el 1 de Mayo de 2021)

¿TIENE EL NOTARIO ALGÚN PAPEL EN LA PUBLICACIÓN DEL MATRIMONIO?

Solo el de comunicar al Registro Civil la celebración, mediante la remisión de la copia autorizada de la escritura (está prevista la remisión telemática, pero aun no es posible)

¿DESDE CUÁNDO EXISTE EL DIVORCIO EN TU PAÍS?

Aparte de un periodo breve durante la segunda república (1932), la regulación estable del divorcio en España se produce en virtud de la Ley de 13 de Julio de 1981.

1. La preparación del divorcio

¿TIENE EL NOTARIO ALGÚN PAPEL EN LA PREPARACIÓN DEL PROCESO DE DIVORCIO, ES DECIR:

¿SU LEGISLACIÓN SOBRE EL MATRIMONIO PREVÉ UN ANÁLISIS PREVIO DE LA SITUACIÓN PATRIMONIAL DE LOS CÓNYUGES QUE PRETENDEN DIVORCIARSE?

En ocasiones, los cónyuges, prefieren solucionar la situación patrimonial antes de divorciarse, para abordar en el divorcio solamente las cuestiones personales. En este supuesto pueden abordar las cuestiones patrimoniales mediante acuerdos celebrados ante Notario.

En otras ocasiones, si no hay hijos menores de edad, el divorcio puede realizarse tanto en la situación personal, como en la patrimonial, de forma íntegramente notarial.

EN CASO AFIRMATIVO, ¿EN QUÉ MEDIDA: TEMPORAL O DIVISIÓN DE PROPIEDAD PERMANENTE? DETERMINACIÓN DE LA COMPENSACIÓN? CÁLCULO DE LOS PAGOS DE MANUTENCIÓN?

Los acuerdos se celebran entre los cónyuges, si bien cuando el régimen económico se liquida ante el Notario, este debe controlar la legalidad de los acuerdos.

Cuando el divorcio se celebra ante Notario, el convenio regulador de divorcio, debe aprobarse por el Notario, pero este debe asegurarse de la inexistencia de acuerdos que sean gravemente perjudiciales o discriminatorios para uno de los cónyuges. Cuando el divorcio es notarial, los cónyuges están asistidos de letrado o letrados, que son los que suelen redactar el convenio regulador y poner a los cónyuges de acuerdo en cuanto a la posible compensación.

Respecto de los pagos de manutención, el Notario no tiene competencia, cuando existen hijos menores, para determinar el divorcio, será la autoridad judicial, con intervención del Ministerio fiscal, la que intervenga para aprobar dichos pagos.

Si los hijos son mayores de edad y en algún modo dependen de los cónyuges, el divorcio se puede efectuar de forma notarial, pero los hijos mayores deben intervenir y mostrar su conformidad al convenio, sin perjuicio de la facultad del Notario de asegurarse de la inexistencia de acuerdos que sean gravemente perjudiciales o discriminatorios para los intervinientes.

EN TODOS LOS CASOS, ¿LOS SERVICIOS DE UN NOTARIO SON UN PASO OBLIGATORIO DURANTE EL PROCESO DE DIVORCIO? EN CASO AFIRMATIVO, ¿EL NOTARIO TIENE UNA MISIÓN PARTICULAR EN ESTA ETAPA DEL PROCEDIMIENTO, POR EJEMPLO, ADVERTENCIA, INTENTO DE CONCILIACIÓN, ETC.?

No, son opcionales. Y en ningún caso el Notario debe realizar ningún acto previo, aun cuando el divorcio sea notarial.

¿INTERVIENEN OTROS PROFESIONALES DEL DERECHO EN ESTE PASO DEL PROCESO DE DIVORCIO, POR EJEMPLO, ABOGADOS, EXPERTOS, ETC.?

Cuando el divorcio es notarial, es necesaria la intervención de abogado sea común para los cónyuges, o independiente para cada uno de ellos.

SI UN NOTARIO TOMA MEDIDAS, ¿CÓMO SE LE NOMBRA? ¿QUÉ PODERES SON LOS SUYOS? ¿ES SOLO UN CONSEJERO? ¿O TIENE COMPETENCIAS ESPECÍFICAS PARA ESTA MISIÓN, COMO POR EJEMPLO LAS DE UN PERITO LEGAL? ¿RECIBE SU MISIÓN POR LEY O POR UN JUEZ?

La misión del Notario es la de controlar la legalidad de los acuerdos y la inexistencia de acuerdos que sean gravemente perjudiciales o discriminatorios para los cónyuges o intervinientes antes reseñados.

La competencia del Notario la determina la Ley, pues solo puede serlo el del domicilio común o de uno de los cónyuges.

2. La sentencia de divorcio

¿EL NOTARIO INTERVIENE EN EL MARCO DE LA SENTENCIA DE DIVORCIO? EN CASO AFIRMATIVO, ¿QUÉ FORMAS DE DIVORCIO SE REFIEREN? ¿PUEDE EL NOTARIO A VECES TOMAR UNA DECISIÓN SOBRE EL DIVORCIO O SOLO ESTÁ FACULTADO PARA PRESENCIAR LOS ACUERDOS ENTRE LOS DIVORCIADOS?

Como se ha indicado el divorcio se puede celebrar en forma notarial o judicial.

Cuando se celebra por vía judicial el Notario no tiene intervención alguna y es el Juez el que toma la decisión sobre el divorcio, con intervención del Ministerio Fiscal cuando hay menores o personas con algún régimen de especial protección.

Cuando el divorcio es notarial, quien aprueba el divorcio es el Notario, pero conforme a determinadas reglas:

- Es competente solo el del domicilio común o de uno de los cónyuges.
- Solo puede producirse en caso de divorcio no contencioso, es decir en el caso de que ambos cónyuges tomen de común acuerdo la decisión de divorciarse.
- Los cónyuges son los que presentan, asesorados por abogado, cuya intervención es preceptiva, el acuerdo de divorcio denominado convenio regulador, limitándose la labor del Notario al control de la legalidad del acuerdo y a comprobar y la inexistencia de acuerdos que sean gravemente perjudiciales o discriminatorios para los cónyuges o intervinientes antes reseñados.

EN SU PAÍS, ¿CUÁLES SON LAS DISTINTAS FORMAS DE DIVORCIO Y CÓMO SE CONCEDE EL DIVORCIO? (MÁXIMO 2 PÁGINAS DE SÍNTESIS O EN FORMA TABULAR)

Creo que ya está contestada.

SI ES POSIBLE UN DIVORCIO ANTE NOTARIO, ¿TIENEN LOS CIUDADANOS LA POSIBILIDAD DE ELEGIR ENTRE ESTE DIVORCIO Y UN DIVORCIO CONCEDIDO POR UN JUEZ?

Solo cuando es no contencioso y no existen menores.

3. Las consecuencias del divorcio

¿EL NOTARIO INTERVIENE DESPUÉS DE QUE SE CONCEDE EL DIVORCIO?

Si el divorcio se realiza en sede judicial, suele incluir la liquidación del régimen económico matrimonial, y en este caso, no existe intervención del Notario.

Si por el contrario el divorcio se realiza ante Notario, este interviene en las cuestiones relativas a la liquidación del régimen económico matrimonial, suelen sustanciarse dentro del convenio regulador, salvo decisión en contrario de los cónyuges que decidan aplazar dicha liquidación a un momento posterior.

EN CASO AFIRMATIVO, ¿CUÁLES SON SUS MISIONES? DIVISIÓN DE PROPIEDAD? ¿TRANSFERENCIAS DE PROPIEDAD? ¿MEDIDAS RELATIVAS A LA PUBLICACIÓN, PROPIEDAD DE LA TIERRA, ETC.?

Los cónyuges determinan la división del haber y los bienes que van a pertenecer a cada uno de ellos después del divorcio. La misión del Notario es dejar constancia en la escritura pública de divorcio de cuál es la verdadera voluntad de los cónyuges, pues la transmisión de la propiedad se efectúa con arreglo a la teoría del título y el modo, teniendo la escritura pública en la cual se liquide el régimen el efecto de transmitir la propiedad.

La publicidad de las transmisiones en España es voluntaria, si bien dicha publicidad protege frente a terceros. Son Los adjudicatarios de los bienes, los que deben encargarse de la inscripción en los Registros oportunos.

¿CÓMO ACTÚA EL NOTARIO EN ESTA ETAPA DEL PROCEDIMIENTO? ¿EL NOTARIO ES ELEGIDO POR LAS PARTES? ¿O DESIGNADO POR UN JUEZ?.

Si el divorcio se otorga ante Notario y la liquidación del régimen económico se produce en el seno del divorcio, las reglas de competencia en cuanto al Notario son las

mismas que en cuanto al divorcio.

Si la liquidación del régimen se produce en un momento posterior al divorcio y fuera de este procedimiento, el Notario pueden elegirlo libremente las partes.

EN ESTA TAREA, ¿EL NOTARIO INTERVIENE EN EL MARCO DE SU FUNCIÓN USUAL O TIENE UN PODER ESPECÍFICO?

En ambos supuestos el Notario actúa en su función usual, que es el ámbito extrajudicial, pues como se ha indicado, solo puede actuar en supuestos no contenciosos y dentro del marco de su actividad habitual.

EN ESTE PASO DEL PROCEDIMIENTO, ¿HAY OTROS PROFESIONALES LEGALES AÚN INVOLUCRADOS EN EL PROCEDIMIENTO DE DIVORCIO: ABOGADOS? JUECES

En la etapa post-divorcio, no suelen intervenir, salvo incumplimiento por las partes de los acuerdos adoptados.

¿CUÁNTO CUESTA APROXIMADAMENTE UN DIVORCIO? ¿HONORARIOS LEGALES, HONORARIOS DE ABOGADOS, HONORARIOS DE NOTARIO, IMPUESTOS, TARIFAS DE REGISTRO?

Los honorarios de notario, abogado y registro varían cuando hay liquidación del régimen económico matrimonial en función del caudal inventariado.

Los honorarios de los abogados también pueden variar en función de si el divorcio es contencioso o no contencioso.

Respecto de los honorarios notariales, cuando simplemente se trata del divorcio, pueden estimarse entre doscientos euros (200,00 €) y trescientos euros (300,00 €).

4. El notario y el divorcio extranjero

SI SU PAÍS NO RECONOCE EL DIVORCIO ANTE NOTARIO, ¿LO RECONOCE SI ESTA FORMA DE DIVORCIO SE CONCEDIÓ EN UN PAÍS EXTRANJERO?

La determinación y existencia del divorcio, sea notarial o no, es una cuestión interna del país en el que se haya concedido y por tanto sus efectos se reconocerán en España, siempre que esté inscrito en el Registro Civil correspondiente.

El art. 107.2 CC tras la reforma operada por la Disposición Final 1 de la Ley de Jurisdicción Voluntaria, dispone que: “La separación legal y el divorcio se regirán por las normas Unión Europea o españolas de Derecho Internacional Privado”.

Las normas UE son, por un lado, el Reglamento 1259/2010 por el que se establece una cooperación reforzada en el ámbito de la ley aplicable al divorcio y a la separación judicial; y por otro lado, los reglamentos relativos a la ley aplicable a los distintos efectos del divorcio y la separación.

¿CUÁL PUEDE SER EL PAPEL DEL NOTARIO A LA HORA DE TRAMITAR O RECIBIR UN DIVORCIO CONCEDIDO EN EL EXTRANJERO?

Salvo en el caso de que vaya a celebrar un nuevo matrimonio o tramitar el expediente previo para su celebración, de alguno de los cónyuges divorciados, en los cuales deberá comprobar la inscripción del divorcio en el Registro Civil correspondiente, el Notario no tiene ningún papel.

¿TIENE EL NOTARIO UN PAPEL EN EL RECONOCIMIENTO DEL PROCEDIMIENTO O LAS CONSECUENCIAS DE UN DIVORCIO CONCEDIDO EN EL EXTRANJERO?

No

5. Cuestiones de derecho internacional privado

¿ES POSIBLE ELEGIR LA LEY APLICABLE EN UN PROCEDIMIENTO DE SEPARACIÓN Y / O DIVORCIO Y EN QUÉ MEDIDA?

De acuerdo con el artículo 5 del Reglamento de la UE 1259/2010:

“1. Los cónyuges podrán convenir en designar la ley aplicable al divorcio y a la separación judicial, siempre que sea una de las siguientes leyes:

- a) la ley del Estado en que los cónyuges tengan su residencia habitual en el momento de la celebración del convenio;
 - b) la ley del Estado del último lugar de residencia habitual de los cónyuges, siempre que uno de ellos aún resida allí en el momento en que se celebre el convenio;
 - c) la ley del Estado cuya nacionalidad tenga uno de los cónyuges en el momento en que se celebre el convenio, o
 - d) la ley del foro.
2. Sin perjuicio de lo dispuesto en el apartado 3, el convenio por el que se designe la ley aplicable podrá celebrarse y modificarse en cualquier momento, pero a más tardar en la fecha en que se interponga la demanda ante un órgano jurisdiccional.
3. Si la ley del foro así lo establece, los cónyuges también podrán designar la ley aplicable ante el órgano jurisdiccional en el curso del procedimiento. En tal caso, el órgano jurisdiccional registrará la designación de conformidad con la ley del foro.”.

¿ES POSIBLE ELEGIR LA JURISDICCIÓN EN ESTOS CAMPOS? ¿ANTES DEL MATRIMONIO? ¿DURANTE EL MATRIMONIO? ¿Y HASTA QUÉ PUNTO?

Entendemos que el acuerdo es posible antes o durante el matrimonio, siempre que respete los parámetros del artículo 5 antes mencionado.

¿SE RECONOCE LA DETERMINACIÓN DE LA LEY O JURISDICCIÓN CUANDO SE HIZO EN EL EXTRANJERO? ¿Y HASTA QUÉ PUNTO?

De nuevo debemos acudir al Reglamento UE 1259/2010 que en sus artículos 6 y 7 determina:

Artículo 6. Consentimiento y validez material

1. La existencia y la validez de un convenio de elección de la ley aplicable y de sus cláusulas se determinarán con arreglo a la ley por la que se regiría el convenio en virtud del presente Reglamento si el convenio o cláusula fuera válido.
2. No obstante, el cónyuge que desee establecer que no dio su consentimiento podrá acogerse a la ley del país en el que tenga su residencia habitual en el momento en que se interponga la demanda ante el órgano jurisdiccional si de las circunstancias se desprende que no sería razonable determinar el efecto de su conducta de conformidad con la ley especificada en el apartado 1.

Artículo 7 Validez formal

El convenio contemplado en el artículo 5, apartados 1 y 2, se formulará por escrito y estará fechado y firmado por ambos cónyuges. Se considerará hecha por escrito toda transmisión efectuada por medios electrónicos que proporcione un registro duradero del convenio

No obstante, si la legislación del Estado miembro participante en el que ambos cónyuges tengan su residencia habitual en la fecha de celebración del convenio establece requisitos formales adicionales para ese tipo de convenio, dichos requisitos serán de aplicación.

Si, en la fecha de celebración del convenio, los cónyuges tienen su residencia habitual en distintos Estados miembros participantes y si las legislaciones de ambos Estados disponen requisitos formales diferentes, el convenio será formalmente válido si cumple los requisitos de una de las dos legislaciones.

Si, en la fecha de celebración del convenio, solo uno de los cónyuges tiene su residencia habitual en un Estado miembro participante y si la legislación de tal Estado establece requisitos formales adicionales para ese tipo de convenio, dichos requisitos serán de aplicación.

6. Leyes vigentes

¿CUÁLES SON LAS PRINCIPALES LEYES VIGENTES EN SU PAÍS QUE ASIGNAN COMPETENCIAS A LOS NOTARIOS EN MATERIA DE DIVORCIO? (MENCIONE LAS LEYES VIGENTES CON FECHAS Y NÚMEROS).

Real Decreto de 24 de julio de 1889, texto de la edición del Código Civil artículos 82, 87, 89, 95, 100.

Ley de 28 de mayo de 1862, del Notariado, artículo 54

7. Conclusiones y prospectiva

SOBRE LA EFICACIA DEL SISTEMA DE DIVORCIO EN SU PAÍS, Y MENCIONE SI SE REQUIEREN O SE CONSIDERAN REFORMAS;

Entendemos que el sistema ha mejorado, y que de futuro si el divorcio notarial demuestra, como lo está haciendo su eficacia, probablemente se pueda ampliar los supuestos a aquellos en los que existan hijos menores, siempre con informe previo del ministerio fiscal.

PARA LOS PAÍSES RELEVANTES: SOBRE LOS BENEFICIOS DE LA INTERVENCIÓN NOTARIAL EN EL PROCESO DE DIVORCIO;

Reporta agilidad al procedimiento y no merma el control de legalidad.

SOBRE LAS POSIBLES (O NO) OPORTUNIDADES DE MEJORAS QUE SE PODRÍAN REALIZAR EN SU SISTEMA, ESPECIALMENTE EN LO QUE RESPECTA A LA INTERVENCIÓN DEL NOTARIO EN EL TRÁMITE.

Entendemos que el procedimiento notarial, está bien regulado.

MEMBER NOTARIAT OF: ESTONIA

Authors: Ülle-Riin RAJA, Katrin SEPP

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Prospective spouses may, by agreement, select a proprietary relationship from among the types of proprietary relations (set out in the regulations of the Estonian Family law act) before the contraction of marriage by an application for marriage. An application for marriage can be made to a notary or at the vital statistics office or at the clergy. Last year (2020), 11.5% of all marriages were registered by notaries.

In addition to the selection of proprietary relation via application for marriage, the prospective spouses or married spouses may enter into a marital property contract in a notarised form. A marital property contract can be concluded to 1) terminate a selection made upon marriage or a proprietary relationship valid on the basis of a marital property contract; 2) establish another proprietary relationship prescribed by law; or 3) make alterations in the selected proprietary relationship in the cases prescribed by law. This means that the content of the matrimonial property contract is limited by family law and concerns in particular the period of marriage. The provisions for divorce remain the subject of other possible civil law agreements. The most common of these contracts is the joint property division agreement, which can be concluded during the marriage or after the marriage has ended. This agreement may be concluded during the marriage in the event of termination of the joint property relationship to divide the property obtained while the joint property relationship was valid. It is also possible to enter into a forward-looking agreement - for example, divorcing spouses can agree on how they will share joint property when the divorce takes effect. In this case, another contract must be concluded after the end of the marriage, in which the former spouses transfer ownership to each other.

Another possible notarial contract related to the termination of the property relationship is the set-off of acquired assets. Upon the termination of the proprietary relationship of set-off of assets increment, the spouses shall ascertain the status of their acquired assets. If the acquired assets of one spouse are greater than the acquired assets of the other spouse, one half of the difference between the values of the acquired assets shall belong to the spouse who received the smaller amount of acquired assets on the basis of a financial claim for set-off.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE?

In addition to the division of joint property and set-off of acquired assets (see previous answer), it is also possible to enter into agreements regarding alimony or agreements concerning the right of access to a child in the case of separation of parents. All these agreements fix some aspects of a divorce. The moment of the legal divorce is not relevant by itself. It is only relevant if it also the moment of termination of the selected property relationship (if the spouses have not chosen the separateness of property before the divorce).

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

In Estonia real estate transactions cannot be made without a notary. Thus, if the divorcing spouses have real estate, they go to a notary in case of an agreement and to a court in case of a dispute. The agreements regarding alimony or agreements concerning the right of access to a child do not require notarial form, but are often concluded at a notary. If divorcing spouses have the need for an enforceable title they must turn to a notary. Enforceable is only a notarized agreement concerning a claim for maintenance, by which a debtor has consented to be subject to immediate compulsory enforcement.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

The notary can provide a ceremonial service, but the notary is not obligated to provide it. It is up to the notary if she/he is willing to make a beautiful speech at the beach on a Saturday afternoon, but if the future spouses wish to register the marriage at the notary's office the notary can not refuse, unless there are legal impediments to the marriage.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

If the marriage is registered by the notary, the notary also makes an entry into the population register.

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Historically Estonian territory has been part of Lutheran countries or Russian Empire, where divorce was also possible under church laws. In the independent Republic of Estonia the year 1923 can be considered as the beginning of civil law divorce.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:**DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?**

In Estonia it is possible to divorce without dividing the marital assets or solving other aspects like support payments. All of these issues can be addressed separately, so no analysis is obligatory before the divorce.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

It depends on the type of property whether notarization of the joint property division agreement is mandatory or not. Notarial authentication is necessary if the property is real estate, share in a private limited company or membership in a building association. As the content of agreements often also depends on the division of movable property, movable property may also be the subject of notarial contracts. These contracts can also concern compensation or support payments. Notary can authenticate the agreements only if there is no dispute.

For example, notary does not decide the amount of support payments, it is up to the parties to agree on the amount of payments or compensation or who gets what.

Temporary property division is not known in Estonia. If the object remains in someone's use temporarily, it can be regulated by a personal right of use agreement or lease agreements. It is also possible to agree on the division of property in a forward-looking manner, which means that initially the owner(s) will remain the same, but if a condition is met, it is possible to demand a real right contract for the transfer of ownership.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

As previously explained, the services of a notary are not always mandatory for the divorce, as it depends on the type of property, but as the amount of homeowners in Estonia is very high (about 78 percent according to the latest population and housing census), it is usually the notary, who deals with the division of property. Notary's task is to clarify the legal consequences and warn the parties, but conciliation is generally not part of the mission.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Some clients hire a lawyer to help resolve complex relationships. Some clients feel that it is not necessary, as the notary acts as an impartial advisor to both parties. If the parties can not agree with the help of a notary or lawyers they can turn to the court. In court lawyers usually help to present the case to the judge.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

Spouses wishing to divide property or divorce choose for themselves which notary to turn to. No one appoints a notary to resolve their divorce. A notary or a vital statistics officer may register a divorce. If the spouses also want to divide the property in the event of a divorce, they often turn to a notary for both the divorce and the division agreement. As explained earlier, the division of real estate or of other substantial types of property must be notarized.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

A notary may grant divorce upon agreement of the spouses on the basis of a joint written petition of the spouses. Notary is only empowered to register the divorce if the spouses are in agreement about the divorce. Notary can also witness agreements between the divorcees.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

In Estonia divorce can be registered by a notary or at the vital statistics office. If one of the spouses does not want to divorce the divorce can be granted only by a court judgement. A court grants divorce if the spouses disagree about the divorce or the circumstances relating to the divorce or if a vital statistics office or a notary is not competent to grant divorce.

There is only one type of divorce.

If spouses both agree to divorce they turn to a notary or to the vital statistics office and make a joint written petition. In the application the spouses shall express their wish to divorce and confirm that they have no disputes concerning the circumstances relating to the divorce. Divorce shall not be granted earlier than one month and later than three months from the date of submission of an application. Usually divorce is granted in the presence of both spouses, but divorce may also be granted without the presence of one spouse, if the spouse cannot appear at a vital statistics office with good reason and the consent of the spouse to the divorce without the presence of the spouse which is authenticated by a notary or consular officer is submitted.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

It can be said that the citizens have a choice between notary, vital statistics office and court. The court cannot decide not to prosecute and send the citizens to a notary or vital statistics office, if there is no dispute. As a rule, however the spouses turn to court only if they disagree about the divorce or the circumstances relating to the divorce or if a vital statistics office or a notary is not competent to grant divorce.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

As explained earlier, divorce and division of property are not necessarily related in Estonia. The property may remain as the joint property of the divorced spouses and in future be disposed by both former spouses. Generally, however, divorced spouses want to deal with property division issues as soon as possible.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

The notary shall prepare a contract for the division of property, authenticate the contract between the parties and register the changes taking place on the basis of the contract in the relevant registers. The notary represents the parties before the registers.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The notary is chosen by the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary acts in his/her usual role. The duties of a notary are to advise, warn, establish the circumstances and facts necessary for the transaction and to represent the parties before the registers.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

Some clients hire a lawyer to advise them, but that it is not necessary or obligatory, as the notary acts as an impartial advisor to both parties. The help of lawyers is rather used to reach agreements in complex cases.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

Divorce at a notary office (including making an entry into the register) costs 76 euros and 80 cents. Property division and ownership transfer costs depend on the value of the property. For example, if the transaction value is 100 000 euros, the notary's fee, including technical costs, is approximately 400 euros. If the transaction value is 100 000 euros, the state fee is 110 euros.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Estonia recognises both.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

If people want to get married in Estonia and one of them has been divorced, the Estonian notary will ask and check the documents and enter the data in our Population Registry.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No, if the document requires recognition it is done by courts in Estonia.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Regulation (EU) No 1259/2010 allows international couples to agree in advance which law they wish to apply to their divorce or legal separation, provided that this law is the law of the state with which they have a closer connection.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

Article 5 (of Regulation 1259/2010):

Choice of applicable law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:
 - (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
 - (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
 - (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
 - (d) the law of the forum.
2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.
3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Articles 6 and 7 of Regulation 1259/2010 establish rules in connection to the substantive and formal validity of such agreements about the applicable law.

Article 6 of the Regulation establishes that the existence and validity of an agreement on choice of law or of any term thereof shall be determined by the law which would govern it under the Regulation if the agreement or term were valid. However, a spouse may rely upon the law of the country in which he or she has his or her habitual residence at the time the court is seized in order to establish that he or she did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law governing the agreement.

According to Article 7 the agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing. In some member states additional requirements may exist in relationship to such agreements particularly if they are included in for example a marriage contract. Additional formal requirements of the law of the participating member state in which the spouses have their habitual residence at the time the agreement are also applicable. If the spouses are habitually resident in different participating member states at the time the agreement is concluded and the laws of those states provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws. If only one of the spouses is habitually resident in a participating member state at the time the agreement is concluded and that state lays down additional formal requirements for this type of agreement, those requirements shall apply. (see Question A. 6 of the national section for further information).

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

§ 64¹ of Family Law Act (RT I 2009, 60, 395; RT I, 27.10.2020, 15) Available: <https://www.riigiteataja.ee/en/eli/513112020002/consolide>)

Vital Statistics Registration Act (RT I 2009, 30, 177; 22.12.2019)

Available: <https://www.riigiteataja.ee/en/eli/522122019007/consolide>

Notaries Act (RT I 2000, 104, 684; RT I, 22.12.2020, 36) Available: <https://www.riigiteataja.ee/en/eli/508022021002/consolide>

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

Our divorce system is very efficient and quick. It is thought in some circles that it could be even more effective if people could do it digitally without the help of any professional, but currently this is not under serious discussion.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

The notaries are best equipped to explain the legal consequences compared to any other officials (if the couple does not want to go to court and can settle the divorce amicably, but have property to divide).

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

Notaries cannot issue certificates that prove divorce when it has been finalised by another official, but it is a minor issue.

NOTARIAT MEMBRE DE : FRANCE

Auteur : Mathilde LODIER

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

En France, lorsque les époux n'ont pas fait de contrat de mariage, le régime légal, par défaut, est le régime de la communauté réduite aux acquêts.

Les époux peuvent choisir un autre régime matrimonial. Pour cela ils doivent impérativement établir un contrat de mariage devant notaire pour d'une part choisir le régime matrimonial et d'autre part, s'ils le souhaitent, moduler le contenu du régime matrimonial choisi.

-CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Le contrat de mariage a pour but de régir les effets patrimoniaux entre les époux durant le mariage et au moment de sa liquidation. Le contrat de mariage détermine uniquement comment se fera la liquidation du régime matrimonial.

Le contrat de mariage ne règle pas à l'avance les aspects du divorce.

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Le contrat de mariage est nécessairement un acte reçu par un notaire.

En France, il n'existe pas de registre particulier à l'état civil. Le notaire n'a pas de publicité à faire.

Lorsque le contrat est signé avant le mariage, le contrat de mariage est mentionné dans l'acte de mariage.

Lorsque le contrat est signé après le mariage, pour établir un changement de régime matrimonial, ledit changement de régime matrimonial fait l'objet d'une mention en marge de l'acte de mariage.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Le notaire français n'a aucun rôle dans la célébration du mariage.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Le notaire français n'a aucun rôle dans la célébration du mariage.

