



# **Training module on Cross-border divorce and maintenance: jurisdiction and applicable**

## **National sections**

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**National section**

**AUSTRIA**

**Dr. Sabine Längle**

**Judge, Vienna Regional Court for Civil Matters**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The current source of the above mentioned legal issues is on the one hand the Austrian Marriage Act (Ehegesetz; EheG) and on the other hand some provisions (§§ 44 to 100) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB).

The Austrian system recognises divorce by mutual consent (§ 55a EheG), divorce by fault (§ 49 EheG) and divorce out of other reasons like mental illness (§§ 50 – 52 EheG) as well as divorce when the spouses have lived separately for 3 (6) years (§ 55 EheG). These circumstances must have led to the breaking-down of the marriage.

There are no special provisions on the – as such in Austria not-existing - legal concept of legal separation.

The regime of nullity of marriage is governed by §§ 20 – 45 EheG.

The procedural law is governed by the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO); concerning the divorce by mutual consent (§ 55a EheG) the Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG) is applicable.

At the moment, there are no concrete reform proposals discussed.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

This issue is dealt with in § 76 of the Austrian Law on Jurisdiction (Jurisdiktionsnorm; JN), which stipulates the jurisdiction of the (last) common habitual residence of the spouses; subsidiary the habitual residence of the defendant; subsidiary the habitual residence of the claimant; subsidiary the Vienna Inner City District Court (Bezirksgericht Innere Stadt Wien).

#### 3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

No.

#### 4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?

Yes.

#### 5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?

Under Austrian statutory law there is no possibility to designate the applicable law in these subject matters (§ 11 Austrian Act on Private International Law; Bundesgesetz über das Internationale Privatrecht; IPRG).

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Under Austrian statutory law there are no formal requirements on agreements on the choice of applicable law, but they would have to be explicit. But as stated above, these kinds of agreements are not allowed in these subject matters. Of course, due to supremacy of European legislation, these provisions will no more apply within the scope of the Regulation.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Maintenance of spouses after divorce is covered by §§ 66 – 80 of the Austrian Marriage Act (Ehegesetz; EheG).

It will above all take into consideration the income conditions of both spouses and the proportion of misconduct of each spouse that has led to divorce.

The procedural law is governed by the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO).

There are no current concrete proposals on reforms discussed.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement procedure is covered by the Austrian Act on the Enforcement of Judgments (Exekutionsordnung; EO). The Austrian Code on Civil Procedure (Zivilprozessordnung; ZPO) will be subsidiary applicable (§ 78 EO).

Enforceable decisions on maintenance claims are – as any other titles by Austrian Courts – executory titles in accordance with the provision of § 1 sub 1 EO.

After the application for enforcement of the title, the competent district court (§§ 17, 18 EO) will decide on its legitimacy.

The most popular kinds of executory measures are the salary execution and the execution against goods and chattels. For these kinds of measures the applicant is not even entitled to provide for the executory title for his application.

There are possibilities for appeals (§ 65 EO) to the Regional Courts. The Supreme Court can deal with questions of general interest (§ 502 of the Austrian Code on Civil Procedure [Zivilprozessordnung; ZPO]).

§ 382a para 1 sub EO provides for interim injunctions on maintenance after divorce.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

Bundesministerium für Justiz, Abt. I 10, Museumstraße 7, A-1070 Wien (Vienna)

[www.bmj.gv.at](http://www.bmj.gv.at)

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

There are some legal instruments in preparation.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Marriage pacts in general are governed by § 1217 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB). The statutory property regime is covered by §§ 1233 -1266 ABGB including § 1237 ABGB dealing with the legal matrimonial property stipulating in general that each spouse remains the owner of the goods he has owned before marriage and acquired during the marriage for the duration of the marriage. After the dissolution of the marriage §§ 81 – 98 Austrian Marriage Act (Ehegesetz; EheG) on the separation of the matrimonial tangible assets and savings will apply.

Under Austrian law the above-mentioned separation will be governed in accordance with the requirements of reasonableness and fairness (§ 81 EheG).

This procedure is covered by the Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG).

There are no current concrete proposals discussed.

**2. Which conflict of laws rules apply in matrimonial property disputes?**

§ 19 Austrian Act on Private International Law (Bundesgesetz über das Internationale Privatrecht; IPRG) will apply. It stipulates that in the absence of an (explicit) agreement of the spouses the law governing the legal affects of marriage will apply.

**3. Which are the property consequences of registered partnerships?**

The dissolution of the partnership will have similar legal property consequences than the dissolution of a marriage covered by §§ 24 – 41 of the Austrian Act on Registered Partnerships (Eingetragene Partnerschaft-Gesetz; EPG).

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

Federal Law on certain aspects of cross-border mediation in civil and commercial Matters, Federal Law Gazette Part I 21/2011 (EU-Mediations-Gesetz).

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

§ 64a Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO): If legal aid was granted in one MS, the decision on legal aid will also cover recognition and enforcement procedure.

§ 64 para 1 sub 5 ZPO: Legal aid also covers travel costs of the applicant.

§ 68 para 1a ZPO: If the enforcement procedure has not started one year after the decision was rendered, the court seized for the enforcement procedure has to review *ex officio* whether the conditions for granting legal aid are still met.

§ 64 para 1 sub 3 ZPO: The granting of legal aid will also cover pre-litigation advice.

§ 64b ZPO: Legal aid will also cover extrajudicial dispute resolution in disputes concerning neighbourhood rights.

### 3. Is your country a contracting party to any bilateral or international instruments on family law?

**Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (ESÜ** Europäisches Übereinkommen v 20.5.1980 über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgerechts BGBl 1985/321; Europäisches Sorgerechtsübereinkommen)

**Convention on jurisdiction, applicable law and recognition of decrees relating to adoptions (HAdoptÜa** Übereinkommen v 15.11.1965 über die behördliche Zusammenarbeit, das anzuwendende Recht und die Anerkennung von Entscheidungen auf dem Gebiet der Annahme an Kindesstatt, BGBl 1978/581)

**Hague Convention on intercountry adoption (HAdoptÜ** Übereinkommen v 29.5.1993 über den Schutz von Kindern und die Zusammenarbeit auf dem Gebiet der Internationalen Adoption BGBl III 1999/14, Haager Adoptionsübereinkommen 1993)

**Hague Convention on the civil aspects of international child abduction (HKÜ** Übereinkommen v 25.10.1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung BGBl 1988/512 Haager Kindesentführungsübereinkommen)

**Hague Convention on the law applicable to maintenance obligations towards children (HUSTÜ** Übereinkommen v 24.10.1956 über das auf Unterhaltsverpflichtungen gegenüber Kindern anzuwendende Recht BGBl 1961/293 Haager Unterhaltsstatutübereinkommen)

**Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations towards children (HUVÜ** Übereinkommen v 15.4.1958)

über die Anerkennung und Vollstreckung von Entscheidungen auf dem Gebiet der Unterhaltspflicht gegenüber Kindern BGBl 1961/294)

**Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of Children (KSÜ** Übereinkommen v 19.10.1996 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung, Vollstreckung und Zusammenarbeit betreffend die elterliche Verantwortung und Maßnahmen zum Schutz der Kinder BGBl III 2011/49)

**Hague Convention on the protection of minors (MSÜ** Übereinkommen vom 5.10.1961 über die Zuständigkeit der Behörden und das anzuwendende Recht auf dem Gebiet des Schutzes von Minderjährigen BGBl 1975/446; Haager Minderjährigenschutzübereinkommen)

**Convention on the recovery abroad of maintenance (NYÜ** Übereinkommen vom 20.6.1956 über die Geltendmachung von Unterhaltsansprüchen im Ausland BGBl 1969/316; New Yorker Unterhaltsübereinkommen)

#### 4. Are there any databases or online tools providing information on family law matters available in your country?

- The **EJN for civil and commercial matters** provides a lot of information on these issues:  
On divorce: [http://ec.europa.eu/civiljustice/divorce/divorce\\_aus\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_aus_en.htm)  
On parental responsibility: [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_aus\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_aus_en.htm)  
On maintenance claims: [http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_aus\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_aus_en.htm)
- For practical hints and comprehensible explanations of the relevant provisions: <https://www.help.gv.at/Portal.Node/hlpd/public/content/k504/Seite.5040000.html>
- **Federal Ministry of Justice**, list of relevant links: <http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a913e4486251.de.html>
- **Federal Ministry for Economy, Family and Youth**: <http://www.bmwfj.gv.at/Familie/BeratungUndInformation/Seiten/default.aspx>
- All **Austrian jurisprudence** of the Supreme Court (and partially of the Courts of Appeal as well as the Regional Courts) is available for free: <https://www.ris.bka.gv.at/Jus/>
- All provisions of **Austrian law** can be requested for free: <https://www.ris.bka.gv.at/Bundesrecht/>

#### 5. Please provide information on accessing and applying foreign family law in your country.

- a. Austria is party to the European Convention of 1968 on Information on Foreign Law
- b. § 4 IPRG: All courts may submit requests to the Federal Ministry of Justice for information on foreign law
- c. EJC for civil and commercial matters

Additional Remark: All provisions of Austrian law can be requested for free: <https://www.ris.bka.gv.at/Bundesrecht/>

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

- 4 Ob 61/05g: applicability
- 7 Ob 153/07m: entry into force
- 4 Ob 20/09h: recognition; Art 21 Br II bis

### Maintenance Regulation

- no published jurisdiction yet
- 19/11z: jurisdiction, competence; Art 14 Br II bis

All quoted Supreme Court decisions can be found under the following link leading to a data base: <https://www.ris.bka.gv.at/Jus/>

The user of this data base just has to enter the reference number of the file without blanks!

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- Schütz*, Zwischenstaatliche Vereinbarungen, die für Familienrichter bedeutsam sein könnten, ÖRZ, 2005, 237 f;
- Verschraegen*, Die Brüssel IIa - Verordnung: ein Danaergeschenk? In *König/Mayr*, Europäisches Zivilverfahrensrecht in Österreich (2007) 92;
- Kaller*, Der Anwendungsbereich der Verordnung Brüssel IIa, iFamZ 2007, 168;
- Schütz*, Anerkennung ausländischer Statusentscheidungen, ÖStA 2007, 101;
- Nademeleinsky/Neumayr*, Internationales Familienrecht Rz 08.01 f; 08.29 ff; 08.60 ff
- Rechberger/Simotta*, Zivilprozessrecht<sup>8</sup> (2011) Rz 149 ff;
- Nademeleinsky* in *Gitschthaler/Höllwerth*, Ehe- und Partnerschaftsrecht (2011) 886 ff;
- Fucik, Kaller-Pröll, Neumayr, Pesendorfer, Rassi, Rauscher, Sengstschmid, Simotta, Traar*, in *Fasching/Konecny* VI/2 (2010);
- Posch*, IPR<sup>5</sup> Rz 11/10;
- Verschraegen*, IPR Rz107.

#### Regulation Rome III: Cross-border divorce - applicable law

- Traar*, Verstärkte Zusammenarbeit beim Kollisionsrecht für Ehescheidungen, Die geplante Verordnung Rom III im Überblick, iFamZ 2010, 351;
- Traar*, Rom III - EU-Verordnung zum Kollisionsrecht für Ehescheidungen, ÖJZ 2011/86;
- Rudolf*, Europäisches Kollisionsrecht für Ehescheidungen – Rom III-VO, EF-Z 2012, 101;
- Posch*, IPR<sup>5</sup> Rz 11/18;
- Verschraegen*, IPR Rz 113.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- Fucik*, Die europäische Unterhaltsverordnung – Gemeinschaftsrechtliche Zuständigkeits- und Kooperationsmechanismen, iFamZ 2009, 245;
- Fucik*, Die europäische Unterhaltsverordnung – Gemeinschaftsrechtliche Anerkennungs- und Vollstreckungsmechanismen, iFamZ 2009, 305;
- Fucik*, Die europäische Unterhaltsverordnung, in *König/Mayr*, Europäisches Zivilverfahrensrecht in Österreich II (2009) 105;
- Fucik* in *Fasching/Konecny*, Kommentar VI/2 EuUVO;
- Mayr*, Europäisches Zivilprozessrecht (2011) Rz 1/160;
- Nademeleinski*, Die neue EU-Unterhaltsverordnung, EF-Z 2011, 130;
- Rechberger/Simotta*, Zivilprozessrecht<sup>8</sup> (2011) Rz 1326 ff;
- Weber*, Das anwendbare Recht im Unterhaltsstreit, Zak 2011/503, 267;
- Fucik*, Rechtswahl und Geschäftsunfähigkeit im Haager Unterhaltsprotokoll, Zak 2011/541, 287;
- Weber*, Der sachliche Anwendungsbereich der EU-Unterhaltsverordnung, ÖJZ 2011, 945;

*Weber*, Die Zuständigkeitstatbestände des Art 3 EU-Unterhaltsverordnung, EF-Z 2012, 13;  
*Weber*, Der europäische Unterhaltsstreit, EF-Z 2012, 88;

*Fucik/Weber*, Statutenwechsel nach dem Haager Unterhaltsprotokoll, iFamZ 2012, 107;

*Posch*, IPR Rz 11/18;

*Verschraegen*, IPR Rz 204;

*Binder*, Der Schutz des Kindes im Internationalen Zivilverfahrensrecht am Beispiel der Europäischen Unterhaltsverordnung, in *Clavora/Garber*, Die Rechtsstellung von Benachteiligten im Zivilverfahren (2012) 205 ff.

### **Matrimonial property regimes and property consequences of registered partnerships**

*Demelius*, Gütergemeinschaft im Grundbuch, ÖJZ 1950, 365;

*Kindler*, Zwei Mustervorlagen von Ehepakten, NZ 1952, 86;

*Staufer*, Gütergemeinschaft und Handelsrecht, NZ 1953, 161;

*Vesely*, Der bäuerliche Ehevertrag, NZ 1954, 42;

*Schellander*, Die verschiedenen Rechtstitel zur Verwaltung des gütergemeinschaftlichen Vermögens, ÖJZ 1957, 596, 622;

*Schatzl*, Gütergemeinschaft und Wohnungseigentum, NZ 1967, 102;

*Rummel*, Zur Auswirkung der Ehescheidung auf die Gütergemeinschaft unter Lebenden, JBl 1968, 406;

*Rummel*, Eheliche Gütergemeinschaft und Gesellschaft bürgerlichen Rechts, FS Demelius (1973) 451;

*Heller/Berger/Stix*, EO<sup>4</sup>, 899, 907, 910 ff, 972;

*Welser*, Ehepakt, Erwerbsgesellschaft bürgerlichen Rechts und Formzwang, GesRZ 1976, 34;  
*Gschnitzer/Faistenberger*, Familienrecht<sup>2</sup>, 82 ff;

*Grillberger*, Eheliche Gütergemeinschaft (1982);

*Jud/Grünwald*, Zivilrechtliche Probleme der Anerkennung von Personalgesellschaftsverträgen zwischen Familienangehörigen, in *Ruppe*, Handbuch der Familienverträge (1985) 277;

*Fenyves*, Ehegüterrechtliche Vereinbarungen aus zivilrechtlicher Sicht, ebendort 749;

*Musger*, Verfahrensrechtliche Bindungswirkungen und Art 6 MRK, JB 1991, 420;

*M. Mohr*, Wirkungen und Gefahren der Gütergemeinschaft auf den Todesfall, NZ 1995,

*Welser*, Gütergemeinschaft auf den Todesfall und maßgebliche Verfügung unter Lebenden, NZ 1997, 270;

*Schramböck*, Ausgewählte Rechtsprobleme der ehelichen Gütergemeinschaft, ÖJZ 1999, 443.

*Jesser-Huss*, Die Eingetragene Partnerschaft, JAP 2010/2011 13;

*Deixler-Hübner*, Die Regelung gleich- und verschiedengeschlechtlicher Lebenspartnerschaften. Unterschiede im europäischen Rechtsvergleich, iFamZ 2008, 199;

*Deixler-Hübner*, Das neue EPG, iFamZ 2010, 93;

*Gröger*, Das Eingetragene Partnerschaft-Gesetz, ÖJZ 2010/23.

**National section**

# **BELGIUM**

**Dr Hakim Boularbah**

**Mathilde Rousseau**

**Université Libre de Bruxelles, Liedekerke Wolters Waelbroeck Kirkpatrick**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### 1. Substantive provisions:

- Divorce: [Articles 229 ff.](#) and [Articles 295 ff.](#) of the Civil Code<sup>1</sup>
- Annulment: [Articles 180 ff.](#) of the Civil Code
- Legal separation: [Articles 308 ff.](#) of the Civil Code

##### 2. Procedural provisions:

- Divorce: [Articles 628, 1](#) and [1254 ff.](#) of the Judicial Code
- Annulment: [Articles 568](#) and [700](#) of the Judicial Code
- Legal separation: [Article 1305](#) of the Judicial Code

There are currently no reform proposals.

#### 2. In case no court of a member state has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

According to [Articles 5, 6, 11](#) and [42](#) of the Belgian Code of Private international law, Belgian courts are competent for cases of divorce when:

- the defendant has his domicile or his usual residence in Belgium;
- the parties have agreed that the courts of Belgium would have jurisdiction;
- the defendant appears before the Belgian courts without arguing that they do not have jurisdiction;
- the last common residence of the spouses was located in Belgium less than 12 months before the filing of the claim;
- the claimant has had his usual residence in Belgium for at least 12 months;
- both spouses are Belgian;
- in the case of a claim introduced by both spouses: when one of them has his usual residence in Belgium;
- when proceedings abroad are impossible or unreasonable to ask for and the case is closely connected to Belgium.

#### 3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

An Act was adopted that modified several Articles of the Judicial Code and added several Articles to that Code. This Act is the "[Loi du 10 mai 2007](#) visant la mise en

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<sup>1</sup> Particular provisions of Belgian Acts cannot be directly accessed through a hyperlink. The hyperlinks included in the Belgian section therefore lead to a copy of the relevant provisions as in force on 16 April 2012. Possible future legislative changes thus will not appear.

oeuvre du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, de la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants ainsi que de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants.”

However, the modified or added Articles only concern parental responsibility.

The modified or added provisions are:

- [Article 587, 1<sup>st</sup> indent](#);
- [Article 633sexies](#);
- [Article 633septies](#);
- [Article 801bis](#);
- [Article 1322bis](#);
- [Article 1322ter](#);
- [Article 1322quinquies, 1<sup>st</sup> indent](#);
- [Article 1322sexies](#) and
- [Article 1322nonies to Article 1322quaterdecies](#).

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes, Belgium is participating in the enhanced cooperation implemented by the Rome III Regulation.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Yes. According to [Article 55, § 2](#), of the Belgian Code of Private international law, the spouses can choose the law applicable to their divorce or to their legal separation during the first hearing of the proceedings. The chosen applicable law can only be that of the State of which both spouses have nationality or Belgian law.

However, the law thus chosen will not be applied by a Belgian court if that law does not provide for the institution of divorce ([Article 55, § 3](#), of the Code of Private international law).

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No. Except for the requirement that the choice of applicable law must be stated during the first hearing as aforementioned, Belgian law does not provide for any formal requirement for such a choice of applicable law.

## B. Cross-border maintenance

### 1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?

1. Substantive provisions: [Articles 301 ff.](#) of the Civil Code and [Article 1288, 4°](#) of the Judicial Code

2. Procedural provisions: [Articles 591, 7°; 624; 626; 1288, 4°; 1320](#) and [1322/1](#) of the Judicial Code

There are currently no reform proposals.

### 2. Please describe the national enforcement procedure applicable in the case of maintenance claims.

The common procedure of seizure is available ([Articles 1386 ff.](#) of the Judicial Code). Maintenance obligations can however be enforced notably on goods of the debtor which are, under the common procedure, non-seizable ([Article 1412](#) of the Judicial Code). The maintenance creditor also has a “privilege” (i.e. priority in the case of insolvency) over other creditors on the goods of the maintenance debtor ([Article 1412 in fine](#) of the Judicial Code).

Moreover, if a maintenance creditor asks for it, the judge can order that a debtor of the maintenance debtor shall be the debtor of the maintenance creditor for the amounts due because of the maintenance obligation ([Article 301, § 11](#), of the Civil Code). The process is called a “delegation of sum” (“délégation de somme”) and aims at providing another debtor to the maintenance creditor. Such a delegation can be ordered for a specified period of time or without a time limit.

### 3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?

The “Service de coopération judiciaire internationale en matière civile”, which is a part of the Federal Ministry of Justice.

### 4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?

Not to our knowledge.

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

#### 1. Substantive provisions:

[Articles 212, al. 2, 215, 217, 218, 222 and 224](#) of the Civil Code form the “primary regime”, i.e. a set of imperative rules, from which the spouses cannot depart. They aim at providing vital patrimonial protection for the family.

[Articles 1387 ff.](#) of the Civil Code form the “secondary regime”, i.e. a legal property regime from which the spouses can agree to depart.

#### 2. Procedural provisions: [Article 628, 2°](#) and [Articles 1253ter ff.](#) of the Judicial Code

There are currently no reform proposals.

### 2. Which conflict of laws rules apply in matrimonial property disputes?

[Articles 49 ff.](#) of the Code of Private international law.

Article 49 provides that the law applicable to a matrimonial property regime is the law chosen by the spouses. However, they can only choose amongst 1) the law of the State in which they will establish their usual residence after the celebration of the wedding, or 2) the law of the State in which one of them has his residence at the moment of the choice, or 3) the law of the State of which one of them has nationality at the moment of the choice. Article 50 provides that the choice must be made before or at the moment of the celebration of the wedding and that it must be made for all the property of the couple. Article 52 provides that the choice is formally valid when it is made in accordance with either the formal requirements of the law applicable to the matrimonial regime, or the formal requirements of the law of the State in which it (the choice) was made. However, Article 50 provides that there must at least be a dated written agreement signed by both spouses.

Article 51 provides the law applicable to a matrimonial property regime in the case of an absence of a choice. It provides that, in such a case, the law applicable to a matrimonial property regime is 1) the law of the State in which both spouses established for the first time their usual residence after the celebration of the wedding, or 2) when they did not establish their first residence in the same State, the law of the State of which both spouses had the nationality at the moment of the celebration of the wedding, or 3) in the other cases, the law of the State in which the wedding was celebrated.

### 3. Which are the property consequences of registered partnerships?

The registered partnership provided for under Belgian law is called “cohabitation légale”.

[Article 1478](#) of the Civil Code provides the property consequences of the “cohabitation légale”. It provides that:

- each cohabitee remains the sole owner of his property when he can prove that it is his own; and
- the income of the cohabitees and the goods that cannot be proven to be the sole property of one of them are considered as co-owned by them.

However, the cohabitees can agree on a different regime. This is the equivalent of the secondary matrimonial regime.

A few restrictions apply to the liberty of the cohabitees regarding their respective property:

- according to [Articles 1477, § 2, 215](#), and [224, § 1, 1°](#), of the Civil Code, neither of the two cohabitees can dispose of rights on their accommodation (right of property or rights under a lease agreement) or of the furniture in that accommodation;
- [Article 1477, § 3](#), of the Civil Code provides that each of the cohabitees must contribute to the expenses of the household in proportion to his means;
- under [Article 1477, § 4](#), of the Civil code, both cohabitees are liable to the payment of expenses made by one cohabitee for the household or for a child raised by both cohabitees.

Such restrictions are imperative, i.e. the cohabitees cannot agree to depart from them. This is the equivalent of the primary matrimonial regime.

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

When Directive No 2008/52/EC was adopted, the Belgian State considered that implementing measures were unnecessary since Articles 1724 ff. of the Judicial Code already complied with the Directive requirements.

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The Belgian domestic Acts implementing Directive No 2003/8/EC are:

- the "[Loi modifiant le Code judiciaire en ce qui concerne la médiation](#)";
- the "[Loi du 23 novembre 1998 relative à l'aide juridique](#)";
- the "[Loi du 15 juin 2006 modifiant le Code judiciaire en ce qui concerne l'aide judiciaire](#)"; and
- the "[Loi du 1er juillet 2006 modifiant le Code judiciaire en ce qui concerne l'assistance judiciaire](#)".

The relevant provisions of those Acts modified or inserted several Articles in the Judicial Code, amongst which the most relevant are the following:

- [Articles 508/1 ff.](#) – See especially Articles 508/24 and 508/25; and
- [Articles 664 ff.](#) – See especially Article 665, 7°, Article 668, c, Article 699*bis* and Article 699*ter*.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

Yes. Belgium is a party to the following instruments in the area of maintenance:

- the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
- the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.

To our knowledge, Belgium is not a party to any international instrument in the areas of divorce and matrimonial property.

In other areas of family law, Belgium is a party to the following international instruments:

- the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- the Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors;
- the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- the Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;
- the New York Convention of 20 November 1989 on the Rights of the Child.

Belgium is also a party to bilateral instruments about more general matters such as, amongst other things, the recognition of foreign official deeds.

This is of course without prejudice to EU related instruments (such as the 23 November 2007 Protocol, for example).

### **4. Are there any databases or online tools providing information on family law matters available in your country?**

The official website for Belgian legislation is the following: [www.ejustice.just.fgov.be/cgi\\_loi/loi.pl](http://www.ejustice.just.fgov.be/cgi_loi/loi.pl).

The "Belgian Federation of Notaries" provides accessible information on Belgian family law matters on its website "[www.notaire.be](http://www.notaire.be)".

The "Association for legislation on aliens" provides accessible information on international aspects of family law on its website "[www.adde.be](http://www.adde.be)".

The "European Judicial Network in Civil and Commercial Matters" provides accessible information on Belgian family law on its website:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_bel_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_bel_en.htm)

- Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_bel_en.htm)

The “European Judicial Atlas in Civil and Commercial Matters” provides accessible information on:

- Matrimonial matters and matters of parental responsibility:

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations:

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

Fee-charging legal databases are also available, which are mainly used by lawyers (e.g. [www.jura.be](http://www.jura.be); [www.jurisquare.be](http://www.jurisquare.be)).

**5. Please provide information on accessing and applying foreign family law in your country.**

[Article 15](#) of the Belgian Code of Private international law provides that the content of the foreign law applicable to a case is determined by the judge and that foreign law is applied according to the way it is interpreted in the relevant foreign country. When the judge cannot determine the content of foreign legislation applicable to a case, he can request the cooperation of the parties. However, when it is clearly impossible to determine the content of the foreign law in due course, Belgian law is applied instead.

To our knowledge, there is no official institution or mechanism providing access to foreign family law.

However, the “Association for legislation on aliens” has a documentation centre in which it provides foreign legislation in several areas of law, including family law. The list of the States and areas concerned can be found on the website of the Association (“[www.adde.be](http://www.adde.be)”), along with links to a few foreign websites providing access to foreign legislation, where such websites exist.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

- Civil Court of Hasselt, 27 December 2011, *Revue@dipr.be*, 2011/1-41, p. 107 (<http://www.dipr.be>)

Parties got married in the Netherlands and both hold Dutch citizenship. The latest marital residence was situated in Belgium.

The Belgian courts have international jurisdiction to hear a petition for divorce in accordance with Article 3, 1, a), first dash, of the Brussels IIbis Regulation.

- Brussels (3rd Chamber), 17 November 2011, *Act. dr. fam.*, 2012, liv. 2, p. 38

According to Article 19 of the Brussels IIbis Regulation, in a case of *lis pendens*, the court first seized has to decide first on its international jurisdiction, which must be determined at the moment that it was seized.

The criterion for jurisdiction is the place of residence or usual residence. This notion, undefined by the Regulation, is applied by the judge as a question of fact and on a case by case basis. The meaning of this expression has to be construed in accordance with the goals and objectives of the Regulation, under the control of the European Court of Justice.

The usual residence does not solely consist in objective criteria; it also carries an intentional element.

- Cantonal Juge of Brussels (2<sup>nd</sup> cant.), 8 April 2011, *Journal des tribunaux*, 2011, n° 6442, p. 494

According to Article 20 of the Brussels IIbis Regulation, the cantonal judge of the place of the Belgian residence of spouses has jurisdiction to order urgent and provisional measures justified by their disagreement, even when a court in another member state has jurisdiction to hear the case on their divorce. That judge has jurisdiction to hear a third party application against his order, even when, in the interval, the parties have moved their residence to another member state.

- Civil Court of Hasselt, 1 February 2011, *Revue@dipr.be*, 2011, liv. 1, 132 (<http://www.dipr.be>)

Maintenance obligations are formally excluded from the material scope of the Brussels IIbis Regulation (art. 1, 3, e). However, they fall under the material scope of the Brussels I Regulation.

To the extent that the claimant's petition regards the divorce and the exercise of parental responsibility over the children, the petition has to be examined in accordance with the Brussels IIbis Regulation. However, to the extent that the claimant's petition regards the maintenance contribution for the children, it has to be examined in accordance with the Brussels I Regulation.

- Gent, 27 May 2010, *Revue@dipr.be*, , 2010/3, p. 62 (<http://www.dipr.be>)

The Belgian Code of Private International Law can only be applied when no international or European rule is applicable (Article 2 of the Belgian Code of Private International private Law). In the present matter, the Court has jurisdiction in accordance with Article 8.1. of the Brussels *IIbis* Regulation and with Article 5.2 of the Brussels I Regulation.

- Civil Court of Liège, 24 November 2009, *Revue@dipr.be*, 2010/3, p. 131 (<http://www.dipr.be>)

Belgian courts have international jurisdiction under Article 3, 1. a), 4th dash, of the Brussels *IIbis* Regulation because the claimant's place of residence has been in Belgium for a period of over a year.

- Brussels (3rd Chamber), 30 April 2009, with note by FALLON, M., *Rev. trim. dr. fam.*, 2011, liv. 1, p. 50

Belgian courts have jurisdiction to hear a petition for divorce when a foreign claimant has been residing in Belgium for at least one year, according to Article 3 of the Brussels *IIbis* Regulation. The term 'habitual residence' implies effectiveness and durability and must be applied having regard to factual and objective elements showing that the person has been living in the same place for a prolonged period with the purpose of it being a stable place of residence and that the person has established personal or professional relationships in that place. It does not matter whether the person is living in Belgium legally or illegally.

- Civil Court of Liège, No 08/6070/A, 22 April 2009, *Revue@dipr.be*, 2010/3, p. 136 (<http://www.dipr.be>)

The civil court of Liège has territorial jurisdiction following article 3.1 a), 5° and 6°, of the Brussels *IIbis* Regulation because the claimant's habitual residence has been situated in Belgium for over a year before the introduction of the claim.

- Brussels (30<sup>th</sup> Chamber), 9 November 2007, *J.L.M.B.*, 2008, liv. 8, p. 340

The judge seized of a divorce petition has to verify his jurisdiction *ex officio*. The claimant holds Cameroonian citizenship; the defendant holds Belgian citizenship and has his habitual residence in Belgium. Therefore, the Belgian courts have jurisdiction (Article 3 of the Brussels *IIbis* Regulation).

- Brussels (3rd Chamber), 6 April 2006, with note by Fallon, M., *Rev. trim. dr. fam.*, 2007, liv. 1, p. 223

The appeal of the District Attorney against a judgment that decides upon a provisional right of custody in a divorce procedure, based on the violation, by the first judge, of the Brussels *IIbis* Regulation, is not admissible. The right of the District Attorney to appeal cannot be justified by the fact that public policy would have been breached, because the situation created by the decision would have to be intolerable for the public policy. Even if the first judge has mistakenly asserted his jurisdiction, he cannot have endangered the Belgian international and diplomatic interests by doing so (Article 138, par. 6, of the Judicial Code).

- Civil Court of Mechelen, 12 January 2006, in *E.J.*, 2006, liv. 10, p. 153, with note by DE BACKER, V., JACOBS, H., *T. Vreemd.*, 2008, special issue, p. 62

The case was about the recognition of a “quick divorce” pronounced in the Netherlands. Two separate petitions had been introduced in the Netherlands, namely a petition for the conversion of a marriage into a registered partnership, followed by a petition for the dissolution of the registered partnership. The Belgian court decided that such a procedure does not fall within the scope of the Brussels IIbis Regulation. Its recognition must therefore be examined under the Belgian rules of private international law.

### Maintenance Regulation

- Civil Court of Hasselt (6th Chamber A), 27 December 2011, *Revue@dipr.be*, 2011, liv. 4, p. 107 (<http://www.dipr.be>)

The Belgian courts have international jurisdiction in accordance with Article 3 of the Maintenance Regulation.

Article 15 of the Regulation provides that the law applicable to maintenance obligations is determined in accordance with the “Hague Protocol” of 23 November 2007 on applicable law on maintenance obligations for all member states that are bound by such Protocol.

According to Article 3 of the Hague Protocol, in matters relating to maintenance obligations, the applicable law is the law of the State where the maintenance debtor has his residence. Article 5 of the Hague Protocol contains one single exception to the general rule for maintenance obligations between ex-spouses. It provides that Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case, the law of this other State is applicable. That exception does not apply in the present matter, since both spouses with Dutch citizenship have been living in Belgium for a long time, even before their marriage. According to Article 3 of the Hague Protocol, Belgian law is therefore applicable.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- BARBE, C. et DECHAMPS, M., "La compétence internationale des juridictions belges [en cas de divorce]", in X., *Divorce. Commentaire pratique*, XII.1.Intr.-1 – XII.1.3-8
- BARBE, C. et DECHAMPS, M., "La compétence internationale des juridictions belges [en cas de divorce]", in *Divorce. Commentaire pratique*, XII.3.0-1 – XII.Bibl.-12
- PFEIFF, S., "Le règlement Bruxelles IIbis. Bilan provisoire et perspectives de réforme", in *Espace judiciaire européen. Acquis et enjeux futurs en matière civile*, pp. 45-74
- SAROLEA, S., "Le conflit familial et le droit international privé", in *Le conflit familial à la croisée du droit*, pp. 167-198
- SAROLEA, S., "Un nouveau règlement au 1er mars 2005: Bruxelles IIbis", in *Div. Act.*, 2004, liv. 9, pp. 130-135
- STORME, H., "Brussel IIbis Vo van toepassing met ingang van 1 maart 2005", in *Revue@dipr.be*, 2005/1, p. 51
- VAN DROOGHENBROECK, J.-F., La jurisprudence du Code judiciaire commentée volume V – Droit judiciaire européen et international, La Charte, 2012, p. 819, esp. Part. I, Chp. 5 on Regulation Brussels IIbis, by WAUTELET, P., with the collaboration of COLLIERNE, F.
- WAUTELET, P., "La dissolution du mariage en droit international privé – compétence, droit applicable et reconnaissance des décisions étrangères", in *Actualités du contentieux familial international*, 69-142

#### Regulation Rome III: Cross-border divorce - applicable law

- BARBE, C., DECHAMPS, M., "La loi applicable [Le divorce en droit international]", in *Divorce. Commentaire pratique*, avril 2011, XII.2.1-1 – XII.2.2-15
- DEVOLDER, K., "Rome III-verordening: wanneer de 'grenze(n)loze' liefde eindigt in een echtscheiding ...", in *Notariaat*, 2011, liv. 14, pp. 1-5
- NUYTS, A., BOULARBAH, H. (chronique), "Droit international privé européen [15 juillet 2010 – 15 juillet 2011]", in *Journal de droit européen*, 2011/184, pp. 304-312
- WAUTELET, P., "Divorce international et choix de loi: quelques précisions", in *J.L.M.B.*, 2010, 38/2010, p. 1791

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- BAMBUST, I., "Le règlement européen 4/2009 en matière d'obligations alimentaires", in *J.T.*, 2009, liv. 6356, pp. 381-392 (<http://jt.larcier.be>)
- DECHAMPS, M., "Le règlement européen 4/2009 relatif aux aliments: Tentative de simplification de la résolution des litiges transfrontières en matière d'obligations alimentaires", in *Rev. trim. dr. fam.*, 2011, liv. 4, pp. 801-832
- ENGLERT, H., "L'entrée en vigueur du Règlement 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires", in *Rev. dr. étr.*, 2011, liv. 163, pp. 171-181

- GALLUS, N., "Recouvrement international des aliment", in *Act. dr. fam.*, 2011, liv. 5, p. 108
- KRUGER, T., "Onderhoudsvorderingen: nieuwe IPR-wetgeving", in *T. Fam.*, 2012, liv. 2, pp. 32-42
- STORME, H., VERHELLEN, J., "Actualia IPR: Erkenning van buitenlandse beslissingen en akten en nieuw Europees en internationaal IPR inzake onderhoudsverplichtingen en minderjarigen", *Chronique de droit à l'usage des juges de paix et de police*, 2010, pp. 43-93
- SZYCHOWASKA, K., "Règlement n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires", in *R.D.C.*, 2009, liv. 7, p. 735 (<http://www.rdc-tbh.be>)
- TRAEST, M., "Quelques aspects concernant l'application dans l'espace du nouveau règlement européen 4/2009 en matière d'obligations alimentaires", in *Revue@dipr.be*, 2010, liv. 2, pp. 105-110 et (<http://www.dipr.be>)
- VAN DROOGHENBROECK, J.-F., *La jurisprudence du Code judiciaire commentée volume V – Droit judiciaire européen et international*, La Charte, 2012, p. 819, esp. Part. I, Chp. 10 on the Maintenance Regulation, by BAMBUST, I.
- X., "Nieuwe EU-Verordening over internationaal privaatrecht bij onderhoudsverplichtingen", in *T. Vreemd.*, 2009, liv. 2, pp. 167-168
- X., "EU zorgt voor uniformiteit bij onderhoudsverplichtingen op internationaal vlak", in *T. Vreemd.*, 2010, liv. 3, p. 296
- X., "Alimentatieverordening van kracht sinds 18 juni 2011", in *T. Vreemd.*, 2011, liv. 3, p. 318

## Matrimonial property regimes and property consequences of registered partnerships

### Matrimonial property regimes

- BOONE, K., SIBIET, A., "Huwelijksvermogensrecht: 'hot topics' vanuit het consultatiecentrum", *Familiale vermogensplanning*, 2009, pp. 43-71
- CASMAN, H. (ed.), *Huwelijksvermogensrecht*, Mechelen, Kluwer, losbl.
- CASMAN, H. (ed.), *Régimes matrimoniaux*, Mechelen, Kluwer, losbl.
- CASMAN, H. & VAN LOOCK, M. (ch. ed.), *Huwelijksvermogensrecht*, Mechelen, Kluwer, (last part no. 52 in November 2011)
- DECLERCK, C., "Secundaire huwelijksvermogensstelsel", in *Patrimonium*, 2010, pp. 5-40.
- DEKKERS, R., CASMAN, H., *Handboek burgerlijk recht – deel IV. Huwelijksstelsels, erfrechten, giften*, Antwerpen, Intersentia, 2010
- DE PAGE, P., *Le régime matrimonial*, Bruxelles, Bruylant, 2010
- DU MONGH, J., DECLERCK, C., "Secundaire huwelijksvermogensstelsel", in *Patrimonium*, 2009, pp. 19-58
- GERLO, J., *Handboek voor familierecht, Boek 2. Huwelijksvermogensrecht*, Die Keure, 2004

- LELEU, Y., DEGUEL, F., E.A., "Le droit patrimonial des couples", in *Chroniques notariales*, 2011, vol. 54, pp. 198-408
- PINTENTS, W., "Het Belgische huwelijksgoederenrecht in rechtsvergelijkend perspectief", *T.P.R.*, 2005, liv. 2, pp. 317-364
- PINTENS, W., DECLERCK, C., DU MONGH, J. & VANWINCKELEN, K., *Schets van het familiaal vermogensrecht*, Antwerpen, Intersentia, 2012
- RAUCENT, L. & LELEU, Y., *Les régimes matrimoniaux*, RN 5/2, Larcier, 1997-2002
- RAUCENT, L. & LELEU, Y., *Les régimes matrimoniaux*, 1. Les droits et devoirs des époux, Larcier, 1997
- RAUCENT, L. & LELEU, Y., *Les régimes matrimoniaux*, 2. Contrat de mariage et modification du régime matrimonial, Larcier, 1999
- RAUCENT, L. & LELEU, Y. (ed.), *Les régimes matrimoniaux*, 3. Le régime légal, Larcier, 2001
- RAUCENT, L. & LELEU, Y. (ed.), *Les régimes matrimoniaux*, 4. Les régimes conventionnels, Le droit transitoire, Larcier, 2002
- RAUCENT, L., GREGOIRE, M., e.a., "Régimes matrimoniaux (Droit interne)", in *Répertoire pratique du droit belge. Législation, Doctrine et Jurisprudence*, Complément, Tome 6, pp. 660-866
- VANDEBEEK, N., *Onroerend goed en het huwelijksvermogen*, 2010, Mechelen, Kluwer

### **Property consequences of registered partnerships**

- ALLAERTS, V., "Samenwoningsvermogensrecht", in X., *Patrimonium*, 2010, pp. 41-58
- ALOFS, E., "De uitbreiding van de schadeloosstelling overeenkomstig de resp. regelingen inzake arbeidsongevallen, beroepsziekten en het asbestfonds naar wettelijk samenwonende partners", in *Not. Fisc. M.*, 2009, liv. 8, pp. 311-327
- CULOT, A., DEGEE, J.-M., e.a.(eds.), *Cohabitation légale et cohabitation de fait – Aspects civils et fiscaux*, Louvain-la-Neuve, Anthemis, 2008
- DE BUSSCHERE, C., "La cohabitation légale: loi du 23 novembre 1998", in *Notarius*, 1999, pp. 26-33
- DE PAGE, P., "La loi du 23 novembre 1998 instaurant la cohabitation légale", in *Rev. trim. dr. fam.*, 1999, pp. 195-219
- DE PAGE, P., "Les créances et comptes entre cohabitants et la loi du 23 novembre 1998", in *Le couple non marié à la lumière de la cohabitation légale*, 2000, pp. 305-320
- DE PAGE, P.; VAN MOLLE, M., *Le statut fiscal des couples: mariage, cohabitation légale et cohabitation de fait*, in X., *Droit fiscal et pratique notariale. Evolutions récentes et questions d'actualité*, Larcier, 2009, pp. 101-148
- LELEU, Y., DEGUEL, F., LANGENAKEN, E., LARUELLE, J., LOUIS, S., ROUSSEAU, L., "Le droit patrimonial des couples", in *Chroniques notariales*, Vol. 54, 2011, pp. 198-408
- TAYMANS, J., "La loi du 23 novembre 1998 instaurant la cohabitation légale (dossier n° 4318-4319bis)", in *Travaux du Comité d'études et de législation [de la Fédération Royale du Notariat Belge]*. Années 1999-2000, pp. 391-398

- TAYMANS, J., "Cohabitation légale et pratique notariale", in *Rev. not. b.*, 2004, liv. 2979, p. 548, err. *Rev. not. b.*, 2004, liv. 2978, pp. 390-399
- VERHEYDEN-JEANMARKT, N., "La cohabitation légale. Du contrat à l'institutionnalisation", in *Liber Amicorum Yvette Merchier*, Brugge, Die Keure, 2001

### Articles 180 - 202 of the Civil Code

#### CHAPITRE IV. - DES DEMANDES EN NULLITE DE MARIAGE.

Art. 180. [Alinéa 1 abrogé] <L 2007-04-25/76, art. 4, 036; En vigueur : 25-06-2007>

Lorsqu'il y a eu erreur dans la personne, le mariage ne peut être attaqué que par celui des deux époux qui a été induit en erreur.

Art. 181. Dans le cas de l'article précédent, la demande en nullité n'est plus recevable toutes les fois qu'il y a eu cohabitation continuée pendant six mois [depuis que l'erreur a été reconnue par l'époux]. <L 2007-04-25/76, art. 5, 036; En vigueur : 25-06-2007>

Art. 182. [Abrogé] <L 19-01-1990, art. 21>.

Art. 183. [Abrogé] <L 19-01-1990, art. 22>.

Art. 184. [Abrogé] <L 31-03-1987, art. 26>. Tout mariage contracté en contravention [aux dispositions contenues aux articles 144, 146bis, 146ter, 147, 161, 162, 163, 341 ou 353-13,] peut être attaqué soit par les époux eux-mêmes, soit par tous ceux qui y ont intérêt, soit par le ministère public. <L 2007-04-25/76, art. 6, 036; En vigueur : 25-06-2007>

Art. 185. <L 19-01-1990, art. 23>. Néanmoins, le mariage contracté par un ou des époux mineurs qui n'ont pas reçu l'autorisation du tribunal de la jeunesse de contracter mariage ne peut plus être attaqué lorsqu'il s'est écoulé six mois depuis que cet époux ou les époux ont atteint l'âge de dix-huit ans.

Art. 186. [Abrogé] <L 19-01-1990, art. 24>.

Art. 187. Dans tous les cas où, conformément à l'article 184, l'action en nullité peut être intentée par tous ceux qui y ont un intérêt, elle ne peut l'être par les parents collatéraux, ou par les enfants [qui ne sont pas nés du mariage en cause], du vivant des deux époux, mais seulement lorsqu'ils y ont un intérêt né et actuel. <L 31-03-1987, art. 27>.

Art. 188. L'époux au préjudice duquel a été contracté un second mariage, peut en demander la nullité du vivant même de l'époux qui était engagé avec lui.

Art. 189. Si les nouveaux époux opposent la nullité du premier mariage, la validité ou la nullité de ce mariage doit être jugée préalablement.

Art. 190. Le procureur du Roi, dans tous les cas auxquels s'applique l'article 184, et sous les modifications portées en l'article 185, peut et doit demander la nullité du mariage, du vivant des deux époux, et les faire condamner à se séparer.

Art. 191. Tout mariage qui n'a point été contracté publiquement, et qui n'a point été célébré devant l'officier public compétent, [ou dont la déclaration n'a pas été faite conformément à l'article 63] peut être attaqué par les époux eux-mêmes, par les père et mère, par les ascendants, et par tous ceux qui y ont un intérêt né et actuel, ainsi que par le ministère public. <L 1999-05-04/63, art. 18, 006; En vigueur : 01-01-2000>

Art. 192. <L 2000-03-01/48, art. 4, 008; En vigueur : 16-04-2000> Si le mariage n'a pas été précédé de la déclaration requise, ou s'il n'a pas été obtenu des dispenses permises par la loi, ou si les délais prescrits pour la déclaration et la célébration du mariage n'ont pas été observés, l'officier public est puni d'une amende de vingt-six francs à trois cents francs et les époux ou ceux sous l'autorité desquels il ont agi sont punis d'une amende de vingt-six francs à deux cents francs.

Art. 193. Les peines prononcées par l'article précédent seront encourues par les personnes qui y sont désignées, pour toute contravention aux règles prescrites par [l'article 166] lors même que ces contraventions ne seraient pas jugées suffisantes pour faire prononcer la nullité du mariage. <L 2000-03-01/48, art. 5, 008; En vigueur : 16-04-2000>

Art. 193bis. <Inséré par L 14-11-1947, art. 1>. Sans préjudice de l'application des articles 184, 190 et 191 qui précèdent et de l'article 46 de la loi du 20 avril 1810 sur l'organisation de l'ordre judiciaire et l'administration de la justice, le ministère public peut se porter partie intervenante dans toute action en nullité de mariage.

Art. 194. Nul ne peut réclamer le titre d'époux et les effets civils du mariage, s'il ne représente un acte de célébration inscrit sur le registre de l'état civil; sauf les cas prévus par l'article 46, au titre des Actes de l'état civil.

Art. 195. La possession d'état ne pourra dispenser les prétendus époux qui l'invoqueront respectivement, de représenter l'acte de célébration du mariage devant l'officier de l'état civil.

Art. 196. Lorsqu'il y a possession d'état, et que l'acte de célébration du mariage devant l'officier de l'état civil est représenté, les époux sont respectivement non recevables à demander la nullité de cet acte.

Art. 197. Si néanmoins, dans le cas des articles 194 et 195, il existe des enfants issus de deux individus qui ont vécu publiquement comme mari et femme, et qui soient tous deux décédés, la [filiation] des enfants ne peut être contestée sous le seul prétexte du défaut de représentation de l'acte de célébration, toutes les fois que cette légitimité est prouvée par une possession d'état qui n'est point contredite par l'acte de naissance. <L 31-03-1987, art. 28>.

Art. 198. Lorsque la preuve d'une célébration légale du mariage se trouve acquise par le résultat d'une procédure criminelle, l'inscription du jugement sur les registres de l'état civil assure au mariage, à compter du jour de sa célébration, tous les effets civils, tant à l'égard des époux, qu'à l'égard des enfants issus de ce mariage.

Art. 199. Si les époux ou l'un d'eux sont décédés sans avoir découvert la fraude, l'action criminelle peut être intentée par tous ceux qui ont intérêt de faire déclarer le mariage valable, et par le procureur du Roi.

Art. 200. Si l'officier public est décédé lors de la découverte de la fraude, l'action sera dirigée au civil contre ses héritiers par le procureur du Roi en présence des parties intéressées et sur leur dénonciation.

Art. 201. <L 31-03-1987, art. 29>. Le mariage qui a été déclaré nul produit néanmoins ses effets à l'égard des époux lorsqu'il a été contracté de bonne foi.

Si la bonne foi n'existe que de la part de l'un des deux époux, le mariage ne produit ses effets qu'en faveur de cet époux.

Art. 202. <L 31-03-1987, art. 30>. Il produit également ses effets en faveur des enfants, même si aucun des époux n'a été de bonne foi.

## Articles 212 – 226sexies of the Civil Code

### TITRE V. DU MARIAGE

#### CHAPITRE VI. - DES DROITS ET DEVOIRS RESPECTIFS DES EPOUX.

Art. 212. <L 14-07-1976, <art>. 1>. Les droits, obligations et pouvoirs des époux sont réglés par les dispositions du présent chapitre, applicables par le seul fait du mariage.

Ils sont en outre définis par les dispositions réglant le régime légal ou par celles de leur contrat de mariage, qui ne peuvent déroger aux dispositions du présent chapitre.

Le mariage ne modifie pas la capacité juridique des époux, sous réserve de l'application de l'article 476.

Art. 213. <L 14-07-1976, art. 1>.

Les époux ont le devoir d'habiter ensemble; ils se doivent mutuellement fidélité, secours, assistance.

Art. 214. <L 14-07-1976, art. 1>.

La résidence conjugale est fixée de commun accord entre les époux. A défaut d'accord entre eux, le juge de paix statue dans l'intérêt de la famille.

Si l'un des époux est [préssumé absent], interdit ou dans l'impossibilité de manifester sa volonté, la résidence conjugale est fixée par l'autre époux. <L 2007-05-09/44, art. 36, 1°, 037; En vigueur : 01-07-2007>

Art. 215. <L 14-07-1976, art. 1>.

§ 1. Un époux ne peut, sans l'accord de l'autre, disposer entre vifs à titre onéreux ou gratuit des droits qu'il possède sur l'immeuble qui sert au logement principal de la famille, ni hypothéquer cet immeuble.

Il ne peut sans le même accord, disposer entre vifs à titre onéreux ou gratuit, des meubles meublants qui garnissent l'immeuble qui sert au logement principal de la famille, ni les donner en gage.

Si l'époux, dont l'accord est requis, le refuse sans motifs graves, le conjoint peut se faire autoriser par le tribunal de première instance et, en cas d'urgence, par le président de ce tribunal, à passer seul l'acte.

§ 2. Le droit au bail de l'immeuble loué par l'un ou l'autre époux, même avant le mariage et affecté en tout ou en partie au logement principal de la famille, appartient conjointement aux époux, nonobstant toute convention contraire.

Les congés, notifications et exploits relatifs à ce bail doivent être adressés ou signifiés séparément à chacun des époux ou émaner de tous deux.

[Toutefois, chacun des deux époux ne pourra se prévaloir de la nullité de ces actes adressés à son conjoint ou émanant de celui-ci qu'à la condition que le bailleur ait connaissance de leur mariage.] <L 20-02-1991, art. 3>.

Toute contestation entre eux quant à l'exercice de ce droit est tranchée par le juge de paix.

Les dispositions du présent paragraphe ne s'appliquent ni aux baux commerciaux, ni aux baux à ferme.

Art. 216. <L 14-07-1976, art. 1>.

§ 1. Chaque époux a le droit d'exercer une profession sans l'accord de son conjoint.

Toutefois, si celui-ci estime que cette activité est de nature à porter un préjudice sérieux à ses intérêts moraux ou matériels ou à ceux des enfants mineurs, il a un droit de recours devant le tribunal de première instance et en cas d'urgence devant le président de ce tribunal.

Le tribunal peut subordonner l'exercice de la profession à la modification préalable du régime matrimonial des époux.

Les dispositions des deux alinéas précédents ne sont pas applicables à l'exercice de mandats publics.

§ 2. Aucun des époux ne peut user dans ses relations professionnelles du nom de son conjoint qu'avec l'accord de celui-ci.

L'accord ne peut être retiré que pour motifs graves. Le retrait ouvre un recours devant le tribunal de première instance et en cas d'urgence devant le président de ce tribunal.

Art. 217. <L 14-07-1976, art. 1>.

Chaque époux perçoit seul ses revenus et les affecte par priorité à sa contribution aux charges du mariage.

Il peut en utiliser le surplus à des acquisitions de biens justifiées par l'exercice de sa profession; ces biens sont soumis à sa gestion exclusive.

L'excédent est soumis aux règles du régime matrimonial des époux.

Art. 218. <L 14-07-1976, art. 1>.

Chacun des époux peut faire ouvrir à son nom, sans l'accord de son conjoint, tout compte de dépôt de sommes ou de titres et prendre en location un coffre-fort.

Il est réputé à l'égard du dépositaire ou du bailleur en avoir seul la gestion ou l'accès.

Le dépositaire et le bailleur sont tenus d'informer le conjoint de l'ouverture du compte ou de la location du coffre.

Art. 219. <L 14-07-1976, art. 1>.

Chacun des époux peut, au cours du mariage, donner à son conjoint mandat général ou spécial de le représenter dans l'exercice des pouvoirs que son régime matrimonial lui laisse ou lui attribue.

Ce mandat est toujours révocable.

Art. 220. <L 14-07-1976, art. 1>.

§ 1. Si l'un des époux est [préssumé absent], interdit ou dans l'impossibilité de manifester sa volonté, son conjoint peut se faire autoriser par le tribunal de première instance à passer seul les actes visés au paragraphe 1er de l'article 215. <L 2007-05-09/44, art. 36, 2°, 037; En vigueur : 01-07-2007>

§ 2. Lorsque l'époux qui est dans l'impossibilité de manifester sa volonté n'a pas constitué mandataire ou n'a pas été pourvu d'un représentant légal, son conjoint peut demander au tribunal de première instance à lui être substitué dans l'exercice de tout ou partie de ses pouvoirs.

§ 3. Dans les cas prévus au paragraphe 1er, le conjoint peut se faire autoriser par le juge de paix à percevoir, pour les besoins du ménage, tout ou partie des sommes dues par des tiers.

Art. 221. <L 14-07-1976, art. 1>.

Chacun des époux contribue aux charges du mariage selon ses facultés.

A défaut par l'un des époux de satisfaire à cette obligation, l'autre époux peut, sans préjudice des droits des tiers, se faire autoriser par le juge de paix à percevoir à l'exclusion de son conjoint, dans les conditions et les limites que le jugement fixe, les revenus de celui-ci ou ceux des biens qu'il administre en vertu de leur régime matrimonial, ainsi que toutes autres sommes qui lui sont dues par des tiers.

Le jugement est opposable à tous tiers débiteurs actuels ou futurs sur la notification que leur a faite le greffier à la requête du demandeur.

Lorsque le jugement cesse de produire ses effets, les tiers débiteurs en sont informés par le greffier.

Les notifications faites par le greffier indiquent ce que le tiers débiteur doit payer ou cesser de payer.

L'autorisation demeure exécutoire nonobstant le dépôt ultérieur d'une requête en divorce ou en séparation de corps jusqu'à la décision du tribunal ou du président du tribunal statuant en référé.

Art. 222. <L 14-07-1976, art. 1>.

Toute dette contractée par l'un des époux pour les besoins du ménage et l'éducation des enfants oblige solidairement l'autre époux.

Toutefois, celui-ci n'est pas tenu des dettes excessives eu égard aux ressources du ménage.

Art. 223. <L 14-07-1976, art. 1>.

Si l'un des époux manque gravement à ses devoirs, le juge de paix ordonne à la demande du conjoint, les mesures urgentes et provisoires relatives à la personne et aux biens des époux et des enfants.

Il en est de même à la demande d'un des époux si l'entente entre eux est sérieusement perturbée.

[Si un époux a commis à l'encontre de l'autre un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal ou a tenté de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code, ou s'il existe des indices sérieux de tels comportements, l'époux victime se verra attribuer, sauf circonstances exceptionnelles, la jouissance de la résidence conjugale s'il en fait la demande.] <L 2003-01-28/33, art. 3, 014; En vigueur : 22-02-2003>

Le juge de paix peut notamment interdire à l'un des époux, pour la durée qu'il détermine, d'aliéner, d'hypothéquer ou de donner en gage des biens meubles ou immeubles, propres ou communs, sans l'accord de l'autre; il peut interdire le déplacement des meubles ou en attribuer l'usage personnel à l'un ou l'autre des époux.

Sont des actes d'aliénation, tous les actes visés à l'article 1er de la loi du 16 décembre 1851 et à l'article 8 de la loi du 10 février 1908.

Le juge de paix peut obliger l'époux détenteur des meubles à donner caution ou à justifier d'une solvabilité suffisante.

Art. 224. <L 14-07-1976, art. 1>.

§ 1. Sont annulables à la demande du conjoint et sans préjudice de l'octroi de dommages et intérêts :

1. les actes accomplis par l'un des époux, en violation des dispositions de l'article 215;
2. les actes accomplis par l'un des époux, après transcription de la requête ou du jugement, en violation d'une interdiction d'aliéner ou d'hypothéquer demandée ou obtenue par application de l'article 223;
3. les donations faites par l'un des époux et qui mettent en péril les intérêts de la famille;
4. les sûretés personnelles données par l'un des époux et qui mettent en péril les intérêts de la famille.