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

1972 : 1^{ère} loi permettant aux deux conjoints de rompre leur mariage.

1804 : le Code civil français reprend cette 1^{ère} loi.

1816 : Suppression du divorce dans le Code civil.

1884 : Le divorce est à nouveau autorisé par la loi mais uniquement en cas de fautes graves précises

La législation actuelle du divorce est créée par la loi du 11 juillet 1975, loi n°75-617.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Lorsqu'il y a des biens et/ou des dettes à partager entre les époux, le notaire intervient pour liquider le régime matrimonial.

Si les époux n'ont pas de biens et/ou de dettes à partager, le notaire n'a aucun rôle à jouer dans le divorce.

Le notaire n'intervient pas pour traiter les aspects personnels du divorce.

Pour le divorce contractuel et le divorce judiciaire par consentement mutuel, la liquidation du régime matrimonial doit être signé avant le prononcé du divorce.

Pour les autres cas de divorce judiciaire, la liquidation du régime matrimonial peut être signé avant le prononcé du divorce, pendant l'instance en divorce ou après le prononcé du divorce.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

La liquidation du régime matrimonial se fait en deux parties, dans un premier temps le notaire liste l'actif et le passif des époux avec leurs évaluations, le notaire calcule les créances entre époux et/ou les récompenses dans les régimes de communautés, puis dans un second temps, le notaire partage les actifs et les passifs entre les époux.

L'acte de liquidation du régime matrimonial une fois signé est définitif.

Dans l'acte de liquidation, il est possible de calculer la prestation compensatoire et de la fixer, le notaire peut proposer un calcul de la prestation compensatoire, mais il ne s'agit pas en tant que telle d'une de ses prérogatives.

Le notaire n'intervient pas dans le calcul d'autres indemnités ou de pensions alimentaires.

Pour le divorce contractuel ou judiciaire par consentement mutuel, les avocats des époux qui fixent les montant en mettant les époux d'accord.

Pour les autres cas de divorce judiciaire, le juge fixe le montant de ces indemnités ou prestations.

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Le notaire n'intervient pas lorsque les époux n'ont pas de biens à partager.

Lorsque les époux ont des biens à partager, le recours au notaire est une étape obligée puisqu'il doit intervenir pour liquider le régime matrimonial des époux.

Le notaire n'a pas de rôle de conciliation puisqu'il ne traite pas des aspects personnels du divorce, il ne traite que des aspects patrimoniaux du divorce.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Pour les cas de divorce judiciaire : l'intervient d'un avocat ou deux avocats est nécessaire. Le juge intervient aussi pour tenter de concilier les époux.

Pour le divorce contractuel : la législation française impose l'intervention d'un avocat pour chacun des époux.

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Le notaire est soit désigné par accord les époux s'ils sont d'accord soit par le juge en cas de désaccord des époux.

Dans les deux cas, le notaire a pour mission d'établir la liquidation du régime matrimonial.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Le notaire n'a aucun rôle dans le prononcé de la décision de divorce.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

La législation française prévoit deux formes de divorce, les époux choisissent entre les différents types de divorce.

Tant que le divorce n'est pas prononcé les époux peuvent changer de divorce. Il est possible de passer d'un divorce judiciaire à un divorce contractuel ou bien l'inverse.

Le divorce judiciaire :

Il s'agit du divorce prononcé par le juge.

Le divorce contractuel par consentement mutuel, par un acte contresigné par avocat :

Dans ce type de divorce, le juge n'intervient pas.

Chaque époux est représenté par un avocat, la législation française impose que chaque époux ait son avocat, il n'est pas possible de prendre un avocat pour les deux époux.

Ces avocats rédigent en commun la convention de divorce, ils règlent les aspects personnels du divorce.

En parallèle, s'il y a de l'actif et du passif à partager par les époux, le notaire prépare l'acte de liquidation du régime matrimonial.

Une fois accord trouvé par les époux tant pour la convention de divorce que de l'acte de liquidation du régime matrimonial.

Les époux signent l'acte de liquidation de régime matrimonial qui ne deviendra effectif qu'une fois la convention de divorce signée et les formalités relatives à ces actes réalisées.

Puis les époux signent la convention de divorce, cette convention est contre signée par chacun des avocats des époux.

La convention signée sera ensuite déposée aux rangs des minutes d'un notaire, choisi par les époux, le divorce devient effectif au jour du dépôt de la convention chez le notaire.

Le notaire qui procède au dépôt de la convention de divorce, n'a pas pour rôle de vérifier pas le fonds de la convention mais uniquement le formalisme de la convention, il doit vérifier que la convention comprend toutes les mentions obligatoires et que les délais de la procédure ont été respectés.

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Pour le divorce judiciaire : le notaire est généralement intervenu en amont afin de liquider le régime matrimonial, le notaire n'a pas d'autre rôle dans ce type de divorce.

Pour le divorce contractuel : le notaire a pu intervenir pour liquider le régime matrimonial. Dans ce type de divorce, l'intervient du notaire est obligatoire puisque le notaire doit enregistrer la convention de divorce signée par les époux et leurs avocats, c'est-à-dire que le notaire dépose cette convention au range de ces minutes, c'est à la date du dépôt que le divorce devient effectif.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

Quel que soit le type de divorce, pour ce qui est de la liquidation du régime matrimonial comprenant un bien immobilier, le notaire doit effectuer la publication au service de la publicité foncière de l'acte de liquidation, puisqu'en France, le notaire a la prérogative de faire publier les actes au service de la publicité foncière.

Pour ce qui est du divorce contractuel, le notaire doit enregistrer la convention signée par les époux et leurs avocats, le divorce devient ainsi effectif.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

Pour le divorce judiciaire, les époux peuvent choisir ensemble le notaire chargé de liquider le régime matrimonial, en cas de désaccord des époux, le juge désigne le notaire.

Pour le divorce contractuel, que ce soit pour la liquidation du régime matrimonial, comme pour la formalité d'enregistrement de la convention signée, le notaire est désigné par accord commun des parties.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Pour ces missions, il s'agit des fonctions habituelles du notaire.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

Au stade des suites du divorce, les autres professionnels ne sont pas impliqués dans la procédure puisqu'il s'agit de formalités postérieures au divorce.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Pour ce qui est de la liquidation du régime matrimonial, quelque soit le type de divorce, le coût de l'acte est fixé par le tarif des notaires, les émoluments du notaire, les taxes et droits sont proportionnels à l'actif des biens licités.

Pour le dépôt de la convention de divorce contre signée par avocat : un coût de cet enregistrement est, à ce jour, est d'environ 50 €

Pour ce qui est des frais liés à l'intervention des avocats, il n'y a pas de tarif fixé par l'état pour les avocats, chaque avocat fixe le coût de son intervention par une convention d'honoraires.

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

La législation française n'a pas créé un divorce par devant notaire, mais un divorce contractuel, sans intervention du juge, par une convention signée par les époux et leurs avocats, puis enregistré par le notaire.

La législation française reconnaît le divorce intervenu à l'étranger non prononcé par un juge.

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Le notaire n'a pas de rôle dans le cadre du traitement ou de la réception d'un divorce prononcé à l'étranger.

Le traitement ou la réception en France d'un divorce prononcé à l'étranger est de la prérogative du Procureur de la République.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Le notaire peut avoir un rôle précis pour les suites du prononcé du divorce à l'étranger.

Dans l'hypothèse où le divorce étranger contient des dispositions relatives à un bien immobilier situé en France, alors le notaire devra établir un acte pour reprendre le contenu du divorce relatif aux biens situés en France, afin que cet acte soit publié au service de la publicité foncière.

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

La France est partie au règlement européen UE 1259/2010.

L'article 5 dudit règlement permet aux époux de désigner la loi applicable au divorce et à la séparation de corps, il s'agit d'un choix de loi limitatif.

Les époux peuvent donc choisir l'une des lois admises par l'article 5 dudit règlement.

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

La France est partie au règlement européen Bruxelles II Bis n°2201/2003, ce règlement permet de déterminer les juridictions compétentes en matière de divorce, mais

il ne permet pas de choisir la juridiction compétente dans ces domaines.

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

La France est partie aux règlements européens relatifs au divorce.

Le règlement européen en matière de divorce relatif à la loi applicable permet de choisir la loi applicable au divorce, la France reconnaît donc ce choix de loi.

Le règlement européen en matière de divorce relatif aux choix de juridiction ne permet pas de choisir la juridiction compétente en matière de divorce, par conséquent la France ne reconnaît pas le choix de juridiction.

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

Pour ce qui est de la liquidation du régime matrimonial, la compétence du notaire : loi du 25 Ventôse an XI – décret n°76-941 du 26 novembre 1971.

Pour ce qui est de l'enregistrement de la convention de divorce contre signé par un avocat : loi n°2016-1547 du 18 novembre 2016 – entrée en vigueur le 1er janvier 2017.

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

La création d'un divorce sans juge a apporté une amélioration, cela a permis à des époux étant d'accord sur le divorce aussi bien sur les aspects personnels que patrimoniales de régler rapidement leur divorce.

MEMBER NOTARIAT OF: GEORGIA

Author: Megi MAGALDADZE

Preamble: marriage

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

In accordance with the Civil Code of Georgia (1997), a notary plays no role in the preparation and/or implementation of the divorce process between the spouses at all; the divorce registration is carried out by the civil registration authority - LEPL Service Development Agency based on the mutual application of both spouses in case when there is no any dispute between them with regard to the matrimonial property and/or common children. If there is a dispute between the spouses, the divorce shall be obtained through the court proceedings.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

There are only 2 ways to obtain the divorce and none of them is conducted by a notary: as we have already indicated above, if there is no any dispute between the spouses with regard to the matrimonial property and/or common children divorce process is conducted by the civil registration authority; If there is a dispute between the spouses, the divorce shall be obtained through the court proceedings. The court shall take measures to reconcile the spouses. It may adjourn the hearing and fix a period of a maximum of six months for reconciliation of the spouses. A divorce shall be granted if the court finds that it is no longer possible for the spouses to live together and preserve the family despite the reconciliation measures taken. When adopting a divorce decision, the court shall, if necessary, take actions to safeguard the interests of the minor children and a disabled spouse.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

See Answer 2.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

All these questions are within the competence of the civil registration authority - LEPL Service Development Agency and - not of a notary.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

In accordance with the Law of Georgia On Private International Law, termination of marriage shall be subject to the law of the country that applies to general effects of marriage.

If divorce is impossible under a foreign law, it may be done according to the law of Georgia if an applicant for a divorce is a citizen of Georgia or was a citizen of Georgia at the time of marriage.

If a divorce took place in Georgia, an obligation of the divorced spouses to provide maintenance shall be subject to the law of a country that was applied to the divorce. This rule shall also apply to other forms of termination of marriage and separation of spouses.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

The Civil Code of Georgia (1997)

The Law of Georgia On Private International Law (1998)



NOTARIAT MEMBRE DE : GRÈCE

Auteur : Christina CHATZIDANDI

Préambule : le mariage

Dans l'ordre juridique grec, le rôle du notaire au moment de la célébration du mariage et dans la publicité de celui-ci n'existe pas : le notaire ne joue aucun rôle ni dans la célébration du mariage ni dans la publicité du mariage. Le régime matrimonial légal est prévu dans l'article 1397 du Code Civil grec, selon lequel le mariage n'entraîne pas de changement sur l'autonomie patrimoniale des époux. Cependant, la législation grecque offre aux époux ou futurs époux la possibilité de choisir un régime différent en ce qui concerne les effets patrimoniaux de leur mariage. Il s'agit de la communauté par indivision à parts égales, un régime régulé dans les articles 1403 - 1416 Code Civil grec.

Le choix de ce régime doit être réalisé par un contrat de mariage, conclu soit avant le mariage soit lors de celui-ci, qui doit être revêtu la forme d'un acte notarié et soumis à une publicité spéciale. Il faut que ce contrat soit être enregistré dans un livre public spécial tenu au Tribunal de Première Instance d'Athènes. Dans ce livre sont enregistrés les contrats conclus dans tout le pays. Toutefois, en pratique, l'implémentation de ce régime est extrêmement rare. Nous rappelons les remarques faites sur ce sujet dans le dernier rapport grec, selon lesquelles l'application du régime légal de l'autonomie patrimoniale est presque absolue.

Les époux, qui choisissent de signer un tel contrat de mariage, peuvent y réglementer le partage des biens communs après la dissolution de la communauté sur la base de l'égalité des droits et des obligations entre les époux (art. 1404 al. 1 Code Civil grec). Le régime de la communauté des biens peut être dissolu, entre autres, avec l'accord commun des époux, qui doit aussi être revêtu la forme d'un acte notarié (art. 1412 Code civil grec).

La dissolution de mariage en droit grec est prononcée par une décision judiciaire à l'exclusion des divorces par consentement mutuel, qui depuis la promulgation de la loi 4509/2017 (JO A 201/22-12-2017) appartient exclusivement à la compétence des notaires. Le divorce prononcé par une décision judiciaire existe du moment où la décision devient irrévocable (art. 1438 Code Civil grec), tandis que le divorce par consentement mutuel existe du moment où l'acte notarié certifiant la dissolution de mariage est déposée au bureau d'état civil où le mariage a été enregistré.

Toutefois, il faut que tant la décision judiciaire prononçant le divorce, après son irrévocabilité, que l'acte notarié certifiant la dissolution de mariage (en cas de divorce par consentement mutuel) soient déposés au bureau d'état civil où le mariage a été enregistré. Les ex-époux sont responsables pour le dépôt des documents y afférents au bureau d'état civil ou leur mandataire (avocat ou non), qui doit être muni d'une procuration spéciale notariale.

1. La préparation du divorce

Le notaire ne joue pas un rôle significatif dans la préparation des opérations de divorce. La législation grecque relative au mariage ne prévoit pas une analyse préalable de la situation patrimoniale des époux, puisqu'un éventuel transfert de propriété entre les ex-époux n'a aucune différence par rapport à tout autre transfert de propriété entre tiers. En plus, le droit grec ne prévoit pas le recours à un notaire au cours de la préparation du divorce, en général. Si les époux décident de divorcer par consentement mutuel, il faut seulement qu'ils déposent préalablement au notaire de leur choix les accords sous seing privé conclus entre eux, contenant leurs déclarations communes de divorcer et la réglementation des soins parentaux, de communication et de la pension alimentaire des enfants mineurs, dont ils avaient déjà signé auprès de greffe du Tribunal de paix, afin que le notaire rédige l'acte notarié certifiant leurs accords.

Au cours de la préparation du divorce les avocats sont les professionnels qui jouent un rôle central, même au cas de divorce par consentement mutuel, qui est prononcé exclusivement par devant notaire validant les accords des époux. Premièrement, les avocats ont un rôle primordial dans la procédure judiciaire de divorce, comme il sera analysé ci-après, puisque la demande en divorce est préparée et rédigée par eux. Au surcroît, les avocats sont ceux qui offrent aux époux les conseils nécessaires

pour la réglementation d'une série des sujets, comme l'alimentation, la garde des enfants mineurs, l'usage du logement familial, en cas qu'il appartienne à un époux etc. Il faut mentionner en ce point qu'il y a aussi des procédures judiciaires pour régler quelques matières et sur lesquelles le rôle fondamental appartient aux avocats. Par exemple, l'époux qui a contribué à la croissance de la propriété de l'autre lors du mariage, peut demander la restitution de la part de croissance due à son contribution (art. 1400 Code civil). Deuxièmement, au cas de divorce par consentement mutuel, il faut que chacun des époux soit représenté par son propre avocat. Les avocats des époux doivent préparer l'accord contenant les déclarations des parties exprimant leur volonté de divorcer par consentement mutuel et, s'ils ont des enfants mineurs, l'accord avec lequel les époux règlent l'exercice des soins parentaux, la communication avec des enfants et leur pension alimentaire. Il s'agit des accords écrits entre les époux, signés par eux et par leurs avocats auprès de greffe du Tribunal de paix, qui certifie l'authenticité de signature des époux, ou seulement par leurs avocats, s'ils ont muni d'une procuration spéciale délivrée au cours du dernier mois avant la signature de l'accord. Par conséquent, les avocats sont les professionnels dont l'intervention est indispensable au cours de la préparation du divorce. Enfin, il faut souligner que les différends de divorce sont exclus de la procédure préalable obligatoire de la médiation, qui est prévu par la loi 4640/2019 (JO A 190/30.11.2019) pour la plupart des affaires de nature civile et commerciale. Donc, le rôle de notaire dans la préparation du divorce est très limité si non inexistant.

2. Le prononcé du divorce

Dans l'ordre juridique grec deux formes de divorce existent : le divorce prononcé par une décision judiciaire et le divorce par consentement mutuel qui tient lieu par devant notaire.

A. Le divorce prononcé par une décision judiciaire

En ce cas, il faut qu'une demande de divorce soit déposée devant le Tribunal compétent, qui en Grèce est le Tribunal de Première Instance soit de la résidence de la partie défendant soit de la dernière résidence commune des époux. On peut distinguer deux cas :

- a) Chacun des époux peut demander le divorce lorsque les relations entre eux ont été ébranlés à tel point que le maintien de rapport conjugal est à juste titre insupportable pour le demandeur (art. 1439 al. 1 Code Civil grec). En cas de bigamie ou d'adultère de la partie défendant, d'abandon du demandeur ou d'attentat à sa vie et de violence intrafamiliale par le défendeur, l'ébranlement du mariage est présumé par le juge, si le défendeur ne prouve pas le contraire (art. 1439 al. 2 Code Civil grec).
- b) Lorsque les époux se trouvent en séparation de fait continuellement depuis deux ans au moins, l'ébranlement des rapports entre eux est présumé de façon irréfragable, même si la raison de divorce concerne exclusivement le demandeur (art. 1439 al. 3 Code Civil grec). Cette forme de divorce est connue en pratique parmi les avocats comme « divorce automatique ».

Le divorce existe du moment où la décision judiciaire prononçant le divorce devient irrévocable. Dès ce point la décision doit être déposée dans le registre où le mariage a été enregistré.

B. Le divorce par consentement mutuel

Depuis la promulgation de la loi 4509/2017, le 22 décembre 2017, qui a modifié les articles 1439 et 1441 du Code Civil grec, la compétence exclusive de divorce par consentement mutuel appartient aux notaires.

Selon les dispositions de la nouvelle formule de l'article 1441 Code Civil grec, les époux peuvent mettre fin à leur mariage par accord écrit. L'accord est conclu entre les époux en présence d'un avocat pour chacun d'entre eux et signée par eux et par leurs avocats ou seulement par les derniers, s'ils sont munis d'un mandat spécial. Le mandat doit avoir été délivré au cours du dernier mois avant la signature de l'accord. Il faut que les époux signent l'accord auprès de greffe du Tribunal de paix, qui certifie l'authenticité des signatures des époux. S'il existe des enfants mineurs, il faut d'abord que l'exercice des soins parentaux, la communication avec les enfants

et leur pension alimentaire soient réglementés avec le même accord ou tout autre accord écrit entre les conjoints, signé tel que défini ci-dessus et qui sera en vigueur pendant deux (2) ans au moins.

L'accord écrit pour la dissolution du mariage, ainsi que l'accord sur la garde, la communication et la pension alimentaire des enfants mineurs et les procurations spéciales (s'ils existent) sont soumis par les avocats de chaque époux à un notaire. La rédaction de l'acte notarié validant les accords des époux est réalisée au moins après dix (10) jours à compter de la signature des accords, dont la date est justifiée par un certificat d'authenticité de la signature des époux par le greffe du Tribunal de paix du ressort du notaire qui va dresser l'acte notarié.

Le notaire rédige un acte confirmant la dissolution du mariage, validant les accords des époux et les incorporant dans celui-ci. L'acte notarié est signé par les époux et leurs avocats, ou seulement par ces derniers, à condition qu'ils soient munis d'un mandat spécial. La procuration doit avoir été donnée au cours du dernier mois avant la signature de l'acte. Lorsque l'attestation concerne l'exercice des soins parentaux, la communication et la pension alimentaire des enfants mineurs, l'acte a une force exécutoire. À l'expiration de l'accord validé, la garde, la communication et la pension alimentaire des enfants peuvent être réglementés pour une nouvelle période par un nouvel accord en poursuivant la même procédure.

Le mariage est dissolu par le dépôt d'une copie de l'acte notarié au registre d'état civil où le mariage a été enregistré.

Dans le cas d'un mariage religieux, la solution spirituelle du mariage est obligatoire. Cette solution est réalisée à la demande de la personne ayant un intérêt légitime, accompagné d'une copie de l'acte notarié et soumise à la Sainte Métropole où le saint temple où le mariage a eu lieu. L'ordre du procureur compétent pour la solution spirituelle de mariage religieux, qui était nécessaire il y a plusieurs années, a été supprimé par la loi 4689/2020, qui a modifié la l'article 1441 par. 4 Code Civil grec.

Les époux sont libres de choisir la forme de divorce qu'ils veulent. Les faits réels de chaque affaire et la qualité des relations entre les époux sont les facteurs, qui affectent le choix des parties.

3. Les suites du divorce

En suite du prononcé de divorce. Un éventuel transfert de propriété entre les ex-époux n'a aucune différence par rapport à tout autre transfert de propriété entre tiers. Les coûts d'un divorce diffèrent d'une procédure à l'autre. Les honoraires d'un acte notarié pour un divorce par consentement mutuel peuvent coûter approximativement 150-200 euros. En plus les conjoints assument les honoraires des deux avocats, étant environ 500 euros pour chaque avocat.

Les frais totaux d'un divorce prononcé par une décision judiciaire dépendent de l'accord libre entre les conjoints et leurs avocats, en ce qui concerne les honoraires des derniers (à titre indicatif 1000 euros pour chaque avocat).

Les frais d'enregistrement sont nuls ou minimaux.

4. Le notaire face au divorce étranger

Comme il est déjà mentionné, depuis décembre 2017, la compétence des divorces par consentement mutuel appartient exclusivement aux notaires. Cependant, même avant cette modification législative, un divorce qui a eu lieu par devant notaire à l'étranger pourrait être reconnue en Grèce, conformément au Règlement 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 (art. 21 et 22). Une décision caractéristique en ce matière était la décision no 209/2014 du Tribunal de Première Instance de Réthymnon (procédure de juridiction gracieuse), qui a reconnu la dissolution d'un mariage qui a tenu lieu par devant notaire, sous la forme d'un acte notarié, en Lettonie sur la base de principe de reconnaissance mutuel des décisions parmi les Etats-membres de l'UE (voir aussi le point 22 du préambule de règlement).

D'ailleurs, un divorce prononcé à l'étranger doit être reconnu soit conformément aux provisions de Règlement 2201/2003 soit conformément à la procédure du Code de procédure civile grec pour les cas qui n'entrent pas au champ d'application de ce Règlement (art. 323 Code de procédure civile grec) soit conformément aux provisions des conventions bilatérales conclus entre Grèce et un pays tiers sur la même matière. Tout d'abord, le Règlement 2201/2003 consacre l'abrogation de recours à toute procédure pour la reconnaissance des décisions rendues dans un Etat membre. Par conséquent, une décision de divorce prononcé à un Etat membre de l'UE est reconnue ipso jure à un autre Etat membre comme il s'agirait de sa propre décision et elle peut être enregistrée directement au bureau d'état civil compétent de l'état membre d'accueil. Toutefois, l'article 21 par. 3 offre à la partie intéressée la possibilité (mais il n'impose pas une obligation) de demander la reconnaissance d'une décision prononçant la dissolution d'un mariage devant le Tribunal compétent. En plus, l'article 39 de Règlement 2201/2003 prévoit la délivrance d'un certificat, délivré par la juridiction compétente ou l'autorité compétente de l'Etat-membre d'origine, concernant les décisions en matière matrimoniale, en utilisant le formulaire prévu par le Règlement. Ce certificat peut être utilisé à un autre Etat-membre.

Ensuite, l'article 323 Code de procédure civile grec prévoit les conditions sous lesquelles une décision judiciaire étrangère peut être valide et avoir une force de chose jugée en Grèce. Ces sont en particulier: a) d'avoir une force de chose jugée conformément à la loi du lieu où elle a été délivré, b) l'affaire appartenait, selon la loi grecque, à la compétence de tribunal de l'Etat où la décision a été délivrée, c) la partie perdante n'était pas privé le droit de la défense et en général le droit de la participation à l'instance, sauf que la privation soit valide aussi pour les nationaux de l'Etat auquel le tribunal appartient, d) la décision étrangère n'est pas contraire à une décision judiciaire grecque, qui était délivrée sur le même différend et entre les mêmes parties que la décision étrangère et qui a une force sur chose jugée et e) il faut qu'elle ne soit pas contraire à l'ordre public grec.

Enfin, il faut aussi souligner qu'il y a une série des conventions bilatérales conclus entre Grèce et un pays tiers, qui règlementent la reconnaissance des décisions provenant de ces pays (par exemple, la convention entre Grèce et Arménie- ratifiée par la loi 3007/2002, la convention entre Grèce et Syrie - ratifiée par la loi 1450/1984 etc.).

Par conséquence, le notaire ne joue aucun rôle ni dans le cadre du traitement ou de la réception d'un divorce prononcé à l'étranger ni dans la reconnaissance des procédures de divorce ou de leurs suites à l'étranger. En tout cas, s'il y a une décision judiciaire déclarative d'un divorce émanant de l'étranger, le notaire ne peut que l'admet.

5. Questions de droit international privé

A. CHOIX DE LA LOI APPLICABLE À LA SÉPARATION ET AU DIVORCE

En Grèce le sujet de la loi applicable à la séparation et au divorce est régi par le Règlement 1259/2010 du Conseil mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, qui est en vigueur en Grèce depuis 29-1-2014 (voir art. 3 et 4 de la Décision 2014/39 de la Commission approuvant la participation de Grèce à la coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, JO L 23/41, 28.1.2014). **Conformément aux dispositions de ce Règlement, les époux peuvent convenir pour désigner la loi applicable au divorce**, ayant en ce matière une autonomie de volonté limitée. Cette convention des époux doit être formulée par écrit, datée et signée par les deux époux (art. 7 par. 1). Selon l'article 5 par. 1 du Règlement, les époux ont la possibilité de choisir une des lois suivantes : a) la loi de l'Etat de la résidence habituelle des époux au moment de la conclusion de la convention, ou b) la loi de l'Etat de la dernière résidence habituelle des époux pour autant que l'un d'eux y réside au moment de la conclusion de la convention, ou c) la loi de l'Etat de la nationalité de l'un des époux au moment de la conclusion de la convention, ou d) la loi du for (lex fori).

La convention désignant la loi applicable peut être conclu et modifiée à tout moment, mais au plus tard au moment de la saisine de la juridiction (art. 5 par. 2). Cependant, les époux peuvent désigner la loi applicable devant la juridiction saisie au cours de la procédure, si la loi du for le prévoit. En ce cas, la juridiction prend acte de la désignation conformément à la loi du for (art. 5 par. 3).

A défaut de choix de la loi applicable par les parties, l'article 8 prévoit que le divorce et la séparation sont soumis à la loi de l'Etat : a) de la résidence habituelle des époux au moment de la saisine de la juridiction ; ou à défaut b) de la dernière résidence habituelle des époux pour autant que cette résidence n'ait pris fin plus d'un an

avant la saisine de la juridiction et que l'un des époux réside encore dans cet Etat au moment de la saisine de la juridiction ; ou, à défaut, c) de la nationalité des deux époux au moment de la saisine de la juridiction ; ou, à défaut, d) dont la juridiction est saisie (lex fori).

Avant l'entrée en vigueur du Règlement 1259/2010, la loi applicable au divorce et à la séparation était déterminée strictement en droit international privé grec dans l'article 16 Code Civil, qui détermine que ces matières sont régies par le droit qui règle les rapports personnels des époux lors de l'ouverture de la procédure de divorce ou de la séparation, renvoyant à l'article 14 Code civil, qui porte sur les rapports personnels des époux. Donc le divorce et la séparation sont régis dans l'ordre suivant :

1. par le droit de la nationalité commune des époux, lors de l'ouverture de la procédure de divorce
2. par le droit de leur résidence commune, lors de l'ouverture de la procédure de divorce
3. par le droit auquel les époux sont le plus étroitement rattachés.