§ 2. L'action en nullité ou en dommages et intérêts doit être introduite, à peine de forclusion, dans l'année du jour où l'époux demandeur a eu connaissance de l'acte.

Si l'époux décède avant que la forclusion ne soit atteinte, ses héritiers disposent, à dater du décès, d'un nouveau délai d'un an.

Art. 225. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226bis. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226ter. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226quater. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226quinquies. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226sexies. [Abrogé] <L 14-07-1976, art. 1>.

Art. 226septies. [Abrogé] <L 14-07-1976, art. 1>.

## **Article 224 of the Civil Code**

Art. <224>. <L 14-07-1976, art. 1>.

§ 1. Sont annulables à la demande du conjoint et sans préjudice de l'octroi de dommages et intérêts :

1. les actes accomplis par l'un des époux, en violation des dispositions de l'article 215;

2. les actes accomplis par l'un des époux, après transcription de la requête ou du jugement, en violation d'une interdiction d'aliéner ou d'hypothéquer demandée ou obtenue par application de l'article 223;

3. les donations faites par l'un des époux et qui mettent en péril les intérêts de la famille;

4. les sûretés personnelles données par l'un des époux et qui mettent en péril les intérêts de la famille.

§ 2. L'action en nullité ou en dommages et intérêts doit être introduite, à peine de forclusion, dans l'année du jour où l'époux demandeur a eu connaissance de l'acte.

Si l'époux décède avant que la forclusion ne soit atteinte, ses héritiers disposent, à dater du décès, d'un nouveau délai d'un an.

## Articles 229 – 233 of the Civil Code

### CHAPITRE I. - DES CAUSES DU DIVORCE.

Art. 229. <L 2007-04-27/00, art. 2, 034; En vigueur : 01-09-2007> § 1er. Le divorce est prononcé lorsque le juge constate la désunion irrémédiable entre les époux. La désunion est irrémédiable lorsqu'elle rend raisonnablement impossible la poursuite de la vie commune et la reprise de celle-ci entre eux. La preuve de la désunion irrémédiable peut être rapportée par toutes voies de droit.

§ 2. La désunion irrémédiable est établie lorsque la demande est formée conjointement par les deux époux après plus de six mois de séparation de fait ou qu'elle est répétée à deux reprises conformément à l'article 1255, § 1er, du Code judiciaire.

§ 3. Elle est également établie lorsque la demande est formée par un seul époux après plus d'un an de séparation de fait ou qu'elle est répétée à deux reprises conformément à l'article 1255, § 2, du Code judiciaire.

Art. 230. <Rétabli par L 2007-04-27/00, art. 3, 034; En vigueur : 01-09-2007> Les époux peuvent également divorcer par consentement mutuel, aux conditions fixées dans la quatrième partie, livre IV, chapitre XI, section 2, du Code judiciaire.

Art. 231. [Abrogé] <L 2007-04-27/00, art. 4, 1°, 034; En vigueur : 01-09-2007>

Art. 232. [Abrogé] <L 2007-04-27/00, art. 4, 2°, 034; En vigueur : 01-09-2007>

Art. 233. [Abrogé] <L 2007-04-27/00, art. 4, 3°, 034; En vigueur : 01-09-2007>

## Articles 295 – 307bis of the Civil Code

### CHAPITRE IV. - DES EFFET DU DIVORCE.

Art. 301.<L 2007-04-27/00, art. 7, 034; En vigueur : 01-09-2007> § 1er. Sans préjudice de l'article 1257 du Code judiciaire, les époux peuvent convenir à tout moment de la pension alimentaire éventuelle, du montant de celle-ci et des modalités selon lesquelles le montant convenu pourra être revu.

§ 2. A défaut de la convention visée au § 1er, le tribunal peut, dans le jugement prononçant le divorce ou lors d'une décision ultérieure, accorder, à la demande de l'époux dans le besoin, une pension alimentaire à charge de l'autre époux.

Le tribunal peut refuser de faire droit à la demande de pension si le défendeur prouve que le demandeur a commis une faute grave ayant rendu impossible la poursuite de la vie commune.

En aucun cas, la pension alimentaire n'est accordée au conjoint reconnu coupable d'un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal, commis contre la personne du défendeur, ou d'une tentative de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code contre cette même personne.

Par dérogation à l'article 4 du titre préliminaire du Code de procédure pénale, le juge peut, en attendant que la décision sur l'action publique soit coulée en force de chose jugée, allouer au demandeur une pension provisionnelle, en tenant compte de toutes les circonstances de la cause. Il peut subordonner l'octroi de cette pension provisionnelle à la constitution d'une garantie qu'il détermine et dont il fixe les modalités.

§ 3. Le tribunal fixe le montant de la pension alimentaire qui doit couvrir au moins l'état de besoin du bénéficiaire.

Il tient compte des revenus et possibilités des conjoints et de la dégradation significative de la situation économique du bénéficiaire. Pour apprécier cette dégradation, le juge se fonde notamment sur la durée du mariage, l'âge des parties, leur comportement durant le mariage quant à l'organisation de leurs besoins, la charge des enfants pendant la vie commune ou après celle-ci. Le juge peut décider le cas échéant que la pension sera dégressive et déterminer dans quelle mesure elle le sera.

La pension alimentaire ne peut excéder le tiers des revenus du conjoint débiteur.

§ 4. La durée de la pension ne peut être supérieure à celle du mariage.

En cas de circonstances exceptionnelles, si le bénéficiaire démontre qu'à l'expiration du délai visé à l'alinéa 1er, il reste, pour des raisons indépendantes de sa volonté, dans un état de besoin, le tribunal peut prolonger le délai. Dans ce cas, le montant de la pension correspond au montant nécessaire pour couvrir l'état de besoin du bénéficiaire.

§ 5. Si le défendeur prouve que l'état de besoin du demandeur résulte d'une décision prise unilatéralement par celui-ci, et sans que les besoins de la famille aient justifié ce choix, il peut être dispensé de payer la pension ou n'être tenu que de payer une pension réduite.

§ 6. Le tribunal qui accorde la pension constate que celle-ci est adaptée de plein droit aux fluctuations de l'indice des prix à la consommation.

Le montant de base de la pension correspond à l'indice des prix à la consommation du mois au cours duquel le jugement ou l'arrêt prononçant le divorce est coulé en force de chose jugée, à moins que le tribunal n'en décide autrement. Tous les douze mois, le

montant de la pension est adapté en fonction de la hausse ou de la baisse de l'indice des prix à la consommation du mois correspondant.

Ces modifications sont appliquées à la pension dès l'échéance qui suit la publication au Moniteur belge de l'indice nouveau à prendre en considération.

Le tribunal peut, dans certains cas, appliquer un autre système d'adaptation de la pension au coût de la vie.

§ 7. [2 Sauf si les parties ont convenu expressément le contraire, le tribunal peut, ultérieurement, à la demande d'une des parties, augmenter, réduire ou supprimer la pension, si, à la suite de circonstances nouvelles et indépendantes de la volonté des parties, son montant n'est plus adapté.]2

De même, si à la suite de la dissolution du mariage, la liquidation-partage du patrimoine commun ou de l'indivision ayant existé entre les époux entraîne une modification de leur situation financière qui justifie une adaptation de la pension alimentaire ayant fait l'objet d'un jugement ou d'une convention intervenus avant l'établissement de comptes de la liquidation, le tribunal peut adapter la pension, [2 ...]2

§ 8. La pension peut à tout moment être remplacée, de l'accord des parties, par un capital homologué par le tribunal. A la demande du débiteur de la pension, le tribunal peut également accorder à tout moment la capitalisation.

§ 9. Les époux ne peuvent pas renoncer aux droits à la pension alimentaire avant la dissolution du mariage.

Ils peuvent néanmoins transiger, en cours de procédure, sur le montant de cette pension, aux conditions fixées par l'article 1257 du Code judiciaire.

§ 10. La pension n'est plus due au décès du débiteur, mais le bénéficiaire peut demander des aliments à charge de la succession aux conditions prévues à l'article 205bis, §§ 2, 3, 4 et 5.

La pension prend, en toute hypothèse, définitivement fin en cas de remariage du bénéficiaire de la pension ou au moment où ce dernier fait une déclaration de cohabitation légale, sauf convention contraire des parties.

Le juge peut mettre fin à la pension lorsque le bénéficiaire vit maritalement avec une autre personne.

§ 11. Le tribunal peut décider qu'en cas de défaut d'exécution par le débiteur de son obligation de paiement, le bénéficiaire de la pension sera autorisé à percevoir les revenus de celui-ci ou ceux des biens qu'il administre en vertu de leur régime matrimonial, ainsi que toutes autres sommes qui lui sont dues par des tiers.

Cette décision est opposable à tout tiers débiteur, actuel ou futur, sur la notification qui leur en est faite par le greffier à la requête du demandeur.

§ 12. [1 ...]1.

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(1)<L 2010-03-19/05, art. 6, 048; En vigueur : 01-08-2010; voir également l'art. 17>

(2)<L 2010-06-02/23, art. 2, 051; En vigueur : 01-07-2010>

Art. 301bis. [Abrogé] <L 2007-04-27/00, art. 8, 034; En vigueur : 01-09-2007>

Art. 302. <L 1995-04-13/37, art. 3, 003; En vigueur : 03-06-1995> Après la dissolution du mariage par le divorce, l'autorité sur la personne de l'enfant et l'administration de ses biens sont exercées conjointement par les père et mère ou par celui à qui elles ont été confiées, soit par [l'accord des parties homologué conformément à l'article 1256] du Code judiciaire, soit par la décision ordonnée par le président statuant en référé conformément à l'article 1280 du Code judiciaire, sans préjudice de l'article 387bis du présent Code. <L 2007-04-27/00, art. 9, 034; En vigueur : 01-09-2007>

Art. 303. [abrogé] <L 1995-04-13/37, art. 4, 003; En vigueur : 03-06-1995>

Art. 304. La dissolution du mariage par le divorce [prononcé] en justice, ne privera les enfants nés de ce mariage, d'aucun des avantages qui leur étaient assurés par les lois, ou par les conventions matrimoniales de leurs père et mère; mais il n'y aura d'ouverture aux droits des enfants que de la même manière et dans les mêmes circonstances où ils se seraient ouverts s'il n'y avait pas eu de divorce. <L 2007-04-27/00, art. 10, 034; En vigueur : 01-09-2007>

Art. 305. [Abrogé] <L 01-07-1972, art. 12>.

Art. 306. [Abrogé] <L 2007-04-27/00, art. 11, 1°, 034; En vigueur : 01-09-2007>

Art. 307. [Abrogé] <L 2007-04-27/00, art. 11, 2°, 034; En vigueur : 01-09-2007>

Art. 307bis. [Abrogé] <L 2007-04-27/00, art. 11, 3°, 034; En vigueur : 01-09-2007>

## Articles 301 – 307bis of the Civil Code

Art. 301.<L 2007-04-27/00, art. 7, 034; En vigueur : 01-09-2007> § 1er. Sans préjudice de l'article 1257 du Code judiciaire, les époux peuvent convenir à tout moment de la pension alimentaire éventuelle, du montant de celle-ci et des modalités selon lesquelles le montant convenu pourra être revu.

§ 2. A défaut de la convention visée au § 1er, le tribunal peut, dans le jugement prononçant le divorce ou lors d'une décision ultérieure, accorder, à la demande de l'époux dans le besoin, une pension alimentaire à charge de l'autre époux.

Le tribunal peut refuser de faire droit à la demande de pension si le défendeur prouve que le demandeur a commis une faute grave ayant rendu impossible la poursuite de la vie commune.

En aucun cas, la pension alimentaire n'est accordée au conjoint reconnu coupable d'un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal, commis contre la personne du défendeur, ou d'une tentative de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code contre cette même personne.

Par dérogation à l'article 4 du titre préliminaire du Code de procédure pénale, le juge peut, en attendant que la décision sur l'action publique soit coulée en force de chose

jugée, allouer au demandeur une pension provisionnelle, en tenant compte de toutes les circonstances de la cause. Il peut subordonner l'octroi de cette pension provisionnelle à la constitution d'une garantie qu'il détermine et dont il fixe les modalités.

§ 3. Le tribunal fixe le montant de la pension alimentaire qui doit couvrir au moins l'état de besoin du bénéficiaire.

Il tient compte des revenus et possibilités des conjoints et de la dégradation significative de la situation économique du bénéficiaire. Pour apprécier cette dégradation, le juge se fonde notamment sur la durée du mariage, l'âge des parties, leur comportement durant le mariage quant à l'organisation de leurs besoins, la charge des enfants pendant la vie commune ou après celle-ci. Le juge peut décider le cas échéant que la pension sera dégressive et déterminer dans quelle mesure elle le sera.

La pension alimentaire ne peut excéder le tiers des revenus du conjoint débiteur.

§ 4. La durée de la pension ne peut être supérieure à celle du mariage.

En cas de circonstances exceptionnelles, si le bénéficiaire démontre qu'à l'expiration du délai visé à l'alinéa 1er, il reste, pour des raisons indépendantes de sa volonté, dans un état de besoin, le tribunal peut prolonger le délai. Dans ce cas, le montant de la pension correspond au montant nécessaire pour couvrir l'état de besoin du bénéficiaire.

§ 5. Si le défendeur prouve que l'état de besoin du demandeur résulte d'une décision prise unilatéralement par celui-ci, et sans que les besoins de la famille aient justifié ce choix, il peut être dispensé de payer la pension ou n'être tenu que de payer une pension réduite.

§ 6. Le tribunal qui accorde la pension constate que celle-ci est adaptée de plein droit aux fluctuations de l'indice des prix à la consommation.

Le montant de base de la pension correspond à l'indice des prix à la consommation du mois au cours duquel le jugement ou l'arrêt prononçant le divorce est coulé en force de chose jugée, à moins que le tribunal n'en décide autrement. Tous les douze mois, le montant de la pension est adapté en fonction de la hausse ou de la baisse de l'indice des prix à la consommation du mois correspondant.

Ces modifications sont appliquées à la pension dès l'échéance qui suit la publication au Moniteur belge de l'indice nouveau à prendre en considération.

Le tribunal peut, dans certains cas, appliquer un autre système d'adaptation de la pension au coût de la vie.

§ 7. [2 Sauf si les parties ont convenu expressément le contraire, le tribunal peut, ultérieurement, à la demande d'une des parties, augmenter, réduire ou supprimer la pension, si, à la suite de circonstances nouvelles et indépendantes de la volonté des parties, son montant n'est plus adapté.]2

De même, si à la suite de la dissolution du mariage, la liquidation-partage du patrimoine commun ou de l'indivision ayant existé entre les époux entraîne une modification de leur situation financière qui justifie une adaptation de la pension alimentaire ayant fait l'objet d'un jugement ou d'une convention intervenus avant l'établissement de comptes de la liquidation, le tribunal peut adapter la pension, [2 ...]2

§ 8. La pension peut à tout moment être remplacée, de l'accord des parties, par un capital homologué par le tribunal. A la demande du débiteur de la pension, le tribunal peut également accorder à tout moment la capitalisation.

§ 9. Les époux ne peuvent pas renoncer aux droits à la pension alimentaire avant la dissolution du mariage.

Ils peuvent néanmoins transiger, en cours de procédure, sur le montant de cette pension, aux conditions fixées par l'article 1257 du Code judiciaire.

§ 10. La pension n'est plus due au décès du débiteur, mais le bénéficiaire peut demander des aliments à charge de la succession aux conditions prévues à l'article 205bis, §§ 2, 3, 4 et 5.

La pension prend, en toute hypothèse, définitivement fin en cas de remariage du bénéficiaire de la pension ou au moment où ce dernier fait une déclaration de cohabitation légale, sauf convention contraire des parties.

Le juge peut mettre fin à la pension lorsque le bénéficiaire vit maritalement avec une autre personne.

§ 11. Le tribunal peut décider qu'en cas de défaut d'exécution par le débiteur de son obligation de paiement, le bénéficiaire de la pension sera autorisé à percevoir les revenus de celui-ci ou ceux des biens qu'il administre en vertu de leur régime matrimonial, ainsi que toutes autres sommes qui lui sont dues par des tiers.

Cette décision est opposable à tout tiers débiteur, actuel ou futur, sur la notification qui leur en est faite par le greffier à la requête du demandeur.

§ 12. [1 ...]1.

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(1)<L 2010-03-19/05, art. 6, 048; En vigueur : 01-08-2010; voir également l'art. 17>

(2)<L 2010-06-02/23, art. 2, 051; En vigueur : 01-07-2010>

Art. 301bis. [Abrogé] <L 2007-04-27/00, art. 8, 034; En vigueur : 01-09-2007>

Art. 302. <L 1995-04-13/37, art. 3, 003; En vigueur : 03-06-1995> Après la dissolution du mariage par le divorce, l'autorité sur la personne de l'enfant et l'administration de ses biens sont exercées conjointement par les père et mère ou par celui à qui elles ont été confiées, soit par [l'accord des parties homologué conformément à l'article 1256] du Code judiciaire, soit par la décision ordonnée par le président statuant en référé conformément à l'article 1280 du Code judiciaire, sans préjudice de l'article 387bis du présent Code. <L 2007-04-27/00, art. 9, 034; En vigueur : 01-09-2007>

Art. 303. [abrogé] <L 1995-04-13/37, art. 4, 003; En vigueur : 03-06-1995>

Art. 304. La dissolution du mariage par le divorce [prononcé] en justice, ne privera les enfants nés de ce mariage, d'aucun des avantages qui leur étaient assurés par les lois, ou par les conventions matrimoniales de leurs père et mère; mais il n'y aura d'ouverture aux droits des enfants que de la même manière et dans les mêmes circonstances où ils se seraient ouverts s'il n'y avait pas eu de divorce. <L 2007-04-27/00, art. 10, 034; En vigueur : 01-09-2007>

Art. 305. [Abrogé] <L 01-07-1972, art. 12>.

Art. 306. [Abrogé] <L 2007-04-27/00, art. 11, 1°, 034; En vigueur : 01-09-2007>

Art. 307. [Abrogé] <L 2007-04-27/00, art. 11, 2°, 034; En vigueur : 01-09-2007>

Art. 307bis. [Abrogé] <L 2007-04-27/00, art. 11, 3°, 034; En vigueur : 01-09-2007>

## **Articles 308 – 311quater of the Civil Code**

### **CHAPITRE V. - DE LA SEPARATION DE CORPS.**

Art. 308. <L 2007-04-27/00, art. 12, 034; En vigueur : 01-09-2007> Le devoir de secours subsiste après le prononcé de la séparation de corps.

Art. 309. [Abrogé] <L 15-12-1949, art. 29>.

Art. 310. [Abrogé] <L 10-10-1967, art. 18>.

Art. 310bis. [Abrogé] <L 10-10-1967, art. 18>.

Art. 311. La séparation de corps emportera toujours séparation de biens.

Art. 311bis. <L 2007-04-27/00, art. 13, 034; En vigueur : 01-09-2007> Les articles <229>, 299, 302 et 304 du même Code sont applicables à la séparation de corps.

Art. 311ter. [Abrogé] <L 20-07-1962, art. 25>.

Art. 311quater. [Abrogé] <L 20-07-1962, art. 25>.

## **Articles 1387-1474 of the Civil Code**

### **TITRE V. - DES REGIMES MATRIMONIAUX.**

#### **CHAPITRE I. - DISPOSITIONS GENERALES.**

Art. 1387. <L 14-07-1976, art. 2>

Les époux règlent leurs conventions matrimoniales comme ils le jugent à propos, pourvu qu'elles ne contiennent aucune disposition contraire à l'ordre public ou aux bonnes moeurs.

Art. 1388. <L 14-07-1976, art. 2>

Les époux ne peuvent déroger aux règles qui fixent leurs droits et devoirs respectifs, ni à celles relatives à l'autorité parentale et à la tutelle ou déterminant l'ordre légal des successions.

[Les époux peuvent, par contrat de mariage ou par acte modificatif, si l'un d'eux a à ce moment un ou plusieurs descendants issus d'une relation antérieure à leur mariage ou adoptés avant leur mariage ou des descendants de ceux-ci, conclure, même sans réciprocité, un accord complet ou partiel relatif aux droits que l'un peut exercer dans la succession de l'autre. Cet accord ne porte pas préjudice au droit de l'un de disposer, par testament ou par acte entre vifs, au profit de l'autre et ne peut en aucun cas priver le conjoint survivant du droit d'usufruit portant sur l'immeuble affecté au jour de l'ouverture de la succession du prémourant au logement principal de la famille et des meubles meublants qui le garnissent, aux conditions prévues à l'article 915bis, §§ 2 à 4.] <L 2003-04-22/46, art. 5, 013 ; En vigueur : 01-06-2003>

Art. 1389. <L 14-07-1976, art. 2>

Les époux ne peuvent établir leurs conventions matrimoniales par simple référence à une législation abrogée [...]. Ils peuvent déclarer qu'ils adoptent un des régimes organisés par le présent titre. <L 2004-07-16/31, art. 132, 014; En vigueur : 01-10-2004>

Art. 1390. <L 14-07-1976, art. 2>

A défaut de conventions particulières, les règles établies au chapitre II du présent titre forment le droit commun.

Art. 1391. <L 14-07-1976, art. 2>

Le régime matrimonial, soit légal, soit conventionnel, prend effet, nonobstant toute convention contraire, à la célébration du mariage.

Art. 1392. <L 14-07-1976, art. 2>

Toutes conventions matrimoniales reçues avant la célébration du mariage et toutes modifications conventionnelles du régime matrimonial sont constatées par acte devant notaire.

Art. 1393. <L 14-07-1976, art. 2>

Avant la célébration du mariage, nulle modification ne peut être apportée aux conventions matrimoniales sans la présence et le consentement simultané de toutes les personnes qui y ont été parties.

Ces modifications sont sans effet à l'égard des tiers si elles n'ont été écrites à la suite de la minute du contrat de mariage; le notaire est obligé de reproduire ces modifications dans les expéditions et grosses qu'il délivre du contrat de mariage.

Art. 1394. <L 2008-07-18/44, art. 2, 019; En vigueur : 01-11-2008> § 1er. Les époux peuvent, au cours du mariage, apporter à leur régime matrimonial toutes modifications qu'ils jugent à propos et même en changer entièrement.

§ 2. Si l'un des époux le demande, l'acte portant modification du régime matrimonial est précédé de l'inventaire de tous les biens meubles et immeubles et des dettes des époux.

Un inventaire est requis lorsque la modification du régime matrimonial entraîne la liquidation du régime préexistant.

Sauf dans le cas visé à l'alinéa 2, l'inventaire peut être fait sur déclarations, pour autant que les deux époux y consentent.

L'inventaire est constaté par acte devant notaire.

Art. 1395. <L 2008-07-18/44, art. 3, 019; En vigueur : 01-11-2008>

§ 1er. Dans le mois qui suit l'acte modificatif, le notaire notifie un extrait de l'acte modificatif à l'officier de l'état civil du lieu où le mariage a été célébré. Celui-ci mentionne en marge de l'acte de mariage la date de l'acte modificatif et le nom du notaire qui l'a reçu.

Lorsque le mariage n'a pas été célébré en Belgique, l'extrait est transmis à l'officier de l'état civil du premier district de Bruxelles, qui le transcrit dans le registre des actes de mariage.

Dans le même délai, le notaire qui a reçu l'acte modificatif notifie un extrait de cet acte au notaire détenteur de la minute du contrat de mariage modifié. Celui-ci en fait mention au pied de la minute et est chargé de reproduire cette mention dans les expéditions et grosses qu'il délivre du contrat originaire.

§ 2. Le notaire procède aux publications visées au paragraphe 1er sous peine d'une amende de vingt-six euros à cent euros, sous peine de destitution et sous peine d'engager sa responsabilité envers les créanciers s'il est prouvé que l'omission résulte d'une collusion.

§ 3. Un acte étranger portant modification du régime matrimonial peut, s'il remplit les conditions requises pour sa reconnaissance en Belgique, être mentionné en marge d'un acte établi par un notaire belge et être joint à cet acte. Cette formalité est effectuée à titre de publicité de la mutation et n'a pas pour effet de rendre celle-ci opposable aux tiers.

Art. 1396. <L 2008-07-18/44, art. 4, 019; En vigueur : 01-11-2008>

§ 1er. Dans le mois qui suit l'établissement de l'acte modificatif, le notaire publie l'extrait des modifications conventionnelles du régime matrimonial au Moniteur belge. Cette publication n'est pas requise pour les modifications ayant trait à une disposition portant modification des règles de liquidation du patrimoine commun, adoptées conformément aux articles 1457 à 1464, ou aux institutions contractuelles.

§ 2. Les modifications conventionnelles ont effet entre époux à dater de l'acte modificatif.

Elles n'ont effet à l'égard des tiers que du jour de la publication au Moniteur belge visée au paragraphe 1er, sauf si, dans leurs conventions conclues avec des tiers, les époux ont informé ceux-ci de la modification.

Art. 1397. <L 14-07-1976, art. 2>

[Le mineur habile à contracter mariage peut consentir toutes les conventions dont ce contrat est susceptible; les conventions et donations qu'il a faites sont valables pourvu qu'il ait été assisté de ses père et mère ou de l'un d'eux dans le contrat.

A défaut de cette assistance, ces conventions et donations peuvent être autorisées par le tribunal de la jeunesse.] <L 19-01-1990, art. 37>

Le mineur est habile à modifier son régime matrimonial avec la même assistance que celle qui est requise pour la conclusion d'un contrat de mariage. [...]. <L 2008-07-18/44, art. 5, 019; En vigueur : 01-11-2008>

## **CHAPITRE II. - DU REGIME LEGAL.**

### **SECTION I. - DES PATRIMOINES ET DU EMPLOI.**

Art. 1398. <L 2003-02-13/36, art. 17, 010; En vigueur : 01-06-2003>

Le régime légal est fondé sur l'existence de trois patrimoines : le patrimoine propre de chacun des deux époux et le patrimoine commun aux deux époux, tels qu'ils sont définis par les articles suivants.

#### *§ 1. DE L'ACTIF DES PATRIMOINES PROPRES.*

Art. 1399. <L 14-07-1976, art. 2>

Sont propres, les biens et créances appartenant à chacun des époux au jour du mariage et ceux que chacun acquiert au cours du régime, par donation, succession ou testament.

A l'égard des tiers, la propriété dans le chef de chacun des époux d'un bien qui n'a pas de caractère personnel doit être établie, à défaut d'inventaire ou à l'encontre d'une possession réunissant les conditions de l'article 2229, par des titres ayant date certaine, des documents émanant d'un service public ou des mentions figurant dans des registres, documents ou bordereaux imposés par la loi ou consacrés par l'usage et régulièrement tenus ou établis.

Entre époux, la preuve de la propriété des mêmes biens peut se faire par toutes voies de droit, témoignages et présomptions compris et même par commune renommée.

Art. 1400. <L 14-07-1976, art. 2>

Sont propres, quel que soit le moment de l'acquisition et sauf récompense s'il y a lieu :

1. les accessoires d'immeubles ou de droits immobiliers propres;
2. les accessoires de valeurs mobilières propres;
3. les biens cédés à l'un des époux par un de ses ascendants soit pour le remplir de ce qui lui est dû, soit à charge de payer une dette de l'ascendant envers un tiers;
4. la part acquise par l'un des époux dans un bien dont il est déjà copropriétaire;
5. les biens et droits qui, par l'effet d'une subrogation réelle, remplacent des propres, ainsi que les biens acquis en emploi ou en remploi;
6. les outils et les instruments servant à l'exercice de la profession;
7. les droits résultant d'une assurance de personnes, souscrite par le bénéficiaire lui-même, acquis par lui au décès de son conjoint ou après la dissolution du régime.

Art. 1401. <L 14-07-1976, art. 2>

Sont propres, quel que soit le moment de l'acquisition :

1. les vêtements et objets à usage personnel;
2. le droit de propriété littéraire, artistique ou industrielle;

3. le droit à réparation d'un préjudice corporel ou moral personnel;
4. le droit aux pensions, rentes viagères ou allocations de même nature, dont un seul des époux est titulaire;
- [5. les droits résultant de la qualité d'associé liés à des parts ou actions sociales communes dans des sociétés où toutes les parts ou actions sociales sont nominatives, si celles-ci sont attribuées à un seul conjoint ou inscrites à son nom.] <L 01-04-1987, art. 1>

## *§ 2. DU EMPLOI.*

Art. 1402. <L 14-07-1976, art. 2>

Le remploi est censé fait à l'égard d'un des époux toutes les fois que lors d'une acquisition immobilière, il a déclaré qu'elle était faite pour lui tenir lieu de remploi et payée à concurrence de plus de la moitié, au moyen du produit de l'aliénation d'un immeuble propre ou de fonds dont le caractère propre est dûment établi.

Art. 1403. <L 14-07-1976, art. 2>

L'époux, qui acquiert un bien immobilier au moyen de fonds communs, peut faire dans l'acte une déclaration de remploi anticipé. Pour autant que l'époux rembourse, dans les deux ans de la date de l'acte, plus de la moitié des sommes prélevées sur le patrimoine commun, le bien acquis aura le caractère de propre à dater du remboursement.

Art. 1404. <L 14-07-1976, art. 2>

Le remploi est censé fait à l'égard d'un époux lorsqu'il est établi que l'acquisition de biens meubles a été payée au moyen de fonds ou du produit de l'aliénation d'autres biens dont le caractère de propre est établi conformément aux dispositions des articles précédents.

## *§ 3. DE L'ACTIF DU PATRIMOINE COMMUN.*

Art. 1405. <L 14-07-1976, art. 2>

Sont communs :

1. les revenus de l'activité professionnelle de chacun des époux, tous revenus ou indemnités en tenant lieu ou les complétant, ainsi que les revenus provenant de l'exercice de mandats publics ou privés;
2. les fruits, revenus, intérêts de leurs biens propres;
3. les biens donnés ou légués aux deux époux conjointement ou à l'un d'eux avec stipulation que ces biens seront communs;
4. tous biens dont il n'est pas prouvé qu'ils sont propres à l'un des époux par application d'une disposition de la loi.

## *§ 4. DU PASSIF DES PATRIMOINES PROPRE ET COMMUN.*

Art. 1406. <L 14-07-1976, art. 2>

Les dettes des époux antérieures au mariage et celles qui grèvent les successions et libéralités qui leur étoient durant le mariage, leur restent propres.

Art. 1407. <L 14-07-1976, art. 2>

Sont propres :

- les dettes contractées par l'un des époux dans l'intérêt exclusif de son patrimoine propre;
- les dettes résultant d'une sûreté personnelle ou réelle donnée par un des époux dans un intérêt autre que celui du patrimoine commun;
- les dettes provenant de l'exercice par l'un des époux d'une profession qui lui a été interdite en vertu de l'article 216 ou d'actes que l'un des époux ne pouvait accomplir sans le concours de son conjoint ou l'autorisation de justice;
- les dettes résultant d'une condamnation pénale ou d'un délit ou quasi-délict commis par un des époux.

Art. 1408. <L 14-07-1976, art. 2>

Sont communes :

- les dettes contractées conjointement ou solidairement par les deux époux;
- les dettes contractées par un des époux pour les besoins du ménage et l'éducation des enfants;
- les dettes contractées par un des époux dans l'intérêt du patrimoine commun;
- les dettes grevant les libéralités faites aux deux époux conjointement ou à l'un d'eux avec stipulation que les biens donnés ou légués seront communs;
- la charge des intérêts qui sont l'accessoire de dettes propres à l'un des époux;
- les dettes alimentaires au profit des descendants d'un seul des époux;
- les dettes dont il n'est pas prouvé qu'elles sont propres à l'un des époux en application d'une disposition de loi.

## **SECTION II. - DES DROITS DES CREANCIERS.**

Art. 1409. <L 14-07-1976, art. 2>

Le paiement d'une dette propre à l'un des époux ne peut être poursuivi que sur son patrimoine propre et ses revenus, sans préjudice des articles suivants.

Art. 1410. <L 14-07-1976, art. 2>

Le paiement des dettes propres à l'un des époux en vertu de l'article 1406 peut être poursuivi sur le patrimoine commun dans la mesure où il s'est enrichi par l'absorption de biens propres au débiteur.

La preuve de l'enrichissement qui incombe au créancier, peut être faite par toutes voies de droit, témoignages et présomptions compris.

Art. 1411. <L 14-07-1976, art. 2>

Le paiement des dettes provenant de l'exercice par un des époux d'une profession qui lui a été interdite par application de l'article 216 ou d'actes que l'un des époux ne pouvait accomplir sans le concours de son conjoint ou l'autorisation de justice, ne peut être poursuivi sur le patrimoine commun que dans la mesure du profit qu'il a tiré de cette activité ou de ces actes.

La preuve du profit, qui incombe au créancier, peut être faite par toutes voies de droit, témoignages et présomptions compris.

Art. 1412. <L 14-07-1976, art. 2>

Les mêmes règles valent pour les dettes résultant d'une condamnation pénale prononcée contre un seul des époux ou d'un délit ou quasi-délict commis par lui.

En outre, en cas d'insuffisance du patrimoine propre de l'époux débiteur, le paiement de ces dettes pourra être poursuivi sur le patrimoine commun à concurrence de la moitié de son actif net.

Art. 1413. <L 14-07-1976, art. 2>

Le paiement d'une dette contractée par les deux époux, même à des titres différents, peut être poursuivi tant sur le patrimoine propre de chacun d'eux que sur le patrimoine commun.

Art. 1414. <L 14-07-1976, art. 2>

Le paiement des dettes communes peut être poursuivi tant sur le patrimoine propre de chacun des époux que sur le patrimoine commun.

Toutefois ne peut être poursuivi sur le patrimoine propre de l'époux non contractant le paiement :

1. des dettes contractées par un des époux pour les besoins du ménage et l'éducation des enfants lorsqu'elles entraînent des charges excessives, eu égard aux ressources du ménage;
2. des intérêts qui sont l'accessoire des dettes propres à l'un des époux;
3. des dettes contractées par un des époux dans l'exercice de sa profession;
4. des dettes alimentaires au profit des descendants d'un seul des époux.

### **SECTION III. - DE LA GESTION DU PATRIMOINE COMMUN.**

Art. 1415. <L 14-07-1976, art. 2>

La gestion comprend tous pouvoirs d'administration, de jouissance et de disposition.

Les époux gèrent le patrimoine commun dans l'intérêt de la famille, conformément aux règles suivantes.

Art. 1416. <L 14-07-1976, art. 2> Le patrimoine commun est géré par l'un ou l'autre époux qui peut exercer seul les pouvoirs de gestion, à charge pour chacun de respecter les actes de gestion accomplis par son conjoint.

Art. 1417. <L 14-07-1976, art. 2>

L'époux qui exerce une activité professionnelle accomplit seul tous actes de gestion nécessaires à celle-ci.

Lorsque les deux époux exercent ensemble une même activité professionnelle, le concours des deux est requis pour les actes autres que d'administration.

Art. 1418. <L 14-07-1976, art. 2>

Sans préjudice des dispositions de l'article 1417, le consentement des deux époux est requis pour :

1. a) acquérir, aliéner ou grever de droits réels les biens susceptibles d'hypothèque;
- b) acquérir, céder ou donner en gage des fonds de commerce ou exploitations de toute nature;
- c) conclure, renouveler ou résilier des baux de plus de neuf ans, consentir des baux commerciaux et des baux à ferme.
2. a) céder ou donner en gage des créances hypothécaires;
- b) percevoir le prix de l'aliénation d'immeubles ou le remboursement de créances hypothécaires, donner mainlevée des inscriptions;
- c) accepter ou refuser un legs ou une donation lorsqu'il est stipulé que les biens légués ou donnés seront communs;
- d) contracter un emprunt;
- e) [conclure un contrat de crédit, visé par la loi du 12 juin 1991 relative au crédit à la consommation], sauf si ces actes sont nécessaires aux besoins du ménage ou à l'éducation des enfants. <L 2003-03-24/40, art. 75, 012; En vigueur : 01-06-2003>

Art. 1419. <L 14-07-1976, art. 2>

Un époux ne peut sans le consentement de l'autre disposer entre vifs à titre gratuit de biens faisant partie du patrimoine commun.

Cette disposition ne s'applique pas aux libéralités dispensées du rapport en vertu de l'article 852, ni à celles faites en faveur de l'époux survivant.

Art. 1420. <L 14-07-1976, art. 2>

Si le conjoint refuse sans motif légitime de donner son consentement ou s'il se trouve dans l'impossibilité de manifester sa volonté, l'autre époux peut se faire autoriser par le

tribunal de première instance à accomplir seul l'un des actes énumérés aux articles 1417, alinéa 2, 1418 et 1419.

Art. 1421. <L 14-07-1976, art. 2>

Chaque époux peut demander au juge de paix d'interdire à son conjoint d'accomplir tout acte de gestion pouvant lui causer préjudice ou nuire aux intérêts de la famille.

Le juge de paix peut autoriser l'acte ou soumettre son autorisation à des conditions déterminées.

Art. 1422. <L 14-07-1976, art. 2>

Le tribunal de première instance peut, à la demande de l'un des époux justifiant d'un intérêt légitime et sans préjudice des droits des tiers de bonne foi, annuler l'acte accompli par l'autre époux :

1° en violation des dispositions des articles 1417, alinéa 2, 1418 et 1419; l'annulation des actes repris au 2. de l'article 1418 suppose en outre l'existence d'une lésion;

2° en violation d'une interdiction prononcée ou des conditions imposées par justice;

3° en fraude des droits du demandeur.

La preuve de sa bonne foi incombe au tiers contractant.

Art. 1423. <L 14-07-1976, art. 2>

L'action en nullité doit être introduite à peine de forclusion dans l'année du jour où l'époux demandeur a eu connaissance de l'acte accompli par son conjoint et au plus tard avant la liquidation définitive du régime.

Si l'époux décède avant que la forclusion soit atteinte, ses héritiers disposent à dater du décès d'un nouveau délai d'un an.

Art. 1424. <L 14-07-1976, art. 2>

Les legs faits par un des époux de la totalité ou d'une quotité du patrimoine commun ne peuvent excéder sa part dans ce patrimoine.

Si le legs porte sur des biens déterminés, le légataire ne peut les réclamer en nature que si ces biens, par l'effet du partage, sont attribués aux héritiers du testateur; dans le cas contraire, le légataire a droit à charge de la succession du testateur, à la valeur des biens légués, sauf réduction dans les deux cas s'il y a lieu.

#### **SECTION IV. - DE LA GESTION DU PATRIMOINE PROPRE.**

Art. 1425. <L 14-07-1976, art. 2>

Chaque époux a la gestion exclusive de son patrimoine propre, sans préjudice de l'article 215, § 1er.



## **DISPOSITION COMMUNE A LA GESTION DES PATRIMOINES PROPRES ET COMMUNS.**

Art. 1426. <L 14-07-1976, art. 2>

§ 1. Si l'un des époux fait preuve d'inaptitude dans la gestion tant du patrimoine commun que de son patrimoine propre ou met en péril les intérêts de la famille, l'autre époux peut demander que tout ou partie des pouvoirs de gestion lui soit retiré.

Le tribunal peut confier cette gestion, soit au demandeur, soit à un tiers qu'il désigne.

Cette décision peut être révoquée si les motifs qui l'ont justifiée cessent d'exister.

§ 2. Toute décision judiciaire retirant à l'un des époux ses pouvoirs de gestion ou lui rendant ces pouvoirs est notifiée par le greffier à l'officier de l'état civil du lieu où le mariage a été célébré; celui-ci en fera mention en marge de l'acte de mariage.

Si le mariage n'a pas été célébré en Belgique, la décision sera notifiée à l'officier de l'état civil du premier district de Bruxelles qui la transcrit dans le registre des actes de mariage.

§ 3. Si l'époux à qui la gestion est retirée ou rendue est commerçant, le greffier en avise [1 la Banque-Carrefour des Entreprises]1.

§ 4. L'article 1253 du Code judiciaire est applicable.

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(1) <L 2009-12-30/14, art. 15, 022; En vigueur : 25-01-2010>

## **SECTION V. - DE LA DISSOLUTION DU REGIME LEGAL.**

### *§ 1. DISPOSITIONS GENERALES.*

Art. 1427. <L 14-07-1976, art. 2>

Le régime légal se dissout :

- 1° par le décès d'un des époux;
- 2° par le divorce et la séparation de corps;
- 3° par la séparation de biens judiciaire;
- 4° par l'adoption d'un autre régime matrimonial.

Art. 1428. <L 14-07-1976, art. 2> En cas de dissolution du régime légal par le décès d'un des époux, la séparation de biens judiciaire, le divorce ou la séparation de corps pour les causes [reprises à l'article 229], les époux ou le conjoint survivant seront tenus de faire inventaire et estimation des biens meubles et des dettes communes. <L 2007-04-27/00, art. 15, 034; En vigueur : 01-09-2007>

[Cet inventaire, dont le contenu est réglé par les articles 1175 et suivants du Code judiciaire, peut se faire sous seing privé lorsque toutes les parties intéressées majeures y consentent et, en cas d'existence de mineurs ou d'incapables, moyennant l'accord du juge de paix saisi par requête.] <L 2001-04-29/39, art. 41, 008; En vigueur : 01-08-2001>

Il doit être établi dans les trois mois du décès, de la transcription du divorce ou de la séparation de corps ou de la publication au Moniteur belge de l'extrait de la décision prononçant la séparation de biens.

A défaut d'inventaire dans ce délai, toute partie intéressée peut établir la consistance du patrimoine commun par toutes voies de droit, même la commune renommée.

Art. 1429. <L 14-07-1976, art. 2> La dissolution du régime légal opérée par le divorce ou la séparation de corps pour les causes [reprises à l'article 229] ne donne pas ouverture aux droits de survie. <L 2007-04-27/00, art. 16, 034; En vigueur : 01-09-2007>

Toutefois, l'époux au profit duquel a été stipulée une institution contractuelle, en conserve le bénéfice lors du décès de son conjoint, sauf la déchéance prévue aux articles 299 et 311bis.

La dissolution du régime légal opérée par la séparation de biens ne donne pas ouverture aux droits de survie; toutefois, l'époux au profit duquel ils ont été stipulés, conserve la faculté de les exercer au décès de son conjoint.

Art. 1430. <L 14-07-1976, art. 2>

La dissolution du régime donne lieu à liquidation et à partage.

Au préalable, il est établi pour chaque époux un compte des récompenses entre le patrimoine commun et son patrimoine propre.

Il est procédé ensuite au règlement du passif et au partage de l'actif net.

Les dispositions du Code judiciaire concernant les partages et licitations et celles du Code civil concernant le partage des successions sont applicables.

Art. 1431. <L 14-07-1976, art. 2>

Les héritiers et successeurs des époux ont les mêmes droits et sont tenus des mêmes obligations que l'époux qu'ils représentent.

## *§ 2. DES COMPTES DE RECOMPENSE.*

Art. 1432. <L 14-07-1976, art. 2>

Il est dû récompense par chaque époux à concurrence des sommes qu'il a prises sur le patrimoine commun pour acquitter une dette propre et généralement toutes les fois qu'il a tiré un profit personnel du patrimoine commun.

Art. 1433. <L 14-07-1976, art. 2>

Il est de même dû récompense au patrimoine commun à concurrence du préjudice qu'il a subi en conséquence d'un des actes énumérés à l'article 1422, lorsque ce préjudice n'a pas été entièrement réparé par l'annulation de l'acte ou lorsque l'annulation n'a pas été demandée ou obtenue.

Art. 1434. <L 14-07-1976, art. 2>

Il est dû récompense par le patrimoine commun à concurrence des fonds propres ou provenant de l'aliénation d'un bien propre qui sont entrés dans ce patrimoine, sans

qu'il y ait eu emploi ou remploi et généralement toutes les fois qu'il a tiré profit des biens propres d'un époux.

Art. 1435. <L 14-07-1976, art. 2>

La récompense ne peut être inférieure à l'appauvrissement du patrimoine créancier. Toutefois, si les sommes et fonds entrés dans le patrimoine débiteur ont servi à acquérir, conserver ou améliorer un bien, la récompense sera égale à la valeur ou à la plus-value acquise par ce bien, soit à la dissolution du régime, s'il se trouve à ce moment dans le patrimoine débiteur, soit au jour de son aliénation s'il a été aliéné auparavant; si un nouveau bien a remplacé le bien aliéné, la récompense est évaluée sur ce nouveau bien.

Art. 1436. <L 14-07-1976, art. 2>

Le droit aux récompenses s'établit par toutes voies de droit.

Elles portent intérêt de plein droit du jour de la dissolution du régime.

Art. 1437. <L 14-07-1976, art. 2>

Les récompenses dues par l'époux au patrimoine commun et celles que le patrimoine commun lui doit s'annulent à concurrence du montant le plus faible.

Art. 1438. <L 14-07-1976, art. 2>

Si les époux sont tous deux créanciers ou débiteurs de récompenses, leurs créances et dettes respectives s'annulent à concurrence du montant le plus faible.

Seul l'époux dont la créance ou la dette est la plus forte reste créancier ou débiteur d'une récompense égale à la différence entre les créances ou dettes respectives.

### *§ 3. DU REGLEMENT DU PASSIF.*

Art. 1439. <L 14-07-1976, art. 2>

Sans préjudice des droits des créanciers hypothécaires et privilégiés, les dettes communes dont, aux termes de l'article 1414, le paiement peut être poursuivi sur les trois patrimoines, sont payées avant celles dont le paiement ne peut être poursuivi que sur le patrimoine commun et celui d'un des époux.

Art. 1440. <L 14-07-1976, art. 2>

Chacun des époux répond sur l'ensemble de ses biens des dettes communes qui subsistent après le partage.

Toutefois, chaque époux ne répond des dettes communes pour le paiement desquelles son patrimoine propre ne pouvait être poursuivi durant le mariage qu'à concurrence de ce qu'il a reçu lors du partage.

Art. 1441. <L 14-07-1976, art. 2>

A défaut d'autre disposition dans l'acte de partage, l'époux qui après le partage paie une dette commune, a un recours contre l'autre époux à concurrence de la moitié de ce qu'il a payé.

#### *§ 4. DU REGLEMENT DES RECOMPENSES.*

Art. 1442. <L 14-07-1976, art. 2>

L'époux à qui une récompense reste due peut, avec l'accord de son conjoint ou à défaut avec l'autorisation du tribunal, prélever, lors du partage, des biens communs à concurrence de ce qui lui est dû et dont la valeur est, en cas de contestation, déterminée par le tribunal.

Ce prélèvement ne peut porter atteinte aux droits d'attribution reconnus à l'autre époux par les articles 1446 et 1447.

Art. 1443. <L 14-07-1976, art. 2>

L'époux qui reste débiteur d'une récompense en règle le montant en espèces, à moins que l'autre époux n'accepte de prélever, lors du partage, à due concurrence, des biens communs dont la valeur est, en cas de contestation, déterminée par le tribunal.

Art. 1444. <L 14-07-1976, art. 2>

L'époux qui n'a pu obtenir du patrimoine commun la totalité de sa récompense devient créancier de l'autre époux à concurrence de la moitié de ce qu'il n'a pas reçu

#### *§ 5. DU PARTAGE.*

Art. 1445. <L 14-07-1976, art. 2>

S'il reste un actif, il se partage par moitié.

Art. 1446. <L 14-07-1976, art. 2>

Lorsque le régime légal prend fin par le décès d'un des époux, le conjoint survivant peut se faire attribuer par préférence, moyennant soulte s'il y a lieu, un des immeubles servant au logement de la famille avec les meubles meublants qui le garnissent et l'immeuble servant à l'exercice de sa profession avec les meubles à usage professionnel qui le garnissent.

Art. 1447. <L 14-07-1976, art. 2>

Lorsque le régime légal prend fin par le divorce, la séparation de corps ou la séparation de biens, chacun des époux peut au cours des opérations de liquidation, demander au tribunal de faire application à son profit des dispositions visées à l'article 1446.

[Il est fait droit, sauf circonstances exceptionnelles, à la demande formulée par l'époux qui a été victime d'un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 de Code pénal ou d'une tentative d'un fait visé aux articles 375, 393, 394 ou 397 du même Code lorsque l'autre époux a été condamné de ce chef par une décision coulée en force de chose jugée.] <L 2007-04-27/00, art. 17, 034; En vigueur : 01-09-2007>

Le tribunal statue en considération des intérêts sociaux et familiaux en cause et des droits de récompense ou de créance au profit de l'autre époux.

Le tribunal fixe la date de l'exigibilité de la soulte éventuelle.

Art. 1448. <L 14-07-1976, art. 2>

L'époux qui a diverti ou recelé quelque bien du patrimoine commun est privé de sa part dans ledit bien.

Art. 1449. <L 14-07-1976, art. 2>

Sauf convention contraire, chacun des époux contribue pour moitié aux frais de liquidation et de partage.

### *§ 6. DES CREANCES ENTRE EPOUX.*

Art. 1450. <L 14-07-1976, art. 2>

Les créances que l'un des époux possède contre l'autre ne s'exercent, pendant la durée du régime légal, que sur les biens propres du débiteur.

Ces créances portent intérêt de plein droit du jour de la dissolution du régime.

### **CHAPITRE III. - DES CONVENTION QUI PEUVENT MODIFIER LE REGIME LEGAL.**

Art. 1451. <L 14-07-1976, art. 2>

Les époux qui ont adopté un régime en communauté ne peuvent déroger aux règles du régime légal qui concernent la gestion des patrimoines propres et commun. Sous réserve des dispositions des articles 1388 et 1389, ils peuvent, par contrat de mariage, apporter toute autre modification au régime légal.

Ils peuvent notamment convenir :

- que le patrimoine commun comprendra tout ou partie de leurs biens présents et futurs;
- qu'il y aura entre eux communauté universelle;
- que l'un des époux aura droit à un préciput;
- qu'en cas de dissolution du mariage par le décès d'un des époux, le partage du patrimoine commun se fera par parts inégales ou que tout ce patrimoine sera attribué à l'un des époux.

Ils restent soumis aux règles du régime légal auxquelles leur contrat de mariage ne déroge pas.

## *§ 1. DES CLAUSES EXTENSIVES DE L'ACTIF COMMUN.*

Art. 1452. <L 14-07-1976, art. 2>

Les époux peuvent convenir que tout ou partie des biens présents et futurs, meubles ou immeubles, visés à l'article 1399, feront partie du patrimoine commun.

Dans ce cas, les dettes visées à l'article 1406 seront à charge du patrimoine commun en proportion de la valeur au moment de l'apport des biens devenus communs par rapport à celle de l'ensemble des biens visés à l'article 1399.

Art. 1453. <L 14-07-1976, art. 2>

Lorsque les époux conviennent qu'il y aura entre eux communauté universelle, ils font entrer dans le patrimoine commun tous leurs biens présents et futurs à l'exception de ceux qui ont un caractère personnel et des droits exclusivement, attachés à la personne.

La communauté universelle supporte toutes les dettes.

Art. 1454. <L 14-07-1976, art. 2>

L'époux qui ne fait entrer dans le patrimoine commun qu'un ou plusieurs biens déterminés, dont la valeur sera indiquée pour chacun d'eux dans le contrat, peut limiter son apport à concurrence d'une certaine somme.

A la dissolution du régime, il lui est dû par le patrimoine commun une récompense égale à la différence entre la valeur au moment de l'apport des biens ainsi entrés dans le patrimoine commun et la somme à concurrence de laquelle ces biens ont été apportés.

Art. 1455. <L 14-07-1976, art. 2>

L'époux qui a fait au patrimoine commun l'apport de biens déterminés a, lors du partage, la faculté de reprendre les biens existants encore en nature en les imputant sur sa part à la valeur au moment du partage.

Art. 1456. <L 14-07-1976, art. 2>

Sauf stipulation contraire dans le contrat de mariage, l'époux qui fait entrer dans le patrimoine commun une quotité de ses biens présents ou futurs sans les déterminer individuellement, conserve sur eux les pouvoirs de gestion que lui attribue l'article 1425.

## *§ 2. DU PRECIPUT.*

Art. 1457. <L 14-07-1976, art. 2>

Les époux peuvent convenir que celui qui survivra ou l'un d'eux s'il survit, aura le droit de prélever sur le patrimoine commun avant tout partage, soit une certaine somme,

soit certains biens en nature, soit une certaine quantité ou quotité d'une espèce déterminée de biens.

Art. 1458. <L 14-07-1976, art. 2>

Le préciput n'est point regardé comme une donation, mais comme une convention de mariage.

Il sera cependant considéré comme une donation, à concurrence de moitié, s'il a pour objet des biens présents ou futurs que l'époux prédécédé a fait entrer dans le patrimoine commun par une stipulation expresse du contrat de mariage.

Art. 1459. <L 14-07-1976, art. 2>

Lorsque la dissolution du régime est l'effet du divorce ou de la séparation de corps pour les causes [reprises à l'article 229], il n'y a pas lieu à délivrance du préciput. <L 2007-04-27/00, art. 18, 034; En vigueur : 01-09-2007>

Lorsque la dissolution du régime est l'effet de la séparation de biens, il n'y a pas lieu à délivrance actuelle du préciput; cependant, les époux ou l'époux au profit duquel il a été stipulé conservent leurs droits pour le cas de survie. Lorsque le préciput n'a été stipulé qu'au profit d'un des époux, celui-ci peut exiger une caution de son conjoint en garantie de ses droits.

Art. 1460. <L 14-07-1976, art. 2>

Les biens faisant l'objet du préciput peuvent être saisis pour le paiement des dettes communes, sauf, lorsque le préciput porte sur des biens en nature, le recours de l'époux bénéficiaire sur le reste du patrimoine commun.

Pareil recours peut également être exercé en cas d'aliénation par un des époux d'un bien en nature, objet du préciput.

### *§ 3. DES CLAUSES DEROGEANT A LA REGLE DU PARTAGE DU PATRIMOINE COMMUN.*

Art. 1461. <L 14-07-1976, art. 2>

Les époux peuvent convenir que celui qui survivra ou l'un d'eux s'il survit, recevra lors du partage une part autre que la moitié, voire tout le patrimoine.

Art. 1462. <L 14-07-1976, art. 2>

Lorsque les époux obtiennent des parts inégales dans le partage du patrimoine commun, ils sont tenus de contribuer au paiement des dettes communes dans la proportion de leur part dans l'actif, sans préjudice de l'application de l'article 1440.

Art. 1463. <L 14-07-1976, art. 2>

A défaut d'autre disposition dans l'acte de partage, l'époux qui après le partage paie une dette commune au-delà de la part qui lui incombe en vertu des articles précédents a un recours contre l'autre époux pour ce qu'il a payé au-delà de sa part.

Art. 1464. <L 14-07-1976, art. 2>

La stipulation de parts inégales et la clause d'attribution de tout le patrimoine commun ne sont pas regardées comme des donations, mais comme des conventions de mariage.

Elles sont cependant considérées comme des donations pour la part dépassant la moitié qu'elles attribuent au conjoint survivant dans la valeur, au jour du partage, des biens présents ou futurs que l'époux prédécédé a fait entrer dans le patrimoine commun par une stipulation expresse du contrat de mariage.

### *§ 4. DISPOSITION COMMUNE.*

Art. 1465. <L 14-07-1976, art. 2>

Dans le cas où il y aurait des enfants [qui ne leur sont pas communs], toute convention matrimoniale qui aurait pour effet de donner à l'un des époux au-delà de la quotité disponible, sera sans effet pour tout l'excédent; mais le partage égal des économies faites sur les revenus respectifs des époux, quoique inégaux, n'est pas considéré comme un avantage fait au préjudice des enfants [qui ne leur sont pas communs]. <L 2007-05-10/61, art. 3, 018; En vigueur : 13-08-2007>

## **CHAPITRE IV. - DE LA SEPARATION DE BIENS.**

### **SECTION I. - DE LA SEPARATION DE BIENS CONVENTIONNELLE.**

Art. 1466. <L 14-07-1976, art. 2>

Lorsque les époux ont stipulé par contrat de mariage qu'ils seront séparés de biens, chacun d'eux a seul tous pouvoirs d'administration, de jouissance et de disposition, sans

préjudice de l'application de l'article 215, § 1er; il garde propres ses revenus et économies.

Art. 1467. <L 14-07-1976, art. 2>

Lorsqu'un époux a laissé l'administration de ses biens à son conjoint, celui-ci n'est tenu, soit sur la demande que le premier pourrait lui faire, soit à la dissolution du régime, qu'à la représentation des fruits existants et il n'est point comptable de ceux qui ont été consommés jusqu'alors.

Art. 1468. <L 14-07-1976, art. 2>

La preuve de la propriété d'un bien se fait tant entre époux que vis-à-vis des tiers selon les règles des alinéas 2 et 3 de l'article 1399.

Les biens meubles dont la propriété dans le chef d'un seul des époux n'est pas établie, sont considérés comme indivis entre eux.

Art. 1469. <L 14-07-1976, art. 2>

Sans préjudice de l'application de l'article 215, § 1er et sous réserve des dispositions de l'alinéa 2 de l'article 815, chacun des époux peut à tout moment demander le partage de tout ou partie des biens indivis entre eux.

Le rachat par l'un des époux de la part de l'autre époux dans un ou plusieurs biens ne peut avoir lieu qu'en vente publique ou moyennant l'autorisation du tribunal.

## **SECTION II. - DE LA SEPARATION DE BIENS JUDICIAIRE.**

Art. 1470. <L 14-07-1976, art. 2>

Un des époux ou son représentant légal peut poursuivre en justice la séparation de biens lorsqu'il apparaît que par le désordre des affaires de son conjoint, sa mauvaise gestion ou la dissipation de ses revenus, le maintien du régime existant met en péril les intérêts de l'époux demandeur.