Par conséquent, les époux avant le Règlement 1259/2010 ne pouvaient pas choisir la loi applicable au divorce ou à la séparation.

B. CHOIX DE LA JURIDICTION DANS LES DOMAINES DE SÉPARATION/DIVORCE

Le Règlement 2201/2003

En ce qui concerne le divorce et la séparation, la compétence internationale des tribunaux grecs est régie en premier lieu par le règlement no 2201/2003 et subsidiairement par les dispositions du Code de procédure civile grec spécifiques à cette matière.

En ce qui concerne le divorce et la séparation qui entrent dans le champ d'application du règlement 2201/2003, la compétence appartient aux juridictions de l'État membre :

- a) sur le territoire duquel se trouve : la résidence habituelle des époux, ou la dernière résidence habituelle des époux, ou la résidence habituelle du défendeur, ou la résidence habituelle de l'un ou l'autre époux, ou la résidence habituelle du demandeur sous certaines conditions
- b) de la nationalité des deux époux ou, dans le cas du Royaume-Uni et de l'Irlande, du «domicile» commun (article 3).

La compétence définie par le règlement a un caractère exclusif, puisqu'un époux avec une résidence habituelle sur le territoire d'un État membre, ou un époux qui est ressortissant d'un État membre, ne peut être attiré devant les juridictions d'un autre État membre (article 6). **La prorogation de compétence dans ce domaine n'est pas prévue.**

Le règlement prévoit des compétences résiduelles, lorsque aucune juridiction d'un État membre n'a compétence. Dans ce cas la compétence est, dans chaque État membre, régie par la loi nationale interne de cet État (article 7, paragraphe 1). En droit grec les dispositions qui régissent les problèmes de juridiction concernant le divorce et la séparation sont les dispositions posées par le Code de procédure civile grec, citées ci-après.

Les dispositions du Code de procédure civile grec

Nous répétons en ce point les dispositions analysés dans le rapport dernier: En vertu de l'article 3 du Code de procédure civile qui pose un principe fondamental du droit judiciaire privé hellénique, « *les nationaux et les étrangers sont soumis à la juridiction des tribunaux helléniques, indistinctement, dans la mesure, où il y a compétence territoriale d'un tribunal hellénique* ».

En vertu de l'article 22 du Code de procédure civile *le tribunal du domicile du défendeur a la compétence générale*. Selon l'article 23 du Code à défaut de domicile, la compétence internationale des tribunaux helléniques est fondée sur *la résidence* de la même personne. Dans l'article 39 du Code de procédure civile il est prévu la possibilité d'introduction des instances y afférentes devant le tribunal de *la dernière résidence habituelle des époux*.

Selon l'article 592 du Code de procédure civile les différends qui concernent *a) le divorce ; b) l'annulation du mariage ; c) la reconnaissance de l'existence ou de l'inexistence du mariage ; d) les rapports des époux durant le mariage* sont tranchés en *la procédure spéciale* des articles 598 à 612 du Code de procédure civile.

En vertu de l'article 611 § 1 du Code de procédure civile *les tribunaux grecs sont privés de juridiction*, dans le cas où, lors de l'introduction de l'instance, *les époux n'ont pas la nationalité hellénique* et que leur loi nationale ne reconnaît pas aux tribunaux helléniques compétence à statuer sur le différend en cause. Cependant selon l'article 611 § 2 du Code de procédure civile cette interdiction est levée, pour ce qui est des actions en divorce, à condition que le mariage, inexistant ou nul d'après

la loi nationale du mari, ne soit valable que par application du droit hellénique. Par contre, *les tribunaux helléniques sont compétents pour connaître des différends découlant des relations matrimoniales* -définies à l'article 592 du Code de procédure civile, *lorsqu'un des époux est ou a été de nationalité hellénique, même s'il n'a pas ou n'a pas eu de domicile ou de résidence habituelle en Grèce*. **Le privilège de nationalité** ainsi établi est également décisif au cas **où l'un des époux était de nationalité hellénique, lors de la célébration du mariage**, même si, par la suite, il a perdu la nationalité hellénique en raison précisément de son mariage.

Dans de pareils cas, selon l'article 612 du Code de procédure civile, à défaut de tribunal territorialement compétent, ce sont les tribunaux d'Athènes qui peuvent être saisis des différends dont il est ici question.

Finalement, les articles 42 et 43 du Code de procédure civile prévoient la possibilité de la prorogation de la compétence *exclusive* des tribunaux helléniques pour tous les litiges concernant un bien. Cet accord peut priver les tribunaux helléniques de leur compétence ou leur octroyer une compétence exclusive. En conséquence, **la prorogation de compétence n'est pas prévue pour les litiges concernant le divorce**.

Par rapport au choix de la loi ou de la juridiction effectué à l'étranger, il est reconnu à condition qu'il soit compatible avec les règles de droit international privé grec et de code de la procédure civile hellénique que nous avons déjà analysé ci-dessus.

6. Lois en vigueur

La compétence des notaires en matière de divorce par consentement mutuel est prévue dans la nouvelle formule de l'article 1441 Code Civil grec, après sa modification par la loi 4509/2017 (JO A 201/22-12-2017).

7. Conclusions et Prospective

En conclusion, on peut dire que la compétence des divorces par consentement mutuel conférée aux notaires depuis décembre 2017 est une conquête importante pour la fonction notariale. En vérité c'est la seule étape de la procédure de divorce à laquelle le notaire intervient. Cette intervention notariale offre aux époux une procédure de divorce simple, efficace et rapide. Mais le rôle du notaire peut devenir plus actif dans le cadre de la médiation où le notaire pourrait vraiment tant que fonctionnaire de justice préventive offrir aux époux des conseils et apaiser les tensions, qui pourraient naître entre eux. La législation pourrait prévoir une étape de conciliation obligatoire avec un recours au notaire. Dans ce cadre une formation plus spécifique des notaires est nécessaire et indispensable, parce que le notariat grec en pratique manque d'expérience dans le domaine de médiation et de conciliation. En conclusion, le notaire pourrait avoir un rôle beaucoup plus efficace dans le processus de divorce, pas seulement comme l'autorité validant les accords des époux déjà formés par leurs avocats, mais aussi comme le professionnel de loi qui pourra contribuer à la formation du contenu des accords.

MEMBER NOTARIAT OF: HUNGARY

Authors: Renata REVICZKY, Szabolcs SZENTE, Gábor HODOSI

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

No

[If you think about marriage contracts in which parties to the marriage and spouses may arrange their relationship in terms of property by means of a marital agreement for the duration of their matrimonial relationship, that is possible. There is a National Register of Marriage and Partnership Contracts pursuant to the Civil Code. The IT system of the register is operated by the Hungarian Chamber of Civil Law Notaries (hereinafter "national chamber"). The register is administered by the civil law notary drawing up the marriage contract in the form of a notarial deed, the civil law notary proceeding in the registration of the marriage contract, or recording the fact of its termination in the register and the national chamber.]

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE? -

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS? -

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Mandatory civil marriage (registered by the registrar) was established by the Marriage Acts (Act XXXI and XXXIII. of 1894) on 1 October 1895. Divorce was regulated by the same Acts.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

-

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS? -

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

No

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Not mandatory but the spouses could involve a lawyer, expert, notary, mediator to help them prepare settlements, draft agreements to be used in the divorce procedure.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED?

In case of agreements incorporated into notarial deed the parties may choose any Hungarian notary by themselves. In case of settlement procedures the residence of the parties/one party shall establish the competence of the given notary.

WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

He is only entitled to draw up into notarial deed the agreement presented by the parties jointly or approve the settlement (as a solution of their previous legal dispute) presented by the parties jointly. The notary must not give any legal advice but may use some kind of mediation methods between the parties. However, in case of an existing legal dispute or in the lack of their legal intention notarial involvement must be refused.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

Divorce (of heterosexual married couples) is a court procedure in Hungary. However, the notary may draft agreements of the parties that could be used before the court and make the court procedure faster and cheaper (this is not mandatory). By the Hungarian Civil Code the divorcees shall agree in the following matters (e.g.): termination of the marital community of property between the parties; use of the common apartment; accommodation of the minor children; contact with the minor children; support and maintenance of the divorced spouse and/or minor children. If there are no agreement in the above mentioned questions, the court shall decide in that matters. The notary shall not make decisions regarding the divorce of heterosexual married couples.

“Divorce” (i.e. termination of the quasi marriage of same-sex partners) is possible before the notary (see below) if there is no legal dispute between the parties or it is possible before the court also.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Divorce before the court: One party shall file a lawsuit in the competent court, formally ask for the termination of the marriage and provide several data and information prescribed by the Act CXXX of 2016 on Civil Procedures. The court shall decide in the questions regarding the minor children (accommodation, contact, support and maintenance) even if the parties do not ask that. The final judgement shall be sent to the competent registrar and to other relevant authorities (e.g. land registry, trade registry).

“Divorce” of same-sex partners before the notary: The spouses shall file a common application to the competent notary and provide the data and information prescribed by the Act XLV of 2008 on Particular Non-contentious Notarial Proceedings. If the parties wish the notary shall approve their settlement on the use of their common apartment and the possible support and maintenance of each other. The final decision shall be sent to the competent registrar and to other relevant authorities (e.g. land registry, trade registry).

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Heterosexual married couples cannot choose, the procedure shall be conducted by the court.

Same-sex partners living in quasi marriage have the choice between court and notary if there is no legal dispute between the parties and there are no minor children whose support and maintenance would be the common obligation of the parties. If there is legal dispute and/or minor children the procedure shall be conducted by the court.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

If the court did not make decision in certain questions (as the parties had not asked for it and/or the court decision is not mandatory in that matter) the parties could make further settlements and agreements before the notary, especially on their common properties or minor children. Furthermore, if several circumstances change after the divorce, they are entitled to make new agreements (e.g. raising the amount of support and maintenance, etc.) which are not opposite to the court judgement. The procedure of the notary is not obligatory (they can find a lawyer to draft their agreement or choose the court settlement procedure also).

- If yes, what are his/her missions? Property division? Transfers of ownership? Measures concerning the publication, land property, etc?

The notary may draw up a contract terminating a marital community of property (not the heterosexual marriage itself!) between spouses or registered partners (same-sex partners in quasi marriage). This could happen before the court procedure or if e.g. the parties did not ask the court to terminate their joint property. If the procedure of other authority is required for the preparation of the notarial deed or the legal effect of the declaration incorporated into a public deed by the civil law notary, the civil law notary shall ex officio request such court or authority to institute the required procedure. In procedures initiated as a consequence of the civil law notary's request, the civil law notary shall have the same legal status as a representative of the party or parties indicated in the public deed. In order to implement the provisions of a contract, a notary informs the registration authorities, eg: Land Registry Office, Court of Registry.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

In case of agreements incorporated into notarial deed the parties may choose any Hungarian notary by themselves. In case of settlement procedures the residence of the parties/one party shall establish the competence of the given notary.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER? No.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

A lawyer, mediator may be involved in the preparation of the division of property as a representative of one of the parties before the notary, but it is not necessary.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

In case of court proceeding the fee (a kind of tax) must be paid in court, the fee for a divorce lawsuit is HUF 30,000 (≈ EUR 80) in accordance with the Act XCIII of 1991 on Fees, pursuant to Section 43 (1). But this is the only the fee the decision of the separation, does not contain the fee for division of the marital common estates. If the value of the case (lawsuit for division of properties) could be determined, 6% of the value is payable.

In case of the notary conducts the "divorce" of the same-sex partners, the notarial fee is HUF 30,000 (≈ EUR 80). The fee for the contract terminating the marital community of property is adjusted to the value of the property (22/2018. (VIII.23) Regulation of the Minister of Justice).

Attorney's fees are subject to free agreement.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

The Regulation of the Council No. 1259/2010 provides for the implementation of enhanced cooperation in the area of the law applicable to divorce and legal separation, which Hungary has also adopted. However, in Hungary the fact of divorce must be registered before the registrar. The registrar is part of the public administration.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Hungarian notaries have basically no role. If the division of the property located in Hungary is to be carried out, a notary may draw up a contract terminating the marital community of property and inform the registration authorities to record the changes.

If a Hungarian notary has a language licence of a foreign language, then the notary could translate the grant of divorce and could submit the petition to the registrar in order to register the divorce.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Hungarian notaries have basically no role. If the division of the property located in Hungary is to be carried out, a notary may draw up a contract terminating the marital community of property and inform the registration authorities to record the changes.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Hungary is a member state to the COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III"), therefore the EU law provides for the spouses to choose the applicable law for their separation/divorce procedure. The Article 5 (1) contains this possibility: "The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
- (d) the law of the forum."

Otherwise, under Sections 28 and 29 of Act XXVIII of 2017 on International Private Law the spouses may agree to designate the law applicable to their property regime provided that it is one of the following laws:

- a) the law of any State of which either party is a national at the time the agreement was reached;
- b) the law of the State of the habitual residence of either party at the time the agreement was reached; or
- c) the law of the State where the acting court is located.

Parties to the marriage shall also have the right of choice of law.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

Hungary is a member state to the 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, therefore the EU law is applicable for a separation/divorce procedure in cases having an international (EU related) element, however this regulation provides the possible prorogation of jurisdiction relating to cases containing parental responsibility subject (Article 12) and such application may be connected with an ongoing divorce, legal separation or marriage annulment procedure.

In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts regulated in Chapter II of the referred EU regulation.

Otherwise, under Section 101 of Act XXVIII of 2017 on International Private Law in case described by Section 7 of COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 Hungarian courts have jurisdiction in marriage cases if any of the spouses is Hungarian national.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Due to Chapter II of the referred EU regulation, the general jurisdiction rules may be applied for overseas matters; if no EU member state has jurisdiction for the separation/divorce procedure, according to Article 7 (1) "jurisdiction shall be determined, in each member state, by the laws of that state." The recognition of jurisdiction depends on the relationship between the affected countries (is there any bilateral or multilateral international agreement between them or not).

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Divorce procedures shall be conducted by courts in Hungary, notaries are not assigned with powers in such fields. However, the registered partnership ("*marriage-like relationship or quasi marriage between persons having same gender*") may be dissolved by the civil law notary due to Act XLV of 2008 on Particular Non-contentious Notarial Proceedings (the provisions relating to such matters are in effect from the 1 July 2009).

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

The Hungarian divorce system handles the marriage as a valuable legal institution and the effective Hungarian constitution ("*Alaptörvény*") provides extra legal guarantees for defending the marriage as a basis of the family life and breeding children. The dissolution of the registered partnership ("*same sex marriage*") is possible if (i) the registered partners mutually request it without any external influence, and (ii) neither of the registered partners has a child whose maintenance is the mutual obligation of the registered partners, and (iii) the registered partners have agreed in the form of a notarial deed or private deed countersigned by an attorney-at-law on their statutory maintenance obligation towards one another – should there be such a claim –, and the occupation of their common dwelling.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

Hungarian notaries are not involved in divorce cases.

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

Notarial involvement will be possible in a divorce procedure provided that there would be no dispute between the spouses in the related matters (with the same conditions referred above in relation to the registered partners), however the Hungarian constitution and the related acts should be amended for creating such opportunity (the intention of the current regulation to support marriage as a legal institute having higher value than other forms of cohabitation).



NOTARIAT MEMBRE DE : ITALIE

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Préambule : le mariage

LE NOTAIRE A-T-IL DANS VOTRE PAYS UNE INTERVENTION AU MOMENT DU MARIAGE, À SAVOIR :

En Italie, le régime matrimonial légal est celui de **la communauté des biens**; il s'applique systématiquement aux époux qui ne choisissent pas de régime matrimonial particulier par contrat de mariage. Dans ce régime, les biens du couple sont répartis entre les biens propres de chaque époux et les biens communs au couple. Au cours du mariage, si ce régime légal ne convient pas aux époux, ils peuvent **signer un contrat de mariage devant notaire** et peuvent régler le régime de propriété de la famille (c'est-à-dire l'ensemble des règles régissant la propriété et l'administration des biens des époux), même en dérogeant, en tout ou en partie, au régime juridique de la communauté de biens.

Par conséquent, avec un accord de mariage, les époux peuvent modifier le régime de communauté de biens, l'étendre ou le restreindre (donnant ainsi naissance à une **communauté conventionnelle**) ou opter pour le régime de **la séparation de biens**, qui prévoit que chaque époux gère personnellement ses biens (à noter que le choix de ce régime ne dispense pas de contribuer aux charges du ménage en fonction de ses possibilités).

-EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

Les futurs époux peuvent stipuler seulement des conventions de mariage, à tout moment, même avant la célébration du mariage, mais la célébration du mariage est une condition de suspension des effets du même accord.

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

NON

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

NON

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

NON

-DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

L'Italie conquiert la loi sur le divorce, le 1er décembre 1970 avec la loi Fortuna-Baslini, n. 898 - "Discipline des cas de dissolution du mariage.

1. La préparation du divorce

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PRÉPARATION DES OPÉRATIONS DE DIVORCE, SAVOIR :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ? SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

NON

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ? EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

NON

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Principalement les Avocats.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

NON

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

Le divorce permet la dissolution du mariage et la cessation de ses effets civils. Cela peut être consensuel ou judiciaire. Les deux types présentent une différence notable en termes de temps et procédures.

Il est à noter qu'avant de pouvoir demander le divorce, dans la plupart des cas, les époux doivent être séparés légalement depuis au moins six mois, en cas de séparation consensuelle, ou un an, en cas de séparation de corps.

Ces délais ont été considérablement réduits par la réforme du «divorce court» qui a modifié la durée précédente de trois ans.

Comme dit, il existe deux types de divorce: consensuel (ou, mieux, à la demande conjointe des deux époux) ou judiciaire.

Le divorce par consensus est possible s'il existe un accord entre les époux sur les conditions personnelles et patrimoniales.

Les époux assistés conjointement d'un avocat ou de deux avocats différents doivent introduire un recours auprès du tribunal compétent, généralement celui de la dernière résidence commune.

La Cour, à l'issue d'une audience présidentielle à laquelle le mari et la femme comparaissent personnellement, vérifie que les conditions atteintes respectent et ne portent pas atteinte aux droits des deux époux et enfants.

Dans l'accord, les époux pourront décider comment régler la garde et le placement des enfants, le droit de visite du parent qui ne vit pas avec les enfants, l'attribution du domicile familial, l'entretien des enfants et le conjoint (s'il y a droit).

Les époux pourront également convenir du partage des biens (objets, etc.), des actifs financiers (argent en compte courant, actions, obligations, etc.) ainsi que décider des transferts immobiliers (propriété ou copropriété d'une maison passe d'un conjoint à l'autre) s'ils ne l'ont pas déjà fait lors de la séparation.

L'intervention de la Cour n'est pas toujours nécessaire étant donné qu'il est possible d'obtenir un divorce également par voie de négociation assistée, avec l'aide d'un avocat, ou devant l'officier de l'état civil, à la commune de résidence.

Au cours des dix dernières années, il y a eu en effets importants changements en matière de séparation et de divorce, dans le domaine de la garde partagée de l'enfant (Loi 54/2006 et DLs 154/2013) et de simplification des procédures de séparation et divorce (DL 132/2014).

En particulier:

a) la loi a établi que le juge, en considérant l'intérêt moral et matériel de l'enfant, doit préférer la garde partagée, pour maintenir, même en cas de séparation des parents, un équilibre de rapports avec l'un comme avec l'autre, et entretenir des relations constructives avec chacun de membres de la famille.

b) le DL 132/2014 (conv. en Loi 10 novembre 2014, n. 162) a prévu que l'on peut se séparer ou divorcer:

- avec un accord conclu devant un (ou plusieurs) avocat(s). Cet accord doit être transmis au Procureur de la République pour le *nullaosta*. S'il y a des enfants mineurs, gravement handicapés, ou dépendants sur le plan économique, le Procureur de la République doit accorder une autorisation à l'accord ou, s'il n'est pas convaincu que l'accord réponde à leurs intérêts, il doit le transmettre au Président du Tribunal, qui fixe, dans un délai de trente jours, la comparution des parties;
- s'il n'y a pas d'enfants mineurs, handicapés ou dépendants sur le plan économique, avec un accord formalisé devant le Maire; celui-ci reçoit la déclaration de vouloir se séparer ou divorcer, personnellement (avec l'assistance facultative d'un avocat) et invite les époux à comparaître devant lui dans les trente jours suivant la réception de la déclaration des époux, pour confirmer l'accord. Pour la loi, le défaut de comparution est équivalent à l'absence de confirmation.

Les solutions consensuelles réduisent considérablement le temps et les coûts du divorce, il suffit de penser que pour un divorce sur demande conjointe cela peut prendre de vingt jours (négociation assistée avec un avocat ou un officier de l'état civil) à trois à quatre mois avec un recours devant la Cour.

Lorsque les époux ne parviennent pas à trouver un accord, il faut opter pour un divorce judiciaire qui, en revanche, peut entraîner des problèmes supplémentaires. Le droit de demander le divorce appartient à chaque époux qui a toujours le droit de mettre fin au mariage même si l'autre ne le souhaite pas.

Avec l'assistance d'un avocat, un seul des époux doit faire appel auprès du tribunal compétent, généralement celui de la dernière résidence commune. Contrairement à la procédure consensuelle, la procédure judiciaire doit donc être obligatoirement menée devant la Cour et est prononcée avec une sentence rendue après un vrai jugement.

Dans ce cas également, il y a une audience présidentielle à l'issue de laquelle la Cour rend une ordonnance qui régit, jusqu'à la sentence, les relations patrimoniales et non patrimoniales entre les époux ainsi que les décisions concernant les enfants (garde, placement, droits de visite, entretien, etc.).

À ce stade, sur demande, une sentence partielle peut être prononcée sur la dissolution immédiate du mariage et renvoyer les questions controversées. L'affaire se poursuit devant le juge d'instruction qui doit évaluer toutes les preuves. A l'issue de l'instruction, la Cour en forme collective (trois juges) prononcera la sentence définitive.

Ces étapes de divorce judiciaire rendent la procédure beaucoup plus longue que la procédure consensuelle: en moyenne, cela peut prendre au moins un / deux ans pour arriver à la fin d'un divorce judiciaire et ces délais peuvent également être encore étendus.

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ? SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

OUI

Le Notaire a la compétence de mettre en œuvre les accords relatifs à la propriété immobilière conclus entre les ex-conjoints dans les conventions de séparation et de divorce, afin de permettre la transcription des accords (partage de biens ou transferts de propriété) dans les Registres Fonciers.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

Le Notaire est choisi par les parties et il intervient quand la procédure de séparation ou divorce est définie par les parties.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Le notaire intervient dans le cadre de sa fonction habituelle, il n'a pas des pouvoirs ultérieurs.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

OUI, soit Avocats soit Juges

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Le coût d'un divorce judiciaire ne peut être défini avec précision, puisque les honoraires de l'avocat sont proportionnels à l'importance du travail. Les honoraires, dus à l'avocat de la défense, sont définis selon les grilles tarifaires régies par l'arrêté ministériel n. 55 de 2014, tel que modifié par l'arrêté ministériel n. 37 de 2018, sur le règlement des honoraires professionnels des avocats.

Quant au D.M. n.37 de 2018, la principale nouveauté introduite par cette nouvelle législation réside dans le fait que, alors que dans les décrets précédents les paramètres prévoyaient que le juge pouvait, en motivant de manière appropriée, procéder à une réduction de la rémunération même au-delà du minimum établi par les tableaux, le décret de 2018 a fixé des pourcentages minimaux de réduction de la rémunération par rapport à la valeur paramétrique de base qui sont obligatoires.

Afin de déterminer l'indemnité due au professionnel, le législateur a divisé le litige en plusieurs phases: o phase d'étude: consistant en l'analyse de la question posée, suite à l'écoute du client, préalablement à l'ouverture du jugement; o phase introductive: consistant en la comparution devant le tribunal et l'exécution des différentes obligations suivantes, ainsi qu'en examen des faits défavorables et des décisions de justice; o phase préliminaire: dans laquelle l'admission des différents moyens de preuve et l'achèvement de ceux-ci sont demandés, remplissant les obligations légales; o phase de décision: consistant en la rédaction des actes de clôture de l'arrêt, le retrait de la condamnation et les formalités nécessaires à son exécution.

Pour chaque phase, le tableau tarifaire prévoit un coût lié à la valeur du litige. Par conséquent, il est possible d'affirmer que le divorce judiciaire peut coûter entre 10 000 € et 15 000 - 20 000 € en cas de jugement particulièrement complexe.

A ces charges, il faut ajouter le paiement de la contribution unifiée qui, en cas de divorce judiciaire, est de 98,00 €.

Sur la base de ce qui précède, le coût à engager pour le divorce judiciaire est principalement lié au comportement procédural des parties puisque, le règlement rapide du litige n'impliquera le paiement que pour les phases déjà réalisées, à l'exclusion des autres. A cela, il faut ajouter la complexité du jugement. Dans la mesure

où, lorsque les problèmes des conjoints exigent des formalités plus importantes et une analyse approfondie, ainsi que la résolution de problèmes d'une importance particulière, cela se traduit par une augmentation des coûts.

4 . Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Le divorce émis par l'Autorité d'un Pays qu'il appartient à l'Union Européenne peut être reconnu et transcrit en Italie selon le Règlement CE 2201/2003 (art. 22 e 46).

Le divorce émis par l'Autorité d'un Pays qu'il n'appartient pas à l'Union Européenne peut être reconnu et transcrit en Italie selon le DIP Italien (artt. 64 et 65).

Dans le cas d'une demande d'enregistrement en Italie d'un divorce prononcé dans un pays où la compétence de valider le divorce consensuel entre époux est attribuée par ce système à des notaires, la disposition correspondante peut être reconnue conformément à l'art. 64 de la loi 218/1995, si les principes de la juridiction italienne sont respectés en termes de contenu.

Où nécessaire, l'officier d'état civil pourra demander indications nouvelles et complémentaires à l'intéressé ou activer le consulat italien à l'étranger afin d'avoir les renseignements nécessaires.

Si l'officier d'état civil ne croit pas qu'il y a les qualités pour la transcription d'une sentence ou mesure de divorce prononcées à l'étranger, il doit refuser l'accomplissement (art. 7 DPR 396/2000).

L'intéressé peut demander à la Cour d'appel la vérification des qualités transcrite pour la reconnaissance (art. 67 de la loi 218/1995).

-QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ? LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

NON

Le Notaire n'a pas de compétence ni aucun rôle dans la réception du divorce prononcé à l'étranger.

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Pour la loi applicable, l'Italie est compétente sur le fondement du REG 1259-2010. Le REG 1259-2010 prévoit le différent critère entre: le choix des conjoints des Pays UE, soit des Pays tiers entre le pays de la résidence habituel, ou de la nationalité commune ou de la lexfori (art. 4).

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES – AVANT LE MARIAGE ? PENDANT LE MARIAGE ? LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Pour la juridiction, les conjoints étrangers qui vivent en Italie peuvent divorcer en Italie.

Dans ce cas, pour la juridiction, l'Italie est compétente sur le fondement du REG 2201-2003 (art. 3) pour les conjoints qui ont la résidence en Italie. Le Règlement s'applique soit pour les conjoints des Pays UE, soit des Pays tiers.

Parmi les critères de compétence, le règlement mentionne la nationalité commune des époux; cependant, il ne réglementait pas les conséquences découlant de la double ou multiple nationalité des deux époux.

Les parties peuvent donc choisir le juge devant lequel trancher le litige: si plusieurs affaires sont portées devant les juridictions d'États différents, la question de compétence doit être résolue sur la base des règles de litispendance (article 19 du règlement)

La lecture de l'art. 3 et de l'art. 7 du REG 2201-2003, et l'absence de règles uniformes sur le droit applicable, favorise celui qui entreprend la procédure pour premier. Il a donc une discrétion considérable dans le choix du tribunal.

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

ON N'EN A PAS

7. Conclusions et Prospective

NOUS VOUS REMERCIONS DE PORTER UN JUGEMENT :

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

On peut dire que le système du divorce italien a été amélioré avec les dernières réformes.

En cas de divorce, on peut dire qu'il y a un domaine de liberté ayant pour objet choix de caractère économique entre les conjoints. Par exemple, on a la possibilité d'un paiement *unatantum* de l'entretien entre époux, plutôt que d'une prestation périodique (art. 5, paragraphe 8, la loi n. 898 de 1970).

Au contraire, on a des limites imposées à l'autonomie privée en rapport aux enfants. C'est le cas, par exemple, des accords qui régissent la protection et la garde de l'enfants (par exemple, les droits du conjoint non gardien ou l'exercice de ses pouvoirs dans le cas de la garde partagée) et la pension alimentaire pour les enfants. C'est aussi le cas des prévisions sur l'attribution de la résidence familiale en cas des enfants qui ne sont pas autosuffisant économiquement, car la loi établit que la jouissance de la résidence familiale est attribuée en tenant prioritairement compte de l'intérêt des fils.

POUR LES PAYS CONCERNÉS : SUR LA VALEUR AJOUTÉE DE L'INTERVENTION DU NOTAIRE DANS LE PROCESSUS DE DIVORCE ;

NON

SUR L'OPPORTUNITÉ (OU NON) D'AMÉLIORATIONS QUI POURRAIENT ÊTRE APPORTÉES À VOTRE SYSTÈME, NOTAMMENT AU REGARD DE L'INTERVENTION DU NOTAIRE DANS LA PROCÉDURE.

En Italie, le divorce par consentement mutuel pourrait devenir encore plus simple et rapide, en cas d'intervention du Notaire.

Le divorce par consentement mutuel offre également une plus grande liberté aux époux dans l'aménagement des effets de leur divorce. Tout cela contribue à leur permettre de divorcer le plus sereinement possible, et, bien souvent, de mieux gérer l'après-divorce, qu'ils ont aménagé à leur convenance.

Divorcer sans juge implique cependant une plus grande responsabilisation et implication des époux. En effet, ils sont tout d'abord chargés de procéder à la liquidation de leur régime matrimonial, c'est-à-dire au partage de leur patrimoine. Cette étape préalable est indispensable afin de pouvoir faire enregistrer leur convention chez un notaire.

MEMBER NOTARIAT OF: KOSOVO

Author: Sefadin BLAKAJ

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

According to the law in force in Kosovo, only the contract on division, administration and disposition of the joint marital property is recognized!

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

Such contracts can only address aspects of the joint marital property created during the marriage!

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The role of the notary is related and limited only in relation to the counseling and / or notarization of the agreement of the spouses regarding the division, administration and disposition of the joint marital property!

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No!

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No!

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

It exist since when the civil marriage was established by law!

1.The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

No!

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Yes!

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Spouses, at any time may apportion their joint property by agreement. The apportioning of the joint property may be carried out when spouses determine or request determination of their shares in their joint property, and by this become co-owners to the determined shares!

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

Spouses can use the notarial service only if they want to reach some kind of compromise agreement for the division, administration or disposition of their property. Such agreements are binding only in the case of real estates. If the spouses do not find a compromise, the division, administration and / or disposition of the joint property must be done in court!

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Lawyers can intervene only in the sense of advising spouses, as well as preparing procedural actions that can be taken in court. Also, mediators can intervene and assist spouses in finding property compromises, only if the spouses agree in advance on a mediation procedure!

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The service that the spouses can receive from the notary is based only on the consent of the spouses. In such a case, the notary plays the role of a neutral legal advisor in notarizing the notarial acts required by the spouses. The notary may also be involved in asset identification and asset valuation operations, provided that the notary is authorized to do so by both spouses.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Marriage may be dissolved by divorce only upon decision of a court. One spouse or both by mutual agreement may request a divorce by filing a claim with the competent court. The right to file a claim can not be passed on to successors but the successors of the plaintiff may continue the commenced procedure, to verify the foundation of the complaint. When one of the spouses files a claim for divorce and the other spouse expressly declares not to reject the soundness of the requests in the complaint, the latest until the conclusion of the main court session, it shall be considered, that the spouses have submitted a proposal for divorce by mutual agreement!

The spouse may request divorce when marital relations have seriously and continuously become disordered or when due to other reasons the marriage has irretrievably broken down. The reasons for divorce include inter alia: unbearable life of spouses, adultery, assassination against the life of the spouse, serious maltreatment, ill-intended and unjustifiable abandonment, incurable mental illness and continuous incapacity to act, unreasonable interruption of factual cohabitation for more than one year and divorce by mutual agreement!

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Divorce before a notary is not possible!

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

The division of the joint property of the spouses may be claimed during the marriage and after its termination by divorce.

If the parties wish to use the notarial service for the division of property after divorce, they must have reached a compromise on the principles and / or parts of the property which they wish to share. If there is no compromise, the division of property during the divorce or after the divorce can be done only by using the court!

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

In this task, the notary only intervenes in the frame of his/her usual role and does not have specific powers!

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONALS STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

If the spouses have failed to use the notarial service for the division of property, as they have failed to find a compromise for this purpose; at this stage of the process only the spouse's lawyers and the judge or trial panel are involved!

HOW MUCH DOES A DIVORCE APPROXIMATELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

It is difficult to conclude this in financial figures; approximately: court fees can range from 50 euros to 150 euros; notary fees depend on the value of the spouses' property and can range from 20 euros to 1000 euros; similar or slightly higher may be the fees for the service of advocacy; the state does not impose other taxes!

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes!

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Such notarial acts related to divorce and made by the notary service abroad must be subject to the court procedure of recognition of the Foreign Act!

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No!

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

The law in force in Kosovo gives priority to the law of the state of origin of the spouses or the law of the state where the spouses had their last residence!

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Not applicable!

7. Conclusions and Prospective

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

The law in force in Kosovo in this area does not seem to have been sufficiently developed yet. Consequently, Kosovo belongs to the of classical system of legislations imposing the regulation of divorce only by the court proceedings. I think that in my country there is space and opportunity to make progress in this part of the legislation, as 1/3 of Kosovars live in EU countries, which would make the divorce procedure very effective and easily accessible to all citizens!

MEMBER NOTARIAT OF: LATVIA

Author: Ieva KRUMINA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

The spouses, before entering in a marriage (as engaged persons) or during the marriage (as spouses) are entitled to conclude a marriage contract which may also contain elements of inheritance agreement. It means that the marriage contract may determine not only the mode of property relationships of the spouses during the marriage but also the way they are going to inherit. If the spouses do not wish to enter into the marriage contract, they can enter only in an inheritance agreement or, for example, an agreement on disclaiming the inheritance.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

Yes, a marriage contract may allow determining the legal consequences for some life situations which may arise in case of a divorce. For example, how would the spouses divide the joint property in case of a divorce.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The Civil Law states that the marriage contract must be drawn up as a notarial deed; therefore, a draft marriage contract is usually prepared by notaries based on the intentions expressed by the clients. After concluding marriage contracts, they are additionally registered by a notary also in the Register of Spouses' Property Relations which is a public register. The contract may be registered by the spouses as well, however, most often it is carried out electronically by a notary based on a power of attorney given by the spouses to the notary under the marriage contract.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No.

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Since 1921.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Regulatory enactments do not govern such issues.

IF YES, TO WHICH EXTENT: TERMORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Regulatory enactments do not govern such issues.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

The services of a notary are not mandatory.

Since 1 February 2011, two institutions handle divorce cases: a court and a sworn notary, who handles so-called 'undisputed' divorce, i.e., cases where the divorce is based on a joint application by both spouses and the spouses do not have any disputes over, for example, property issues or a scope of subsistence.

Thus, Article 325 of the Notariate law states that a sworn notary shall divorce a marriage, if spouses have agreed thereon and if:

- 1) spouses do not have a joint minor child and joint property;
- 2) spouses have a joint minor child or joint property and spouses have entered into a written agreement regarding custody of the joint minor child, rights of access, child's means of support and division of the joint property.

If the spouses have not reached a particular agreement but still wish to divorce on a no-contestation basis at the notary, the notary provides consultations and brings closer the opinions of both parties. If the agreement is reached the notary prepares a contract signed by both spouses. However, if the spouses fail to reach an agreement, the divorce can be settled only in a court on the basis of an application by one spouse.

DO OTHER LEGAL PROFESSIONNALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

It is not mandatory to involve other specialists in a divorce settled by a notary. Where necessary, the spouses may additionally use the services of a mediator or, for example, involve a lawyer who prepares spouses' agreement on division of the joint property or a custody over minor children, rights of access and child's means of support. It is not mandatory for an agreement to be in a form of a notarial deed; hence it may be prepared also privately (without involving a notary) and may be submitted to the court as a private document in a divorce case.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The notary is chosen by spouses. Scope of notary's authorities are governed by laws and regulations (mainly the Notariate Law and Civil Law). Notary is an official who starts (initiates) a divorce case, runs the proceedings and also settles a divorce on the basis of a joint application of both spouses according to the procedure laid down in law.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

Yes, in cases where a divorce is being settled by the notary, the divorce proceedings are concluded with a notarial deed issued by the notary – divorce certificate.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED?

The law system of Latvia knows only one type of settlement - a divorce. There is no such term as 'legal separation' in Latvian law system.

A notary makes a decision on a divorce not earlier than after 30 days since initiating a divorce case. The divorce case will be initiated on a bases of application signed by bought spouses. During 30 days period each spouse is entitled to revoke their application on divorce. A revocation shall be expressed in a written form and without any conditions. A signature on the revocation shall be notarially certified. If any of spouses revoke their divorce application, a notary terminates a divorce case and registers this fact in the Register of Divorce matters. The notary shall inform the other spouse regarding the revocation and regarding termination of the divorce matter. The termination of the divorce matter shall not be obstruction for a new submission regarding divorce, however, both spouses must start the process anew. If the notary has not received a revocation of divorce within the time period mentioned above, he or she settles divorce by making a notarial deed on divorce (divorce certificate). The divorce comes in force on the day the notary has issued a divorce certificate. Divorce certificate template is approved by the Cabinet of Ministers. If the divorce is settled before a court, the notary does not participate in delivering of the judgement. In that case the divorce is settled on a bases of a judgment issued by the court.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Yes, the spouses can choose: either (1) to mutually agree and settle a divorce at a notary on a no-contestation basis, or (2) to file a claim on a divorce in a court where mutual agreement has not been achieved.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED? IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

Once the divorce is settled (as soon as the divorce certificate is issued), a notary updates data in the national system (Register of Natural Persons) and registers fact of divorce electronically. The notary issues a divorce certificate to the spouses. Information on the fact of divorce is not published in any other place.

The remaining functions of a notary will depend on the contents of spouses' agreement. For example, the spouses may authorise a notary to participate in property right re-registration after the divorce by sending the electronic documents necessary for property right re-registration to the Land Register. The notary is not involved in property division on the basis of a law and does not take any actions in this regard,

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The divorce certificate is issued by a notary at whom the divorce case was initiated. The spouses may freely choose a notary whom to address in order to initiate a divorce. Regional affiliation of notaries does not apply to divorce cases unless the spouses come to a certain notary in his or her area.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary carries out all the activities within the scope of competence laid down in regulatory enactments. As already stated, the spouses may especially authorise

the notary in relation to execution of the signed agreement (for example, re-registration of property rights on the name of other spouse) but only provided that this agreement at a particular notary was signed in a form of a notarial deed.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

No, they are not involved.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

Divorce settled by a notary cost between 120 EUR and 150 EUR, including taxes and duties. Additional costs include preparation of spouses' agreement, which is calculated on the basis of the value of spouses' joint property, but not less than 105 EUR, including taxes and duties.

Advocate and lawyer fee is not regulated by the law therefore the costs may vary greatly. State fee for settling a divorce case by court is 145 EUR.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Latvia recognises the divorce before a notary.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Latvian notary does not play any role in it.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Latvian notary does not play any role in it.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Pursuant to national conflict-of-laws rules (Article 12 of the Civil Law), a divorce settled in Latvia must be settled under Latvian law regardless of the nationality of the spouses.

At the same time, the spouses may choose the applicable laws and regulations in compliance with the Council Regulation (E) No 1259/2010 (20 December 2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

Jurisdiction of a divorce in a transborder case is determined in compliance with the Council Regulation (EC) Nr. [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](#).

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

If the choice of applicable regulatory enactment or jurisdiction is provided in the directly applicable law provisions of the European Union or international legal aid agreements with the third countries and the choice in a foreign country has been made in compliance with said legal provisions, it is binding also on Latvia.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

1) The Civil Law, adopted on 28.01.1937; In force since: 01.09.1992; Available: <https://likumi.lv/ta/id/225418-civillikums>

2) The Notariate Law, adopted on: 01.06.1993.; In force since: 01.09.1993. Available: <https://likumi.lv/ta/id/59982-notariata-likums>

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

Divorce system in Latvia is generally efficient and no fundamental reforms are required. An opportunity to divorce in a notary's office considerably alleviates the procedure not only for the parties to the case but also takes some burden off the court system. A divorce procedure at the notary, if compared to the court, is considerably faster, legally simpler and most often also financially more advantageous. Since the divorce can be settled at the notary, the number of divorce applications received in a court has reduced by 63% on average¹. Reduction of the number of cases allows the court to address difficult cases where the parties fail to reach an agreement. It is still important to ask if there is something else that can be improved in Latvia, and one of such improvements would be introduction of mandatory notarial deed form for agreements of division of spouses' property and joint custody of a minor child, access rights and child's means of support. A notarial deed form has several important benefits, one of them – enforcement of performance of liabilities on a no-contestation basis if the liabilities included in the agreement are not being performed in good faith already once the divorce is settled.

¹ Source of information Ministry of Justice Republic of Latvia : <https://www.tm.gov.lv/lv/jaunums/par-vairak-ka-60-samazinajies-tiesas-sanemto-laulibas-skirsanas-pieteikumu-skaitis>

MEMBER NOTARIAT OF: LITHUANIA

Author: Dainius PALAIMA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

A notary does not play any role in application to register a marriage, but, as indicated below, spouses may regulate their property relations by marriage contract. In Lithuania marriage contracts are approved by notaries and registered in the public Register of Marriage Contracts.

A marriage contract is a contract between a man and a woman in which the parties establish property rights and obligations with respect to each other in marriage and divorce. A marriage contract is attested by notary as notarial act (despite the fact that the term “notarial deed” is not known in Lithuanian law, but the “approval” of a transaction within the meaning of the application of Lithuanian law means the approval of a public document); document attested by notary has a greater probative value recognized by law. A marriage contract must be entered into before a notary.

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Types of marriage contract:

pre-marital contract - a contract concluded before the registration of the marriage. This agreement enters into force upon registration of the marriage.

post-marriage contract - a contract concluded after the registration of a marriage. This Agreement shall enter into force upon its conclusion or at any other moment chosen by the parties to the Agreement.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

In the marriage contract, the parties may discuss that the property acquired before the marriage and after the marriage remains the personal property of each spouse. In this case, the division of property in the event of divorce would be avoided, as there is no joint property belonging to both spouses;

In the marriage contract, the parties may discuss that the personal property acquired by each spouse before the marriage becomes the joint property of the spouses after the marriage. In the event of divorce, the property will be divided in accordance with the procedure provided for in the marriage contract;

In the marriage contract, the parties may discuss that the property acquired after the marriage becomes joint partial ownership. In the event of a divorce, the property will be divided equally;

As mentioned above, in addition, the parties may discuss in the agreement the issues of mutual maintenance, the procedure for the division of property in the event of divorce, aspects of child support, issues of meeting the needs of the family, and so on.

Thus, the parties to the contract can choose one of the three forms of asset management mentioned above. These forms do not necessarily have to be established for the whole asset, the parties may provide for the said forms of asset management for specific items or for each part of the asset.

WHAT IS THE PROCEDURE FOR CONCLUDING A CONTRACT?

Persons intending to conclude a marriage contract must apply to a notary who approves the contract. Pursuant to the Civil Code of the Republic of Lithuania, a marriage

contract may be amended by mutual agreement of the parties to the contract with the prior consent of the court. In this case, the court verifies that the spouses do not harm the interests of their creditors by amending or terminating the contract. If only one spouse wants to terminate or change the contract, in this case only the court can terminate or change the contract. The parties may prescribe such forms of asset management for specific items or for each part of the assets.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The marriage contract is concluded only in notarial form, i. y. signed and certified in the presence of both spouses and a notary. Since, as indicated, the marriage contract is a public document (transaction) certified by a notary, it is prepared by a notary after determining will and intentions of the parties and adapting them in accordance with legal requirements. The law (Civil Code of Republic of Lithuania) determines when and how marriage contract is concluded, it also sets the limits (frames) of its application, sets certain restrictions, conditions on which a marriage contract cannot be agreed (for example, spouses cannot agree on conditions that limit or annul the right of one (or both) of the spouses to maintenance, limit or annul the right of one (or both) of the spouses to bring legal proceedings in court, change the procedure and conditions of succession in property), changes conditions of amendment to marriage contract or its termination. The marriage contract is valid for the spouses from the moment of its signing or from the moment agreed by the spouses in the future. If a pre-marital contract (i.e. a marriage contract concluded by persons who have not yet registered a marriage) is concluded, this agreement shall enter into force not earlier than before the conclusion of the marriage. The provisions of the marriage contract may be used against third parties only if the marriage contract (as well as its amendments and termination) is registered in the Register of Marriage Contracts. The notary, having approved the marriage contract (as well as its amendments and termination), transmits the data directly to the Marriage Register manager by electronic means of communication.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

There was no civil registration in Lithuania in 1918–40 (except for the Klaipėda region), divorce was regulated by ecclesiastical norms of various denominations, and property issues related to divorce were regulated by state courts. Only a spiritual court could annul a marriage if the spouse so requested, accusing the other of adultery, unfaithful to marital life, or disappearance. Many non-Catholics (and atheists) went to Klaipėda to enter into a civil marriage.

The 1940 Marriage Act and the Metrics Act provide for civil registration, including divorce. Since 1940, divorce has been regulated by the 1926 Code of Marriage, Family and Custody Law of the Russian Soviet Federative Socialist Republic, temporarily introduced in Lithuania, according to which the divorce was dissolved by the civil registry office upon receipt of a declaration by one or both spouses. This simplified procedure was changed by an order of the Presidium of the Supreme Soviet of the USSR in 1944 - a judicial divorce procedure was established. From 1970 (as amended until 2000), divorce was regulated by the Marriage and Family Code of the LSSR, according to which, with the consent of both spouses, who did not have minor children, the marriage was dissolved by civil registration authorities. When the spouses have minor children, disagree on the division of property, or anything else, the divorce was decided in court. The husband was not entitled to file for divorce without the wife's consent while the wife was pregnant and for 1 year after the birth of the child. It has been established that the obligation of the spouses to provide material support to each other remains even after the divorce, if one is incapacitated for work and the other can support it. The marriage was considered to have been dissolved upon registration of the divorce with the civil registry office.

After the adoption of the Civil Code of the Republic of Lithuania in 2000, marriage is dissolved only by a court decision. The actual Civil Code of Lithuania was adopted in July 18, 2000, approved by the Law on the Entry into Force and Implementation of the Civil Code, entered into force in July 1, 2001 (with some exceptions). The norms of the Code, for which other deadlines were set, came into force later. For example, private international law applicable to family relations, conflict rules (articles 1.34, 1.36, 1.44) came into force after the entry into force of the respective international agreements of the Republic of Lithuania, norms regarding the register of marriage contracts - after the adoption of the relevant laws on wills, the register of marriage contracts, the register of legal persons.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

No, see below.

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

IF YES, TO WHICH EXTENT: TEMPORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

DO OTHER LEGAL PROFESSIONNALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

A marriage may be dissolved by the mutual consent of the spouses, on the application of one of the spouses or through the fault of a spouse (spouses). Application for divorce shall be presented to the court. As far as the division of property of the spouses is concerned. A mutual agreement of the spouses certified by a notary may be brought to the court granting divorce. The agreement certified by a notary is not mandatory. In granting a divorce the court must resolve matters relating to the residence and maintenance of the minor children, the maintenance of one of the spouses, adjustment of the community property of the spouses, except in cases where the property has been adjusted by the mutual agreement of the spouses certified in the notarial procedure.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

There is no alternative to non-judicial means for solving issues relating to the divorce without going to court in Lithuania.

On the January 1, 2020, amended Code of Civil Procedure came to force. From this date, family disputes are be mediated before going to the court. Notaries are qualified to mediate any civil dispute.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

A marriage may be dissolved by the mutual consent of the spouses provided all the following conditions have been satisfied:

- 1) over a year has elapsed from the commencement of the marriage;
- 2) the spouses have made a contract in respect of the consequences of their divorce (property adjustment, maintenance payments for the children, etc.);
- 3) both the spouses have full active legal capacity.

A marriage may be dissolved on the application of one of the spouses filed with the court of the district where the applicant resides, if at least one of the following conditions are satisfied:

- 1) the spouses have been separated for over a year;
- 2) after the formation of the marriage one of the spouses has been declared legally incapacitated by the court;
- 3) one of the spouses has been declared missing by the court;
- 4) one of the spouses has been serving a term of imprisonment for over a year for the commission of a non-premeditated crime.

On behalf of the spouse lacking legal capacity the application for divorce may be filed by his or her guardian, a public prosecutor or a guardianship and care institution.

A spouse may apply for divorce on the grounds of the fault of one or both of the spouses, where the marriage has broken down through the fault of the other spouse. The fault of a spouse for the breakdown of the marriage shall be established if he or she has seriously breached the duties under Civil Code hereof, which is the reason why their matrimonial life has become impossible. A marriage shall be presumed to have broken down through the fault of the other spouse where he or she has been convicted of a pre-meditated crime or has committed adultery or is violent toward the other spouse or the other members of the family or has deserted the family and has not been caring for it for over a year. The respondent in a divorce suit may argue against his or her fault and adduce facts to prove that the other spouse is at fault for the breakdown of the marriage. The court having regard to the circumstances of the case may declare that both parties are at fault for the breakdown of the marriage. A divorce based on the fault of both spouses shall have the same consequences as the dissolution of marriage by the mutual consent of the spouses (Articles 3.51 to 3.54).

One of the spouses may apply to the court for the approval of the separation if due to certain circumstances, which may not depend on the other spouse, their life together has become intolerable (impossible) or can seriously prejudice the interests of their minor children or the spouses are no longer interested in living together. Both spouses may jointly apply to the court for the approval of their separation if they have made a contract concerning the consequences of their separation providing for the residence, maintenance and education of their minor children as well as for the adjustment of their property and mutual maintenance.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No, see below.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

As it is mentioned above, property may be divided before a notary, but before (not after) going to the court for a divorce case.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

In the abovementioned prejudicial stage notary is chosen by the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

Usual role.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

After Courts decision on divorce comes into power it should be executed as any other Court decision. If it is not executed properly, a bailiff may intervene if it is needed to, for example, by recovering monetary compensation awarded by the Court.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

If a marriage is dissolved by the mutual consent of the spouses, a mutual application of the spouses for divorce shall be presented to the court of the district where one of the spouses resides. The application must be accompanied by the contract as to the consequences of the divorce. The application must contain reasons why, in the opinion of the spouses, their marriage has broken down. The requirements for the application are provided in the Civil Procedure Code (the Article 539). In this case divorce shall be obtained under simplified procedures.

If a marriage is dissolved by the application of one of the spouses, the application of one of the spouses shall be represented to the court of the district where the applicant resides. The application must contain the indication of one of the grounds for divorce under paragraph 1 Article 3.55 hereof. The application must also indicate how the applicant is going to perform his or her obligations toward the other spouse and their minor children. The application must also contain the data provided for in the Code of Civil Procedure (other requirements for the application are provided in the Code of Civil Procedure (the Article 539). In this case divorce shall be obtained under simplified procedures.

If a marriage is dissolved by on the bases of the fault of one or both of the spouses, the application of one of the spouses shall be represented to the court of the district where the defendant resides. The requirements for the application are provided in the Civil Procedure Code (the Article 382). A divorce on the basis of the fault of one of the spouses shall be granted by the court under contentious procedure.

The application for legal separation shall be represented to the court of the district where the defendant resides. The requirements for the application are provided in the Civil Procedure Code (the Article 382). The court shall examine applications for separation in the contentious procedure.

Joint co-ownership rights of the spouses shall end on divorce. If a marriage is dissolved by the mutual consent of the spouses, the questions of property adjustment shall have to be solve in a contract in respect of the consequences of their divorce. If a marriage is dissolved by the application of one of the spouses or by on the bases of the fault of one or both of the spouses, in granting a divorce the court must resolve matters relating to the adjustment of the community property of the spouses, except in cases where the property has been adjusted by the mutual agreement of the spouses certified in the notarial procedure (Article 3.59).

Legal consequences of divorce to the property interests of the spouses shall be produced from the moment of the commencement of divorce proceedings. A spouse other than the one determined to be at fault for the breakdown of the marriage may ask the court to rule that the legal consequences of divorce to the interests of the spouses shall be produced from the day of their actual separation.

Where the matrimonial dwelling is owned by one of the spouses, the court may make a usufruct order and allow the other spouse to remain in the matrimonial dwelling if their minor children live with him or her. The usufruct order shall be valid until the child (children) attain majority. Where the matrimonial dwelling is rented, the court may award the rights of the lessee to the spouse that remains to live with their minor children or that lacks capacity for work and may evict the other spouse if he or she has been ordered to live separately.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Where law of the Republic of Lithuania is applied in case of divorce, and accordingly the Civil Procedure Code of the Republic of Lithuania, the marriage is dissolved only in court, therefore in this case it would be considered that marriage could not be terminated in any other form or jurisdiction.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

In cases where the divorce is governed by the law of the Republic of Lithuania and, accordingly, the Code of Civil Procedure of the Republic of Lithuania, the marriage is dissolved only in court, therefore in this case it would be considered that the marriage could not be terminated in any other form or jurisdiction.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Records of civil status acts of a foreign court decision on divorce that has entered into force are amended and updated without applying a special procedure for recognition of foreign court decisions.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Applicable law is determined by Civil Code of Republic of Lithuania and parties may not choose it by their own will.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

The courts of Lithuania have jurisdiction over family cases if at least one of the spouses is a citizen of Lithuania or a stateless person and the permanent residence of this stateless person is in Lithuania. If both spouses have their permanent residence in Lithuania, their family cases shall be heard exclusively by the courts of Lithuania. The courts are also competent to hear family cases if both spouses are foreigners but their permanent residence is in Lithuania.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

The norms of private international law are provided in book I of the Civil Code. The Article 1.29 provides law applicable to separation and dissolution of marriage. Separation and dissolution of marriage shall be governed by the law of the spouses' state of domicile. If the spouses do not have their common domicile, the law of the state of their last common domicile shall apply, or failing that, the law of the state where the case is tried. If the law of the state of common citizenship of the spouses does not permit a dissolution of marriage or imposes special conditions for dissolution, the dissolution of marriage may be performed in accordance with the law of the Republic of Lithuania if one of the spouses is also a Lithuanian citizen or is domiciled in the Republic of Lithuania.

According to the Article 1.30 the courts of the Republic of Lithuania shall have jurisdiction over actions of annulment, dissolution of marriage or separation in the cases provided for by the Code of Civil Procedure of the Republic of Lithuania.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Civil Code of Lithuania: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.404614?jfwid=-19pnqb9et2>

Law on the Notarial Profession: <https://www.notarurumai.lt/en/doclib/iq1coypawxmes36xpetzb6huyv4pcvuk>.