Art. 1471. <L 14-07-1976, art. 2>

Les créanciers de l'un ou de l'autre époux ne peuvent pas demander la séparation de biens.

Ils peuvent intervenir à l'instance.

Art. 1472. <L 14-07-1976, art. 2>

La séparation de biens judiciaire remonte quant à ses effets au jour de la demande, tant entre époux qu'à l'égard des tiers.

Art. 1473. <L 14-07-1976, art. 2>

La décision prononçant la séparation de biens est de nul effet si l'état liquidatif du régime antérieur n'a pas été dressé par acte authentique dans l'année de la publication au Moniteur belge d'un extrait de cette décision.

Le délai peut être prorogé sur requête par la juridiction qui a prononcé la séparation de biens.

Art. 1474. <L 14-07-1976, art. 2>

Les créanciers d'un des époux peuvent s'opposer à ce que la liquidation s'opère hors de leur présence et y intervenir à leurs frais.

Ils peuvent en outre, dans un délai de six mois prenant cours à l'expiration de celui prévu à l'article précédent, se pourvoir contre une liquidation opérée en fraude de leurs droits.

## Article 1477 of the Civil Code

Art. 1477. <L 1998-11-23/35, art. 2, 004; En vigueur : 01-01-2000>

§ 1er. Les dispositions du présent article qui règlent les droits, obligations et pouvoirs des cohabitants légaux sont applicables par le seul fait de la cohabitation légale.

§ 2. Les articles 215, 220, § 1er, et 224, § 1er, 1, s'appliquent par analogie à la cohabitation légale.

§ 3. Les cohabitants légaux contribuent aux charges de la vie commune en proportion de leurs facultés.

§ 4. Toute dette contractée par l'un des cohabitants légaux pour les besoins de la vie commune et des enfants qu'ils éduquent oblige solidairement l'autre cohabitant. Toutefois, celui-ci n'est pas tenu des dettes excessives eu égard aux ressources des cohabitants.

[§ 5. Dans les limites de ce que le cohabitant légal survivant a recueilli dans la succession de son cohabitant légal prédécédé en vertu de l'article 745octies, § 1er, et des avantages que celui-ci lui aurait consentis par donation, testament ou convention visée à l'article <1478>, le cohabitant légal survivant est tenu de l'obligation établie à l'article 203, § 1er, envers les enfants du cohabitant légal prédécédé dont il n'est pas lui-même le père ou la mère.] <L 2007-03-28/39, art. 9, 016; En vigueur : 18-05-2007>

[§ 6. La succession du cohabitant légal prédécédé sans laisser de postérité doit des aliments aux ascendants du défunt qui sont dans le besoin au moment du décès, à concurrence des droits successoraux dont ils sont privés par des libéralités au profit du cohabitant légal survivant.] <L 2007-03-28/39, art. 9, 016; En vigueur : 18-05-2007>

## Article 1478 of the Civil Code

Art. 1478. <L 1998-11-23/35, art. 2, 004; En vigueur : 01-01-2000>

Chacun des cohabitants légaux conserve les biens dont il peut prouver qu'ils lui appartiennent, les revenus que procurent ces biens et les revenus du travail.

Les biens dont aucun des cohabitants légaux ne peut prouver qu'ils lui appartiennent et les revenus que ceux-ci procurent sont réputés être en indivision.

Si le cohabitant légal survivant est un héritier du cohabitant prémourant, l'indivision visée à l'alinéa précédent sera tenue, à l'égard des héritiers réservataires du prémourant, comme une libéralité, sauf preuve du contraire.

En outre, les cohabitants règlent les modalités de leur cohabitation légale par convention comme ils le jugent à propos, pour autant que celle-ci ne contienne aucune clause contraire à l'article 1477, à l'ordre public, aux bonnes moeurs, ou aux règles relatives à l'autorité parentale, à la tutelle et aux règles déterminant l'ordre légal de la succession. Cette convention est passée en la forme authentique devant notaire, et fait l'objet d'une mention au registre de la population.

## Articles 5 – 14 of the Code of Private international law

**Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27 juillet 2004 )**

### **CHAPITRE 1er. - Dispositions générales.**

#### **Section 4. - Compétence judiciaire.**

##### **Compétence internationale fondée sur le domicile ou la résidence habituelle du défendeur.**

Art. 5. § 1er. Hormis les cas où la présente loi en dispose autrement, les juridictions belges sont compétentes si le défendeur est domicilié ou a sa résidence habituelle en Belgique lors de l'introduction de la demande.

S'il y a plusieurs défendeurs, les juridictions belges sont compétentes si l'un d'eux est domicilié ou a sa résidence habituelle en Belgique, à moins que la demande n'ait été formée que pour traduire un défendeur hors de la juridiction de son domicile ou de sa résidence habituelle à l'étranger.

§ 2. Les juridictions belges sont également compétentes pour connaître de toute demande concernant l'exploitation de l'établissement secondaire d'une personne morale n'ayant ni domicile ni résidence habituelle en Belgique, lorsque cet établissement est situé en Belgique lors de l'introduction de la demande.

##### **Prorogation volontaire de compétence internationale.**

Art. 6. § 1er. Lorsque les parties, en une matière où elles disposent librement de leurs droits en vertu du droit belge, sont convenues valablement, pour connaître des différends nés ou à naître à l'occasion d'un rapport de droit, de la compétence des juridictions belges ou de l'une d'elles, celles-ci sont seules compétentes.

Hormis les cas où la présente loi en dispose autrement, le juge belge devant lequel le défendeur comparaît est compétent pour connaître de la demande formée contre lui, sauf si la comparution a pour objet principal de contester la compétence.

§ 2. Dans les cas prévus au § 1er, le juge peut toutefois décliner sa compétence lorsqu'il résulte de l'ensemble des circonstances que le litige ne présente aucun lien significatif avec la Belgique.

### **Dérogation volontaire à la compétence internationale.**

Art. 7. Lorsque les parties, en une matière où elles disposent librement de leurs droits en vertu du droit belge, sont convenues valablement, pour connaître des différends nés ou à naître à l'occasion d'un rapport de droit, de la compétence des juridictions d'un Etat étranger ou de l'une d'elles et qu'un juge belge est saisi, celui-ci doit surseoir à statuer, sauf s'il est prévisible que la décision étrangère ne pourra pas être reconnue ou exécutée en Belgique ou si les juridictions belges sont compétentes en vertu de l'article 11. Il se dessaisit lorsque la décision étrangère est susceptible d'être reconnue en vertu de la présente loi.

### **Demande en garantie ou en intervention et demande reconventionnelle.**

Art. 8. Une juridiction belge compétente pour connaître d'une demande l'est également pour connaître :

1° d'une demande en garantie ou en intervention, à moins que celle-ci n'ait été formée que pour traduire hors de la juridiction normalement compétente celui qui a été appelé;

2° d'une demande reconventionnelle dérivant du fait ou de l'acte sur lequel est fondée la demande originaire.

### **Connexité internationale.**

Art. 9. Lorsque les juridictions belges sont compétentes pour connaître d'une demande, elles le sont également pour connaître d'une demande qui y est liée par un rapport si étroit qu'il y a intérêt à instruire et à juger celles-ci en même temps afin d'éviter des solutions qui pourraient être inconciliables si les causes étaient jugées séparément.

### **Mesures provisoires et conservatoires et mesures d'exécution.**

Art. 10. Dans les cas d'urgence, les juridictions belges sont également compétentes pour prendre des mesures provisoires ou conservatoires et des mesures d'exécution concernant des personnes ou des biens se trouvant en Belgique lors de l'introduction de la demande, même si, en vertu de la présente loi, les juridictions belges ne sont pas compétentes pour connaître du fond.

### **Attribution exceptionnelle de compétence internationale.**

Art. 11. Nonobstant les autres dispositions de la présente loi, les juridictions belges sont exceptionnellement compétentes lorsque la cause présente des liens étroits avec la Belgique et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger que la demande soit formée à l'étranger.

### **Vérification de la compétence internationale.**

Art. 12. Le juge saisi vérifie d'office sa compétence internationale.

### **Compétence interne.**

Art. 13. Lorsque les juridictions belges sont compétentes en vertu de la présente loi, la compétence d'attribution et la compétence territoriale sont déterminées par les dispositions pertinentes du Code judiciaire ou de lois particulières, sauf dans le cas prévu à l'article 23.

Toutefois, à défaut de dispositions susceptibles de fonder la compétence territoriale, celle-ci est déterminée par les dispositions de la présente loi concernant la compétence internationale. Lorsque ces dispositions ne permettent pas de déterminer la compétence territoriale, la demande peut être portée devant le juge de l'arrondissement de Bruxelles.

### **Litispendance internationale.**

Art. 14. Lorsqu'une demande est pendante devant une juridiction étrangère et qu'il est prévisible que la décision étrangère sera susceptible de reconnaissance ou d'exécution en Belgique, le juge belge saisi en second lieu d'une demande entre les mêmes parties ayant le même objet et la même cause, peut surseoir à statuer jusqu'au prononcé de la décision étrangère. Il tient compte des exigences d'une bonne administration de la justice. Il se dessaisit lorsque la décision étrangère est susceptible d'être reconnue en vertu de la présente loi. L'issuement est situé en Belgique lors de l'introduction de la demande.

## **Article 15 of the Code of Private international law**

### **Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27 juillet 2004 )**

Art. 15. § 1er. Le contenu du droit étranger désigné par la présente loi est établi par le juge.

Le droit étranger est appliqué selon l'interprétation reçue à l'étranger.

§ 2. Lorsque le juge ne peut pas établir ce contenu, il peut requérir la collaboration des parties.

Lorsqu'il est manifestement impossible d'établir le contenu du droit étranger en temps utile, il est fait application du droit belge.

**Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27 juillet 2004 )**

**CHAPITRE III. - Relations matrimoniales.**

**Section 1re. - Compétence internationale.**

**Compétence internationale en matière de relations matrimoniales.**

Art. 42. Les juridictions belges sont compétentes pour connaître de toute demande concernant le mariage ou ses effets, le régime matrimonial, le divorce ou la séparation de corps, outre dans les cas prévus par les dispositions générales de la présente loi, si :

1° en cas de demande conjointe, l'un des époux a sa résidence habituelle en Belgique lors de l'introduction de la demande;

2° la dernière résidence habituelle commune des époux se situait en Belgique moins de douze mois avant l'introduction de la demande;

3° l'époux demandeur a sa résidence habituelle depuis douze mois au moins en Belgique lors de l'introduction de la demande; ou

4° les époux sont belges lors de l'introduction de la demande.

**Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé  
(M.B., 27 juillet 2004 )**

**CHAPITRE II. - Personnes physiques.**

**Section 4. Droit applicable au régime matrimonial.**

**Choix du droit applicable au régime matrimonial.**

Art. 49. § 1er. Le régime matrimonial est régi par le droit choisi par les époux.

§ 2. Les époux ne peuvent désigner que l'un des droits suivants:

1° le droit de l'Etat sur le territoire duquel ils fixeront pour la première fois leur résidence habituelle après la célébration du mariage;

2° le droit de l'Etat sur le territoire duquel l'un d'eux a sa résidence habituelle au moment du choix;

3° le droit de l'Etat dont l'un d'eux a la nationalité au moment du choix.

**Modalités du choix du droit applicable.**

Art. 50. § 1er. Le choix du droit applicable peut être fait avant la célébration du mariage ou au cours du mariage. Il peut modifier un choix antérieur.

§ 2. Le choix doit être effectué conformément à l'article 52, alinéa 1er.

Il doit porter sur l'ensemble des biens des époux.

§ 3. Le changement de droit applicable résultant d'un choix effectué par les époux n'a d'effet que pour l'avenir. Les époux peuvent en disposer autrement, sans pouvoir porter atteinte aux droits des tiers.

**Droit applicable à défaut de choix.**

Art. 51. A défaut de choix du droit applicable par les époux, le régime matrimonial est régi :

1° par le droit de l'Etat sur le territoire duquel l'un et l'autre époux fixent pour la première fois leur résidence habituelle après la célébration du mariage;

2° à défaut de résidence habituelle sur le territoire d'un même Etat, par le droit de l'Etat dont l'un et l'autre époux ont la nationalité au moment de la célébration du mariage;

3° dans les autres cas, par le droit de l'Etat sur le territoire duquel le mariage a été célébré.

**Droit applicable à la forme du choix d'un régime matrimonial.**

Art. 52. Le choix d'un régime matrimonial est valable quant à la forme si celle-ci répond soit au droit applicable au régime matrimonial au moment du choix, soit au droit de l'Etat sur le territoire duquel il a été fait. Il doit au moins faire l'objet d'un écrit daté et signé des deux époux.

La mutation de régime matrimonial a lieu selon les formalités prévues par le droit de l'Etat sur le territoire duquel la mutation est effectuée.

### **Domaine du droit applicable au régime matrimonial.**

Art. 53. § 1er. Sans préjudice de l'article 52, le droit applicable au régime matrimonial détermine, notamment :

- 1° la validité du consentement sur le choix du droit applicable;
- 2° l'admissibilité et la validité du contrat de mariage;
- 3° la possibilité et l'étendue du choix d'un régime matrimonial;
- 4° si et dans quelle mesure les époux peuvent changer de régime, et si le nouveau régime agit de manière rétroactive ou si les époux peuvent le faire agir de manière rétroactive;
- 5° la composition des patrimoines et l'attribution des pouvoirs de gestion;
- 6° la dissolution et la liquidation du régime matrimonial, ainsi que les règles du partage.

§ 2. Le mode de composition et d'attribution des lots est régi par le droit de l'Etat sur le territoire duquel les biens sont situés au moment du partage.

### **Protection des tiers.**

Art. 54. § 1er. L'opposabilité du régime matrimonial aux tiers est régie par le droit applicable au régime.

Toutefois, lorsque le tiers et l'époux dont il est le créancier avaient leur résidence habituelle sur le territoire du même Etat lors de la naissance de la dette, le droit de cet Etat est applicable, à moins que :

- 1° les conditions de publicité ou d'enregistrement prévues par le droit applicable au régime matrimonial aient été remplies; ou
- 2° le tiers connaissait le régime matrimonial lors de la naissance de la dette ou ne l'a ignoré qu'en raison d'une imprudence de sa part; ou
- 3° les règles de publicité prévues en matière de droits réels immobiliers par le droit de l'Etat sur le territoire duquel l'immeuble est situé aient été respectées.

§ 2. Le droit applicable au régime matrimonial détermine si et dans quelle mesure une dette contractée par l'un des époux pour les besoins du ménage ou l'éducation des enfants oblige l'autre époux.

Toutefois, lorsque le tiers et l'époux dont il est le créancier avaient leur résidence habituelle sur le territoire du même Etat lors de la naissance de la dette, le droit de cet Etat est applicable.

## Article 55 of the Code of Private international law

**Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27 juillet 2004 )**

### **CHAPITRE II. - Personnes physiques.**

#### **Section 5. - Dissolution du mariage et séparation de corps.**

##### **Droit applicable au divorce et à la séparation de corps.**

Art. 55. § 1er. Le divorce et la séparation de corps sont régis:

1° par le droit de l'Etat sur le territoire duquel l'un et l'autre époux ont leur résidence habituelle lors de l'introduction de la demande;

2° à défaut de résidence habituelle sur le territoire d'un même Etat, par le droit de l'Etat sur le territoire duquel se situait la dernière résidence habituelle commune des époux, lorsque l'un d'eux a sa résidence habituelle sur le territoire de cet Etat lors de l'introduction de la demande;

3° à défaut de résidence habituelle de l'un des époux sur le territoire de l'Etat où se situait la dernière résidence habituelle commune, par le droit de l'Etat dont l'un et l'autre époux ont la nationalité lors de l'introduction de la demande;

4° dans les autres cas, par le droit belge.

§ 2. Toutefois, les époux peuvent choisir le droit applicable au divorce ou à la séparation de corps.

Ils ne peuvent désigner que l'un des droits suivants:

1° le droit de l'Etat dont l'un et l'autre ont la nationalité lors de l'introduction de la demande;

2° le droit belge.

Ce choix doit être exprimé lors de la première comparution.

§ 3. L'application du droit désigné au § 1er est écartée dans la mesure où ce droit ignore l'institution du divorce. Dans ce cas, il est fait application du droit désigné en fonction du critère établi de manière subsidiaire par le § 1er.

## Article 508 of the Judicial Code

### **Extrait du Code judiciaire**

#### **Art. 508.**

<L 2001-07-04/41, <art>. 14, 089; En vigueur : 25-07-2001>

Les mandats, accordés par l'Ordre national des Avocats de Belgique dans des commissions et associations créées par la loi, sont maintenus et sont censés être des mandats communs à l'Ordre des Barreaux francophones et germanophone et à l'Orde van Vlaamse Balies jusqu'à ce qu'elles désignent leurs propres représentants, conformément à leurs propres règlements et aux dispositions légales.



**Extrait du Code judiciaire**

**LIVRE IIIBIS. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De l'aide juridique de première et de deuxième ligne.**

**CHAPITRE I. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> Disposition générale.**

Art. 508/1. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Pour l'application du présent livre, il faut entendre par :

1° aide juridique de première ligne : l'aide juridique accordée sous la forme de renseignements pratiques, d'information juridique, d'un premier avis juridique ou d'un renvoi vers une instance ou une organisation spécialisées;

2° aide juridique de deuxième ligne : l'aide juridique accordée à une personne physique sous la forme d'un avis juridique circonstancié ou l'assistance juridique dans le cadre ou non d'une procédure ou l'assistance dans le cadre d'un procès y compris la représentation au sens de l'article 728;

3° Commission d'aide juridique : la Commission visée à l'article 508/2;

4° Bureau d'aide juridique : le bureau visé à l'article 508/7;

5° organisation d'aide juridique : toute organisation assurant une aide juridique de première ligne dans un arrondissement judiciaire.

**CHAPITRE II. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De la Commission d'aide juridique.**

Art. 508/2. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> § 1er. Il y a dans chaque arrondissement judiciaire une Commission d'aide juridique. Dans l'arrondissement judiciaire de Bruxelles, il en existe deux : la Commission d'aide juridique française et la Commission d'aide juridique néerlandaise.

La Commission d'aide juridique a la personnalité juridique et détermine son règlement d'ordre intérieur.

§ 2. La Commission a son siège au chef-lieu de l'arrondissement ou en tout autre lieu désigné par elle.

§ 3. La Commission est composée paritairement, d'une part, de représentants du barreau désignés par l'Ordre des Avocats de l'arrondissement judiciaire concerné, et, d'autre part, de représentants des centres publics d'aide sociale et d'organisations d'aide juridique agréées.

Le Roi détermine, par arrêté délibéré en Conseil des Ministres, les modalités relatives à l'agrément des organisations d'aide juridique ainsi qu'à la composition et au fonctionnement de la Commission.

Art. 508/3. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

La Commission d'aide juridique a pour mission :

1° d'organiser les permanences d'aide juridique de première ligne assurées par des avocats et de veiller à leur décentralisation si nécessaire;

2° de promouvoir la concertation et la coordination entre les organisations d'aide juridique et de faciliter le renvoi vers des organisations spécialisées entre autres en favorisant la conclusion de conventions;

3° de veiller à la diffusion, spécialement auprès des groupes sociaux les plus vulnérables, d'informations relatives à l'existence et aux conditions d'accès à l'aide juridique.

Cette diffusion a lieu là où l'aide juridique est assurée ainsi que, notamment, dans les greffes, les parquets, chez les huissiers de justice, dans les administrations communales et les centres publics d'aide sociale de l'arrondissement judiciaire;

4° de formuler les recommandations qu'elle juge utiles sur la base des rapports visés aux articles 508/6 et 508/11 et transmettre ces recommandations et rapports au Ministre de la Justice.

Art. 508/4. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

L'Etat alloue un subside aux commissions d'aide juridique sur la base de critères objectifs fixés par arrêté royal délibéré en Conseil des Ministres.

### **CHAPITRE III. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De l'aide juridique de première ligne.**

Art. 508/5. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

§ 1er. Sans préjudice de l'aide juridique de première ligne assurée par d'autres organisations d'aide juridique, les permanences d'aide juridique de première ligne sont assurées par des avocats.

L'Ordre des Avocats inscrit une fois l'an sur une liste les avocats désireux d'accomplir des prestations au titre de l'aide juridique de première ligne.

La liste mentionne les orientations que les avocats déclarent et qu'ils justifient ou pour lesquelles ils s'engagent à suivre une formation organisée par le Conseil de l'Ordre ou les autorités visées à l'article 488.

Le refus d'inscription sur la liste est susceptible d'appel conformément à (l'article 432bis). <L 2006-06-21/36, art. 37, 135; En vigueur : 01-11-2006>

L'Ordre transmet la liste des avocats à la Commission d'aide juridique.

(§ 2. Sans préjudice de l'aide juridique de première ligne assurée par d'autres organisations d'aide juridique, aucuns frais ni honoraires ne sont réclamés par les avocats au bénéficiaire de l'aide juridique.) <L 2003-12-22/42, art. 373, 117; En vigueur : 01-01-2004>

§ 3. Lorsque le renvoi vers une organisation d'aide juridique ou vers l'aide juridique de deuxième ligne s'avère indiqué, le demandeur en est immédiatement informé. L'organisation ou le Bureau d'aide juridique en est informé sans délai.

§ 4. L'Ordre des Avocats contrôle la qualité des prestations effectuées par les avocats au titre de l'aide juridique de première ligne.

En cas de manquement, le Conseil de l'Ordre peut, par décision motivée, radier un avocat de la liste visée au § 1er, selon la procédure prévue aux (articles 458 à 463). <L 2006-06-21/36, art. 38, 135; En vigueur : 01-11-2006>

Art. 508/6. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> Sans préjudice des règles relatives au secret professionnel, les avocats assurant l'aide juridique de première ligne sont tenus d'adresser à la Commission d'aide juridique un rapport annuel portant sur les prestations accomplies à ce titre selon les modalités établies par le Ministre de la Justice en concertation avec les autorités visées à l'article 488.

Ils font un rapport succinct au Bureau des consultations qu'ils ont données.

#### **CHAPITRE IV. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De l'aide juridique de deuxième ligne partiellement ou entièrement gratuite.**

##### **Section I. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De l'organisation.**

Art. 508/7. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Au sein de chaque barreau, le Conseil de l'Ordre des Avocats établit un Bureau d'aide juridique selon les modalités et les conditions qu'il détermine.

Le bureau a notamment pour mission d'organiser des services de garde.

L'Ordre des Avocats inscrit une fois l'an sur une liste les avocats désireux d'accomplir à titre principal ou à titre accessoire des prestations au titre de l'aide juridique de deuxième ligne organisée par le bureau.

La liste mentionne les orientations que les avocats déclarent et qu'ils justifient ou pour lesquelles ils s'engagent à suivre une formation organisée par le Conseil de l'Ordre ou les autorités visées à l'article 488.

Le refus d'inscription sur la liste est susceptible d'appel conformément à (l'article 432 bis). <L 2006-06-21/36, art. 39, 135; En vigueur : 01-11-2006>

Le bureau transmet la liste des avocats à la Commission d'aide juridique.

Art. 508/8. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

L'Ordre des Avocats contrôle la qualité des prestations effectuées par les avocats au titre de l'aide juridique de deuxième ligne.

En cas de manquement, le Conseil de l'Ordre peut par décision motivée radier un avocat de la liste visée à l'article 508/7 selon la procédure visée aux (articles 458 à 463). <L 2006-06-21/36, art. 40, 135; En vigueur : 01-11-2006>

Art. 508/9. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

§ 1er. Pour l'obtention d'une aide juridique de deuxième ligne partiellement ou entièrement gratuite, les personnes accordant l'aide juridique de première ligne renvoient le demandeur vers le bureau.

Le bureau désigne un avocat que le demandeur aura choisi sur la liste visée à l'article 508/7. Le bureau informe l'avocat de sa désignation.

L'avocat dont le nom figure sur la liste et auquel un justiciable se sera adressé directement sans passer par le bureau demande au bureau l'autorisation d'accorder l'aide juridique de deuxième ligne à son client lorsqu'il estime que celui-ci peut bénéficier de la gratuité complète ou partielle. L'avocat fait parvenir au bureau les pièces visées à l'article 508/13.

En cas d'urgence, la personne qui n'a pas d'avocat peut s'adresser directement à l'avocat du service de garde. Cet avocat lui assure l'aide juridique et demande au bureau la confirmation de sa désignation.

§ 2. Un avocat qui intervient en application du présent chapitre ne peut en aucun cas s'adresser directement au bénéficiaire en vue du paiement des frais et honoraires, à moins que le bureau ne l'autorise à percevoir des provisions en cas d'urgence.

Art. 508/10. <L 2006-06-15/53, art. 2, 137; En vigueur : 10-08-2006>

Lorsque le bénéficiaire ne parle pas la langue de la procédure, le bureau lui propose dans la mesure du possible un avocat parlant sa langue ou une autre langue qu'il comprend et à défaut, un interprète. Les frais d'interprète sont à charge de l'Etat. Ils sont réglés selon la procédure prévue au règlement général sur les frais de justice en matière répressive.

Art. 508/11. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Les avocats sont tenus de faire régulièrement rapport au bureau selon les modalités établies par le Ministre de la Justice en concertation avec les autorités visées à l'article 488.

Le bureau transmet annuellement un rapport sur le fonctionnement de l'aide juridique de deuxième ligne à la Commission d'aide juridique et au Ministre de la Justice selon les modalités établies par celui-ci.

Art. 508/12. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Sauf en cas d'urgence ou d'accord exprès du bureau, il est interdit aux avocats d'accorder une aide juridique de deuxième ligne dans les affaires pour lesquelles ils sont intervenus au titre de l'aide juridique de première ligne visée à l'article 508/4.

## **Section II. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> Du bénéfice de la gratuité complète ou partielle.**

Art. 508/13. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

L'aide juridique de deuxième ligne peut être partiellement ou entièrement gratuite pour les personnes dont les ressources sont insuffisantes ou pour les personnes y assimilées.

Le Roi détermine par arrêté délibéré en Conseil des Ministres le montant de ces ressources, les pièces justificatives à produire ainsi que les personnes assimilées à celles dont les ressources sont insuffisantes.

Le bureau vérifie si les conditions de gratuité sont remplies.

Le bureau conserve une copie des pièces.

Art. 508/14. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

La demande tendant au bénéfice de la gratuité complète ou partielle est introduite verbalement ou par écrit par le demandeur ou son avocat figurant sur la liste visée à l'article 508/7.

(Sans préjudice de l'alinéa précédent, la demande peut également être introduite par le biais des autorités compétentes, au sens de la directive 2003/8/CE du Conseil du 27 janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires.) <L 2006-06-15/53, art. 3, 137; En vigueur : 10-08-2006>

Sauf en cas d'urgence, toutes les pièces justificatives visées à l'article 508/13 sont jointes à la demande.

En cas d'urgence, le bénéfice de la gratuité complète ou partielle peut être accordé provisoirement au demandeur par le bureau. Dans ce cas, le bureau fixe le délai dans lequel le demandeur doit produire les pièces justificatives visées à l'article 508/13.

Pour statuer sur la demande de la gratuité complète ou partielle, le bureau se prononce sur pièces. Le demandeur ou, le cas échéant, son avocat, est entendu à sa demande ou lorsque le bureau l'estime nécessaire.

Les demandes manifestement mal fondées sont rejetées.

Art. 508/15. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Sauf en cas d'urgence, le demandeur et, le cas échéant, son avocat, est informé de la décision du bureau dans les quinze jours de la demande.

Toute décision de refus est motivée.

Sa notification doit contenir les informations utiles pour introduire le recours prévu à l'article <508>/16.

Art. 508/16. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Le demandeur peut, dans le mois de la notification prévue à l'article 508/15, former un recours auprès du tribunal du travail contre une décision de refus.

Art. 508/17. <L 2006-06-15/53, art. 4, 137; En vigueur : 10-08-2006>

Si le demandeur a obtenu l'aide juridique entièrement ou partiellement gratuite et souhaite introduire une requête tendant à l'assistance judiciaire, son avocat transmet sans délai la décision du bureau d'aide juridique au tribunal compétent.

Art. 508/18. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Le bureau peut mettre fin à l'aide juridique de deuxième ligne lorsque le bénéficiaire ne satisfait plus aux conditions prévues à l'article 508/13 ou lorsque le bénéficiaire ne collabore manifestement pas à la défense de ses intérêts.

A cette fin, l'avocat dépose une requête motivée au bureau.

Le bureau porte la requête à la connaissance du bénéficiaire et l'invite à formuler ses observations.

Toute décision de mettre fin à l'aide octroyée est communiquée par lettre recommandée à la poste au bénéficiaire. Cette décision est susceptible de recours.

Les articles 508/15 et 508/16 sont d'application.