Civil Procedure Code of Republic of Lithuania: <https://www.e-tar.lt/portal/lt/legalAct/TAR.2E7C18F61454/asr>

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

As mentioned before, since January 1, 2020, compulsory mediation applies to the settlement of family disputes, unless the person seeking the dispute has experienced domestic violence and the other party to the dispute is a potential perpetrator and a pre-trial investigation into domestic violence has been initiated or a court case involving domestic violence, or a conviction for domestic violence has been convicted, or a certificate of an entity authorized to provide specialized comprehensive assistance in accordance with the procedure established by law has been submitted regarding the provision of specialized comprehensive assistance to a person due to possible domestic violence. Notaries may provide mediation services if they are in the mediators list.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

Ministry of Justice proposed a measures to reduce court's caseload by eliminating requirement for judicial authorisation. At the moment, a marriage contract may be amendment only with leave of the court. Ministry of Justice suggests, that it could be attested by notary without a court authorisation meaning, that notary will be obliged to carry out comprehensive examination of factual situation, which is courts prerogative.

MEMBER NOTARIAT OF: NORTH MACEDONIA

Author: Nenad TRIPUNOSKI

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

No, we don't have such contracts.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

/

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

/

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Divorce in our country exist more than 70 years.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

No. The notary do not have a role in the preparation of the divorce process.

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

/

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

No. The services of notary are not a mandatory step during the divorce process.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

If the spouses have joint minor children or children over which it is extended parental law, the conciliation procedure is conducted by the center for social work.

If the spouses do not have joint minor children or children over whom it is extended parental rights conducts the conciliation procedure of the spouses the court, if it does not assess that it is expedient to leave the conciliation to the center for social work.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

/

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No. The notary does not intervene in the frame of the divorce judgement.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Marriage may be divorced by mutual consent of the spouses, the marriage can be divorced at the request of one of the spouses if the marital relationship is so disturbed that cohabitation became unbearable and the spouse can file for divorce if the marital union is in fact stopped for more than a year. The divorce is granted by a judge (The court decides on the divorce).

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

No. The divorce before a notary is not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

Yes, but only about division of the joint property.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

An agreement for division of the joint property can be concluded with the notary public.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The notary is chosen by the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary intervene in the frame of his/her usual role.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

If there is no agreement for division of the joint property, then the judges will decide about it and in this procedures the lawyers can be involved.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

The costs depend on many factors (whether lawyers will be involved, whether there is joint property, whether there are children, etc.).

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

It depends on the bilateral and international agreements that our country has signed.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

It depends on the bilateral and international agreements that our country has signed.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No. The notary does not have a role in the recognition of the procedure or consequences of a divorce that was granted overseas.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

No, it is not possible.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No, it is not possible.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

No, it is not recognized.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Notaries in my country are not involved in divorce proceedings.

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

My opinion is that if the notaries in my country are involved in the divorce procedure, then the procedure itself would be much faster especially for divorces with mutual consent of the spouses and divorces without joint minor children.

MEMBER NOTARIAT OF: MALTA

Authors: Maronia FENECH, Graziella AGIUS FARRUGIA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

In Malta, the parties can choose which regime is to regulate the patrimonial aspect of their marriage, that is whether the spouses would like the patrimonial aspect of their marriage to be regulated by the separation of estates, by the community of acquests or by the community of residue under separate administration. This may be done before marriage by means of a pre-nuptial deed published by a notary, and does not require court authorisation.

If the parties do not enter into a pre-nuptial agreement, the community of acquests starts to apply automatically from the date of their marriage. However, should the spouses want to change the applicable matrimonial property regime during their marriage, they may still do so by means of a deed published by a notary, upon obtaining court authorisation from the Court of Voluntary Jurisdiction for which an application is filed by a notary or lawyer (but most frequently by a notary).

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

There are instances, whereby the parties would agree beforehand that certain aspects agreed to within the pre-nuptial or post-nuptial agreement would remain unchanged in case of a divorce. However, it is not possible for a couple to make provisions of how the estate is to be liquidated in the eventuality of divorce.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The notary or a lawyer would be responsible for the drafting of these terms, but only a notary is responsible for the publication of the contract.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Since the 01 October 2011 (by virtue of Act 14 of 2011)

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

The Notary does not participate in any stage of the divorce process in Malta. According to the Art 66A et seq. of the Civil Code of Malta (Chapter 16 of the Laws of

Malta), a divorce decree is pronounced only by the court and the notary does not play a role in it. Unlike personal separation, which allows the couple to choose whether the separation is to take place by means of a public deed published by a notary (following court authorisation for the publication) or by means of a court judgement, this option is not given in the case of divorce.

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Article 1333 of Chapter 16 of the laws of Malta stipulates that the partition of the community of acquests shall be made by assigning one-half of the assets and liabilities comprised in the community to each of the spouses. This applies in all cases where the common property between spouses is being portioned, including in the case of divorce.

IF YES, TO WHICH EXTENT: TERMORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

See reply above.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS?

No

IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

N/A

DO OTHER LEGAL PROFESSIONNALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Lawyers have exclusive competence over divorce matters. If the spouses have companies or other complex financial instruments to partition, they may engage the services of an accountant for the registration of company share transfers and similar matters. However, in general, it is the lawyer who predominantly takes care of all aspects of divorce.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

Notaries are not involved at all.

2. The divorce judgement

DOES THE NOTARTY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED?

In Malta, according to Art 66B of the Civil Code, divorce may be obtained upon a demand made either jointly by the two spouses, or by one of them against the other spouse. On the date of commencement of divorce proceedings, the spouses must have lived apart from each other for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation. A Divorce decree is pronounced by the judge at the Civil Court (Family Court).

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

This is not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

N/A

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

N/A

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

N/A

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

N/A

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

There are court fees (the court application itself costs less than €100), lawyers' fees, and expenses for searches relating to immovable property of the spouses (where applicable) or any other expenses incurred to collect required information especially that relating to the patrimony of the spouses. These fees may vary considerably depending on the complexity of the particular case. A normal divorce case without any complication would however cost between €700 - €1000.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes, if this was validly executed. According to Article 33 of the Marriage Act, Chapter 255 of the Laws of Malta, without prejudice to the implementation of any regulation applicable between the Member States of the European Union, a decision of a foreign court or a decision or other official act of equivalent effect of a foreign competent authority on the status of a married person or affecting such status shall be recognised for all purposes of law in Malta **if the decision is given or if the other official act is issued by a court or a competent authority of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen.**

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The notary has no role in this.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The parties themselves or one of them may present the instrument of divorce to the Public Registry of Malta in order to register their status as 'divorced'. However, in case where as part of the divorce proceedings, immovable property and/or other assets situated in Malta were transferred to one of the spouses, a lawyer has to be engaged to take care of the procedure. In case of immovable property, the services of a notary are also required. A distinction is also made between divorces acquired in another European Union member state and third countries since the procedure for recognition varies.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

The applicable law may be chosen and indicated on agreements relating to matrimonial property regimes pursuant to European Union Council Regulation 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. **However**, divorce, legal separation and marriage annulment fall outside the scope of this Regulation, as per Article 1 paragraph 2 of the Regulation.

On the matter of divorce and personal separation proceedings, Article 5 of the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation stipulates that the spouses **may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:**

(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum. An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum. This regulation was not adopted by all EU member states, however the choice of law made shall apply whether or not it is the law of a participating member state.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE?

In Malta, this cannot be done by any pre-nuptial agreement or by any agreement during marriage. However, within the EU, a request for divorce can be filed with the courts of the country where both spouses live, where they last lived together (provided one of them still lives there), where one of the spouses lives (provided the application is filed jointly), or where both spouses are nationals.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Yes, if the formal validity of the instrument by virtue of which the choice of law or jurisdiction was made is in accordance with the law of the state in which it was drawn up.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

N/A

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

At present reforms are being discussed so that the four year period requirement mentioned above will be removed and a couple will be able to file for divorce without waiting for four years from legal separation or from the day on which the couple stopped living together.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE

N/A

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE:

If notaries are given competence to publish deeds of divorce, this would considerably reduce the workload from courts of law. As is the case with personal separation proceedings, a couple should be given a choice, that is whether to (a) choose to divorce through court by instituting proceedings for divorce whenever there is contention between the spouses or (b) choose to divorce amicably by means of a public deed upon obtaining prior authorisation from the court.

MEMBER NOTARIAT OF: MONTENEGRO

Author: Igor STIJOVIĆ

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

According to the Family Law of Montenegro during the marriage or before entering into marriage, spouses may by an agreement (marital agreement) regulate all their property relations related to the existing or future property.

Marital agreement shall be concluded in a written form and it must be certified by the notary, who shall be obliged before certifying the agreement to read it to the spouses and to warn them that the agreement excludes the legal regime for the joint property.

Marital agreement which refers to immovable property shall be registered in the register of immovables.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

Only when parties wont agreement on the division of joint property (existing or future property).

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Montenegro adopted Family Law in 2007, but before it was a federal Family Law that also provided for divorce.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

No

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Yes, lawyers, mediators

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

Its not under national laws

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

Family laws prescribes:

Divorce

Article 56

A spouse may ask for a divorce of a marriage if the relationships in the marriage have seriously and permanently been disturbed or if the purpose of marriage cannot be realized for some other reasons.

Article 57

Spouses may require the marriage to be divorced based on their agreement.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

No, divorce before a notary is not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

Only in case preparing agreement on division of the property.

Notary is competent to draw up agreement on the division of the property, if the parties wish that.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

Spouses (ex spouses) may amicably divide the joint property by determining the parts in the whole property or a part of the property or of an individual item, as well as by determining that each spouse obtains certain items or rights from the property or that one spouse pays the other spouse the monetary value of his/her part.

The agreement must be made in written form by notary.

Settlement of joint property of spouses may be requested during the marriage and after cessation of a marriage.

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

The party chooses a notary.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

The notary intervene in the frame of his/her usual role.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

No

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

The notarys fee is determined by the value of the property. If it cannot be determined by value of the property, the notary entitled to compensation according to the time spent, but not more than 300E.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The notary states the divorce only within the scope of his competence

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Only relating to the property rights.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

Private International Law of Montenegro prescribes:

Choice of law Article 86

The spouses may at any event choose the law applicable to a divorce, and in addition to one of the laws from Article 85 of the present Act may also choose the law of nationality of either spouse at the time the divorce application is made. The agreement designating the applicable law must be made in writing and certified in accordance with law, not later than at the time the divorce application is made.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

Private international Law prescribes:

Contractual relations between spouses

Article 82 The spouses may agree in writing to subject their contractual property relations to the law: 1)of the state of nationality of either of the spouses; 2)the state of habitual residence of either of the spouses; 3)the state in which they intend to establish their common habitual residence; 4), in relation to immovable property, the law of the place in which the immovable property is located. The spouses may modify or revoke their choice of law. The choice made after the marriage is concluded shall start producing effect from the moment of conclusion of marriage, except as otherwise agreed by the parties.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Private international Law prescribes :

Choice of jurisdiction

Article 129 In respect of disposition of property in the event of his death, a person may designate a court or courts of the state the law of which can be chosen as applicable to succession under Article 72 of the present Act to also have jurisdiction in respect of disposition of his property, in its entirety or in part. Once chosen in this way, the jurisdiction shall be exclusive. 6. Jurisdiction in respect of family law disputes Marriage and related disputes Article 130 A Montenegrin court shall have jurisdiction to hear actions relating to the existence of marriage, divorce or annulment of marriage, if: 1)one spouse is a Montenegrin national or was a Montenegrin national at the time the marriage was concluded; 2)both spouses have their habitual residence in Montenegro; 3)one spouse is a stateless person who has habitual residence in Montenegro; or 4)one spouse has habitual residence in Montenegro, except where it is clear that the decision of the Montenegrin court would not be recognized under the law of the state of which either of the spouses is a national. The jurisdiction of a Montenegrin court pursuant to paragraph 1 of this Article also refers to a case when the marriage dispute seeks a decision on maintenance between the spouses or former spouses, parental care or child subsistence or marital property regime.

6 . Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Family Law

“(Official Gazette RCG”, br. 1/2007 i “Official Gazette CG”, br. 53/2016 i 76/2020)

Law on notaris

“(Official Gazette RCG”, br. 68/2005 i “Official Gazette CG”, br. 49/2008 i 55/2016 i 84/2018)



NOTARIAT MEMBRE DE : PORTUGAL

Auteur : Filipa AZEVEDO MAIA

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE ? AU PORTUGAL, IL EXISTE TROIS TYPES DE RÉGIMES MATRIMONIAUX : LA COMMUNAUTÉ UNIVERSELLE, LA COMMUNAUTÉ RÉDUITE AUX ACQUÊTS ET LA SÉPARATION DE BIENS. LE RÉGIME DE LA COMMUNAUTÉ RÉDUITE AUX ACQUÊTS EST LE RÉGIME SUPPLÉTIF.

Si les parties optent pour un autre régime de biens prévu par la loi ou souhaitent établir d'autres dispositions comme bon leur semble, à condition de demeurer dans le cadre légal, elles devront conclure un contrat de mariage (cf. articles 1698 et 1717 du Code civil).

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Non

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Le notaire peut intervenir lors de la passation du contrat de mariage compte tenu que celui-ci peut adopter la forme d'acte notarié (cf. article 170 du Code civil). Sa préparation incombe au notaire.

Cependant, cette intervention n'est pas impérative, d'une part parce que la passation d'un contrat de mariage n'est pas obligatoire et d'autre part parce qu'il existe d'autres professionnels compétents pour établir ce contrat.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Non. Au Portugal, pour les mariages (civils), ce rôle relève des fonctions de l'Officier d'État-civil.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

Le divorce existe au Portugal depuis l'avènement de la République en 1910.

1. La préparation du divorce

VOTRE Législation relative au mariage prévoit-elle une analyse préalable de la situation patrimoniale des époux souhaitant divorcer ?

Non.

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

L'intervention du notaire n'est jamais obligatoire pendant la procédure de divorce.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Oui c'est possible, notamment des avocats et des médiateurs familiaux.

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Le notaire peut intervenir en cas de divorce par consentement mutuel mais uniquement à la demande des parties. Il n'est jamais nommé à cet effet et son intervention n'est pas obligatoire. Dans ce cas, le notaire peut aider les parties, par exemple à établir la demande à soumettre au Bureau d'Etat-civil qui va instruire la respective procédure de divorce.

2. Le prononcé du divorce

LE NOTAIRE INTERVIEN-T-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Le notaire n'est pas compétent en matière de décisions relatives au divorce.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Au Portugal, nous avons le divorce par consentement mutuel des conjoints et le divorce contentieux, c'est-à-dire sans l'accord d'un des conjoints (le divorce « litigieux »). Dans le premier cas et d'une manière générale, la décision traduit l'accord des conjoints à condition de respecter les dispositions légales en la matière. Cette décision est rendue par le Bureau d'État-civil. En cas de divorce contentieux, c'est le tribunal qui rend une décision et peut également se prononcer sur certaines questions : attribution du foyer familial, des responsabilités parentales et d'une pension alimentaire si les époux ont des enfants mineurs, la pension alimentaire à verser à l'un des conjoints le cas échéant, etc...

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

La procédure de divorce n'est engagée devant un tribunal que si les conjoints ne parviennent pas à un accord et à condition que soient réunies certaines conditions prévues à l'article 1781 du Code civil (cf. article 1773/3 du Code civil). Dans tous les autres cas, le divorce a lieu par consentement mutuel. En fait, le citoyen ne choisit pas l'endroit où il va engager sa procédure de divorce, dans la mesure où ce choix résulte des circonstances de son dossier. Cependant, en cas de divorce par consentement mutuel, le citoyen peut choisir de faire appel à un notaire ou à un autre professionnel du droit qui va le soutenir pendant le déroulement de la procédure.

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Oui.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

Le notaire peut intervenir en matière de partage des biens communs du couple : il dresse l'inventaire ou acte le partage quand il y a accord entre les conjoints.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ?

Désigné par le Juge ? Le notaire est librement choisi par les parties. Toutefois, dans les cas où il y a inventaire, c'est-à-dire lorsqu'il n'y a pas d'accord des ex-époux, l'existence d'un élément de rattachement avec l'office notarial choisi constitue un impératif. Ce rattachement peut être établi, notamment, en fonction de la situation de la plupart des biens immobiliers, de celle des établissements commerciaux composant l'héritage ou du domicile des personnes directement concernées par le partage. En aucun cas, le notaire n'est désigné par le juge.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Dans le cadre de sa fonction habituelle.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

Oui, la procédure de divorce peut impliquer d'autres professionnels, notamment des avocats et des juges, surtout s'il s'agit d'un divorce contentieux.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

En cas de divorce par consentement mutuel, la procédure à engager auprès du bureau d'état-civil coûte 280 €, auxquels s'ajoutent 625 € en cas de partage des biens communs du couple. À ces montants peuvent s'ajouter le montant des certificats nécessaires, ainsi que d'autres frais payables à titre d'impôts ou de consultation des bases de données de l'état-civil. Naturellement, si les parties ont recours à un notaire ou à un avocat, elles devront également payer les frais dus pour les actes réalisés par ces professionnels. Toutefois, en cas de divorce par consentement mutuel, la procédure peut être gratuite si les parties prouvent qu'elles ne disposent pas des moyens financiers nécessaires pour prendre en charge les frais de procédure.

Dans le cas d'un divorce contentieux, chacune des parties prend en charge 306 € de dépens à la fin de la procédure de divorce, auxquels s'ajoutent évidemment les honoraires des avocats. En cas de divorce contentieux, le tribunal peut également facturer des frais supplémentaires à titre de dépens ou charges.

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Non

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Le notaire n'intervient pas dans cette procédure. En effet, s'il s'agit d'un pays de l'UE, la décision n'a pas besoin d'être reconnue au Portugal, sans préjudice de la mention marginale du jugement ou de la décision de divorce sur les documents de l'état civil. Si le pays n'est pas membre de l'UE, en revanche, cette reconnaissance a lieu par le biais d'une action en justice.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non.

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Non. Au Portugal, la norme en vigueur est celle qui est prévue à l'article 3 du Règlement (CE) n° 2201/2003 du 27 novembre, conformément aux critères qui y sont établis.

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

Non

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Ce choix n'est pas possible et par conséquent la juridiction n'est pas reconnue.

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE ? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

Code de procédure civile (Loi n° 41/2013 du 26 juin)

Régime de l'inventaire notarial (Loi n° 117/2019 du 13 septembre) Statut du Notariat (Décret-loi n° 26/2004 du 4 février)

Code du Notariat (Décret-loi n° 207/95 du 14 août)

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

POUR LES PAYS CONCERNÉS : SUR LA VALEUR AJOUTÉE DE L'INTERVENTION DU NOTAIRE DANS LE PROCESSUS DE DIVORCE ;

SUR L'OPPORTUNITÉ (OU NON) D'AMÉLIORATIONS QUI POURRAIENT ÊTRE APPORTÉES À VOTRE SYSTÈME, NOTAMMENT AU REGARD DE L'INTERVENTION DU NOTAIRE DANS LA PROCÉDURE.

Le notaire peut actuellement préparer et rédiger la demande de divorce, la convention sur l'exercice de l'autorité parentale - nécessaire en cas d'enfants mineurs - comprenant la garde et le domicile des enfants, les modalités de visite et la pension alimentaire à verser ; la convention sur la destination du domicile familial (réglementant et attribuant son usage à l'époux demandeur ou à l'épouse demanderesse) ; la convention sur l'attribution d'une pension alimentaire au conjoint qui en a besoin; la liste des actifs et passifs du patrimoine du couple, etc.

Cependant, le notaire, en tant que juriste spécialisé et professionnel hautement qualifié, doté d'impartialité et respectueux de la loi, pourrait assumer un rôle beaucoup plus pertinent dans la procédure de divorce, rendant l'ensemble de la procédure plus rapide et favorisant le désengorgement souhaité des services de l'état-civil.

Outre la formalisation obligatoire auprès des notaires des demandes de divorce par consentement mutuel, ainsi que des différentes conventions qui doivent les accompagner, en vertu de l'article 1773, paragraphe 2 et de l'article 1775 du Code civil, le notaire pourrait même se voir attribuer la compétence de prononcer le divorce s'il y a accord entre les parties.

NOTARIAT MEMBRE DE : ROUMANIE

Auteurs : Stila COCEA, Galia RADULESCU

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

Le Code civil prévoit la possibilité pour les époux ou futurs époux, selon le cas, de choisir entre plusieurs régimes matrimoniaux qui établissent les effets patrimoniaux du mariage respectif. Au moment de la conclusion du mariage, les époux doivent remplir la déclaration de mariage dans laquelle il sera indiqué, entre autres, le régime matrimonial choisi (communauté légale, séparation des biens ou communauté conventionnelle). Le régime matrimonial choisi ne prendra effet qu'à compter du jour de l'officialisation du mariage. L'acte juridique établissant le régime matrimonial choisi est la convention matrimoniale (qui doit être conclue par un acte authentifié par le notaire), à l'exception du régime de la communauté légale pour l'adoption duquel il n'est pas nécessaire de conclure l'acte respectif.

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

En principe, la convention matrimoniale conclut par les époux ne contient pas des aspects relatifs à un éventuel divorce entre les époux, mais seulement à la nature juridique des biens acquis par les époux pendant le mariage (propres ou communs). Ces aspects ont d'importance si les époux divorcent et souhaitent partager les biens acquis pendant le mariage.

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Le notaire public qui conclut une convention matrimoniale a l'obligation, selon la loi, de les inscrire au registre national notarial des régimes matrimoniaux tenu au niveau national par le Centre National d'Administration des Registres National Notariales - CNARNN.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Le notaire n'a pas des attributions lors de l'officialisation / conclusion d'un mariage, car cette attribution appartient au fonctionnaire délégué du Service de l'état civil de la mairie de la localité où au moins un des époux a son domicile / sa résidence.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non, le notaire public n'a aucun rôle dans les procédures de la publicité du mariage.

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

Des règlements relatifs à la dissolution d'un mariage ont été adoptés dès le XIXe siècle, avec l'adoption du Code civil de 1864, qui a donné aux tribunaux cette compétence. La compétence de dissoudre, à l'amiable, le mariage entre les époux (qu'ils aient ou non des enfants mineurs) a été attribuée au notaire public, à partir du 1.10.2011, par l'adoption du nouveau Code civil et par l'abrogation du Code civil de 1864.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

La législation de Roumanie ne prévoit pas la possibilité que le notaire public accomplisse cette analyse.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISoire ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

Il n'est pas le cas.

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

La procédure administrative de la dissolution d'un mariage des époux a lieu soit devant le notaire public, soit par l'intermédiaire de l'officier de l'état civil, dans ce dernier cas uniquement si les époux n'ont pas des enfants mineurs.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

En Roumanie, il n'existe pas une réglementation à cet égard.

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Du point de vue notariale, la procédure de divorce par consentement des époux appartient à la compétence du notaire public qui a le siège de l'étude notariale dans la circonscription judiciaire ou du Tribunal de Bucarest, dans le territoire duquel le mariage a pris fin ou il se trouve la dernière résidence commune du conjoint. La demande de divorce reçoit également un numéro d'enregistrement unique au niveau national du Registre national d'évidence des certificats de divorce (RNECD). Le notaire public inscrit la demande au registre des divorces le jour de la réception de la demande, après avoir vérifié s'il a la compétence (en fonction de la juridiction territoriale). Il inscrit la demande aussi au RNECD afin qu'une autre demande de divorce ne soit pas enregistrée par les mêmes époux. Après ces vérifications, le notaire public donne aux époux un délai de réflexion de 30 jours et les informe de celui-ci au moment de l'enregistrement de la demande. Afin d'accepter la demande de divorce au cas où ils existent des enfants mineurs, le notaire public saisie l'autorité compétente, en joignant à la demande le projet de l'accord des époux concernant l'exercice de l'autorité parentale, le logement des enfants, la modalité de maintenir les liens personnels et la détermination de la contribution de chaque parent pour élever les enfants, leur éducation, leur apprentissage et formation professionnelle après le divorce. Au dossier de la cause il est soumis le rapport d'enquête sociale, afin de résoudre la procédure de divorce par voie notariale. Si les époux insistent dans leur demande de divorce et si, en ce sens, leur consentement est libre et éclairé, après l'authentification de l'accord des parties concernant les enfants mineurs, le notaire public rédige une conclusion d'admission la demande de divorce par consentement mutuel, conclusion par laquelle il constate qu'ils expriment leur consentement libre et éclairé et remplissent, cumulativement, les autres conditions légales prévues par le Code civil pour la dissolution du mariage. Après l'admission de la demande de divorce, le notaire public délivre l'acte de divorce par lequel il constate la dissolution du mariage par l'accord des parties. Afin de délivrer l'acte de divorce, le notaire public demandera, par l'intermédiaire de l'administrateur des registres uniques de l'Union, l'attribution d'un numéro de l'acte de divorce du Registre unique des actes de divorce, tenu par le Ministère de l'Intérieur. Le numéro attribué par ce registre est inscrit par le notaire public sur l'acte de divorce.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Selon le Code civil, la procédure du divorce à voie administrative par l'intermédiaire du notaire peut avoir lieu si les époux sont d'accord avec le divorce et avec les autres aspects prévus par la loi.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Dans le Code civil, le mariage entre deux époux peut être dissous de plusieurs manières, à savoir :

a) Divorce par consentement des époux par voie judiciaire

Le divorce par consentement des époux peut être prononcé quelle que soit la durée du mariage et qu'il y ait ou non des enfants mineurs issus du mariage, mais ne peut être admis si l'un des époux est mis en interdiction. À cette fin, le tribunal est tenu de vérifier l'existence du consentement libre et éclairé de chaque époux.

b) Divorce par consentement des époux par voie administrative ou par procédure notariale

L'officier de l'état civil ou le notaire public du lieu du mariage ou de la dernière résidence commune des époux peut constater la dissolution du mariage par consentement des époux si les époux sont d'accord avec le divorce et ils n'ont pas des enfants mineurs; la constatation de la dissolution du mariage dans ce cas se fait par un acte de divorce. S'il y a des enfants mineurs nés du mariage, hors du mariage ou adoptés, le notaire public vérifiera si les époux sont d'accord sur toutes les questions relatives au nom à porter après le divorce, à l'exercice de l'autorité parentale par les deux parents, à l'établissement de logement des enfants après le divorce, la manière de maintenir les liens personnels entre le parent séparé et chacun des enfants, ainsi que d'établir la contribution des parents aux frais pour élever les enfants, pour leur éducation, leur enseignement et leur formation professionnelle.

Du point de vue procédural, la demande de divorce est introduite conjointement par les époux. L'officier de l'état civil ou le notaire public enregistre la demande et leur accorde un délai de réflexion de 30 jours. A l'expiration de ce délai, les époux comparaissent en personne, et l'officier de l'état civil ou, le cas échéant, le notaire public vérifie si les époux persistent en leur intention de divorcer et si, en ce sens, leur consentement est libre et éclairé. Si les époux persistent dans le divorce, l'officier de l'état civil ou, le cas échéant, le notaire public, délivre l'acte de divorce sans mentionner la faute des époux.

Si les époux ne s'entendent pas sur le nom de famille à porter après le divorce ou sur l'exercice conjoint des droits parentaux, l'officier de l'état civil ou, selon le cas, le notaire public émet une décision de rejet de la demande de divorce et guident les époux à s'adresser au tribunal. La solution des demandes concernant les autres effets du divorce sur lesquels les époux ne sont pas d'accord est de la compétence du tribunal.

Après la délivrance de l'acte de divorce par l'officier de l'état civil ou par le notaire public, il en enverra une copie certifiée conforme à la mairie du lieu où le mariage a été conclu, à mentionner dans l'acte de mariage; si la demande de divorce est déposée à la mairie où le mariage a été conclu, l'officier de l'état civil qui a constaté la dissolution du mariage la mentionnera dans l'acte de mariage en ce qui concerne l'intervention de ce fait juridique.

c) Divorce pour faute

Dans une situation où, pour de bonnes raisons, les rapports entre les époux sont gravement endommagés et la poursuite du mariage n'est plus possible, le divorce peut être prononcé si le tribunal établit la faute de l'un des époux dans la dissolution du mariage. Cependant, si des preuves apportées montrent que les deux conjoints sont en faute, le tribunal peut prononcer le divorce pour leur faute commune, même si un seul d'entre eux a demandé le divorce. Sur l'hypothèse selon laquelle le divorce est demandé à la requête de l'un des époux, après une séparation de fait d'une durée d'au moins 2 ans, il sera prononcé de la faute exclusive du conjoint demandeur, à moins que le défendeur approuve le divorce, lorsqu'il est prononcé sans mentionner la faute des époux.

d) Divorce en raison de l'état de santé d'un mari

Dans ce cas, la dissolution du mariage intervient lorsque, à la demande de l'un des époux dont l'état de santé rend impossible la poursuite du mariage. Dans ce cas, le divorce est prononcé sans mentionner la faute des époux.

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

Le divorce par accord des parties peut avoir lieu aussi bien devant le tribunal que devant le notaire public (ou l'officier de l'état civil, selon le cas). Dans ces hypothèses, la demande de divorce sera signée par les deux époux. Également, il est nécessaire à se mettre d'accord aussi sur les modalités selon lesquelles ils ont accepté de régler les demandes accessoires du divorce. Par conséquent, si les époux sont d'accord, ils peuvent choisir soit de mener la procédure de dissolution du mariage par le notaire public, soit devant le tribunal.

3 . Les conséquences du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

EN PRINCIPE, APRÈS QUE LE NOTAIRE A DÉLIVRÉ L'ACTE DE DIVORCE ET L'A COMMUNIQUÉ AUX INSTITUTIONS PRÉVUES PAR LA LOI POUR FAIRE LA MENTION DANS L'ACTE DE MARIAGE, SON RÔLE CESSE. TOUTEFOIS, APRÈS LA MENTION INDIQUÉE CI-DESSUS A ÉTÉ RÉALISÉE, SI LES EXÉPOUX EN FONT LA DEMANDE, LE NOTAIRE PUBLIC PEUT PROCÉDER À LA LIQUIDATION DU RÉGIME MATRIMONIAL ET AU PARTAGE DE BIENS ACQUIS LORS DU MARIAGE.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

Une fois l'inscription inscrite sur l'acte de mariage, les époux peuvent demander la conclusion de plusieurs actes juridiques concernant la situation des biens acquis pendant le mariage, tels que la liquidation des biens et leur partage ou la conclusion des actes de disposition entre eux et / ou par des tiers. Si le régime de la communauté des biens finit par dissoudre le mariage, les ex-maris restent copropriétaires en indivision sur les biens communs jusqu'à la constitution de la quote-part qui appartient à chacun. Si les ex-maris demandent la liquidation du régime matrimonial et / ou le partage des biens, il est nécessaire qu'après avoir effectué ces opérations, leur publicité soit effectuée dans les registres nationaux notariaux. Lors de la liquidation de la communauté, chacun des époux reprend ses propres biens, après quoi les biens communs seront partagés et les dettes seront réglées. À cet effet, la quote-part due à chaque époux est d'abord déterminée, en fonction de sa contribution tant à l'acquisition des biens communs qu'à l'accomplissement des obligations communes. Jusqu'à preuve du contraire, il est présumé que les époux ont eu une contribution égale.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

La conclusion de l'acte de liquidation et /ou de partage des biens acquis lors du mariage ou des actes de disposition peut être réalisée par tout notaire notifié par les anciens époux.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Oui. Dans cette situation, le notaire public intervient en base de ses compétences habituelles d'authentifier des actes juridiques.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

En principe, non.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

En ce qui concerne les frais du notaire pour accomplir la procédure de divorces, ils sont approximativement 150 euros.

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Il n'est pas le cas.

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Pour que les effets d'un divorce concernant les citoyens roumains puissent se produire en Roumanie, le divorce doit être inscrit ou transcrit, selon le cas, dans les actes d'Etat civil de Roumanie.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non, le notaire n'a aucun rôle dans cette reconnaissance.

5 - Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Le Code civil prévoit que les époux peuvent choisir d'un commun accord l'une des lois suivantes applicables au divorce: la loi de l'État sur le territoire duquel les époux ont leur résidence habituelle commune ou leur dernière résidence habituelle commune, (si au moins l'un d'entre eux y habite à la date de la convention sur le choix de la loi applicable), la loi de l'État dont l'un des époux est le ressortissant, la loi de l'État sur le territoire duquel les époux ont habité au moins 3 ans; la loi roumaine.

En l'absence du choix de la loi par les époux, la loi applicable au divorce est: la loi de l'État sur le territoire duquel les époux ont leur résidence habituelle commune au moment de l'introduction de la demande de divorce; en l'absence de résidence habituelle commune, la loi de l'État sur le territoire duquel les époux avaient leur dernière résidence habituelle commune, si au moins l'un des époux a sa résidence habituelle sur le territoire de cet État au moment de l'introduction de la demande de divorce; à défaut, la loi de la nationalité commune des époux au moment de l'introduction de la demande de divorce; en l'absence de la nationalité commune des époux, la loi de la dernière nationalité commune des époux, si au moins l'un d'entre eux a gardé cette nationalité au moment de l'introduction de la demande). La loi roumaine s'applique dans tous les autres cas. De plus, dans l'art. 1 par rapport à l'art. 5 du RÈGLEMENT (UE) No. 1259/2010 DU CONSEIL du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, Les époux peuvent convenir de désigner la loi applicable au divorce et à la séparation de corps, pour autant qu'il s'agisse de l'une des lois suivantes: a) la loi de l'État de la résidence habituelle des époux au moment de la conclusion de la convention; ou b) la loi de l'État de la dernière résidence habituelle des époux, pour autant que l'un d'eux y réside encore au moment de la conclusion de la convention; ou c) la loi de l'État de la nationalité de l'un des époux au moment de la conclusion de la convention; ou d) la loi du for.

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

La Convention de choisir la loi applicable peut être conclue ou modifiée au plus tard à la date de saisine de l'autorité compétente pour prononcer le divorce.

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Le choix de la loi ou de la juridiction fait à l'étranger pour les états membres de l'Union Européenne est couvert par Le Règlement (UE) no. 1259/2010 du Conseil du 20 décembre 2010 mettant en œuvre une coopération renforcée dans le domaine de la loi applicable au divorce et a la séparation de corps et par Le Règlement (CE) no. 2201/2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale. S'il s'agit du choix de la loi applicable réalisé dans des autres états hors de l'Union Européenne, les dispositions de l'art. 1094 - 1102 du Code de procédure civile sont

applicables, concernant la reconnaissance par les tribunaux des décisions étrangères en Roumanie.

En ce qui concerne le choix de juridiction par les époux, les conditions de sa validité seront appréciées par le tribunal lors du jugement de l'action de divorce.

6 - Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE ? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

Le Code Civil – art. 334, 329-330374-381, art. 2597-2598

La Loi des notaires publics et de l'activité notariale no. 36/1995 – art. 139

Le Règlement d'application la Loi des notaires publics et de l'activité notariale no. 36/1995, approuve par l'ordre du Ministère de la Justice no. 233/C/2013 – art. 267 et art. 269-275

Le Code de Procédure Civile – art. 1094 - 1102

7 - Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

La réglementation de la procédure de divorce tant par voie administrative, que juridique est suffisamment détaillée dans les actes normatifs en la matière.

MEMBER NOTARIAT OF: RUSSIA (ENG)

Author: Yuriy KASHURIN

Preamble: marriage

The regime provided for by law is the joint ownership of their property in the Russian Federation. The regime provided for by law is valid unless a marriage contract specifies otherwise.

Spouses have the right to change the legal regime of the joint ownership, to establish a regime of joint, shared or separate ownership of all the spouses' property, its separate types or the property of each of the spouses by a marriage contract. A marriage contract can be concluded both before the state registration of the marriage, and at any time during the marriage.

A marriage contract concluded before the state registration of marriage shall enter into force from the date of state registration of the marriage.

The marriage contract is concluded in writing and is subject to notarization. The spouses have the right to determine in the marriage contract the property that will be transferred to each of the spouses in the event of divorce, as well as to include in the marriage contract any other provisions concerning the property relations of the spouses.

The notary is not involved in the celebration of the marriage, the publication of the registration, or the dissolution of the marriage.

Dissolution of a marriage is considered in the registry office or in court.

A marriage dissolved in a civil registry office terminates from the date of the state registration of the dissolution of the marriage in the Civil Register, and in case of divorce in court - from the date the court decision enters into legal force.

1. The divorce preparation

If a notary takes action, how is he appointed? What powers does he/she have? Is he/she only a counsellor? Or does he/she have special credentials for this mission, such as a legal expert? Does he/she receive his/her mission legally or from a judge?

Prior to the registration of divorce, spouses can conclude a marriage contract and determine the regime of ownership and establish a regime of joint, shared or separate ownership of all spouses' property, its individual types or the property of each of the spouses, or conclude an agreement on the division of property.

The division of the common property of the spouses can be considered both during the marriage and after its dissolution at the request of any of the spouses, as well as in the case of the creditor's claim for the division of the common property of the spouses in order to foreclose on the share of one of the spouses in the common property of the spouses.

Now therefore, the parties have the right to apply to the notary office:

- During marriage, both for certification of a marriage contract and an agreement on the division of property
- After divorce - only property division agreements.

The division of the spouses' common property, as well as the determination of the spouses' shares in this property, shall be considered in a judicial proceeding in the event of a dispute.

Contacting a notary is optional and voluntary.

The notary does not participate in the divorce process itself.

2. Divorce decision

Dissolution of a marriage is considered in the civil registry offices, and in the cases provided for by the Family Code in court.

In case of mutual consent to the dissolution of the marriage of spouses who do not have common minor children, the dissolution of the marriage is considered in the civil registry offices.

Dissolution of a marriage at the request of one of the spouses, regardless of whether the spouses have common minor children, considered in the civil registry office, if the other spouse:

- declared missing by the court;
- declared incompetent by the court;
- convicted of committing a crime to imprisonment for a term exceeding three years.

Dissolution of marriage and the issuance of a certificate of divorce are considered after a month from the date of filing an application for divorce by the civil registry office.

Divorce in court.

Dissolution of a marriage is considered in a judicial proceeding if the spouses have common minor children or in the absence of the consent of one of the spouses to dissolve the marriage.

Dissolution of a marriage is considered in court also in cases where one of the spouses, despite having no objections, evades the dissolution of the marriage at the civil registry office, including refusing to submit an application.

Dissolution of marriage in court in the absence of the consent of one of the spouses to divorce.

Dissolution of a marriage in court is considered if the court has established that the further life of the spouses and the preservation of the family are impossible.

If there is a mutual consent to the dissolution of the marriage of the spouses with common minor children, the court dissolves the marriage without clarifying the reasons for the divorce. The spouses have the right to submit an agreement on children to the court. In the absence of such an agreement, or if the agreement violates the interests of children, the court takes measures to protect their interests.

Dissolution of a marriage is considered not earlier than the expiration of a month from the date of filing by the spouses of an application for divorce by the court.

3. Consequences of divorce

After a divorce, a notary could be requested to certify the Property Division Agreement, alimony agreement, agreement on the procedure for communicating with children. As part of the division of property, a notary can send an electronic application for registration of the transfer of ownership of real estate.

The parties at their own discretion make the choice of a notary.

4. Notary and foreign divorce

Not applicable to Russian family relations.

5. Questions of private international law

During the period of marriage, the parties, when concluding a marriage contract, may determine the application of the norms of Russian law to property located on the territory of the Russian Federation.

6. Applicable legislation

Civil Code of the Russian Federation (parts one, two, three and four) (with amendments and additions)
Family Code of the Russian Federation of December 29, 1995 N 223-FZ

NOTARIAT MEMBRE DE : RUSSIE (FR)

Auteur : Yuriy KASHURIN

Préambule: le mariage

En Fédération de Russie, le régime matrimonial légal est le régime des acquets. Le régime matrimonial légal est valable, sauf disposition contraire du contrat de mariage. Les époux peuvent changer le régime légal des acquets par le contrat de mariage, établir un régime de propriété conjointe, partagée ou séparée de tous les biens des époux, de certains types des biens ou des biens de chaque conjoint. Le contrat de mariage peut être conclu avant l'enregistrement public du mariage ainsi qu'à tout moment pendant le mariage.

Le contrat de mariage conclu avant l'enregistrement public du mariage entre en vigueur à compter de la date d'enregistrement public du mariage.

Le contrat de mariage est conclu par écrit et soumis à la certification notariale. Les époux peuvent déterminer dans le contrat de mariage les biens qui seront transférés à chaque conjoint en cas de divorce, ainsi qu'inclure toutes autres dispositions concernant les relations patrimoniales des époux dans le contrat de mariage.

Le notaire n'intervient pas dans la célébration du mariage, la publication de l'enregistrement ou la dissolution du mariage.

La dissolution du mariage s'effectue dans les bureaux de l'état civil ou par voie judiciaire.

Le mariage dissous dans un bureau de l'état civil prend fin à compter de la date de l'enregistrement public de la dissolution du mariage dans le registre de l'état civil et, en cas de divorce en justice, à compter de la date de l'entrée en vigueur de la décision de justice.

1. La préparation du divorce

Si le notaire prend des mesures, comment est-il nommé ? quels pouvoirs a-t-il/elle ? n'est-il/elle qu'un conseiller ? ou a-t-il/elle des qualifications spéciales pour cette mission, par ex. celles d'expert juridique? reçoit-il/elle sa mission légalement ou d'un juge ?

Avant l'enregistrement de la dissolution du mariage, les époux peuvent conclure un contrat de mariage et déterminer le régime de propriété et établir un régime de propriété conjointe, partagée ou séparée de tous les biens des époux, de certains types des biens ou des biens de chaque conjoint, ou conclure un accord sur le partage des biens.

Le partage des acquets des époux peut être effectué pendant le mariage ou après sa dissolution à la demande de l'un des époux, ainsi qu'en cas de réclamation par le créancier du partage des acquets afin de saisir la part de l'un des époux dans les acquets.

Ainsi, les parties peuvent s'adresser au notaire :

- pendant le mariage pour la certification d'un contrat de mariage et d'un accord sur le partage des biens
- après la dissolution du mariage - uniquement pour les accords de partage des biens.

En cas de contestation, le partage des acquets, ainsi que la détermination des parts des époux dans ces acquets sont effectués par voie judiciaire.

L'intervention du notaire est facultatif et volontaire.

Le notaire n'intervient pas au processus de divorce lui-même.

2. Décision de divorce

La dissolution du mariage s'effectue dans les bureaux de l'état civil et, dans les cas prévus par le Code de la famille, par voie judiciaire.

En cas de consentement mutuel à la dissolution du mariage des époux qui n'ont pas d'enfants mineurs communs, la dissolution du mariage s'effectue dans les bureaux de l'état civil.

La dissolution du mariage à la demande de l'un des époux, qu'ils aient ou non des enfants mineurs communs, s'effectue dans les bureaux de l'état civil, si l'autre conjoint:

- est déclaré disparu par le tribunal ;
- est déclaré incapable par le tribunal ;
- est reconnu coupable d'avoir commis un crime à une peine d'emprisonnement supérieure à trois ans.

La dissolution du mariage et la délivrance d'un acte de divorce sont effectuées par l'office de l'état civil un mois après la date de dépôt de la demande de dissolution du mariage.

La dissolution du mariage par voie judiciaire

La dissolution du mariage s'effectue par voie judiciaire si les époux ont des enfants mineurs communs ou en l'absence du consentement de l'un des époux à la dissolution du mariage.

La dissolution du mariage s'effectue par voie judiciaire également dans les cas où l'un des époux, malgré l'absence d'objections, se soustrait à la dissolution du mariage dans le bureau de l'état civil, notamment en refusant de déposer la demande.

La dissolution du mariage par voie judiciaire en l'absence du consentement de l'un des époux au divorce

La dissolution du mariage par voie judiciaire est effectuée si le tribunal a établi que la poursuite de la vie conjugale et la préservation de la famille sont impossibles.

S'il existe un consentement mutuel à la dissolution du mariage des époux ayant des enfants mineurs communs, le tribunal dissout le mariage sans préciser les motifs du divorce. Les époux peuvent soumettre au tribunal un accord concernant les enfants. En l'absence d'un tel accord, ou si l'accord viole les intérêts des enfants, le tribunal prend des mesures pour protéger leurs intérêts.

La dissolution du mariage est prononcée par le tribunal au plus tôt un mois après la date du dépôt par les époux de la demande de dissolution du mariage.

3. Conséquences du divorce

Après le divorce, il peut être demandé à un notaire de certifier l'accord de partage des biens, l'accord de pension alimentaire, l'accord sur la procédure de communication avec les enfants.

Dans le cadre du partage des biens, le notaire peut envoyer une demande électronique pour enregistrer la mutation d'un bien immobilier.

Le choix du notaire est fait par les parties à leur entière discrétion.

4. Notaire et divorce étranger

Ne s'applique pas aux relations familiales russes.

5. Questions de droit international privé

Pendant la période du mariage, les parties, lors de la conclusion d'un contrat de mariage, peuvent déterminer l'application des normes du droit russe aux biens situés sur le territoire russe.

6. Loi applicable

Le Code civil de la Fédération de Russie (CC de la Fédération de Russie) (alinéas un, deux, trois et quatre) (tel que modifié et complété)
LE Code de la famille de la Fédération de Russie du 29 décembre 1995 N 223-FZ

MEMBER NOTARIAT OF: SERBIA

Author: Aleksandar MRKALJEVIĆ

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

With respect to property relations between spouses, apart from the joint estate regime envisaged by the law, spouses, or future spouses may otherwise regulate their property relations by a marital agreement.

This type of agreement among spouses was, for the first time, introduced in the legal system of the Republic of Serbia by the 2005 Family Law. Conclusion of this type of agreement is quite rare, due to which the lack of general and judicial practice is present in the conclusion, contents, and fulfilment of such a type of an agreement. Also the marital agreement is defined by only one Article of the Family Law, due to which the actual contents of the agreement, mutual rights and obligations of spouses are limited only by coercive regulations.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE?

It is indisputable that the conclusion of a marital agreement is desirable from the aspect of the prevention of disputes. Namely, by concluding marital agreements, spouses, or future spouses, regulate property relations, in line with the wishes and the set objectives, to wit at the moment when matrimonial relations are harmonious. In such a way not only a greater flexibility in the regulation of mutual relations between spouses is achieved but the legal security of spouses is raised to a higher level and it prevents conducting of (long-term) lawsuits.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The marital agreement is concluded in the form of a notarized instrument. When notarizing the agreement the notary is obliged to particularly warn the parties to the agreement to the fact that it excludes the legal joint estate regime, on which he/she puts the note in the notarization clause. Otherwise the marital agreement is null and void.

Regarding the publication The Republic of Serbia does not have a register of marriage contracts, nor can such contracts or existence thereof be entered in the civil register.

Marriage contracts and contracts on the management and disposal of joint property may be registered only in the part referring to immovable property, which is done at the competent register of immovables.

In addition to this, under the Serbian Family Act, a marriage contract that refers to immovables is entered in the public record where rights on immovables are registered.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

In the Republic of Serbia marriage is entered into in a formalized form, exclusively by giving statements of will before the registrar, in the presence of two witnesses. The registrar is in charge of solemnizing marriages and the notary does not have any competences in this procedure

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No.

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Since the first Serbian civil code (1844).

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The notaries in the Republic of Serbia do not have a formalized role in any procedure of conciliation or mediation between spouses whose personal or property relations are disrupted. Namely, in case of an action filed for divorce, the procedure of attempted conciliation and the proceedings for reaching a settlement among spouses (mediation) are conducted exclusively by the court.

Although he/she does not have a formal role in the procedure of conciliation of spouses, the notary may get into a situation where he/she participates in such a procedure in an indirect way. Thus, the participants who are spouses can apply to the notary with the request for a legal advice with respect to their property relations and the notary may get into a situation where by his/her legal advice he/she has impact not only on the property but also, indirectly, on personal relations between the spouses. The function of the notary, as a part of the preventive justice, is to resolve the legal relationship between the parties in an amicable way without the parties resorting to a court. If the notary, by his/her activities and legal advice resolves the property relations between spouses through a compromise and to mutual satisfaction, it certainly also has effect on the future personal relations between the spouses. Resolving of a property conflict does not exclude but certainly reduces possibilities for conflicts of non-property nature.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

At this moment, in the Republic of Serbia, the court has the exclusive jurisdiction over the dissolution of marriages – a marriage is dissolved in a civil lawsuit before the court of jurisdiction.

The civil lawsuit for dissolution of a marriage may be instituted upon the application of spouses for divorce by consent, or upon the action of one of the spouses. Also, the action for divorce may be filed by both spouses.

Spouses are entitled to divorce by mutual consent if they conclude a written separation agreement, or if they conclude a written agreement on common or individual exercising of parental right and an agreement on settlement of joint estate. In such a case the court hands down a single decision by which it resolves all the personal, family and property relations between the spouses.

Although marriage in the Republic of Serbia, at this moment, is dissolved exclusively by the court, in case of divorce by mutual consent spouses may conclude, before the notary, a written agreement on common or individual exercising of parental right and an agreement on settlement of joint estate and submit such an agreement with the petition for divorce by mutual consent to the court of jurisdiction. In such a case, the agreement concluded before the notary in the part in which it is related to the agreement on common or individual exercising of parental right is subject to control by the court bearing in mind the duty of the court to control whether such an agreement is in the best interest of the child.

Consequently, although the notary does not formally participate in dissolution of marriages, often he/she, and not the court, hears the spouses, compiles a draft agreement based on their statements - to wit not only with respect to the property but also to the personal relations between the spouses and children. If the spouses actually conclude such an agreement, it will be, most often without any intervention by the court, accepted and incorporated in the operative part of the judgment by which the marriage is dissolved. Without contesting the importance of the control function of the court, in this case the notary is the body who has regulated not only the property but also personal relations between former spouses.

3 . The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No.

If yes, what are his/her missions? Property division? Transfers of ownership? Measures concerning the publication, land property, etc?

How does the notary take action at this stage of the procedure? Is the notary chosen by the parties? Or appointed by a judge?

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

If the spouses are not using professional services of lawyers and draft the civil lawsuit for dissolution of a marriage or separation agreement by themselves the amount can be as low as around 50 EUR.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNIZE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNIZE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

In General, yes. The rules for the recognition and enforcement of foreign court decisions are regulated by the provisions of the Law on Resolving Conflict of Laws With Regulations of Other Countries (Law). According to Law – a decision of another authority which is equivalent to the court decision in the country where it was taken shall also be considered a foreign court decision.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Notary does not have any role in this procedure

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

No. The law applicable to divorce matters shall be the law of the country of which both spouses are nationals at the time when the action for divorce is brought. If spouses are nationals of different countries at the time when the action for divorce is brought, the laws of both countries cumulatively of which they are nationals shall govern divorce matters.

If a marriage cannot be divorced under the law referred to in the previous paragraph the law applicable to divorce shall be the Serbian law, provided that one of the spouses is permanently resident in Serbia at the time when the civil lawsuit is brought.

If one of the spouses is a Serbian national who is not permanently resident in Serbia, and the marriage cannot be divorced under the law referred in previous paragraphs , the law applicable to divorce shall be the law of Serbia.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNIZED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

As written before, at this moment, in the Republic of Serbia, the court has the exclusive jurisdiction over the dissolution of marriages – a marriage is dissolved in a civil lawsuit before the court of jurisdiction. The procedure of divorce itself is regulated by Family law (2005).

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

Although there have been certain indications that the notaries in the Republic of Serbia, by amendment of the existing laws, could get the powers in divorce non-contentious proceedings, at the moment of writing of this Report (April 2021), there are no formal motions for such amendments of the laws.

By entrusting divorce proceedings to the notaries, parties are facilitated access to and participation in such proceedings bearing in mind that the number of the notaries is considerably higher than the number of the first-instance courts that have the jurisdiction to conduct such proceedings. Also, the duration of such proceedings at the notaries' is ,as a rule, shorter than in a court.

The very nature of the notarial activity enables the notary, naturally, within the framework of the existing regulations, a greater flexibility in conducting non-contentious proceedings that have been entrusted to him/her.

Observed from the formal legal point of view, participants before the notary may also conclude the notarial settlement by which they will through mutual concessions resolve the disputable situation which exists between them, which settlement has the legal effects of a settlement concluded before the court (for example division of joint property, the amounts of allowance etc....)



NOTARIAT MEMBRE DE : SLOVAQUIE

Auteur : Magdaléna VALUŠOVÁ

Préambule : le mariage

LE NOTAIRE A-T-IL DANS VOTRE PAYS UNE INTERVENTION AU MOMENT DU MARIAGE, À SAVOIR :

Non

-EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

Non

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Non

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS?

∅

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Non

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

Par tribunal, jugement

1. La préparation du divorce

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PRÉPARATION DES OPÉRATIONS DE DIVORCE, SAVOIR :

Non

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Non

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

∅

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Non

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Oui - avocats

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIIÉE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Ø

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Non

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Nous n'avons pas les différentes formes de divorce

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

Non, le divorce devant notaire est n'est pas possible, seulement prononcé par un juge

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Non

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

Ø

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

Ø

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Non

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

Avocats

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Cca 10% ou 500€

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Non

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Ø

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE?

Oui

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES – AVANT LE MARIAGE? PENDANT LE MARIAGE?

Oui

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES?

Par les juridictions européennes dans les membres EU

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

La loi № 460/1992 Constitution de la République slovaque

La loi № 40/1964 Code civil

La loi № 161/2015 Rec.l. l'Ordre extralittigant civil

La loi № 94/1963 Droit de la famille....etc

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

∅

POUR LES PAYS CONCERNÉS : SUR LA VALEUR AJOUTÉE DE L'INTERVENTION DU NOTAIRE DANS LE PROCESSUS DE DIVORCE ;

∅

SUR L'OPPORTUNITÉ (OU NON) D'AMÉLIORATIONS QUI POURRAIENT ÊTRE APPORTÉES À VOTRE SYSTÈME, NOTAMMENT AU REGARD DE L'INTERVENTION DU NOTAIRE DANS LA PROCÉDURE.

∅

MEMBER NOTARIAT OF: SLOVENIA

Author: Romana GAJŠEK

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

On 15 April 2019 new Family Code in Slovenia was implemented. Marriage agreement contracts (Marital property agreement) in the form of a notarial deeds and no-fault divorce at the notary (spouses without children or with adult children) were implemented.

The Notary Chamber also established a registry of weddings contracts. Data of persons which concluded weddings contracts are public and they are published on the website of the Chamber of Notaries of Slovenia.

The new Slovenian Family Code governs the institute of an agreement for the arrangement of property and legal relations. The agreement for arrangement of property and legal relations is the contract in which spouses agree on the content of their property regime which differs from the statutory one. Here, spouses can unanimously agree also on all other property relations for the duration of marriage as well as in the event of a divorce. Before the agreement on the arrangement of property and legal relations is concluded, spouses have to inform each other of their property status or the agreement on the arrangement of their property and legal relations is contestable. A part of the agreement on the arrangement of property and legal relations could also be the agreement on a mutual support and an agreement on spousal support for the event of a divorce.

The Agreement between spouses about their property and legal relations has to be concluded in the form of a directly executable notarial deed. Before the agreement is signed, the notary's obligation for explanation is foreseen and the agreement is entered into the register of agreements about the arrangement of property and legal relations. If the agreement on the arrangement of their property and legal relations is not valid, the statutory property regime shall apply for the spouses. If the agreement on the arrangement of property and legal relations is not entered in the register of agreements about the arrangement of property and legal relations, then the presumption is valid in relation to third persons that the statutory property regime applies to property relations between spouses.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Notaries have those competences since 15. 4. 2019.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

General explanatory duty of a notary

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

A lawyer may participate as a representative of one party, but this is not mandatory.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

The notary's jurisdiction is determined by the Family Code. More you will find below

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES? IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED?:

1. Consensual divorce before a notary

Family Law Article 97

(Consensual divorce before a notary)

Spouses without joint children over whom they exercise parental care that wish to divorce, and have concluded an agreement on the division of co-owned property and on which of them remains or becomes a tenant of the home in which they live, and on the maintenance of the spouse who does not have the means of subsistence and is unemployed without fault, shall request a notary to draw up a notarial act on the agreement of the spouses to divorce.

The divorce shall be final as of the day of signing of the notarial act referred to in the preceding paragraph. The notarial act referred to in the preceding paragraph shall be the legal basis for entering the divorce in the civil register.