#### **CHAPITRE V. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> L'indemnisation des avocats.**

Art. 508/19. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

(§ 1er. L'avocat perçoit l'indemnité de procédure accordée au bénéficiaire.) <L 2007-04-21/85, art. 2, 1°, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>>

(§ 2.) Les avocats chargés de l'aide juridique de deuxième ligne partiellement ou complètement gratuite font rapport au bureau sur chaque affaire pour laquelle ils ont accompli des prestations à ce titre. (Ce rapport mentionne également l'indemnité de procédure perçue par l'avocat.) <L 2007-04-21/85, art. 2, 2° et 3°, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>

Le bureau attribue des points aux avocats pour ces prestations et en fait rapport au bâtonnier.

Le bâtonnier communique le total des points de son barreau aux autorités visées à l'article 488, lesquelles communiquent le total des points de tous les barreaux au Ministre de la Justice.

(§ 3.) Dès réception de l'information visée au (§ 2), le Ministre de la Justice peut faire effectuer un contrôle selon les modalités qu'il détermine après concertation avec les autorités visées à l'article 488. Il ordonne le paiement de l'indemnité à ces autorités qui en assurent la répartition par le biais des ordres des avocats. <L 2007-04-21/85, art. 2, 2° et 4°, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>

#### **CHAPITRE Vbis. - Frais liés à l'organisation des bureaux d'aide juridique. <inséré par L 2005-12-27/30, art. 12; En vigueur : 01-01-2005>**

Art. 508/19bis. <inséré par L 2005-12-27/30, art. 12; En vigueur : 01-01-2005>

Une subvention annuelle est prévue pour les frais liés à l'organisation des bureaux d'aide juridique, à charge du budget du SPF Justice. Celle-ci correspond à 8,108 % de l'indemnité visée à l'article 508/19, (§ 3). <L 2007-04-21/85, art. 3, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>

Cette subvention est payable à terme échu.

Le Roi détermine les modalités d'exécution de cet article, et notamment la manière dont cette subvention est répartie.

**CHAPITRE VI. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De la récupération de l'indemnité de l'Etat. - Du droit de l'avocat au paiement intégral des frais et honoraires.**

Art. 508/20. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

§ 1er. Sans préjudice de sanctions pénales, l'indemnité allouée pour l'aide juridique de deuxième ligne peut être récupérée par le Trésor auprès du bénéficiaire de cette aide :

1° s'il est établi qu'est intervenue une modification du patrimoine, des revenus ou des charges du bénéficiaire et que celui-ci est par conséquent en mesure de payer;

2° lorsque le justiciable a tiré profit de l'intervention de l'avocat de manière telle que si ce profit avait existé au jour de la demande, cette aide ne lui aurait pas été accordée;

3° si l'aide a été accordée à la suite de fausses déclarations ou a été obtenue par d'autres moyens frauduleux.

Dans ce cas, le bureau dresse l'état des frais et honoraires que l'avocat peut encore réclamer au bénéficiaire.

§ 2. Si le bénéficiaire a droit à l'intervention d'une assurance de protection juridique, l'avocat désigné en informe le bureau et le Trésor est subrogé aux droits du bénéficiaire à concurrence du montant de l'aide juridique consentie qu'il a pris en charge.

Si le bénéficiaire a obtenu ladite intervention, le Trésor lui réclame le montant de l'aide juridique consentie.

(Il en va de même si le bénéficiaire a droit à une indemnité de procédure et la perçoit après que l'avocat a fait rapport au bureau conformément à l'article 508/19, § 2.) <L 2007-04-21/85, art. 4, 1°, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>

Si l'avocat du bénéficiaire a obtenu (l'intervention d'une assurance protection juridique), le Trésor lui réclame le montant de l'aide juridique consentie. <L 2007-04-21/85, art. 4, 2°, 147; En vigueur : 01-01-2008 ; voir également l'art. 13>

§ 3. La récupération visée au § 1er du présent article se prescrit par cinq ans à compter de la décision d'octroi de l'aide juridique partiellement ou entièrement gratuite, sans que le délai de prescription puisse être inférieur à un an à compter de la perception de l'indemnité par l'avocat.

**CHAPITRE VII. - <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999> De la commission d'office des avocats.**

Art. 508/21. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Dans tous les cas où en vertu de la loi un avocat doit être commis d'office, il est désigné par le bâtonnier ou par le bureau, sauf les exceptions prévues par la loi.

Art. 508/22. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Lorsque la personne qui doit être assistée n'est pas dans les conditions de ressources visées à l'article 508/13, le bâtonnier désigne l'avocat qui aura été choisi par cette personne. Dans les cas qu'il juge urgents, le bâtonnier désigne un avocat qui participe aux services de garde visés à l'article 508/7.

(L'article 446ter) est applicable en ce qui concerne les honoraires de cet avocat.

Si la personne assistée omet ou refuse de payer, l'Etat alloue une indemnité à l'avocat commis d'office pour l'accomplissement des prestations pour lesquelles la Commission a eu lieu. <L 2006-06-21/36, art. 41, 135; En vigueur : 01-11-2006>

En cas de paiement partiel des honoraires par la personne assistée, l'indemnité est diminuée du montant payé.

Lorsqu'une indemnité est octroyée, les chapitres V et VI sont d'application.

Art. 508/23. <Inséré par L 1998-11-23/34, art. 4; En vigueur : 01-09-1999>

Lorsque la personne assistée est dans les conditions de ressources visées à l'article 508/13, le bureau désigne un avocat dans la liste visée à l'article 508/7.

Dans les cas qu'il juge urgents, le bâtonnier désigne un avocat qui est inscrit sur la liste visée à l'article 508/7 et en informe le bureau.

Pour le surplus, les dispositions des chapitres IV à VI sont d'application.

**CHAPITRE VIII. - Des affaires transfrontalières visées par la directive 2003/8/CE.  
<inséré par L 2006-06-15/53, art. 5; En vigueur : 10-08-2006>**

Art. 508/24. <inséré par L 2006-06-15/53, art. 6; En vigueur : 10-08-2006>

§ 1er. Pour ce qui concerne les affaires transfrontalières au sens de la directive 2003/8/CE du Conseil du 27 janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires, l'autorité compétente pour l'expédition et la réception de la demande est le Service public fédéral Justice.

§ 2. Le bureau d'aide juridique est également compétent pour recevoir les demandes visant au bénéfice de l'aide juridique ou de l'assistance judiciaire sur le territoire d'un autre Etat membre de l'Union européenne.

Dans ce cas, il transmet sans délai cette demande au Service public fédéral Justice qui, après en avoir assuré la traduction dans une langue reconnue par l'Etat destinataire, la communique dans les quinze jours à l'autorité compétente de ce pays.

§ 3. Afin de faciliter la transmission des demandes, les formulaires standard relatifs aux demandes et à la transmission de celles-ci, visés à l'article 16 de la directive visée au § 1er, sont utilisés.

§ 4. Lorsque la demande est introduite par l'intermédiaire de l'autorité visée au § 1er, les frais de traduction de cette demande et des documents connexes exigés sont à la charge de l'Etat. Ils sont réglés selon la procédure prévue au règlement général sur les frais de justice en matière répressive.

§ 5. Lorsqu'une personne a obtenu le bénéfice de l'aide juridique dans un Etat membre de l'Union européenne, dont un juge a rendu la décision, elle bénéficie de l'aide juridique lorsque la décision doit être reconnue, déclarée exécutoire ou exécutée en Belgique.

§ 6. L'autorité visée au § 1er refuse de transmettre la demande si celle-ci est manifestement non fondée ou se situe manifestement hors du champ d'application de la directive visée au § 1er. En statuant sur le bien-fondé d'une demande, il est tenu compte de l'importance de l'affaire en cause pour le demandeur. La décision de refus est motivée et notifiée par simple lettre au demandeur.

Art. 508/25. <inséré par L 2006-06-15/53, art. 7; En vigueur : 10-08-2006>

La personne qui ne bénéficie pas de ressources insuffisantes au sens de l'article 508/13, peut néanmoins bénéficier de l'aide juridique si elle apporte la preuve qu'elle ne peut pas faire face aux frais en raison de la différence du coût de la vie entre l'Etat membre dans lequel elle a son domicile ou sa résidence habituelle et la Belgique.

## Article 568 of the Judicial Code

### Extrait du Code judiciaire

Art. 568.

Le tribunal de première instance connaît de toutes demandes hormis celles qui sont directement dévolues à la cour d'appel et la Cour de cassation.

Si le défendeur conteste la compétence du tribunal de première instance, le demandeur peut, avant la clôture des débats, requérir le renvoi de la cause devant le tribunal d'arrondissement qui statuera comme il est dit aux articles 641 et 642.

Lorsque le défendeur décline la juridiction du tribunal de première instance en vertu de l'attribution du litige à des arbitres, le tribunal se dessaisit s'il y a lieu.

## Article 587 of the Judicial Code

### Extrait du Code judiciaire

Art. 587. <L 1997-04-03/41, art. 12, 052; En vigueur : 09-06-1997> Le président du tribunal de première instance statue :

1° sur les contestations prévues par la loi du 20 juillet 1971 sur les funérailles et sépultures;

2° sur les demandes prévues par l'article 68 de la loi du 29 mars 1962 organique de l'aménagement du territoire et de l'urbanisme;

3° (sur les demandes prévues à l'article 4, alinéa 1er, 2°, et à l'article 4, alinéa 2, 2°, de la loi du 1er septembre 2004 complétant les dispositions du Code civil relatives à la vente en vue de protéger les consommateurs;) <L 2004-09-01/38, art. 6, 127; En vigueur : 01-01-2005>

4° sur les demandes prévues à l'article 14 de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel;

5° sur les demandes formées conformément à la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement;

6° (sur les demandes prévues aux articles 18 et 21 de la loi du 2 août 2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales); <L 2002-08-02/94, art. 31, 104; En vigueur : 30-11-2002>

7° (...); <L 2007-05-10/33, art. 16, 147; En vigueur : 01-11-2007>

8° (...); <L 2007-05-10/33, art. 16, 147; En vigueur : 01-11-2007>

(9° sur les recours prévus aux articles 63, § 4, dernier alinéa, et 167, dernier alinéa, du Code civil.) <L 1999-05-04/63, art. 21, 082; En vigueur : 01-01-2000>

(10° sur les demandes prévues à l'article 8 de la loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales, qui sont dirigées contre des personnes non commerçantes ou contre leurs groupements professionnels ou interprofessionnels.) <L 2002-08-02/32, art. 12, 100; En vigueur : 07-08-2002>

(11° sur les demandes prévues à l'article 3, § 1er, alinéa 1er, de la loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution.) <L 2003-03-11/31, art. 4, 111; En vigueur : 27-03-2003>

(12° sur les demandes formées conformément à l'article 4 de la loi du 26 juin 2003 relative à l'enregistrement abusif des noms de domaine, à l'exception de celles visées à l'article 589, 12°.) <L 2003-06-26/48, art. 9, 118; En vigueur : 19-09-2003>

13° (...); <L 2007-05-10/33, art. 16, 147; En vigueur : 01-11-2007>

14° (...); <L 2007-05-10/33, art. 16, 147; En vigueur : 01-11-2007>

(15° sur les demandes visées aux articles 1322bis et 1322decies.) <L 2007-05-10/52, art. 2, 153; En vigueur : 01-07-2007>

Sauf si la loi en dispose autrement, les demandes prévues au premier alinéa sont introduites et instruites selon les formes du référé.

### Extrait du Code judiciaire

Art. 591.(Fédéral) Le juge de paix connaît, quel que soit le montant de la demande:

1° des contestations relatives aux louages d'immeubles et des demandes connexes qui naîtraient de la location d'un fonds de commerce; des demandes en payement d'indemnités d'occupation et en expulsion de lieux occupés sans droit, qu'elles soient ou non la suite d'une convention; de toutes contestations relatives à l'exercice du droit de préemption reconnu aux preneurs de biens ruraux;

2° des contestations ayant pour objet l'usage, la jouissance, l'entretien, la conservation ou l'administration du bien commun en cas de copropriété;

[2°bis des demandes fondées sur les articles 577-9, §§ 2, 3, 4, 6 ou 7, 577-10, § 4 et 577-12, alinéa 4 du Code civil.] <L 1994-06-30/34, art. 8, 047; En vigueur : 1995-08-01>

3° des contestations ayant pour objet les servitudes, ainsi que les obligations que la loi impose aux propriétaires de fonds contigus;

4° des contestations relatives aux droits de passage;

5° des actions possessoires;

6° des contestations relatives à l'établissement des obligations d'irrigation et de dessèchement, à la fixation du parcours de la conduite d'eau, de ses dimensions et de sa forme, à la construction des ouvrages d'art à établir pour la prise d'eau, à l'entretien de ces ouvrages, aux changements à faire aux ouvrages déjà établis et aux indemnités dues au propriétaire, soit du fonds traversé, soit du fonds qui recevra l'écoulement des eaux, soit de celui qui servira d'appui aux ouvrages d'art;

7° de toutes contestations relatives aux pensions alimentaires, à l'exclusion toutefois de celles fondées sur [l'article 336 du Code civil] et de celles se rattachant à une action en divorce ou en séparation de corps sur laquelle il n'a pas été définitivement statué par un jugement ou un arrêt passé en force de chose jugée <L 1987-03-31/52, art. 78, 014; En vigueur : 06-06-1987>;

8° [de toutes contestations relatives à l'exercice du droit de réquisition exercé par le bourgmestre des immeubles abandonnés visés à l'article 134bis de la nouvelle loi communale.] <L 1993-01-12/34, art. 18, 039; En vigueur : 5555-55-55 "... à la date à laquelle l'arrêté royal portant exécution des dispositions de l'article 134bis de la nouvelle loi communale aura été publié au Moniteur belge" art. 3, L 1993-01-21/30.>

9° de toutes contestations relatives aux réquisitions militaires, tant en ce qui concerne le droit que le montant de l'indemnité;

10° des contestations relatives aux réparations des dégâts miniers prévus par les lois coordonnées du 15 septembre 1919 sur les mines, minières et carrières et des contestations qui ont trait à la réparation des dommages causés soit par la recherche, soit par l'exploitation d'un gisement, prévus par l'arrêté royal du 28 novembre 1939 relatif à la recherche et à l'exploitation des roches bitumineuses, du pétrole et des gaz combustibles;

11° des contestations en matière de remembrement de biens ruraux;

12° des contestations relatives aux servitudes de débroussaillage sur les terrains limitrophes des voies ferrées;

13° des contestations pour dommages faits aux champs, fruits et récoltes, soit par l'homme, soit par les animaux;

14° des demandes formées en vertu de la loi du 16 mai 1900 apportant des modifications au régime successoral des petits héritages, sans préjudice de la compétence du tribunal de première instance; [il en va de même des demandes formées en vertu de la loi relative au régime successoral des exploitations agricoles en vue d'en promouvoir la continuité.] <L 1988-08-29/30, art. 13, 015; En vigueur : 1988-10-04>

15° des actions en réhabilitation et des actions en nullité basées sur un vice ou défaut de la chose, dans les ventes ou échanges d'animaux;

16° [des contestations relatives à l'octroi d'un salaire différé dans l'agriculture et l'horticulture;] <L 28-12-1967, art. 6>

17° (les demandes en matière de droit de fouille.) <L 15-07-1970, art. 30>

18° [des contestations relatives à l'intégration verticale dans le secteur de la production animale.] <L 01-04-1976, art. 15>

18° [des contestations relatives aux réparations des dommages visées par la loi du 10 janvier 1977, organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine.] <L 10-01-1977, art. 5. Le législateur a ajouté deux fois un no 18>

[19° Des demandes d'indemnisation des dommages visées à l'article 14 du décret du 24 janvier 1984, portant des mesures en matière de la politique de l'eau souterraine.] <DCFL 24-01-1984, art. 18, seulement valable pour la Communauté flamande>

[20° des contestations relatives aux réparations des dommages visées par le décret du Conseil Régional Wallon organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine;] <DRW 1985-10-11/33, art. 6, 008>

[21° des contestations en matière de contrats de crédits [ainsi que des demandes d'octroi de facilités de paiement et des contestations en matière de cautionnement de contrats de crédits], tels qu'ils sont régis par la loi du 12 juin 1991 relative au crédit à la consommation.] <L 1991-06-12/30, art. 114, § 3, 029; En vigueur : au plus tard le 09-07-1992, à une date à fixer par le Roi> <L 2003-03-24/40, art. 77, 115; En vigueur : 01-01-2004>

[22° de toutes contestations relatives à l'exercice par le ministre ayant l'Intégration sociale dans ses attributions, ou par son délégué, du droit de réquisitionner tout immeuble abandonné, visé à l'article 74 de la loi du 2 janvier 2001 portant des dispositions sociales, budgétaires et diverses.] <L 2001-06-10/70, art. 2, 093; En vigueur : 11-09-2001>

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## COMMUNAUTES ET REGIONS

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Art. 591. (REGION DE BRUXELLES-CAPITALE)

Le juge de paix connaît, quel que soit le montant de la demande:

1° des contestations relatives aux louages d'immeubles et des demandes connexes qui naîtraient de la location d'un fonds de commerce; des demandes en paiement d'indemnités d'occupation et en expulsion de lieux occupés sans droit, qu'elles soient ou non la suite d'une convention; de toutes contestations relatives à l'exercice du droit de préemption reconnu aux preneurs de biens ruraux;

2° des contestations ayant pour objet l'usage, la jouissance, l'entretien, la conservation ou l'administration du bien commun en cas de copropriété;

[2°bis des demandes fondées sur les articles 577-9, §§ 2, 3, 4, 6 ou 7, 577-10, § 4 et 577-12, alinéa 4 du Code civil.] <L 1994-06-30/34, art. 8, 047; En vigueur : 1995-08-01>

3° des contestations ayant pour objet les servitudes, ainsi que les obligations que la loi impose aux propriétaires de fonds contigus;

4° des contestations relatives aux droits de passage;

5° des actions possessoires;

6° des contestations relatives à l'établissement des obligations d'irrigation et de dessèchement, à la fixation du parcours de la conduite d'eau, de ses dimensions et de sa forme, à la construction des ouvrages d'art à établir pour la prise d'eau, à l'entretien de ces ouvrages, aux changements à faire aux ouvrages déjà établis et aux indemnités dues au propriétaire, soit du fonds traversé, soit du fonds qui recevra l'écoulement des eaux, soit de celui qui servira d'appui aux ouvrages d'art;

7° de toutes contestations relatives aux pensions alimentaires, à l'exclusion toutefois de celles fondées sur [l'article 336 du Code civil] et de celles se rattachant à une action en divorce ou en séparation de corps sur laquelle il n'a pas été définitivement statué par un jugement ou un arrêt passé en force de chose jugée <L 1987-03-31/52, art. 78, 014; En vigueur : 06-06-1987>;

8° [de toutes contestations relatives à l'exercice du droit de réquisition exercé par le bourgmestre des immeubles abandonnés visés à l'article 134bis de la nouvelle loi communale.] <L 1993-01-12/34, art. 18, 039; En vigueur : 5555-55-55 "... à la date à laquelle l'arrêté royal portant exécution des dispositions de l'article 134bis de la nouvelle loi communale aura été publié au Moniteur belge" art. 3, L 1993-01-21/30.>

9° de toutes contestations relatives aux réquisitions militaires, tant en ce qui concerne le droit que le montant de l'indemnité;

10° des contestations relatives aux réparations des dégâts miniers prévus par les lois coordonnées du 15 septembre 1919 sur les mines, minières et carrières et des contestations qui ont trait à la réparation des dommages causés soit par la recherche, soit par l'exploitation d'un gisement, prévus par l'arrêté royal du 28 novembre 1939 relatif à la recherche et à l'exploitation des roches bitumineuses, du pétrole et des gaz combustibles;

11° des contestations en matière de remembrement de biens ruraux;

12° des contestations relatives aux servitudes de débroussaillage sur les terrains limitrophes des voies ferrées;

13° des contestations pour dommages faits aux champs, fruits et récoltes, soit par l'homme, soit par les animaux;

14° des demandes formées en vertu de la loi du 16 mai 1900 apportant des modifications au régime successoral des petits héritages, sans préjudice de la compétence du tribunal de première instance; [il en va de même des demandes formées en vertu de la loi relative au régime successoral des exploitations agricoles en

vue d'en promouvoir la continuité.] <L 1988-08-29/30, art. 13, 015; En vigueur : 1988-10-04>

15° des actions en réhabilitation et des actions en nullité basées sur un vice ou défaut de la chose, dans les ventes ou échanges d'animaux;

16° [des contestations relatives à l'octroi d'un salaire différé dans l'agriculture et l'horticulture;] <L 28-12-1967, art. 6>

17° [les demandes en matière de droit de fouille.] <L 15-07-1970, art. 30>

18° [des contestations relatives à l'intégration verticale dans le secteur de la production animale.] <L 01-04-1976, art. 15>

18° [des contestations relatives aux réparations des dommages visées par la loi du 10 janvier 1977, organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine.] <L 10-01-1977, art. 5. Le législateur a ajouté deux fois un no 18>

[19° Des demandes d'indemnisation des dommages visées à l'article 14 du décret du 24 janvier 1984, portant des mesures en matière de la politique de l'eau souterraine.] <DCFL 24-01-1984, art. 18, seulement valable pour la Communauté flamande>

[20° des contestations relatives aux réparations des dommages visées par le décret du Conseil Régional Wallon organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine;] <DRW 1985-10-11/33, art. 6, 008>

[21° des contestations en matière de contrats de crédits [ainsi que des demandes d'octroi de facilités de paiement et des contestations en matière de cautionnement de contrats de crédits], tels qu'ils sont régis par la loi du 12 juin 1991 relative au crédit à la consommation.] <L 1991-06-12/30, art. 114, § 3, 029; En vigueur : au plus tard le 09-07-1992, à une date à fixer par le Roi> <L 2003-03-24/40, art. 77, 115; En vigueur : 01-01-2004>

[22° de toutes contestations relatives à l'exercice par le ministre ayant l'Intégration sociale dans ses attributions, ou par son délégué, du droit de réquisitionner tout immeuble abandonné, visé à l'article 74 de la loi du 2 janvier 2001 portant des dispositions sociales, budgétaires et diverses.] <L 2001-06-10/70, art. 2, 093; En vigueur : 11-09-2001>

23° [2 de toutes les actions formées sur la base de la procédure du Chapitre IVbis de l'ordonnance du 19 juillet 2001 relative à l'organisation du marché de l'électricité en Région de Bruxelles-Capitale et de toutes les actions formées sur la base de la procédure du Chapitre Vbis de l'ordonnance du 1er avril 2004 relative à l'organisation du marché du gaz en Région de Bruxelles-Capitale, concernant des redevances de voiries en matière de gaz et d'électricité et portant modification de l'ordonnance du 19 juillet 2001 relative à l'organisation du marché de l'électricité en Région de Bruxelles-Capitale, ainsi que des demandes connexes, telles les récupérations de créances et celles en matière de facilités de paiement.]2

Art. 591. (Autorité flamande) Le juge de paix connaît, quel que soit le montant de la demande:

1° des contestations relatives aux louages d'immeubles et des demandes connexes qui naîtraient de la location d'un fonds de commerce; des demandes en paiement d'indemnités d'occupation et en expulsion de lieux occupés sans droit, qu'elles soient

ou non la suite d'une convention; de toutes contestations relatives à l'exercice du droit de préemption reconnu aux preneurs de biens ruraux;

2° des contestations ayant pour objet l'usage, la jouissance, l'entretien, la conservation ou l'administration du bien commun en cas de copropriété;

[2°bis des demandes fondées sur les articles 577-9, §§ 2, 3, 4, 6 ou 7, 577-10, § 4 et 577-12, alinéa 4 du Code civil.] <L 1994-06-30/34, art. 8, 047; En vigueur : 1995-08-01>

3° des contestations ayant pour objet les servitudes, ainsi que les obligations que la loi impose aux propriétaires de fonds contigus;

4° des contestations relatives aux droits de passage;

5° des actions possessoires;

6° des contestations relatives à l'établissement des obligations d'irrigation et de dessèchement, à la fixation du parcours de la conduite d'eau, de ses dimensions et de sa forme, à la construction des ouvrages d'art à établir pour la prise d'eau, à l'entretien de ces ouvrages, aux changements à faire aux ouvrages déjà établis et aux indemnités dues au propriétaire, soit du fonds traversé, soit du fonds qui recevra l'écoulement des eaux, soit de celui qui servira d'appui aux ouvrages d'art;

7° de toutes contestations relatives aux pensions alimentaires, à l'exclusion toutefois de celles fondées sur [l'article 336 du Code civil] et de celles se rattachant à une action en divorce ou en séparation de corps sur laquelle il n'a pas été définitivement statué par un jugement ou un arrêt passé en force de chose jugée <L 1987-03-31/52, art. 78, 014; En vigueur : 06-06-1987>;

8° [de toutes contestations relatives à l'exercice du droit de réquisition exercé par le bourgmestre des immeubles abandonnés visés à l'article 134bis de la nouvelle loi communale.] <L 1993-01-12/34, art. 18, 039; En vigueur : 5555-55-55 "... à la date à laquelle l'arrêté royal portant exécution des dispositions de l'article 134bis de la nouvelle loi communale aura été publié au Moniteur belge" art. 3, L 1993-01-21/30.>

9° de toutes contestations relatives aux réquisitions militaires, tant en ce qui concerne le droit que le montant de l'indemnité;

10° des contestations relatives aux réparations des dégâts miniers [1 et des contestations qui ont trait à l'indemnisation des dommages causés par la recherche ou l'extraction d'hydrocarbures ou par le stockage géologique du dioxyde de carbone, ainsi qu'à l'indemnisation de la perte de jouissance en conséquence de l'occupation des terrains dans le cadre du décret du 8 mai 2009 relatif au sous-sol profond]1;

11° des contestations en matière de remembrement de biens ruraux;

12° des contestations relatives aux servitudes de débroussaillage sur les terrains limitrophes des voies ferrées;

13° des contestations pour dommages faits aux champs, fruits et récoltes, soit par l'homme, soit par les animaux;

14° des demandes formées en vertu de la loi du 16 mai 1900 apportant des modifications au régime successoral des petits héritages, sans préjudice de la compétence du tribunal de première instance; [il en va de même des demandes formées en vertu de la loi relative au régime successoral des exploitations agricoles en vue d'en promouvoir la continuité.] <L 1988-08-29/30, art. 13, 015; En vigueur : 1988-10-04>

15° des actions en réhabilitation et des actions en nullité basées sur un vice ou défaut de la chose, dans les ventes ou échanges d'animaux;

16° [des contestations relatives à l'octroi d'un salaire différé dans l'agriculture et l'horticulture;] <L 28-12-1967, art. 6>

17° (les demandes en matière de droit de fouille.) <L 15-07-1970, art. 30>

18° [des contestations relatives à l'intégration verticale dans le secteur de la production animale.] <L 01-04-1976, art. 15>

18° [des contestations relatives aux réparations des dommages visées par la loi du 10 janvier 1977, organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine.] <L 10-01-1977, art. 5. Le législateur a ajouté deux fois un no 18>

[19° Des demandes d'indemnisation des dommages visées à l'article 14 du décret du 24 janvier 1984, portant des mesures en matière de la politique de l'eau souterraine.] <DCFL 24-01-1984, art. 18, seulement valable pour la Communauté flamande>

[20° des contestations relatives aux réparations des dommages visées par le décret du Conseil Régional Wallon organisant la réparation des dommages provoqués par des prises et des pompages d'eau souterraine;] <DRW 1985-10-11/33, art. 6, 008>

[21° des contestations en matière de contrats de crédits [ainsi que des demandes d'octroi de facilités de paiement et des contestations en matière de cautionnement de contrats de crédits], tels qu'ils sont régis par la loi du 12 juin 1991 relative au crédit à la consommation.] <L 1991-06-12/30, art. 114, § 3, 029; En vigueur : au plus tard le 09-07-1992, à une date à fixer par le Roi> <L 2003-03-24/40, art. 77, 115; En vigueur : 01-01-2004>

[22° de toutes contestations relatives à l'exercice par le ministre ayant l'Intégration sociale dans ses attributions, ou par son délégué, du droit de réquisitionner tout immeuble abandonné, visé à l'article 74 de la loi du 2 janvier 2001 portant des dispositions sociales, budgétaires et diverses.] <L 2001-06-10/70, art. 2, 093; En vigueur : 11-09-2001>

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(1)<DCFL 2009-05-08/15, art. 65, 180; En vigueur : 06-09-2011>

(2)<ORD 2011-07-20/28, art. 66, 193; En vigueur : 20-08-2011>

## Article 624 of the Judicial Code

### Extrait du Code judiciaire

Art. 624. Hormis les cas où la loi détermine expressément le juge compétent pour connaître de la demande, celle-ci peut, aux choix du demandeur, être portée :

1° devant le juge du domicile du défendeur ou d'un des défendeurs;

2° devant le juge du lieu dans lequel les obligations en litige ou l'une d'elles sont nées ou dans lequel elles sont, ont été ou doivent être exécutées;

3° devant le juge du domicile élu pour l'exécution de l'acte;

4° devant le juge du lieu où l'huissier de justice a parlé à la personne du défendeur si celui-ci ni, le cas échéant, aucun des défendeurs n'a domicile en Belgique ou à l'étranger.