Within eight days of the signing of the notarial act the notary shall send the notarial act referred to in paragraph one of this Article to the administrative unit which shall enter the divorce in the civil register.

2. Consensual divorce before court (with minor children)

Article 96 Family code

(Consensual divorce)

(1) A court shall grant a divorce on the basis of the agreement of the spouses provided they have reached an agreement on the care, upbringing and maintenance of joint children and their contacts with the parents according to the provisions of this Code, and if they have submitted, in the form of an enforceable notarial deed, an agreement on the division of co-owned property and on which of them remains or becomes a tenant, and on the maintenance of the spouse that does not have the means of subsistence and is unemployed without fault.

(2) Before a court grants a divorce, it shall establish whether the care, upbringing and maintenance of joint children and their contacts with the parents have been provided for by an agreement of the spouses in the best children's best interests. If the court finds that the agreement referred to in the preceding paragraphs is not in the children's best interests, it shall reject the motion for consensual divorce.

3. Divorce with Appeals procedure/ lawsuit (without notary involment)

Article 98

(Divorce)

(1) If the marriage is unsustainable for whatever reason, either of the spouses may sue for divorce.

(2) When a court grants a divorce on the basis of the preceding paragraph, it shall also decide on the care, upbringing and maintenance of joint children and their contacts with the parents in accordance with this Code.

(3) Before granting a divorce the court shall establish in what way the best interests of the child will be best protected.

(4) The court shall send the decree of divorce referred to in paragraph one of this Article to the administrative unit, which shall enter the divorce in the civil register within eight days of the rendering of the decree.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

No-fault divorce (spouses without children or with adult children) shall be done before a notary.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

If yes, what are his/her missions? Property division? Transfers of ownership? Measures concerning the publication, land property, etc?

Within eight days of the signing of the notarial act the notary shall send the notarial act referred to in paragraph one of this Article to the administrative unit which shall enter the divorce in the civil register.

How does the notary take action at this stage of the procedure? Is the notary chosen by the parties? Or appointed by a judge?

On the basis of an authorization by law, the notary is chosen by the parties.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUSAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

On the basis of an authorization in law he has usual role.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

A lawyer may participate as a representative of one party, but this is not mandatory.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

Notarial act on the agreement of the spouses to divorce costs cca. 200 EUR. Costs for Notarial act on agreement on the division of co-owned property depends of value of property.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS? DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Lack of experience - no role of notaries

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNIZED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

The spouses' personal and property relations are regulated by the law of the country of which both spouses are citizens. If they are citizens of different countries, the law of the country of their permanent residence is applied. If they are not citizens of the same country and do not have a permanent residence in the same country, the law of the country in which they were last jointly resident is applied. If the applicable law cannot be determined according to these rules, the law of the country to which the spouses have the closest relation is applied (Art. 38(1) of the Private International Law and Procedure Act).

Likewise, property relations between unmarried cohabiting partners are governed by the law of the country of their common citizenship. If they do not share a common citizenship, the law of the country of their joint residence is applied.

If a married couple has entered into an agreement concerning their property, the applicable law shall be the law that was applicable to their property relations at the time they entered into the agreement.

Bilateral conventions on international legal assistance that contain conflict-of-law rules on matrimonial property relations have been concluded with the Czech Republic, France, Hungary, Mongolia, Poland, Romania, the Russian Federation and Slovakia (see <http://www.mp.gov.si/>).

Spouses may choose the law which shall apply to their property relations if the law originally applicable to their property relations allows such a choice (Art. 39 of the Private International Law and Procedure Act). However, the selected law will not be applied if the effect of its application would be contrary to the public policy of the Republic of Slovenia (Art. 6 of the Private International Law and Procedure Act). Slovenian law itself does not provide for the choice of applicable law.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Družinski zakonik / Family Code

(Uradni list RS, Official Gazette, Nr. 15/17, 21/18, 22/19, 67/19 and 200/20)

<http://www.pisrs.si/Pis.web/npbDocPdf?idPredpisa=ZAKO7556&type=doc&lang=EN>

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED; FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

When family law is amended, the provision contributes to relieving the courts of the burden by no longer deciding on the consensual divorces of spouses who do not have joint minor children, whom they are legally obliged to support, and agree on essential mutual issues. Given that they agree on this, there is no need for a lawsuit, because these are not issues that would be disputable, and from this point of view, litigation before the court is superfluous. Divorce in this case is not a classic decision or trial, as the spouses agreed and decided on it themselves, but it is a matter of regulating the legal relationship between them, especially if there is no dispute about the division of joint property, who will stay in the apartment in which they live, and the possible maintenance of one of the spouses, which means that there is no need for such divorces to be decided by the courts. Undoubtedly, the transfer of this part of divorces to notaries will also be one of the measures to reduce court backlogs, as those judges who are currently conducting these proceedings will be able to decide on family relationships.

NOTARIAT MEMBRE DE : SUISSE

Auteurs : Blaise FELLAY, Corinne ZIMMERLI

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE ?

Oui

CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Non

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

-

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Non

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

Le Code civil suisse du 10 décembre 1907, entré en vigueur le 1er janvier 1912 a unifié les règles relatives au divorce au niveau fédéral.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Notre législation ne prévoit pas une analyse préalable. La seule opération qui doit intervenir est la liquidation du régime matrimonial.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISoire ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ? -

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Le notaire n'est pas une étape obligatoire.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

Des avocats ou des médiateurs

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

Le notaire peut être désigné par le juge du divorce pour la liquidation du régime matrimonial.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

Non.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

Le divorce est la dissolution juridique du mariage par le Tribunal de première instance. Seul un tribunal peut prononcer un divorce.

Il existe deux types de procédure de divorce en Suisse :

1. Le **divorce sur requête commune** lorsque les deux membres du couple souhaitent divorcer, même sans être d'accord sur les modalités. On distingue:
 - le divorce sur requête commune **avec accord complet** lorsque les conjoints ont tous les deux la volonté de divorcer et sont d'accord sur toutes les conséquences du divorce;
 - le divorce sur requête commune **avec accord partiel** lorsque les conjoints ont tous les deux la volonté de divorcer, mais ne sont pas parvenus à s'entendre sur toutes les modalités du divorce.
2. Le **divorce sur demande unilatérale** lorsqu'un seul membre du couple souhaite divorcer. Il est possible dans deux hypothèses:
 - après deux ans au moins de vie séparée (une année pour les partenaires enregistrés);

- lorsque la continuation du mariage est insupportable (rupture du lien conjugal), par exemple en cas de violences conjugales, ou de crime commis au sein du couple.

Une séparation ou un divorce a des effets sur :

- les **enfants** : Dans la majorité des cas, les parents exercent ensemble l'autorité parentale, alors que l'enfant vit principalement chez l'un de ses deux parents qui en a la garde. Le parent qui n'a pas la garde de l'enfant (chez qui l'enfant ne réside pas) et l'enfant ont le droit d'avoir des relations personnelles sous la forme de visites, d'appels téléphoniques, de nouvelles, etc. Le parent chez qui l'enfant réside en règle générale contribue à l'entretien de l'enfant en lui assurant soins et éducation. Le parent qui n'a pas la garde (chez qui l'enfant ne réside pas) participe à l'entretien de l'enfant en versant des prestations pécuniaires (pensions).
- l'**attribution du logement familial** : Comme la suspension de la vie commune met fin au ménage commun, l'un des deux membres du couple doit quitter le domicile conjugal.
- la **liquidation du régime matrimonial** : Lorsque le régime matrimonial est liquidé, le patrimoine et les dettes des conjoints sont répartis entre eux.
- le **partage de la prévoyance professionnelle** : Il porte sur les avoirs acquis dans la caisse de pensions durant le mariage.
- l'**entretien du conjoint après le divorce** : Si l'un des membres du couple ne peut pas assurer lui-même son entretien, l'autre doit y contribuer. L'existence, le montant et la durée de la contribution d'entretien dépendent de plusieurs facteurs : la répartition des tâches durant le mariage, l'âge, l'état de santé, la formation professionnelle et les perspectives de gain à venir. S'il n'y a pas d'enfants communs ou si le mariage n'a été que de courte durée, il peut ne pas y avoir d'obligation d'entretien.

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

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3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

Non

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ? -

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ? -

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ? -

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Art. 25 LDIP : « Une décision étrangère est reconnue en Suisse :

- a. si la compétence des autorités judiciaires ou administratives de l'État dans lequel la décision a été rendue était donnée ;
- b. si la décision n'est plus susceptible de recours ordinaire ou si elle est définitive, et
- c. s'il n'y a pas de motif de refus au sens de l'art. 27 ».

Art. 27 LDIP :

- 1 La reconnaissance d'une décision étrangère doit être refusée en Suisse si elle est manifestement incompatible avec l'ordre public suisse.
- 2 La reconnaissance d'une décision doit également être refusée si une partie établit :
 - a. qu'elle n'a été citée régulièrement, ni selon le droit de son domicile, ni selon le droit de sa résidence habituelle, à moins qu'elle n'ait procédé au fond sans faire de réserve ;
 - b. que la décision a été rendue en violation de principes fondamentaux ressortissant à la conception suisse du droit de procédure, notamment que ladite partie n'a pas eu la possibilité de faire valoir ses moyens ;
 - c. qu'un litige entre les mêmes parties et sur le même objet a déjà été introduit en Suisse ou y a déjà été jugé, ou qu'il a précédemment été jugé dans un État tiers, pour autant que cette dernière décision remplisse les conditions de sa reconnaissance.
- 3 Au surplus, la décision étrangère ne peut faire l'objet d'une révision au fond ».

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

Aucun rôle du notaire.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

Non

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Art. 59 LDIP : « Sont compétents pour connaître d'une action en divorce ou en séparation de corps :

- a. les tribunaux suisses du domicile de l'époux défendeur ;
- b. les tribunaux suisses du domicile de l'époux demandeur, si celui-ci réside en Suisse depuis une année ou est suisse ».

Art. 60 LDIP : « Lorsque les époux ne sont pas domiciliés en Suisse et que l'un d'eux est suisse, les tribunaux du lieu d'origine sont compétents pour connaître d'une action en divorce ou en séparation de corps, si l'action ne peut être intentée au domicile de l'un des époux ou si l'on ne peut raisonnablement exiger qu'elle le soit ».

Art. 61 LDIP : « Le divorce et la séparation de corps sont régis par le droit suisse ».

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

Art. 47 LDIP : « Lorsque les époux n'ont ni domicile ni résidence habituelle en Suisse et que l'un d'eux est suisse, les autorités judiciaires ou administratives du lieu d'origine sont compétentes pour connaître des actions ou ordonner les mesures relatives aux effets du mariage, si l'action ne peut être intentée ou la requête déposée devant l'autorité du domicile ou de la résidence habituelle de l'un des époux, ou si l'on ne peut raisonnablement exiger qu'elle le soit ».

Art. 48 LDIP :

- 1 Les effets du mariage sont régis par le droit de l'État dans lequel les époux sont domiciliés.
- 2 Lorsque les époux ne sont pas domiciliés dans le même État, les effets du mariage sont régis par le droit de l'État du domicile avec lequel la cause présente le lien le plus étroit.

Lorsque les autorités judiciaires ou administratives suisses du lieu d'origine sont compétentes en vertu de l'art. 47, elles appliquent le droit suisse ».

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Art. 50 LDIP : « Les décisions ou mesures étrangères relatives aux effets du mariage sont reconnues en Suisse lorsqu'elles ont été rendues dans l'État du domicile ou de la résidence habituelle de l'un des époux ».

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE ? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

Aucune

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

Le droit du divorce a été révisé en 2004 et en 2009. A notre connaissance, il n'y a pas actuellement de réforme en cours.

MEMBER NOTARIAT OF: CZECHIA

Author: Simon KLEIN

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Yes, the notary can draft (as an uthentic instrument) a contract on the property régime of the spouses

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A PORTENTIAL DIVORCE?

Yes, the contract can set rules governing the settlement of property upon divorce

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The notary gives advice on the contents of the contract and on its legal effects

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

Divorce existed before the country did

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

Yes

IF YES, TO WHICH EXTENT: TERMORARAY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

The spouses can agree on the division of property and/or compensation in advance, such a contract takes effect upon divorce

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

No

DO OTHER LEGAL PROFESSIONNALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

Not mandatorily

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNCELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

No

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

The divorce is always granted by the court. In case both spouses demand a divorce and are already living apart, the divorce is non contentional and has to be granted by the court. If one of the spouses opposes the divorce, the court has to examine if the marriage is seriously disruptet and which of the spouses is at fault, before granting the divorce.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUSAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

Yes

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No role

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

No

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

Depending on the applicable law

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

N/A

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

The divorce system in Czechia functions overall well, but improvements in the form of notarial divorce are currently being considered.

MEMBER NOTARIAT OF: TURKEY

Author: Sedat KISA

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

Before the act of marriage, during engagement a contract of renunciation is not allowed because of waiver of unborn rights is not possible. Under Turkish Civil Code a marriage contract can be made in the notary before or after marriage. Marriage contract is valid only if it is made with a notarized document signed by parties.

There are two different systems that can govern the marital property regime under Turkish law. The arrangement can be based on the legal marital property system or a separate nuptial agreement. Under Civil Code, spouses can make nuptial agreements about the marital property, before, during and after the marriage.

There are two different forms of a marriage contract:

- **Pre-nuptial agreement.** The pre-nuptial agreement can be made at a notary.
- **Marital property regime.** The spouses can inform the marriage officer of the regime that they want to choose when they apply for the marriage.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE?

Before the new Turkish Civil Code (Date of Acceptance: 22.11.2001) it was really necessary to enter into such contracts to protect the women from the damages of a divorce, but now under the new Civil Code, the accepted legal marital property system is the so-called participation on the acquired assets, which means that spouses benefit equally from the assets acquired during marriage and it is considered safe for both parties of the marriage.

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

The property regime contract needs to be made by or approved by a notary public. (Civil Code Art.205)

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

The marriage ceremony is performed by the marriage officer. The marriage officers in the cities is the mayor or a person authorized by the mayor for the marriage ceremony. In villages marriage officer is the head of the village.

According to Civil Registration Law (Population Services Law) Ministry of Internal Affairs can give the authority and task of officiating marriages to population and citizenship directorates and foreign representative officers and mufti officers. If one of the spouses is a foreigner, then the municipality marriage officers and head of the civil registry are authorized. Notaries have no role in the marriage celebration.

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

Those who make the marriage transaction are obliged to notify the registry office within ten days from the date of marriage and to register it. Marriages made by foreign representatives are reported to the civil registration offices within 30 days from the date of marriage.

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

The first Civil Code of Turkish Republic was accepted at Feb. 17, 1926 and in force at Nov.4, 1926, divorces in a modern sense began under the terms of Civil Code. Prior to this, divorce was regulated by religious rules. (Unlike Catholicism, divorce was an accepted institution under Islamic rules.)

1. The divorce preparation**DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:**

Notaries have no role in the preparation of the divorce process.

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Compensation and other payments will be decided at the final judgement, but the court may take some measures as well as a temporary alimony.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARNING, CONCILIATION ATTEMPT, ETC?

In Turkey, the power of attorney is made at a notary, the parties will only come to the notary if they will appoint a lawyer, in this case the notary can only provide consultancy about the content of the power of attorney.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

The appointment of a lawyer is not mandatory, but generally it appears that a lawyer is appointed for safe trials, while experts are often appointed by the courts as an assistant element.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

Notaries have no action in the preparation of divorce process.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCES?

Notary does not intervene in the frame of divorce judgement.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

The Code of Civil Procedure (No 6100) determines which courts have jurisdiction to hear family law proceedings. However, because family law requires various levels of expertise, separate family courts were established by the Code of the Foundation, Competence and Procedures of Family Court (No 4787).

The Code of Civil Procedure determines jurisdiction in divorce proceedings. Under Code of Civil Procedure, the court in the defendant's domicile has jurisdiction.

Property disputes arising out of matrimonial law cases can be filed with the courts in the place of domicile of one of the parties.

Divorce must be based on a specific ground and the judgment of the court. The grounds for divorce are limited and specified under Articles 161 to 166 of the Civil Code (*Code 4721*). If one ground can be established, this is sufficient to file for divorce.

Special grounds for divorce

Adultery. To establish a ground for divorce based on adultery, there must be a valid marriage between the parties of the divorce. It is not an obstacle if the parties live separately, as the marriage relationship between the parties remains. Another condition is that one of the spouses must have a sexual relationship with another person. Adultery will only be accepted if the sexual relationship was with a person of a different sex.

The right to file for a divorce on the basis of adultery can be used only until the spouse forgives her or his spouse, and lasts for six months, starting from the finding out of the adultery and also to the end of a five-year period following the adultery in any case.

Plots against life, misbehavior, or indignity. An attempt by one spouse to murder the other. Grave assaults are threats or attempt to bodily harm of the other spouse by force or violence.

All kinds of torture, mental and physical cruelty, not satisfying a spouse's needs, forcing sexual acts and sequestration are all considered to be acts of serious misbehavior.

Additionally, indignity is also a ground for divorce. However, the Court of Cassation ruled that not all behavior that causes indignity shall constitute a ground for divorce. It must be an extreme form of indignity.

The right to file for a divorce on these reasons can be only used until the spouse forgives her or his spouse and lasts for six months starting from the finding out this ground for divorce and also ends in any case at the end of the five-year period.

Crime or living a dishonorable life. Crime is considered a ground for divorce if the crime is infamous (for example, robbery, fraud, falsification, smuggling, embezzlement and rape).

Living a dishonorable life means a life that does not comply with the honor, esteem or self-respect as understood in Turkey. The behavior must be continuing in order to constitute living a dishonorable life. The Court of Cassation will consider the lifestyle of the parties and its continuity when deciding whether or not the spouse is living a dishonorable life.

Desertion. Under the Civil Code, desertion means that one of the spouses has left the family home without a valid reason. In practice, in order to satisfy this ground, the desertion of the spouse must be for the purpose of ending the common life.

Mental illness. Either the husband or the wife can at any time sue for a divorce on the ground of insanity of the other spouse provided that spouse's mental illness

makes life in common unbearable and incurability of the illness is based on the official expert report.

General grounds

Breakdown of marriage. This is the most common ground for divorce in Turkey and also known as a high-conflict divorce. To establish this ground, the conflict must be serious, violent and spouses must not want to continue their common life. Examples include the breakdown of a marriage due to excessive jealousy that has made the marriage unbearable or forcing the wife to live with the husband's whole family (including distant relatives) in the same house.

Consensual divorce. To establish this ground, the marriage must have lasted for at least one year. Spouses must file the divorce case together or if one spouse files, the other spouse must accept the divorce. The judge is obliged to hear the spouses and consider the protocol signed by the parties in order to pronounce the divorce.

In the absence of any pre- or post-nuptial agreements, the legal matrimonial property regime is the participation on the acquired assets.

If a pre- or post-nuptial agreement is found to be valid, the court will uphold the agreement. If the agreement is found to be invalid or does not exist, the court will deliver a judgment regarding the allocation of financial resources and property according to the Civil Code. The court will distinguish between individual property and property acquired during the course of the marriage when making a judgment. Additionally, during the divorce proceedings, the court will request that transfers of assets to third parties or any related transaction to be limited. Capital assets must be kept secure until the finalization of the judgment and the parties can ask the court to take any necessary measures to achieve this.

If one of the parties will suffer poverty as a result of the dissolution of the marriage and that party is not significantly more at fault than the other party, that party will be entitled to claim alimony from the other party (*Article 175, Civil Code*). This is provided that the alimony is proportional to the financial strength of the other party.

Additionally, temporary alimony is available during the divorce proceedings. This is to cover costs relating to the cost of living of the spouse and childcare arrangements.

The question of fault is not essential in relation to obtaining temporary alimony. Any order for temporary alimony will be removed when a final decision has been made.

The alimony is automatically removed if the spouse receiving the alimony remarries or if one of the parties die. Alimony payment can be also terminated by the court if the receiving party cohabits with another person without a marriage, experiences a change in the financial circumstances or lives disreputably (*Article 176, Civil Code*).

Both parents have mutual rights and are responsibility for managing the children's assets (*Article 352, Civil Code*). When the parties divorce, the parent with custody must provide information that shows the assets of the child to the court. The parent must also notify all the important changes to the assets or the investments to the court. The parents can use the incomes received from children's assets to cover the care, raise and education of the children and also to cover the expenses of the family in accordance with the equality.

All the expenses of care, education and protection of the children are to be covered by both parents (*Article 327, Civil Code*). If the child was born outside of marriage, the paternity of the father must be established legally in order to request the child alimony from the father.

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Divorce before a notary is not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No, the notary does not intervene after the divorce is granted.

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

The judges hear and decide the case, lawyers take part in the trial according to the request of the parties.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

It costs at least 5.000 TR (approximately 600 US dollars) all inclusive.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

International Private and Procedural Code Article 58;

The competent court will decide on enforcement, subject to the following conditions:

- The judgment must have been given on matters that do not fall within the exclusive jurisdiction of Turkish courts. If the judgment is likely to be contested by the defendant, the judgment must not have been issued by a state court which has considered itself competent.
- The court decree must not openly be contrary to public order.
- The right of defence of the defendant spouse must not have been seriously violated.
- Article 58:

(1) A foreign court decree may serve as a definitive evidence or final judgment, provided that the court decides that the foreign court decree fulfill the conditions of enforcement.

Considering the provisions mentioned above, the Turkish Court of Appeals does not accept administrative decisions for recognition and accepts the court decree as a must.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

Only the foreign private law decisions awarded by the courts could be the subject of recognition and execution. Besides, without a Turkish court's recognition decision, a foreign award can not have a final decision effect in Turkey. The new amendments of art. 27/A of Civil Registration Act has provided a direct registration –without any requirement of a court decision- of divorce decisions and other decisions that terminates marriage and also rendered administrative divorce decisions definitive without any court interference. The decision must be duly finalized. The decision should not be clearly against the Turkish public order. For the registration of the decision,

the parties themselves or their representatives must apply. We also have to mention that this procedure doesn't exactly fulfill the consequences of recognition, it is a registration.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No, the notary has no role in the recognition procedure or regarding the consequences of a divorce that was granted overseas.

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

- According to International Private and Procedural Code;
- Article 14:

(1)The grounds and provisions for divorce and separation shall be governed by the common national law of the spouses. If the spouses have different nationalities, the law of the place of their common habitual residence, in case of absence of such residence, Turkish law shall govern.

- Article 2:

3) If the provisions of the applicable foreign conflict of laws refer to another foreign law, this referral will only be taken into consideration in conflicts related to law of persons and property law. The substantive provisions of this foreign law thereof shall be applied.

- Although the choice of applicable law is not allowed in divorce cases (art.14) if the referred foreign law allows then it is possible to give an effect to the choice of law of the spouses at Turkish Courts.

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

General rule under Code of Civil Procedure is that the court of the defendant's domicile has jurisdiction.

If the claimant has an independent residential property and the claimant has been living with their spouse for at least six months before filing for divorce, the case can be filed at the court where the husband or wife resides or where they have resided together (*Article 168, Civil Code*).

As both situations are acceptable, the claimant can decide whether the case is filed according to the provisions of Code of Civil Procedure or Civil Code.

Private International Code Article 40:

The international jurisdiction of the Turkish courts shall be determined by the domestic jurisdiction rules.

And even though the last rule mentions the Turkish citizens this can be also applied to the foreigners due to article 41 of Private International Code:

If lawsuits concerning the personal status of Turkish citizens who do not have a domicile in Turkey are not or can not be filed in the foreign state where they have their domicile and if there is no competent court in Turkey, the lawsuit shall be filed at the place of such citizen's habitual residence; or if the person does not have a habitual residence in Turkey, it shall be filed at his/her last domicile in Turkey. In the absence of a last domicile in Turkey, it shall be filed with the courts of Istanbul, Ankara, or Izmir.

In divorce cases, the rules of jurisdiction are generally not considered from the public order, so even if the divorce case is filed in an unauthorized court, the court does not take it into account by itself if the defendant has no preliminary objection.

In short it is not possible to choose jurisdiction with an agreement before the divorce. Parties can effect their jurisdictions either via their residence or by their actions (or lack of an action) during the divorce case.

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT

If other necessary conditions are fulfilled, for example if it is not contrary to Turkish Public order, it has to be recognised.

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

Notaries in Turkey have no power regarding divorce.

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

The Turkish Civil Code had a recent amendment in 2001 and there is no need a reform for now, with new provisions; the child is considered to be under the custody of his/her parents and during the marriage the parents assert their custodial rights together and the legal marital property system is now the participation on the acquired assets which is fair for the spouses.

Family law is a huge subject, but at least consensual divorces should be possible in front of notaries in Turkey.

MEMBER NOTARIAT OF: UNITED KINGDOM

Author: Charles HENSHAW

Preamble: marriage

In your country, does the notary have a role at the moment of the marriage, that is:

ARE THERE SOME FORMS OF CONTRACTS THAT REGULATE THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE?

There only exists one form of marriage contract in the United Kingdom and it gives the right to parental responsibility and the right for a spouse to live in the matrimonial home.

The notary does not have a role to play at the time of the celebration of the marriage. He does not prepare nor attest any contracts in relation to the marriage.

CAN THESE CONTRACTS FIX IN ADVANCE SOME ASPECTS OF A POTENTIAL DIVORCE?

No

IF YES, DOES THE NOTARY HAVE A ROLE IN THEIR SETTING UP AND/OR PUBLICATION AND ACCORDING TO WHICH TERMS?

Not applicable

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE CELEBRATION?

No

DOES THE NOTARY HAVE A ROLE IN THE MARRIAGE PUBLICATION?

No

SINCE WHEN DOES DIVORCE EXIST IN YOUR COUNTRY?

The 1857 Matrimonial Causes Act enabled individuals in England to divorce.

1. The divorce preparation

DOES THE NOTARY HAVE A ROLE IN THE PREPARATION OF THE DIVORCE PROCESS, THAT IS:

DOES YOUR LEGISLATION REGARDING MARRIAGE PROVIDE FOR AN UPSTREAM ANALYSIS OF THE PATRIMONIAL SITUATION OF THE SPOUSES WHO INTEND TO DIVORCE?

No. There is no matrimonial regime in the UK.

In England, there is no community of property, so the patrimonial situation of the spouses is determined by the Court's discretion.

IF YES, TO WHICH EXTENT: TEMPORARY OR PERMANENT PROPERTY DIVISION? DETERMINATION OF COMPENSATION? CALCULATION OF SUPPORT PAYMENTS?

Not applicable.

IN EVERY CASE, ARE THE SERVICES OF A NOTARY A MANDATORY STEP DURING THE DIVORCE PROCESS? IF YES, DOES THE NOTARY HAVE A PARTICULAR MISSION AT THIS STAGE OF THE PROCEDURE, FOR EXAMPLE WARINING, CONCILIATION ATTEMPT, ETC?

No.

DO OTHER LEGAL PROFESSIONALS INTERVENE AT THIS STEP OF THE DIVORCE SETUP, FOR EXAMPLE LAWYERS, EXPERTS, ETC?

In a complex divorce, it is usually the case that solicitors intervene. They will usually advise individuals regarding the initiation of divorce proceedings and assist in responding to petitions.

IF A NOTARY TAKES ACTION, HOW IS HE/SHE APPOINTED? WHAT POWERS ARE HIS/HERS? IS HE/SHE ONLY A COUNSELLOR? OR DOES HE/SHE HAVE SPECIFIC POWERS FOR THIS MISSION, LIKE FOR EXAMPLE THE ONES OF A LEGAL EXPERT? DOES HE/SHE GET HIS/HER MISSION BY LAW OR FROM A JUDGE?

A notary is not appointed.

2. The divorce judgement

DOES THE NOTARY INTERVENE IN THE FRAME OF THE DIVORCE JUDGEMENT? IF YES, WHICH FORMS OF DIVORCE ARE CONCERNED? CAN THE NOTARY SOMETIMES MAKE A DECISION REGARDING THE DIVORCE OR IS HE ONLY EMPOWERED TO WITNESS AGREEMENTS BETWEEN THE DIVORCEES?

The notary does not intervene within the scope of the divorce judgment.

IN YOUR COUNTRY, WHAT ARE THE VARIOUS FORMS OF DIVORCE AND HOW IS THE DIVORCE GRANTED? (MAX 2 PAGES SYNTHESIS OR IN TABULAR FORM)

IF A DIVORCE BEFORE A NOTARY IS POSSIBLE, DO CITIZENS HAVE THE CHOICE BETWEEN THIS DIVORCE AND A DIVORCE GRANTED BY A JUDGE?

Divorce before a notary is not possible.

3. The consequences of divorce

DOES THE NOTARY INTERVENE AFTER THE DIVORCE IS GRANTED?

No

IF YES, WHAT ARE HIS/HER MISSIONS? PROPERTY DIVISION? TRANSFERS OF OWNERSHIP? MEASURES CONCERNING THE PUBLICATION, LAND PROPERTY, ETC?

Not applicable

HOW DOES THE NOTARY TAKE ACTION AT THIS STAGE OF THE PROCEDURE? IS THE NOTARY CHOSEN BY THE PARTIES? OR APPOINTED BY A JUDGE?

Not applicable.

IN THIS TASK, DOES THE NOTARY INTERVENE IN THE FRAME OF HIS/HER USUAL ROLE OR DOES HE/SHE HAVE SPECIFIC POWER?

Not applicable.

AT THIS STEP OF THE PROCEDURE, ARE OTHER LEGAL PROFESSIONAL STILL INVOLVED IN THE DIVORCE PROCEDURE: LAWYERS? JUDGES?

Once the petition has been lodged with the Court, Solicitors are no longer involved and the case is then handled by the relevant Court.

HOW MUCH DOES A DIVORCE APPROXIMATIVELY COST? LEGAL FEES, LAWYER'S FEES, NOTARY'S FEES, TAXES, REGISTRATION FEES?

If the divorce is uncontested, the fees will amount to approximately £550 (less if the petitioner is claiming state benefits or is on a low income).

If the divorce is contested, the additional fees - which mainly comprise solicitor fees and court fees - can vary from hundreds to several tens of thousands of pounds, depending on the complexity of a given case.

4. The notary and the foreign divorce

IF YOUR COUNTRY DOES NOT RECOGNISE THE DIVORCE BEFORE A NOTARY, DOES IT RECOGNISE IT IF THIS FORM OF DIVORCE WAS GRANTED IN A FOREIGN COUNTRY?

In relation to divorces obtained by means of judicial or other proceedings after 4th April 1988, an overseas divorce is recognised in the UK if it is effective under the law of the country in which it was obtained (Family Law Act 1986). This can be carried out by a court in the overseas jurisdiction or by another body recognised by the state, which would involve notaries in some jurisdictions.

A divorce that took place prior to 4th April 1988, has criteria set out by the Legal Separations Act 1971.

WHAT CAN BE THE ROLE OF THE NOTARY WHEN IT COMES TO THE PROCESSING OR RECEPTION OF A DIVORCE THAT WAS GRANTED OVERSEAS?

The notary would have no role in this area. This is dealt with by the Court.

DOES THE NOTARY HAVE A ROLE IN THE RECOGNITION OF THE PROCEDURE OR CONSEQUENCES OF A DIVORCE THAT WAS GRANTED OVERSEAS?

No

5. Questions of international private law

IS IT POSSIBLE TO CHOOSE THE APPLICABLE LAW IN A SEPARATION AND/OR DIVORCE PROCEDURE, AND TO WHICH EXTENT?

No

IS IT POSSIBLE TO CHOOSE THE JURISDICTION IN THESE FIELDS? BEFORE THE MARRIAGE? DURING THE MARRIAGE? AND TO WHICH EXTENT?

No

IS THE DETERMINATION OF THE LAW OR JURISDICTION RECOGNISED WHEN IT WAS MADE OVERSEAS? AND TO WHICH EXTENT?

6. Current laws

WHAT ARE THE MAIN CURRENT LAWS IN YOUR COUNTRY THAT ASSIGN POWERS TO NOTARIES REGARDING DIVORCE?

No laws assign powers to notaries regarding divorce in England.

7. Conclusions and Prospective

ON THE EFFECTIVENESS OF THE DIVORCE SYSTEM IN YOUR COUNTRY, AND MENTION IF REFORMS ARE REQUIRED OR CONSIDERED;

In its current form, the system of divorce in the UK appears to be effective. It is however a “fault-based” system which requires one spouse to not only initiate proceedings but also to allege fault on behalf of the other.

This occurs if either Adultery, Unreasonable Behaviour or Desertion can be proved. In the event that of these faults is not alleged, divorce can only occur once there has been separation for two years if both spouses agree to the divorce, or five years if one spouse refuses.

Therefore, if a speedier divorce is requested by both parties, one spouse must “accept the blame” in order to hastily process the matter, which can lead to resentment and ill feeling.

The Divorce and Dissolution Act 2020, introduced by the UK Government, should modify the “fault based” system introducing the option to divorce after 2 years with the consent of both parties.

FOR RELEVANT COUNTRIES: ON THE BENEFITS OF THE NOTARY INTERVENTION IN THE DIVORCE PROCEDURE;

Not applicable.

ON THE POSSIBLE (OR NOT) OPPORTUNITIES OF IMPROVEMENTS THAT COULD BE MADE IN YOUR SYSTEM, ESPECIALLY REGARDING THE INTERVENTION OF THE NOTARY IN THE PROCEDURE.

It is not currently clear what role a notary could play regarding the procedure as it is handled by the Court and the notary in England is concerned with the preparation and attestation of documentation for use overseas.

NOTARIAT MEMBRE DE : UKRAINE

Auteur : Olexander BIEDNOV

Préambule : le mariage

Le notaire a-t-il dans votre pays une intervention au moment du mariage, à savoir :

EXISTE-T-IL, LORS DU MARIAGE, DES FORMES DE CONTRAT RÉGLANT LES EFFETS PATRIMONIAUX DU MARIAGE

Selon l'art. 92 du Code de la famille de l'Ukraine, les personnes qui ont présenté une demande d'enregistrement de mariage peuvent conclure un contrat de mariage. Le contrat de mariage règle les relations patrimoniales entre les époux, détermine leurs droits et obligations de propriété. Selon la législation ukrainienne, la conclusion d'un contrat de mariage est un droit et non une obligation des futurs mariés.

-CES CONTRATS PEUVENT-ILS RÉGLER À L'AVANCE CERTAINS ASPECTS DU DIVORCE ?

Oui, dans le contrat de mariage, il est possible de déterminer la procédure pour le partage des biens, y compris après le divorce. Dans ce cas, en cas de divorce, les époux peuvent éviter de longs litiges pour le partage des biens et avoir plus de chances de maintenir des bonnes relations après le divorce. En outre, le contrat de mariage peut déterminer certaines conditions, montant et modalités de la pension alimentaire.

SI OUI, LE NOTAIRE INTERVIENT-IL DANS LEUR FORMATION ET/OU LEUR PUBLICITÉ, ET SELON QUELLES MODALITÉS ?

Selon l'art. 94 du Code de la famille, le contrat de mariage doit être conclu par écrit et notarié. Avant la notariation du contrat de mariage, le notaire vérifie la capacité d'exercice et la capacité juridique des parties du contrat, établit les intentions réelles de chacune des parties de conclure le contrat, ainsi que l'absence d'objections de la part des parties à chacun des termes de l'acte. L'établissement des intentions réelles de chacune des parties est effectué par le notaire établissant la même compréhension du sens, des termes du contrat et de ses conséquences juridiques pour chacune des parties. Ainsi, le notaire effectue un travail d'explication juridique et participe activement à l'élaboration du projet de contrat en prenant en compte toutes les volontés des parties.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA CÉLÉBRATION DU MARIAGE ?

Non, la législation actuelle de l'Ukraine ne prévoit pas la participation d'un notaire dans la célébration un mariage.

LE NOTAIRE JOUE-T-IL UN RÔLE PARTICULIER DANS LA PUBLICITÉ DU MARIAGE ?

Non, la législation actuelle de l'Ukraine ne prévoit pas la participation d'un notaire dans la publicité du mariage.

DEPUIS QUAND LE DIVORCE EXISTE-T-IL DANS VOTRE PAYS ?

En raison de l'importance publique, le divorce a fait l'objet d'une réglementation juridique à différentes étapes de développement de la législation ukrainienne. La procédure de divorce a été modifiée à plusieurs reprises conformément aux exigences de la législation en vigueur à différentes époques : elle était tantôt simplifiée au maximum (suffisait une déclaration de l'un des époux), tantôt compliquée (nécessitait l'implication du public dans la résolution de ces problèmes). À cet égard, l'alternative moderne (auprès des autorités de l'état civil ou devant les tribunaux) pour le divorce est généralement considérée comme la plus efficace et dans l'intérêt des époux. La procédure moderne de divorce a été inscrite dans le Code du mariage et de la famille de l'Ukraine, approuvé par la loi n° 2006-VII du 20/06/1969.

1. La préparation du divorce

Le notaire joue-t-il un rôle particulier dans la préparation des opérations de divorce, savoir :

VOTRE LÉGISLATION RELATIVE AU MARIAGE PRÉVOIT-ELLE UNE ANALYSE PRÉALABLE DE LA SITUATION PATRIMONIALE DES ÉPOUX SOUHAITANT DIVORCER ?

Non, la législation ukrainienne actuelle ne prévoit pas de telles actions. Les époux, s'ils le souhaitent, peuvent s'adresser à un spécialiste dans le domaine du droit/notaire et recevoir des conseils complets sur cette question.

SI OUI, À QUELLES FINS : PARTAGE DE BIENS, DÉFINITIF OU PROVISOIRE ? FIXATION D'INDEMNITÉS ? CALCUL DE PENSIONS ?

LE RECOURS À UN NOTAIRE EST-IL, DANS TOUS LES CAS, OU DANS CERTAINS CAS SEULEMENT, UNE ÉTAPE OBLIGÉE DE LA PROCÉDURE DE DIVORCE ? SI OUI A-T-IL UNE MISSION PARTICULIÈRE À CE STADE DE LA PROCÉDURE, TELLE QU'AVERTISSEMENT, TENTATIVE DE CONCILIATION, ETC.... ?

Les conjoints qui ont exprimé le désir de dissoudre le mariage ne sont pas tenus de s'adresser à un notaire. Conformément à la législation en vigueur, l'enregistrement public du divorce est effectué par les organes de l'enregistrement public des actes de l'état civil sur la base d'une demande conjointe des époux sans enfants ou d'une décision de justice dans les autres cas.

De plus, si l'un des époux ne peut présenter personnellement une demande de divorce pour un motif valable, une telle déclaration, notariée ou équivalente à notariée, peut être présentée par l'autre époux en son nom. Ainsi, une visite chez un notaire n'est requise que s'il est nécessaire de certifier la signature sur la demande d'enregistrement d'état du divorce.

D'AUTRES PROFESSIONNELS DU DROIT INTERVIENNENT-ILS À CE STADE DE PRÉPARATION DU DIVORCE, AVOCATS ? EXPERTS ? ETC.... ?

En cas de divorce sur décision de justice, les juges participent directement à la procédure de divorce. À la demande des parties, les avocats peuvent intervenir à la préparation des documents nécessaires au procès et à la représentation de leurs intérêts devant le tribunal.

EN CAS D'INTERVENTION DU NOTAIRE, COMMENT EST-IL DÉSIGNÉ ? QUELS SONT SES POUVOIRS ? EST-IL UN SIMPLE CONSEIL ? OU A-T-IL DES POUVOIRS PARTICULIERS POUR SA MISSION, TELS QUE CEUX D'UN EXPERT JUDICIAIRE ? REÇOIT-IL UNE MISSION CONFIEE PAR LA LOI, OU FIXÉE PAR UN JUGE ?

La législation en vigueur ne prévoit pas l'intervention d'un notaire dans ce type de relation juridique.

2. Le prononcé du divorce

LE NOTAIRE INTERVIENT-IL DANS LA CADRE DU PRONONCÉ DE LA DÉCISION DE DIVORCE ? SI OUI POUR QUELLES FORMES DE DIVORCE ? LE NOTAIRE PEUT-IL ÊTRE AMENÉ À PRENDRE DES DÉCISIONS RELATIVES AU DIVORCE OU NE PEUT-IL QUE CONSTATER DES ACCORDS ENTRE LES ÉPOUX DIVORCÉS ?

La législation en vigueur ne prévoit pas l'intervention d'un notaire dans ce type de relation juridique.

QUELLES SONT LES DIFFÉRENTES FORMES DE DIVORCE DANS VOTRE PAYS, ET COMMENT LE DIVORCE EST-IL PRONONCÉ ?

RÉSILIATION DU MARIAGE PAR SUITE DE SA DISSOLUTION	
Un mariage peut prendre fin par suite de sa dissolution effectuée à l'initiative de l'un des époux ou à leur demande conjointe, ainsi qu'en cas de décès de l'un des époux ou de sa déclaration de décès.	
Un mariage prend fin par suite de sa dissolution:	
À la demande conjointe des époux ou de l'un d'eux (articles 106, 107 du Code de la famille de l'Ukraine)	À la demande conjointe des époux ou l'un des époux sur la base d'une décision de justice (articles 109, 110 du Code de la famille de l'Ukraine).
<p>À la demande conjointe des époux la dissolution du mariage est effectuée par l'organisme d'enregistrement des actes de l'état civil du lieu de résidence des époux ou de l'un d'eux, à condition que :</p> <ul style="list-style-type: none"> • le couple n'a pas d'enfant ; • aucun des époux ne s'oppose au divorce. <p>Le mariage est dissous indépendamment de l'existence d'un différend patrimonial entre les époux.</p> <p>Si l'un des époux n'est pas en mesure de déposer personnellement une demande de divorce pour un motif valable, l'autre époux peut déposer une demande notariée ou équivalente en son nom.</p>	<p>Les conjoints ayant des enfants ont le droit de demander le divorce au tribunal avec une convention écrite indiquant avec qui les enfants vivront, quel type de participation sera prise par le parent qui vivra séparément pour assurer leurs conditions de vie, ainsi que les conditions d'exercice de leur droit à l'éducation personnelle des enfants.</p> <p>Le tribunal statue sur la dissolution du mariage s'il est établi que la demande de divorce correspond à la volonté réelle de la femme et du mari, et qu'après la dissolution du mariage leurs droits personnels et patrimoniaux, ainsi que les droits de leurs enfants, ne seront pas violés. Le tribunal statue sur la dissolution du mariage un mois après la date de dépôt de la demande. Jusqu'à l'expiration de ce délai, la femme et le mari ont le droit de retirer la demande de divorce.</p>
<p>À la demande de l'un des époux la dissolution du mariage est effectuée par l'organisme de l'état civil du lieu de résidence des époux ou de l'un d'eux, si l'autre époux :</p> <ul style="list-style-type: none"> • reconnu disparu ; • déclaré incapable. 	<p>Une action en divorce peut être intentée par l'un des époux. Une action en divorce ne peut être intentée pendant la grossesse de l'épouse et un an après la naissance de l'enfant, à moins que l'un des époux n'ait commis un comportement illicite comportant des éléments d'infraction pénale à l'égard de l'autre époux ou enfant. Le mari et la femme ont le droit de demander le divorce pendant la grossesse de la femme si la paternité de l'enfant conçu est reconnue par une autre personne. Le mari et la femme ont le droit de demander le divorce avant que l'enfant n'atteigne l'âge d'un an si la paternité est reconnue par une autre personne ou par décision de justice, si les informations sur le mari en tant que père de l'enfant sont exclues de l'acte de naissance de l'enfant. Le tuteur a le droit de demander le divorce si les intérêts du conjoint déclaré incapable l'exigent.</p>

<p>L'organisme public d'enregistrement des actes de l'état civil dresse un procès-verbal de divorce à l'expiration d'un délai d'un mois à compter du dépôt d'une telle demande, si celle-ci n'a pas été retirée, et délivre un certificat de divorce.</p> <p>En cas de divorce prononcé par l'autorité d'enregistrement des actes de l'état civil, le mariage prend fin le jour de l'enregistrement du divorce.</p>	<p>En cas de divorce par le tribunal, le mariage prend fin le jour de l'entrée en vigueur de la décision de divorce prononcée par le tribunal.</p> <p>Le document certifiant le fait du divorce par le tribunal est la décision du tribunal sur le divorce qui est entrée en vigueur.</p> <p>La décision judiciaire de divorce après son entrée en vigueur est transmise par le tribunal à l'organe d'enregistrement de l'état civil du lieu de prise de décision pour l'inscription des informations au Registre national des actes de l'état civil des citoyens et d'une marque dans l'acte de mariage.</p>
	<p>En examinant l'affaire, le tribunal prend des mesures pour réconcilier les époux, à moins que cela ne soit contraire aux principes moraux de la société.</p> <p>Le tribunal découvre les relations réelles entre des époux, les véritables motifs de la demande de divorce, prend en compte la présence d'un enfant mineur, d'un enfant handicapé et d'autres circonstances de la vie des époux.</p> <p>Le tribunal se prononce sur le divorce s'il est établi que la poursuite de la cohabitation des époux et la préservation du mariage seraient contraires à l'intérêt de l'un d'eux, à l'intérêt d'une importance significative de leurs enfants.</p>

SI UN DIVORCE DEVANT NOTAIRE EST POSSIBLE, LES CITOYENS PEUVENT-ILS CHOISIR ENTRE CE DIVORCE ET CELUI PRONONCÉ PAR UN JUGE ?

La législation en vigueur ne prévoit pas la participation d'un notaire dans ce type de relation juridique.

3. Les suites du divorce

LE NOTAIRE INTERVIENT-IL EN SUITE DU PRONONCÉ DU DIVORCE ?

La législation en vigueur n'établit pas d'obligation directe pour les ex-conjoints de contacter un notaire après le divorce. Cependant, même après le divorce, les ex-époux peuvent s'adresser à un notaire pour conclure un accord sur le partage des biens leur appartenant sur la base des biens communs ou conclure un accord sur le paiement d'une pension alimentaire pour un enfant commun.

SI OUI POUR QUELLE MISSION ? PARTAGE DE BIENS ? TRANSFERTS DE PROPRIÉTÉ ? MESURES DE PUBLICITÉ, FONCIÈRE OU AUTRE ? ETC.... ?

À la demande des parties, un notaire peut être impliqué dans le processus de division de la propriété commune, de changement du régime juridique de la propriété (mobilière et immobilière) et d'un enregistrement ultérieur des droits de propriété dans le registre d'État.

COMMENT LE NOTAIRE INTERVIENT-IL À CE STADE DE LA PROCÉDURE ? EST-IL CHOISI PAR LES PARTIES ? DÉSIGNÉ PAR LE JUGE ?

Si les parties sont parvenues à un accord et souhaitent résoudre volontairement la question du partage des biens à l'amiable, elles choisissent indépendamment un notaire pour certifier les accords pertinents.

DANS CETTE MISSION, LE NOTAIRE INTERVIENT-IL DANS LE CADRE DE SA FONCTION HABITUELLE, OU A-T-IL DES POUVOIRS PARTICULIERS ?

Les pouvoirs d'un notaire dans ces relations juridiques sont clairement réglementés par la loi « Sur le Notariat » et la procédure d'exécution des actes notariés.

Y-A-T-IL À CE STADE DE LA PROCÉDURE D'AUTRES PROFESSIONNELS ENCORE IMPLIQUÉS DANS LA PROCÉDURE DE DIVORCE : AVOCATS ? JUGES ?

À la demande des parties, des avocats et autres spécialistes du droit peuvent être impliqués pour des consultations supplémentaires.

QUELS SONT APPROXIMATIVEMENT LES COÛTS D'UN DIVORCE : FRAIS DE JUSTICE, FRAIS D'AVOCATS, FRAIS DE NOTAIRES, TAXES, FRAIS D'ENREGISTREMENT ?

Les frais de divorce dépendent de l'existence du litige. Ils peuvent aller de 5 euros (frais d'enregistrement) à plusieurs milliers si vous agissez par l'intermédiaire du tribunal avec l'intervention d'avocats.

4. Le notaire face au divorce étranger

SI VOTRE PAYS NE CONNAIT PAS LE DIVORCE PAR DEVANT NOTAIRE, RECONNAIT-IL CETTE FORME DE DIVORCE INTERVENUE À L'ÉTRANGER ?

Pour qu'un certificat de divorce délivré par des organismes étrangers, y compris des notaires, ait force de loi, il doit être légalisé en Ukraine. La procédure de légalisation dépend du pays dans lequel le mariage sera dissous, ou plutôt des accords qui existent entre ce pays et l'Ukraine. Dans ce cas, les notaires sont guidés dans leur travail par les dispositions de la loi ukrainienne « Sur le droit international privé » et le cas échéant, par les accords sur l'entraide judiciaire en matière familiale et civile.

QUEL PEUT ÊTRE LE RÔLE DU NOTAIRE DANS LE CADRE DU TRAITEMENT OU DE LA RÉCEPTION DANS SON PAYS D'UN DIVORCE PRONONCÉ À L'ÉTRANGER ?

À ce stade, le notaire ne peut que certifier l'authenticité de la signature du traducteur sur l'acte confirmant le divorce. Ce qui, à son tour, est la première étape de l'utilisation de ce document en Ukraine.

LE NOTAIRE A-T-IL UN RÔLE DANS LA RECONNAISSANCE DES PROCÉDURES DE DIVORCE, OU DE LEURS SUITES, À L'ÉTRANGER ?

La législation en vigueur ne prévoit pas la participation d'un notaire à la procédure de reconnaissance d'un divorce prononcé à l'étranger.

5. Questions de droit international privé

EST-IL POSSIBLE, ET DANS QUELLES LIMITES, DE CHOISIR LA LOI APPLICABLE À LA SÉPARATION ET/OU DIVORCE ?

Selon l'art. 63 de la loi « Sur le droit international privé » la résiliation du mariage et les conséquences juridiques du divorce sont déterminées par la loi en vigueur concernant les conséquences juridiques du mariage.

Ainsi, pour réguler les relations juridiques liées au divorce, il est possible d'utiliser :

- la loi du pays de nationalité des époux ;
- la loi du pays de résidence des époux ;
- la loi du pays avec lequel les époux ont le lien le plus étroit - par exemple, la patrie de l'un des époux, le pays de résidence de ses parents etc.

EST-IL POSSIBLE, ET DANS QUELLES LIMITES DE CHOISIR LA JURIDICTION DANS CES DOMAINES - AVANT LE MARIAGE ? PENDANT LE MARIAGE ?

Dans l'art. 60 de la loi ukrainienne « Sur le droit international privé », le législateur ukrainien définit quatre conflits de lois dans la définition de la loi que les époux doivent suivre lorsqu'ils décident des conséquences juridiques du mariage :

- 1) droit personnel commun des époux (lex patrie);
- 2) la loi du lieu de résidence commune des époux, à condition que l'un des époux continue de résider dans cet État (lex domicilii) ;

- 3) la loi de l'État avec lequel les deux époux ont le lien le plus étroit d'une autre manière (loi propre);
- 4) la loi choisie par les époux (lex voluntadis).

Le choix de la loi ou le changement de la loi préalablement choisie peut être effectué par les participants aux relations juridiques à tout moment, notamment, lors de la réalisation d'une opération, à différents stades de son exécution etc. Le choix de la loi ou une modification d'un droit préalablement choisi effectué après l'opération ont un effet inverse et sont valables dès le moment de l'opération, mais ne peuvent pas :

- 1) constituer un motif de nullité de l'opération pour non-respect de sa forme ;
- 2) limiter ou violer les droits acquis par des tiers avant de choisir un droit ou de modifier un droit précédemment choisi.

LE CHOIX DE LA LOI OU DE LA JURIDICTION EFFECTUÉ À L'ÉTRANGER EST-IL RECONNU ET DANS QUELLES LIMITES ?

Dans ce cas, les notaires dans leur travail sont guidés par les dispositions de la loi ukrainienne « Sur le droit international privé » et, le cas échéant, les accords sur l'entraide judiciaire en matière familiale et civile. Par conséquent, le choix de loi ou de juridiction fait par les parties est pleinement reconnu.

6. Lois en vigueur

QUELLES SONT LES PRINCIPALES LOIS ACTUELLEMENT EN VIGUEUR DANS VOTRE PAYS QUI RECONNAISSENT DES COMPÉTENCES AUX NOTAIRES EN MATIÈRE DE DIVORCE? (CITER LES LOIS EN VIGUEUR AVEC DATES ET NUMÉROS).

- Code de la famille de l'Ukraine du 10 janvier 2002 n° 2947-III ;
- Loi de l'Ukraine « Sur l'enregistrement par l'État des actes d'état civil » du 1er juillet 2010 n° 2398-VI ;
- Loi de l'Ukraine « Sur le droit international privé » du 23 juin 2005 n° 2709-IV ;
- Ordonnance du ministère de la Justice de l'Ukraine « Sur l'approbation des règles d'enregistrement public de l'état civil en Ukraine » du 18.10.2000 n° 52/5.

7. Conclusions et Prospective

SUR L'EFFICACITÉ DU SYSTÈME DE DIVORCE DANS VOTRE PAYS, EN INDIQUANT SI DES RÉFORMES SONT SOUHAITÉES OU ENVISAGÉES ;

Dans le temps qui vient, nous attendons l'adoption de la loi n° 5644 prévoyant l'octroi de pouvoirs aux notaires d'enregistrer et de dissoudre les mariages, ce qui affectera positivement la qualité et la durée de ces processus.

POUR LES PAYS CONCERNÉS : SUR LA VALEUR AJOUTÉE DE L'INTERVENTION DU NOTAIRE DANS LE PROCESSUS DE DIVORCE ;

Concernant la valeur ajoutée de l'intervention du notaire dans la procédure de divorce ;

Offrir aux notaires la possibilité d'enregistrer les actes d'état civil (y compris le divorce) a ses aspects positifs :

- premièrement, les notaires travaillent quotidiennement avec les règles du droit de la famille, telles que l'aliénation de biens immobiliers, de voitures, de droits sociaux, le partage des biens des époux, les contrats de mariage, les successions, etc. Chaque notaire de formation juridique supérieure connaît les normes du droit civil et familial, prodiguera des conseils qualifiés aux jeunes mariés sur les droits et devoirs des époux, le régime juridique des biens acquis tant dans le mariage qu'avant lui;
- deuxièmement, nous pouvons supposer que l'alphabétisation juridique des citoyens réduira les différends, offrira des options de la résolution pacifique des problèmes matériels et des obligations alimentaires (car souvent, dans la pratique, les notaires certifient les contrats de paiement de pension alimentaire, les contrats de participation

- à l'éducation d'un mineur et la détermination de son lieu de résidence), ce qui réduira considérablement la charge des tribunaux ;
- troisièmement, étant donné que les notaires en Ukraine sont déjà engagés dans l'enregistrement des biens immobiliers et des entreprises, ont des compétences pour travailler avec les registres unifiés et d'État, sont des utilisateurs du registre de l'état civil, donc le processus de maîtrise en tant qu'officiers d'état civil sera rapide et indolore ;
 - quatrièmement, chaque citoyen a le droit de choisir où procéder à l'enregistrement par l'État des actes d'état civil: soit chez un notaire, soit dans les organes d'enregistrement d'état civil déjà familiers, soit dans les collectivités locales autonomes.

Ainsi, la réforme de l'enregistrement de l'état civil rapprochera les services de l'Ukrainien moyen, réduira les files d'attente dans les services d'enregistrement de l'état civil. Accorder aux notaires le droit d'enregistrer les mariages donnera aux Ukrainiens le droit de choisir, ce qui est l'orientation principale et prioritaire de la législation ukrainienne, car toutes les réformes menées en Ukraine sont menées précisément pour rapprocher les citoyens ordinaires de la fourniture de services et accélérer leur fourniture. En même temps, il y a tout lieu de croire que les notaires s'en sortiront parfaitement lorsqu'ils leur donneront le pouvoir d'enregistrer les actes de l'état civil !

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