## Article 626 of the Judicial Code

### Extrait du Code judiciaire

Art. 626. Les demandes relatives aux pensions alimentaires énumérées à l'article 591, 7° , peuvent être portées devant le juge du domicile du demandeur (.....) [1 à l'exception des demandes tendant à réduire ou à supprimer ces pensions alimentaires.]1. <L 24-07-1978 , art. 1>

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(1)<L 2010-03-19/05, art. 10, 177; En vigueur : 01-08-2010; voir également l'art. 17>

## Article 628 of the Judicial Code

### Extrait du Code judiciaire

Art. 628. Est seul compétent pour connaître de la demande :

1° le juge de la dernière résidence conjugale ou du domicile du défendeur, lorsqu'il s'agit d'une demande en divorce ou de séparation de corps (pour désunion irrémédiable) : <L 2007-04-27/00, art. 19, 149; En vigueur : 01-09-2007>

2° (le juge de la dernière résidence conjugale, lorsqu'il s'agit d'une demande prévue aux articles (213), 214, 215, 216, 220, 221, 223, 224, 1395, 1420, 1421, 1422, 1426, 1442, 1463 et 1469 du Code civil;) <L 14-07-1976, (art. 4, § 2), art. 23> <L 24-07-1978, art. 2>

(3° Le juge de la résidence ou, à défaut, du domicile de la personne à protéger, lorsqu'il s'agit d'une requête visée à l'article 488bis, a), du Code civil. Le juge de paix ayant désigné l'administrateur reste compétent pour l'application ultérieure des dispositions des articles 488bis, d) à 488bis, k), à moins qu'il ait, par décision motivée, décidé, d'office ou à la requête de la personne protégée ou de tout intéressé, du procureur du Roi ou de l'administrateur provisoire, de transmettre le dossier au juge de paix du canton de la nouvelle résidence principale, lorsque la personne protégée quitte le canton pour installer sa résidence principale de manière durable dans un autre canton judiciaire. Ce dernier juge devient compétent.) <L 2003-05-03/62, art. 10, 120; En vigueur : 31-12-2003>

4° le juge du domicile du notaire, lorsqu'il s'agit d'une demande de taxation d'émoluments;

5° le juge du siège social de la société mutualiste ou de l'association sans but lucratif dont la dissolution est demandée;

6° le juge du siège de l'établissement d'utilité publique, lorsqu'il s'agit d'une demande de révocation d'administrateurs;

7° le juge du domicile de l'opposant, en matière de dépossession involontaire de titres au porteur, ou, lorsque l'opposant n'a pas son domicile en Belgique, le juge du siège social de l'établissement débiteur;

8° (le juge du domicile du consommateur lorsqu'il s'agit d'une demande relative à un contrat de crédit régi par la loi du 12 juin 1991 relative au crédit à la consommation (, y compris les demandes d'octroi de facilités de paiement et les demandes relatives au cautionnement de contrats de crédit);) <L 1991-06-12/30, art. 114, § 4, 029; En vigueur : 22-10-1991> <L 2003-03-24/40, art. 78, 115; En vigueur : 01-01-2004>

9° (le juge de la résidence principale de l'enfant, lorsqu'il s'agit d'une demande visée à l'article 11bis du Code de la nationalité belge, ou de la résidence principale du déclarant, lorsqu'il s'agit d'une demande visée à l'article 12bis ou de déclarations fondées sur les articles 15 à 17, 24, 26 et 28 du même Code (ou de la résidence principale de celui qui fait suppléer à l'absence d'un acte de naissance par un acte de notoriété délivré sur la base de l'article 5 du même Code.) <L 1991-06-13/31, art. 7, §2, 030; En vigueur : 01-01-1992> <L 2000-03-01/46, art. 3, 086; En vigueur : 01-05-2000>

10° le juge du domicile du preneur d'assurance, lorsqu'il s'agit de contestations en matière de contrat d'assurance, quel que soit l'objet du contrat, sans préjudice des dispositions qui règlent les assurances maritimes et de celles qui ont trait à la réparation des dommages résultant des accidents du travail;

11° le juge dans le ressort duquel se trouve le port d'attache du navire ou du bâtiment, lorsqu'il s'agit de demandes relatives à la réparation des accidents de travail survenus aux gens de mer ou aux ayants droit;

12° le juge du domicile de l'acheteur, lorsqu'il s'agit de contestations relatives à une vente de semences, d'engrais et de substances destinées à la fourniture des animaux pourvu que l'acheteur n'ait pas fait acte de commerce;

13° le juge du siège social ou du principal établissement de la société, lorsqu'il s'agit (de contestations visées à l'article 574,1°,) et, même après la dissolution de la société lorsqu'il s'agit du partage des obligations qui en résultent, pour autant que l'action soit intentée dans les deux ans du partage; <L 1999-05-07/70, art. 3, 084; En vigueur : 05-09-1999>

14° le juge du domicile de l'assujetti, de l'assuré ou de l'ayant droit, lorsqu'il s'agit des contestations prévues (aux ((articles 580, 2°, 3°, 6°, 7°, 8°), 9°), 10° (,11° et 12°)), 581, 582, 1° et 2°, et des contestations relatives à l'application aux travailleurs indépendants de sanctions administratives prévues à l'article 583), et le juge du domicile du bénéficiaire des indemnités, lorsqu'il s'agit des contestations prévues à l'article 579. <L 12-05-1971, art. 4, 1°> <L 30-06-1971, art. 22> <L 20-06-1975, art. 11> <L 22-12-1977, art. 166, §3> <L 1989-07-06/30, art. 47, 017; En vigueur : 01-06-1989>

Si l'assujetti, l'assuré ou l'ayant droit n'a pas ou n'a plus de domicile en Belgique, la compétence territoriale est déterminée par sa dernière résidence ou son dernier domicile en Belgique. (Si l'assujetti ou l'assuré n'a pas eu de résidence ou de domicile en Belgique, la compétence territoriale est déterminée par le lieu de la dernière occupation en Belgique) <L 12-05-1971, art. 4, 2°>

(A l'égard des mandataires de sociétés, de groupements européens d'intérêt économique ou de groupements d'intérêts économique qui résident exclusivement ou principalement à l'étranger, la compétence territoriale est déterminée par le lieu où est établi le principal établissement de la société ou du groupement en Belgique;) <L 1989-07-12/36, art. 19, 1°, 018; En vigueur : 01-07-1989>

15° (le juge du siège de l'exploitation du preneur si le siège de l'exploitation se trouve en Belgique, le juge de la situation du bien loué si le siège de l'exploitation se trouve à l'étranger, lorsqu'il s'agit de contestations en matière de bail à ferme;) <L 1988-11-07/43, art. 42, 016; En vigueur : 1988-12-16>

(16° le juge du siège ou du principal établissement du groupement, lorsqu'il s'agit de contestations entre membres d'un groupement européen d'intérêt économique ou d'un groupement d'intérêt économique, entre gérants, entre gérant(s) et membres, entre liquidateurs, entre liquidateurs et membres ou entre membres, gérants et liquidateurs ainsi que de toute demande en dissolution d'un groupement.) <L 1989-07-12/36, art. 19, 2°, 018; En vigueur : 01-07-1989>

(17° le juge du domicile du débiteur, au moment de l'introduction de la demande, lorsqu'il s'agit d'une demande visée à l'article 1675/2.) <L 1998-07-05/58, art. 2, 062; En vigueur : 01-01-1999>

(18°) le juge de la dernière résidence commune des cohabitants légaux, lorsqu'il s'agit d'une demande visée à l'article 1479 du Code civil.) <L 1998-11-23/35, art. 5, 067; En vigueur : 01-01-2000> <L 2003-03-17/32, art. 2, 113; En vigueur : 01-09-2003> <L 2003-03-13/62, art. 3, 119; En vigueur : 01-09-2005>

(19° le juge du domicile du créancier d'aliments lorsqu'il s'agit d'une demande d'intervention visée par la loi du 21 février 2003 créant un Service des créances alimentaires au sein du SPF Finances.) <L 2003-03-17/32, art. 2, 113; En vigueur : 01-09-2003>

(19° le juge du domicile ou de la résidence habituelle de l'adoptant, des adoptants ou de l'un d'eux, lorsqu'il s'agit d'une demande en constatation de l'aptitude à adopter;

20° le juge du domicile ou de la résidence habituelle de l'enfant, lorsqu'il s'agit d'une demande en constatation de l'adoptabilité;

21° le juge du domicile ou de la résidence habituelle de l'adoptant, des adoptants ou de l'un d'eux, lorsqu'il s'agit d'une demande en adoption; à défaut, le juge du domicile ou de la résidence habituelle de l'adopté; à défaut, le juge du lieu où l'adoptant ou les adoptants font élection de domicile;

22° le juge du domicile ou de la résidence habituelle du défendeur ou de l'un d'eux, lorsqu'il s'agit d'une demande en révocation d'une adoption simple ou en révision d'une adoption; à défaut, le juge de Bruxelles;) <L 2003-03-13/62, art. 3, 119; En vigueur : 01-09-2005>

(23° le juge du dernier domicile en Belgique de la personne disparue, absente ou présumée absente ou, si celle-ci n'a jamais eu de domicile en Belgique, le juge de l'arrondissement de Bruxelles.) <L 2007-05-10/51, art. 4, 152; En vigueur : 01-07-2007>

(24° le juge de l'endroit où la personne visée à l'article 62bis du Code civil a fait la déclaration en vue de faire rédiger un acte portant mention du nouveau sexe.) <L 2007-05-09/50, art. 2, 154; En vigueur : 01-09-2007>

## Article 633sexies of the Judicial Code

### Extrait du Code judiciaire

Art. 633sexies. <Inséré par L 2007-05-10/52, art. 3; En vigueur : 01-07-2007>

§ 1er. Le tribunal de première instance qui est établi au siège de la cour d'appel dans le ressort de laquelle l'enfant, selon le cas, est présent ou a sa résidence habituelle au moment du dépôt ou de l'envoi de la requête, est seul compétent pour connaître des demandes visées à l'article 1322bis.

Toutefois, lorsque la procédure est en langue allemande, le tribunal de première instance d'Eupen est seul compétent.

§ 2. A défaut de présence de l'enfant en Belgique, la requête est déposée ou envoyée au greffe du tribunal de première instance qui est établi au siège de la cour d'appel dans le ressort de laquelle le défendeur a son domicile ou sa résidence habituelle.

Toutefois, lorsque la procédure est en langue allemande, le tribunal de première instance d'Eupen est seul compétent.

## Article 633septies of the Judicial Code

### Extrait du Code judiciaire

Art. 633septies. <inséré par L 2007-05-10/52, art. 4; En vigueur : 01-07-2007>

Le tribunal de première instance qui est établi au siège de la cour d'appel dans le ressort de laquelle l'enfant avait sa résidence habituelle avant son déplacement ou son non-retour illicite, est seul compétent pour connaître des demandes visées à l'article 1322decies.

Toutefois, lorsque la procédure est en langue allemande, le tribunal de première instance d'Eupen est seul compétent.

**Extrait du Code judiciaire - Quatrième partie : DE LA PROCEDURE CIVILE.**

**LIVRE PREMIER L'ASSISTANCE JUDICIAIRE.**

**CHAPITRE 1er. - Définition.** <inséré par L 2006-07-01/72, art. 2; En vigueur : 10-08-2006>

Art. 664. L'assistance judiciaire consiste à dispenser, en tout ou en partie, ceux qui ne disposent pas des revenus nécessaires pour faire face aux frais d'une procédure, même extrajudiciaire, de payer les (droits divers), d'enregistrement, de greffe et d'expédition et les autres dépens qu'elle entraîne. Elle assure aussi aux intéressés la gratuité du ministère des officiers publics et ministériels, dans les conditions ci-après déterminées. <L 2006-12-19/33, art. 66, 083 ; En vigueur : 01-01-2007>

(Elle permet également aux intéressés de bénéficier de la gratuité de l'assistance d'un conseiller technique lors d'expertises judiciaires.) <L 2006-07-20/39, art. 10, 076; En vigueur : indéterminée et au plus tard le 01-01-2007>

**CHAPITRE II. - Champ d'application.** <inséré par L 2006-07-01/72, art. 3; En vigueur : 10-08-2006>

Art. 665. L'assistance judiciaire est applicable:

1° à tous les actes relatifs aux demandes à porter ou pendantes devant un juge de l'ordre judiciaire ou administratif ou devant des arbitres;

2° aux actes relatifs à l'exécution des jugements et arrêts;

3° aux procédures sur requête;

4° aux actes de procédure qui relèvent de la compétence d'un membre de l'ordre judiciaire ou requièrent l'intervention d'un officier public ou ministériel.

5° (aux procédures de médiation, volontaires ou judiciaires, menées par un médiateur agréé par la commission visée à l'article 1727.) <L 2005-02-21/36, art. 2, 071; En vigueur : 30-09-2005>

(6° à toutes les procédures extrajudiciaires imposées par la loi ou le juge;

7° pour l'exécution des actes authentiques dans un autre Etat membre de l'Union européenne dans le cadre de l'article 11 de la directive 2003/8/CE du Conseil du 27 janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires, dans les conditions définies par cette directive.) <L 2006-07-01/72, art. 12, 077; En vigueur : 10-08-2006>

(8° à l'assistance d'un conseiller technique lors d'expertises judiciaires.) <L 2006-07-20/39, art. 11, 076; En vigueur : indéterminée et au plus tard le 01-01-2007>

Art. 666. Lorsque l'actif d'une faillite est présumé insuffisant pour couvrir les premiers frais de liquidation, le juge saisi ordonne, d'office ou à la requête du curateur, la gratuité de la procédure.

La gratuité est également accordée pour les actes et les procédures conservatoires jusqu'à l'expiration du délai de quarante jours à partir du jugement déclaratif de la faillite.

Art. 667. Le bénéfice de l'assistance judiciaire est accordé aux personnes de nationalité belge, lorsque leur prétention paraît juste et qu'elles justifient de l'insuffisance de leurs revenus.

(La décision du bureau d'aide juridique octroyant l'aide juridique de deuxième ligne, partiellement ou entièrement gratuite, constitue une preuve de revenus insuffisants.)  
<L 2006-07-01/72, art. 13, 077; En vigueur : 10-08-2006>

Art. 668. <L 15-12-1980, art. 90>

Le bénéfice de l'assistance judiciaire peut être accordé dans les mêmes conditions :

- a) aux étrangers, conformément aux traités internationaux;
- b) à tout ressortissant d'un Etat membre du Conseil de l'Europe;
- c) à tout étranger qui a, d'une manière régulière, sa résidence habituelle en Belgique (ou qui est en situation régulière de séjour dans l'un des Etats membres de l'Union européenne); <L 2006-07-01/72, art. 14, 077; En vigueur : 10-08-2006>
- d) à tout étranger dans les procédures prévues par la loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

**CHAPITRE III. - Procédure.** <inséré par L 2006-07-01/72, art. 4; En vigueur : 10-08-2006>

Art. 669. Le bénéfice de l'assistance judiciaire accordé au requérant peut, selon l'importance de ses revenus, être subordonné au versement entre les mains du receveur de l'enregistrement d'une somme à déterminer par la décision qui accorde l'assistance.

Art. 670. La demande d'assistance judiciaire est portée devant le bureau du tribunal qui doit être saisi du litige ou, selon le cas, du lieu ou l'acte doit être accompli.

Néanmoins, elle est adressée au bureau de la Cour de cassation au bureau de la cour d'appel ou de la cour du travail, au juge de paix ou au tribunal de police, lorsque le litige est de leur compétence ou que l'acte à accomplir relève de leur juridiction.

Art. 671. L'assistance judiciaire n'est accordée que pour les actes de procédure à accomplir et pour les simples copies ou les extraits de pièces à produire devant le juge saisi ou à saisir du litige, y compris la signification de la décision définitive. (L'assistance judiciaire couvre également les frais et honoraires du médiateur dans le cadre d'une procédure de médiation judiciaire ou volontaire, menée par un médiateur agréé par la commission visée à l'article 1727 (ainsi que les frais et honoraires des conseillers techniques assistant les parties dans le cadre d'expertises ordonnées par un juge).) <L 2005-02-21/36, art. 3, 071; En vigueur : 30-09-2005> <L 2006-07-20/39, art. 12, 076; En vigueur : indéterminée et au plus tard le 01-01-2007>

En cas d'appel ou de pourvoi en cassation, la demande d'assistance est formée devant le bureau du tribunal ou de la cour saisi du recours.

Art. 672. La partie civile et la partie civilement responsable peuvent demander le bénéfice de l'assistance judiciaire en s'adressant par requête, même verbale, au juge saisi de la poursuite.

Art. 672bis. <Inséré par L 1998-01-07/63, art. 3; En vigueur : 04-04-1998> Si la demande visée aux articles 671 et 672 est faite conjointement avec la demande visée à l'article 674bis, elle est adressée au juge compétent, suivant la procédure définie à cet article.

Art. 673. Dans les cas urgents et en toutes matières, le président du tribunal ou de la cour et, durant l'instance, le juge saisi de la cause, peuvent, sur requête, même verbale, accorder le bénéfice de l'assistance pour les actes qu'ils déterminent.

Art. 674. (Abrogé) <L 2006-07-01/72, art. 15, 077; En vigueur : 10-08-2006>

Art. 674bis. <Inséré par L 1998-01-07/63, art. 2; ED : 04-04-1998> § 1er. En matière pénale, l'inculpé, la partie civilement responsable, la partie civile, et toute personne qui, sur base du dossier, pourrait faire état d'un préjudice, peuvent demander l'assistance judiciaire en vue d'obtenir copie de pièces du dossier.

§ 2. La demande est adressée par requête :

1° au président de la chambre du conseil ou de la chambre des mises en accusation lorsque le procureur du Roi ou le procureur général, le cas échéant, prend des réquisitions en vue du règlement de la procédure;

2° au tribunal de police ou au président de la chambre du tribunal correctionnel, lorsque l'inculpé est cité ou a été convoqué par procès-verbal tel que prévu par l'article 216quater du Code de procédure pénale;

3° au président de la chambre de la cour d'appel;

4° au président de la cour d'assises.

(5° au président de la chambre du tribunal correctionnel ou au président de la chambre de la cour d'appel qui connaît de l'appel de l'action publique.) <L 2003-01-06/31, art. 2, 061; En vigueur : 01-03-2003>

(alinéa 2 abrogé) <L 2003-01-06/31, art. 2, 061; En vigueur : 01-03-2003>

§ 3. Lorsque le procureur du Roi ou le procureur général, le cas échéant, a pris des réquisitions en vue du règlement de la procédure, la demande d'assistance judiciaire relative à la délivrance de copies de pièces du dossier est introduite, à peine de déchéance, en ce qui concerne les parties appelées, au plus tard à la première audience.

§ 4. Lorsque l'affaire a été portée sans ordonnance de renvoi devant le tribunal de police ou le tribunal correctionnel, ou devant la cour d'appel, en cas d'application des articles 479 et suivants du Code d'instruction criminelle, le demande d'assistance judiciaire en vue d'obtenir la délivrance de copies de pièces du dossier doit être introduite, à peine de déchéance, dans les huit jours à dater de la citation ou de la convocation.

Le texte de l'alinéa 1er de ce paragraphe est reproduit dans la citation ou la convocation.

(Lorsque l'action publique est portée en appel devant le tribunal correctionnel ou la cour d'appel, la demande d'assistance judiciaire en vue d'obtenir la délivrance de copies de pièces du dossier est introduite, à peine de déchéance, dans les huit jours à dater de la déclaration d'appel. S'il est interjeté appel par le ministère public ou par la partie civile, sans que le prévenu ait interjeté appel, la demande d'assistance judiciaire est introduite, à peine de déchéance, dans les huit jours à dater de la citation.

Le texte de l'alinéa 3 de ce paragraphe est reproduit dans la citation en appel.) <L 2003-01-06/31, art. 2, 061; En vigueur : 01-03-2003>

§ 5. Sauf si elle peut établir qu'elle n'a pas été informée en temps utile, toute personne qui, sur base du dossier, pourrait faire état d'un préjudice doit introduire sa requête, à peine de déchéance, au plus tard le cinquième jour avant la première audience à laquelle la juridiction de jugement connaît de l'action publique.

§ 6. La requête écrite est signée par le requérant ou son avocat. Elle est déposée, selon le cas, à l'audience ou au greffe, ou bien envoyée au greffe par lettre recommandée à la poste. La date figurant sur le récépissé délivré par les services postaux fait office de date de dépôt. La requête verbale est formulée à l'audience, et il en est fait mention sur (le procès-verbal d'audience); elle peut aussi être faite sous forme de déclaration au greffe. La déclaration enregistrée par le greffier est versée au dossier. <L 2006-07-10/39, art. 24, 078; En vigueur : indéterminée et au plus tard : 01-01-2013 (voir L 2010-12-29/01, art. 4)>

Le requérant indique les pièces dont il demande la copie lorsqu'il aura eu l'occasion de consulter le dossier.

Seule peut être sollicitée la copie de pièces figurant dans le dossier au moment du dépôt de la requête. Les documents mentionnés à l'article 676 sont joints à la requête.

§ 7. L'examen de la demande d'assistance judiciaire visant à la délivrance de copies se déroule à huis clos. Il a lieu à une audience ultérieure lorsque la requête est déposée ou faite au greffe. Il a lieu à l'audience à laquelle le juge connaît de l'action publique lorsque la requête a été formulée verbalement.

Le président ou le juge statue après que le requérant ou son avocat ainsi que le ministère public ont été entendus ou ont eu l'opportunité de l'être.

Le président ou le juge peut rejeter la demande ou y faire droit en tout ou en partie. Dans sa décision, le président ou le juge indique les pièces pour lesquelles il autorise la délivrance de copies au titre de l'assistance judiciaire.

§ 8. Toute personne dont la requête a été acceptée en tout ou en partie peut introduire une nouvelle requête relative aux pièces versées ultérieurement au dossier.

La requête est introduite, à peine de déchéance, au plus tard le cinquième jour avant l'audience de la juridiction de jugement.

Lorsqu'à l'issue du délai visé à l'alinéa 2, de nouvelles pièces sont versées ultérieurement au dossier, le greffier délivre gratuitement une copie desdites pièces aux parties qui ont déjà bénéficié antérieurement de l'assistance judiciaire pour la délivrance de copies.

§ 9. La décision du juge relative à l'assistance judiciaire pour la délivrance de copies de pièces du dossier n'est pas susceptible d'opposition.

L'appel peut être introduit par le requérant ou par le ministère public dans un délai de vingt-quatre heures, lequel commence à courir à partir du prononcé du jugement.

L'appel est interjeté, selon les règles applicables en matière pénale, auprès du greffe de la juridiction qui a rendu la décision.

Il doit être examiné dans les quinze jours de son introduction :

1° par la chambre du conseil en cas d'appel de la décision du tribunal de police;

2° par la chambre des mises en accusation en cas d'appel de la décision de la chambre du conseil ou du tribunal correctionnel.

§ 10. Les décisions relatives à l'assistance judiciaire pour la délivrance de copies de pièces du dossier ne peuvent faire l'objet d'un pourvoi en cassation.

§ 11. La procédure relative à l'assistance judiciaire pour la délivrance de copies de pièces du dossier en matière pénale ne peut retarder le cours normal de l'action publique.

Art. 675. Devant le tribunal de première instance, le tribunal du travail et le tribunal de commerce, le requérant adresse au bureau une requête établie en double et signée par lui ou son avocat; (Cette requête n'est soumise à aucune autre formalité. Le requérant) peut aussi s'adresser verbalement au bureau; en ce cas, le greffier rédige une note sommaire exposant l'objet de la (requête écrite). Dans l'un et l'autre cas, le requérant joint à sa demande les pièces prévues à l'article 676 ou, le cas échéant, à l'article 677. <L 2006-07-01/72, art. 16, 1° et 2°, 077; En vigueur : 10-08-2006>

(Alinéas 2, 3, 4 et 5 abrogés) <L 2006-07-01/72, art. 16, 3°, 077; En vigueur : 10-08-2006>

(Devant le juge de paix, le bénéfice de l'assistance judiciaire peut être accordé sur simple demande, écrite ou verbale, à laquelle sont jointes les pièces visées à l'article 676 ou 677.) <L 2006-07-01/72, art. 16, 4°, 077; En vigueur : 10-08-2006>

Art. 676. <L 1998-11-23/34, art. 6, 041; En vigueur : 01-09-2001> Le Roi fixe par arrêté délibéré en Conseil des Ministres les pièces justificatives à produire pour l'application de ce livre.

Pour l'exécution de cette disposition, les agents de l'Administration des Finances peuvent être déliés du secret professionnel qui leur est imposé par les lois relatives aux impôts sur les revenus.

Art. 677. (Sans préjudice de l'article 508/17 et de la possibilité d'introduire la demande par le biais des autorités compétentes au sens de la directive visée à l'article 508/24, § 1er, le requérant résidant à l'étranger fait parvenir sa demande au bureau ou au juge, à l'aide du formulaire visé à l'article 16 de la directive visée à l'article 508/24, § 1er. Il joint à cette demande les documents justificatifs de ses revenus, tels qu'ils sont exigés par la loi du pays où il réside.) <L 2006-07-01/72, art. 17, 077; En vigueur : 10-08-2006>

Si dans ce pays aucune loi ne règle la matière, ou s'il n'est pas possible de se conformer à la loi qui y est en vigueur, il joint à sa demande une déclaration affirmée devant l'agent consulaire belge du lieu de sa résidence; cette déclaration contient l'indication de la résidence du requérant et l'énumération détaillée de ses moyens d'existence et de ses charges.

Art. 678. <L 2006-07-01/72, art. 18, 077; En vigueur : 10-08-2006> Le bureau statue sur pièces. Il peut aussi examiner la demande.

Il peut, pour cet examen, s'adresser au ministère public et lui demander rapport.

Pour cet examen, le bureau peut convoquer le requérant en chambre du conseil. La convocation lui est adressée, sous pli judiciaire, par le greffier.

Le bureau se prononce dans les huit jours de l'introduction de la demande.

Le greffier notifie l'ordonnance au requérant sous pli judiciaire dans les trois jours de la prononciation.

L'examen a lieu en chambre du conseil.

Art. 679. (Abrogé) <L 2006-07-01/72, art. 19, 077; En vigueur : 10-08-2006>

Art. 680. La procédure prévue aux articles 675 à (678) est suivie devant le bureau de la cour d'appel et de la cour du travail. <L 2006-07-01/72, art. 20, 1°, 077; En vigueur : 10-08-2006>

(Alinéa 2 abrogé). <L 2006-07-01/72, art. 20, 2°, 077; En vigueur : 10-08-2006>

Art. 681. (Abrogé) <L 2006-07-01/72, art. 21, 077; ED : 10-08-2006>

Art. 682. <L 2008-06-01/33, art. 2, 094; En vigueur : 26-06-2008> Devant le Bureau de la Cour de cassation, la procédure est suivie conformément aux articles 675 à 677. L'examen aura lieu en chambre du conseil.

Sauf s'il s'agit du mémoire en réponse au pourvoi, le Bureau de la Cour de cassation ne se prononce, dans les matières visées à l'article 478 sur la demande d'assistance judiciaire, qu'après avoir recueilli l'avis d'un avocat à la Cour de cassation désigné par le bâtonnier de l'Ordre. Il peut néanmoins rejeter la demande sans cet avis préalable s'il constate que, soit la requête d'assistance judiciaire, soit le pourvoi envisagé est manifestement irrecevable ou fondé sur un moyen manifestement non sérieux ou que le délai d'introduction du pourvoi est trop proche de son expiration pour permettre à un avocat à la Cour de cassation de l'introduire en temps utile.

Les décisions du Bureau qui rejettent la requête ou n'accordent pas l'assistance judiciaire sont motivées.

Art. 682bis. <Inséré par L 2008-06-01/34, art. 2; En vigueur : 26-06-2008> En cas d'urgence, le premier président se prononce sur la requête, après avoir recueilli l'avis du procureur général, sans qu'un avis préalable de l'avocat à la Cour de cassation soit requis et sans que les parties doivent être appelées ou entendues.

Art. 683. Les décisions sont exécutoires de plein droit et sur minute nonobstant tout recours.

(La partie requérante peut) en obtenir gratuitement l'expédition. <L 2006-07-01/72, art. 23, 077; En vigueur : 10-08-2006>

Art. 684. La décision accordant l'assistance sous la réserve exprimée à l'article 669 est notifiée par le greffier au bureau du receveur de l'enregistrement qui, à son tour, prévient le greffier dès que la consignation est faite.

Cette consignation est mentionnée par le greffier en marge de la minute de la décision.

Art. 685. Toute décision qui accorde l'assistance désigne les officiers publics ou ministériels qui auront à prêter leur ministère.

Art. 686. Au début de chaque année judiciaire, les chambres de discipline des notaires et des huissiers de justice du ressort dressent une liste pour régler la répartition des affaires entre les notaires et les huissiers et la transmettent aux bureaux de première instance et d'appel.

Art. 687. Les dossiers relatifs aux demandes d'assistance judiciaire peuvent être soumis, suivant le cas, à l'examen d'un délégué de la chambre des huissiers de justice ou d'un délégué de la chambre des notaires. Ces chambres ont la faculté de joindre une note au dossier. Toutefois, il ne peut résulter de cette communication aucun retard dans l'examen des affaires.

**CHAPITRE IV. - Des recours.** <inséré par L 2006-07-01/72, art. 5; En vigueur: 10-08-2006>

Art. 688. (Les décisions des juges de paix, des tribunaux de police et des bureaux d'assistance judiciaire d'un tribunal de première instance, d'un tribunal du travail ou d'un tribunal de commerce peuvent être frappées d'appel par le requérant.) <L 2006-07-01/72, art. 24, 077; En vigueur : 10-08-2006>

Le procureur général près la cour d'appel peut déférer à la Cour de cassation uniquement pour contravention à la loi, les décisions du bureau d'appel.

Art. 689. <L 2006-07-01/72, art. , 077; En vigueur : 10-08-2006> L'appel est formé, à peine de déchéance, dans le mois de la notification de la prononciation, par requête écrite, déposée au greffe de la juridiction d'appel. Cette requête n'est soumise à aucune autre formalité que la mention des motifs, prescrite à peine de nullité.

La procédure prévue à l'article 678 est suivie.

Art. 690. Le pourvoi en cassation est formé par déclaration reçue au greffe de la Cour de cassation dans les dix jours du prononcé, motivé et signifié (au requérant) dans les dix jours de sa date, le tout à peine de nullité. <L 2006-07-01/72, art. 26, 077; En vigueur : 10-08-2006>

La signification est faite avec citation à comparaître à jour fixe devant la Cour de cassation.

Il est procédé suivant les règles énoncées en matière répressive.

**CHAPITRE V. - Des frais.** <inséré par L 2006-07-01/72, art. 6; En vigueur : 10-08-2006>

Art. 691. Si (le requérant) ne comprend pas la langue dont il est fait usage devant le bureau de première instance ou d'appel, l'intervention d'un interprète est obligatoire dans toutes les parties du pays. Les frais d'interprète sont à charge de l'Etat. <L 2006-07-01/72, art. 27, 077; En vigueur : 10-08-2006>

Art. 692. Les frais de transport et de séjour des magistrats, officiers publics ou ministériels, les frais et honoraires des experts, les taxes des témoins, conformément aux règles énoncées aux chapitres des expertises et des enquêtes, (les frais et honoraires du médiateur dans le cadre d'une procédure de médiation judiciaire ou volontaire, menée par un médiateur agréé par la commission visée à l'article 1727) le coût des insertions dans les journaux lorsqu'elles sont prescrites par la loi ou autorisées par justice, les décaissements et le quart des salaires des huissiers de justice, ainsi que les décaissements des autres officiers publics ou ministériels sont avancés à la décharge de l'assisté, selon la procédure prévue au règlement général sur les frais de justice en matière répressive. <L 2005-02-21/36, art. 4, 071; En vigueur : 30-09-2005>

(Les frais de déplacement que l'assisté expose lorsque la loi requiert ou lorsque le juge ordonne sa présence physique à l'audience sont avancés à la décharge de l'assisté, selon la procédure prévue au règlement général sur les frais de justice en matière répressive.

Il en va de même des frais d'interprétation lorsque l'étranger ne comprend pas la langue de la procédure.

Les frais de traduction des documents exigés par la loi ou par le juge saisi du litige sont, de la même manière, avancés à la décharge de l'étranger visé à l'alinéa précédent.) <L 2006-07-01/72, art. 28, 077; En vigueur : 10-08-2006>

Le Roi détermine, s'il échet, les modalités d'exécution du présent article.

Art. 692bis. <L 2006-07-20/39, art. 13; En vigueur : indéterminée et au plus tard le 01-01-2007> Les frais et honoraires des conseillers techniques assistant les parties lors d'expertises ordonnées par le juge sont avancés à la décharge de l'assisté.

Le Roi détermine, s'il échet, le montant de ces frais et honoraires et les modalités selon lesquelles ils sont taxés, payés, et, le cas échéant, recouverts.

**CHAPITRE VI. - Du recouvrement par l'Etat.** <inséré par L 2006-07-01/72, art. 7; En vigueur : 10-08-2006>

Art. 693. Le recouvrement des émoluments et honoraires des officiers publics et ministériels, à l'exception du quart des salaires des huissiers de justice, le recouvrement des droits et amendes liquidés en debet et des avances faites par l'administration de l'enregistrement et des domaines, peuvent être poursuivis dans tous les cas contre l'assisté, s'il est établi qu'une modification de son patrimoine, de ses revenus ou de ses charges est intervenue depuis la décision lui accordant le bénéfice de l'assistance judiciaire et qu'il est dès lors en état de payer.

Ce recouvrement peut en outre être poursuivi, solidairement à charge de la partie adverse, si celle-ci a été condamnée aux dépens ou si une transaction est intervenue au cours du procès.

Art. 694. Si l'adversaire de l'assisté est condamné aux dépens, le greffier transmet, dans le mois, un extrait du jugement au receveur de l'enregistrement.

En cas de transaction, les parties sont tenues d'informer l'administration de l'enregistrement et des domaines, par lettre recommandée à la poste, qu'il a été mis fin au litige. Cette information doit être donnée dans les soixante jours de l'accord intervenu, faute de quoi il est encouru par chacune des parties une amende administrative de 100 francs au minimum et qui peut être portée au double des frais de justice avancés par l'administration.

Art. 695. Le recouvrement de la créance de l'administration est poursuivi par elle, conformément aux dispositions sur le recouvrement des droits d'enregistrement.

La signification de la contrainte au défendeur condamné emporte, au profit de l'assisté, les effets de la signification du jugement par défaut prévue à l'article 806.

Lorsqu'il s'agit d'une faillite dont l'actif est insuffisant pour couvrir les frais résultant de la procédure, les frais et droits sont remboursés dans l'ordre suivant:

1° les avances faites par l'Etat;

2° les honoraires des curateurs et des officiers publics ou ministériels;

3° les droits dus à l'Etat.

Art. 696. La provision versée par l'assisté conformément à l'article 669 est affectée au paiement des frais et honoraires dus aux huissiers de justice, notaires, experts (, aux médiateurs agréés par la commission visée à l'article 1727) et témoins, suivant l'ordre de date des diverses prestations. Si, à la fin du procès, la provision n'est pas épuisée, le solde est restitué à l'assisté après paiement de tous les droits revenant au trésor, sur justification de la fin du litige. <L 2005-02-21/36, art. 5, 071; En vigueur : 30-09-2005>

Art. 697. L'action en recouvrement des sommes dues au trésor se prescrit par trente ans, à compter du jour de l'enregistrement s'il s'agit de droits liquidés en débet, et à partir du jour où l'administration de l'enregistrement a effectué le paiement, s'il s'agit d'avances faites par elle.

**CHAPITRE VII. - Du retrait.** <inséré par L 2006-07-01/72, art. 8; En vigueur : 10-08-2006>

Art. 698. Tant que l'affaire n'est pas terminée, l'assistance peut être retirée, si elle n'a été obtenue que sur la foi de déclarations inexactes ou si les fins de l'acte introductif sont autres que celles de la requête en obtention du bénéfice de l'assistance.

La demande en retrait peut être faite pour toute partie en cause et par le ministère public. Elle est formée par requête motivée et signifiée avec citation à comparaître devant le tribunal saisi du litige, au jour qui aura été fixé par appointement. Les parties ne sont tenues de comparaître en personne que si le juge l'ordonne.

Celui-ci peut, s'il estime convenable, envoyer la demande pour information au bureau qui a accordé l'assistance. Il ordonne telles mesures d'instruction que de conseil et statue souverainement sur la demande de retrait.

Les frais avancés par l'Etat, les droits tenus en suspens, les émoluments et honoraires des officiers publics et ministériels, autres que la portion payée des salaires des huissiers de justice, sont immédiatement exigibles à charge de la partie déchue du bénéfice de l'assistance.

Art. 699. Celui qui, par des déclarations sciemment inexactes ou par d'autres moyens frauduleux, aura obtenu ou tenté d'obtenir le bénéfice de l'assistance sans y avoir droit, est puni d'un emprisonnement de huit jours à un an et d'une amende de 100 à 5 000 francs, ou de l'une de ces peines seulement.

Toutes les dispositions du livre 1er du Code pénal, y compris le chapitre VII et l'article 85 sont applicables à ces infractions.

**CHAPITRE VIII. - Des affaires transfrontalières visées par la directive 2003/8/CE.** <inséré par L 2006-07-01/72, art. 9; En vigueur : 10-08-2006>

Art. 699bis. <inséré par L 2006-07-01/72, art. 10; En vigueur : 10-08-2006> Pour ce qui concerne les affaires transfrontalières au sens de la directive 2003/8/CE du Conseil du 27

janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans le cadre de telles affaires, l'article 508/24 est applicable par analogie.

Art. 699ter. <inséré par L 2006-07-01/72, art. 11; En vigueur : 10-08-2006> La personne qui ne bénéficie pas de revenus insuffisants au sens de l'article 667, peut néanmoins bénéficier de l'assistance judiciaire si elle apporte la preuve qu'elle ne peut pas faire face aux frais en raison de la différence du coût de la vie entre l'Etat membre dans lequel elle a son domicile ou sa résidence habituelle et la Belgique.

## Article 700 of the Judicial Code

### Extrait du Code judiciaire

Art. 700.

(A peine de nullité, les) demandes principales sont portées devant le juge au moyen d'une citation, sans préjudice des règles particulières applicables aux comparutions volontaires et aux procédures sur requête. <L 2007-04-26/71, art. 5, 088; En vigueur : 22-06-2007>

(Les actes déclarés nuls pour contravention à la présente disposition interrompent la prescription ainsi que les délais de procédure impartis à peine de déchéance.) <L 2007-04-26/71, art. 5, 088; En vigueur : 22-06-2007>

## Article 801bis of the Judicial Code

### Extrait du Code judiciaire

Art. 801bis. <Inséré par L 2007-05-10/52, art. 5; En vigueur : 01-07-2007>

Le juge peut rectifier les erreurs matérielles ou de calcul qui seraient contenues dans un certificat établi par lui, conformément au Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000. Le Roi peut déclarer le présent article applicable aux certificats visés dans d'autres instruments internationaux.

Si l'erreur matérielle ou de calcul n'intervient que dans le certificat, la demande de rectification est introduite par requête unilatérale.

Si l'erreur matérielle ou de calcul dans le certificat est le résultat d'une erreur matérielle ou de calcul contenue dans la décision rendue par le juge pour laquelle le certificat a été émis, la rectification du certificat est demandée conjointement à celle de la décision rendue par le juge. La procédure prévue aux articles 794 à 801 est suivie.

Le greffier envoie par lettre ordinaire une copie du certificat rectifié à toutes les parties à la cause.

**Extrait du Code judiciaire**

**LIVRE IV. PROCEDURES PARTICULIERES.**

**CHAPITRE Xbis. <L 14-7-1976, art. 29> Des demandes des époux relatives à leurs droits et devoirs respectifs et à leur régime matrimonial.**

Art. 1253bis. (abrogé) <L 1992-08-03/31, art. 53, 020; En vigueur : 01-01-1993>

Art. 1253ter. <L 14-7-1976, art. 29>

La requête contient les nom, prénom, profession et domicile des époux.

La requête écrite est signée par le demandeur ou son avocat. (Les articles 1034bis à 1034sexies sont applicables à la requête écrite.) <L 1992-08-03/31, art. 54, 020; En vigueur : 01-01-1993>

Art. 1253quater. <L 14-7-1976, art. 29>

Lorsque les demandes sont fondées sur les articles 214, 215, 216, 221, 223, 1420, 1421, 1426, 1442, 1463 et 1469 du Code civil :

- a) le juge fait convoquer les parties [2 ...]2 et tente de les concilier;
- b) l'ordonnance est rendue dans les quinze jours du dépôt de la requête; [1 elle est notifiée par pli judiciaire aux deux époux par le greffier]1;
- c) si l'ordonnance est rendue par défaut, le défaillant peut [1 dans le mois de la notification par pli judiciaire]1 former opposition par requête déposée au greffe du tribunal;
- d) l'ordonnance est susceptible d'appel quel que soit le montant de la demande : l'appel est interjeté [1 dans le mois de la notification par pli judiciaire]1;
- e) chacun des époux peut à tout moment demander, dans les mêmes formes, la modification ou la rétraction de l'ordonnance ou de l'arrêt.

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(1)<L 2010-03-19/05, art. 11, 108; En vigueur : 01-08-2010; voir également l'art. 17>

(2)<L 2010-06-02/35, art. 9, 111; En vigueur : 10-07-2010>

Art. 1253quinquies. <L 14-7-1976, art. 29> Le juge de paix, saisi d'une demande fondée sur les articles 220, § 3, 221 et 223 du Code civil, peut ordonner aux époux et même aux tiers, la communication de tous renseignements et documents de nature à établir le montant des revenus et créances des époux; s'il n'est pas donné suite par le tiers à la réquisition du juge dans le délai qu'il détermine ou si les renseignements donnés apparaissent incomplets ou inexacts, le juge peut, par jugement motivé, ordonner la comparution du tiers à la date qu'il fixe. Le greffier convoque le tiers par pli judiciaire et joint à la convocation une copie du jugement.

Le tiers défaillant ou se refusant à fournir les renseignements demandés est passible des sanctions prévues à l'article 926; la convocation reproduit à peine de nullité la phrase précédente et le texte de l'article 926.

Lorsque le juge ordonne à une administration publique de lui fournir des renseignements sur les revenus et créances des époux, le secret imposé aux fonctionnaires de cette administration est levé.

Art. 1253sexies. <L 14-7-1976, art. 29>

§ 1er. Les requêtes fondées sur les articles 223 et 1421 du Code civil et demandant que soit ordonnée l'interdiction d'aliéner ou d'hypothéquer des biens susceptibles d'hypothèque, contiennent les lieux et dates de naissance des époux, l'indication spéciale de la nature et de la situation de chacun des immeubles visés dans la requête et pour les navires, leurs noms et les caractéristiques prévues à l'article 4, § 1er, 1° et 2°, de la loi du 10 février 1908.

L'ordonnance prononçant cette interdiction contient les mêmes indications; à la demande de l'époux qui l'a obtenue, un extrait en est notifié par le greffier au conservateur des hypothèques pour être inscrit en marge du dernier titre d'acquisition transcrit des immeubles ou navires visés dans l'ordonnance.

§ 2. La notification, faite au défendeur, de l'ordonnance fondée sur l'article 223 du Code civil, comportant l'interdiction d'aliéner ou de donner en gage des biens meubles, reproduit le texte de l'article 507 du Code pénal.

Art. 1253septies. <L 14-7-1976, art. 29>

Dans les cas d'urgence, l'époux qui demande l'interdiction d'aliéner ou d'hypothéquer des biens susceptibles d'hypothèque, peut demander au juge de paix, qu'avant même de statuer sur le mérite de la requête, il soit autorisé à faire inscrire sa demande en marge du dernier titre d'acquisition transcrit des biens visés dans la requête; un extrait de l'ordonnance est notifié par le greffier au conservateur des hypothèques.

De même, l'époux qui demande que soit prononcée l'interdiction d'aliéner ou de donner en gage des biens meubles ou des créances, peut demander à être autorisé à faire opposition entre les mains de son conjoint ou d'un tiers; cette opposition, faite par exploit d'huissier de justice, vaut interdiction d'aliéner, de donner en gage ou de déplacer jusqu'au prononcé de l'ordonnance statuant sur le mérite de la requête.

Art. 1253octies. <L 14-7-1976, art. 29> Les inscriptions portées dans les registres des conservateurs des hypothèques en exécution des articles précédents, valent pour six mois à moins que l'ordonnance n'ait fixé une autre durée.

Elles cessent en tout ou en partie leurs effets à la suite d'une ordonnance ou d'un arrêt modificatif; elles peuvent être radiées du consentement de l'époux ou de ses ayants cause ou par décision de justice, conformément aux articles 92 à 95 de la loi hypothécaire du 16 décembre 1851.

**Extrait du Code judiciaire**

**CHAPITRE XI. Du divorce, de la séparation de corps et de la séparation de biens.**

**Section Ière. (Du divorce pour désunion irrémédiable) <L 2007-04-27/00, art. 21, 1°, 087; En vigueur : 01-09-2007>**

Art. 1254. <L 2007-04-27/00, art. 22, 087; En vigueur : 01-09-2007> § 1er. [1 La demande en divorce fondée sur l'article 229, § 2, du Code civil est introduite par une requête signée par chacun des époux ou par au moins un avocat ou un notaire.

La demande en divorce fondée sur l'article 229, § 3, du Code civil peut être introduite par requête.

Les dispositions prévues aux articles 1034bis à 1034sexies s'appliquent à la requête visée aux alinéas 1er et 2.]1

Outre les mentions habituelles, l'acte introductif d'instance contient, le cas échéant, la mention de l'identité des enfants mineurs non mariés ni émancipés communs aux époux, des enfants adoptés par eux ainsi que des enfants de l'un d'eux adoptés par l'autre, de chaque enfant de chacun des époux dont la filiation est établie, ainsi que de chaque enfant qu'ils élèvent ensemble.

L'acte introductif d'instance contient, le cas échéant, une description détaillée des faits ainsi que, dans la mesure du possible, toutes les demandes relatives aux effets du divorce, sans préjudice du § 5.

Il peut contenir également les demandes éventuelles relatives aux mesures provisoires concernant la personne, les aliments et les biens tant des parties que des enfants mineurs non mariés ni émancipés communs aux époux, des enfants adoptés par eux ainsi que des enfants de l'un d'eux adoptés par l'autre. Si le demandeur souhaite que ces demandes soient immédiatement introduites en référé, la demande est introduite par exploit d'huissier de justice contenant citation à comparaître devant le président siégeant en référé, ainsi qu'il est dit à l'article 1280, et devant le tribunal.

La partie demanderesse joint à l'acte introductif d'instance, pour chacun des époux et pour les enfants éventuels susmentionnés :

1° une preuve de l'identité, de la nationalité et de l'inscription au registre de la population, au registre des étrangers ou au registre d'attente;

2° les actes de naissance des enfants susmentionnés;

3° une copie certifiée conforme du dernier acte de mariage et du dernier contrat de mariage;

4° la preuve de la résidence actuelle ou, le cas échéant, une preuve de la résidence habituelle en Belgique depuis plus de trois mois, si celle-ci diffère de la résidence mentionnée au Registre national.

Si les documents remis ont été établis dans une langue étrangère, le greffe peut demander une traduction certifiée conforme de ceux-ci.

§ 2. Les intéressés sont dispensés de fournir les diverses preuves d'identité, de nationalité et d'inscription aux registres de la population ou des étrangers mentionnées

au § 1er, pour autant qu'ils soient inscrits, à la date de l'acte introductif d'instance, au Registre national des personnes physiques créé par la loi du 8 août 1983 organisant un Registre national des personnes physiques. Les données figurant dans ce registre font foi jusqu'à preuve du contraire. Le greffier du tribunal contrôle dans ce cas les données d'identité au moyen du Registre national et verse un extrait de celui-ci au dossier.

Ils sont également dispensés de fournir :

1° les actes de naissance mentionnés au § 1er, pour autant que les enfants concernés soient nés en Belgique;

2° l'acte de mariage, si le mariage a été contracté en Belgique.

Dans les deux cas, le greffe du tribunal demande lui-même une copie de l'acte au dépositaire du registre. Il en va de même lorsque l'acte a été transcrit en Belgique et que le greffe connaît le lieu de sa transcription.

§ 3. Les dispositions du § 2 ne s'appliquent pas à une action en référé. Elles ne s'appliquent pas davantage aux personnes inscrites au registre d'attente.

§ 4. Si les mentions de l'acte introductif d'instance sont incomplètes, ou si le greffe n'a pas pu recueillir en temps utile certaines informations pour l'audience d'introduction, le juge invite la partie la plus diligente à communiquer les informations requises ou à compléter le dossier de la procédure. Chaque partie peut aussi prendre elle-même l'initiative de constituer le dossier.

[2 § 4/1. Dès que la première demande est introduite, le greffier informe les parties de la possibilité de médiation en leur envoyant immédiatement le texte des articles 1730 à 1737, accompagné d'une brochure d'information concernant la médiation rédigée par le Ministre qui a la Justice dans ses attributions ainsi que de la liste des médiateurs agréés spécialisés en matière familiale et établis dans l'arrondissement judiciaire concerné.]2

§ 5. Jusqu'à la clôture des débats, les parties ou l'une d'elles peuvent étendre ou modifier la cause ou l'objet de la demande, introduire des demandes reconventionnelles ou ampliatives, et ce, par conclusions contradictoirement prises, ou par conclusions communiquées à l'autre conjoint par exploit d'huissier ou par lettre recommandée à la poste avec accusé de réception.

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(1) <L 2010-06-02/23, art. 3, 110; En vigueur : 01-07-2010>

(2) <L 2011-04-05/17, art. 2, 113; En vigueur : indéterminée, au plus tard le 01-12-2011>

Art. 1255. <L 2007-04-27/00, art. 23, 087; En vigueur : 01-09-2007> § 1er. [1 Lorsque le divorce est sollicité conjointement en vertu de l'article 229, § 2, du Code civil, le juge prononce le divorce s'il établit que les parties sont séparées de fait depuis plus de six mois.]1

Si les parties ne sont pas séparées de fait depuis plus de six mois, le juge fixe une nouvelle audience. Celle-ci a lieu à une date immédiatement ultérieure à l'écoulement du délai de six mois, ou trois mois après la première comparution des parties. Lors de cette audience, si les parties confirment leur volonté, le juge prononce le divorce.

Lorsqu'il prononce le divorce, le juge homologue le cas échéant les accords intervenus entre parties.

§ 2. Si le divorce est demandé par l'un des époux en application de l'article 229, § 3, du Code civil, le juge prononce le divorce s'il constate que les parties sont séparées de fait depuis plus d'un an.

Si les parties ne sont pas séparées de fait depuis plus d'un an, le juge fixe une nouvelle audience. Celle-ci a lieu à une date immédiatement ultérieure à l'écoulement du délai d'un an, ou un an après la première audience. Lors de cette audience, si l'une des parties le requiert, le juge prononce le divorce.

§ 3. Si le divorce est demandé par l'un des époux et qu'en cours de procédure, l'autre marque son accord quant à la demande, le divorce est prononcé moyennant le respect des délais visés au § 1er.

§ 4. La séparation de fait des époux peut être établie par toutes voies de droit, l'aveu et le serment exceptés, et notamment par la production de certificats de domicile démontrant des inscriptions à des adresses différentes.

§ 5. Si le divorce est demandé par l'une des parties, en application de l'article 229, § 1er, du Code civil, et que le caractère irrémédiable de la désunion est établi, le juge peut prononcer le divorce sans délai.

§ 6. [3 Le juge peut ordonner aux parties de comparaître en personne, à la demande d'une des parties ou du ministère public, ou s'il l'estime utile, notamment en vue de concilier les parties ou d'apprécier l'opportunité d'un accord relatif à la personne, aux aliments et aux biens des enfants.

Sans préjudice de l'article 1734, le juge tente de concilier les parties. Il leur donne toutes les informations utiles sur la procédure et, en particulier, sur l'intérêt de recourir à la médiation telle que prévue à la septième partie. S'il constate qu'un rapprochement est possible, il peut ordonner la surséance à la procédure, afin de permettre aux parties de recueillir toutes informations utiles à cet égard et d'entamer le processus de médiation. La durée de la surséance ne peut être supérieure à un mois.]3

§ 7. Si l'un des époux est dans un état de démence ou dans un état grave de déséquilibre mental, il est représenté en tant que défendeur par son tuteur, son administrateur provisoire, ou, à défaut, par un administrateur ad hoc désigné préalablement par le président du tribunal à la requête de la partie demanderesse.

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(1) <L 2010-06-02/23, art. 4, 110; En vigueur : 01-07-2010>

(2) <L 2010-06-02/35, art. 10, 111; En vigueur : 10-07-2010>

(3) <L 2011-04-05/17, art. 3, 113; En vigueur : indéterminée, au plus tard le 01-12-2011>

Art. 1256. <Rétabli par L 2007-04-27/00, art. 24, 087; En vigueur : 01-09-2007> A tout moment, les parties peuvent demander au juge d'homologuer leurs accords sur les mesures provisoires relatives à la personne, aux aliments et aux biens des époux ou de leurs enfants.

Il peut refuser d'homologuer l'accord s'il est manifestement contraire à l'intérêt des enfants.

A défaut d'accord ou en cas d'accord partiel, la cause est renvoyée, à la demande d'une des parties, à la première audience utile des référés, pour autant qu'elle ne soit pas encore inscrite au rôle des référés. L'article 803 est d'application.

Art. 1257.

<Abrogé par L 2010-06-02/23, art. 5, 110; En vigueur : 01-07-2010>

Art. 1258. [1 Sauf convention contraire, les dépens sont partagés par parts égales entre les parties lorsque le divorce est prononcé sur la base de l'article 229, § 2, du Code civil.

Sauf convention contraire, chaque partie supporte ses dépens lorsque le divorce est prononcé sur la base de l'article 229, § 1er ou 3, du Code civil. Le juge peut toutefois en décider autrement compte tenu de toutes les circonstances de la cause.]1

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(1) <L 2009-11-17/03, art. 2, 107; En vigueur : 01-02-2010>

Art. 1259. (Abrogé) <L 2007-04-27/00, art. 27, 1°, 087; En vigueur : 01-09-2007>

Art. 1260. (abrogé) <L 1994-06-30/33, art. 6, 026; En vigueur : 1994-10-01>

Art. 1260bis. (abrogé) <L 1994-06-30/33, art. 6, 026; En vigueur : 1994-10-01>

Art. 1261. (...) <L 1994-06-30/33, art. 6, 026; ED : 1994-10-01>

Lorsque les parties ou l'une d'elles ont fait élection de domicile, les significations sont faites à ce domicile.

(alinéa 2 abrogé) <L 2007-04-26/71, art. 29, 088; En vigueur : 22-06-2007>

Art. 1262. (abrogé) <L 1994-06-30/33, art. 7, 026; En vigueur : 1994-10-01>

Art. 1263. <L 1994-06-30/33, art. 8, 026; En vigueur : 1994-10-01>

[1 Lorsque la loi exige la comparution personnelle des parties ou que le tribunal l'a ordonné,]1 l'époux qui fait défaut peut être déclaré déchu de son action.

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(1) <L 2011-04-05/17, art. 4, 113; En vigueur : indéterminée, au plus tard le 01-12-2011>

Art. 1264. <L 1994-06-30/33, art. 9, 026; En vigueur : 1994-10-01>

Les parties comparaissent à l'enquête en personne, assistées de leur avocat s'il échet. Elles peuvent également être représentées par celui-ci.

Art. 1265. (abrogé) <L 1994-06-30/33, art. 10, 026; En vigueur : 1994-10-01>

Art. 1266. (abrogé) <L 1994-06-30/33, art. 10, 026; En vigueur : 1994-10-01>

Art. 1267. (Abrogé) <L 2007-04-27/00, art. 27, 2°, 087; En vigueur : 01-09-2007>

Art. 1268. (Abrogé) <L 2007-04-27/00, art. 27, 3°, 087; En vigueur : 01-09-2007>

Art. 1269. (Le dispositif des jugements ou arrêts (prononçant le divorce) énonce l'identité complète des parties ainsi que les lieu et date de la célébration de leur mariage.) <L 1-7-1974, art. 10> <L 1994-06-30/33, art. 12, 026; En vigueur : 1994-10-01>  
(Alinéa 2 abrogé) <L 2007-04-27/00, art. 27, 4°, 087; En vigueur : 01-09-2007>

Art. 1270. La reproduction des débats par la voie de la presse est interdite sous peine d'une amende de 100 à 2 000 francs et d'un emprisonnement de huit jours à six mois ou d'une de ces peines seulement.

Toutes les dispositions du livre Ier du Code pénal y compris le chapitre VII et l'article 85 sont applicables à cette infraction.

Art. 1270bis. (Abrogé) <L 2007-04-27/00, art. 27, 5°, 087; En vigueur : 01-09-2007>

Art. 1271. (abrogé) <L 1994-06-30/33, art. 14, 026; En vigueur : 1994-10-01>

Art. 1272. (abrogé) <L 1994-06-30/33, art. 14, 026; En vigueur : 1994-10-01>

Art. 1273. (abrogé) <L 1990-05-03/34, art. 2, 013; En vigueur : 1990-07-03>

Art. 1274. [1 Le délai pour se pourvoir en cassation et le pourvoi en cassation sont suspensifs.]<sup>1</sup>

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(1) <L 2010-06-02/23, art. 6, 110; En vigueur : 01-07-2010>

Art. 1275. <L 1994-06-30/33, art. 16, 026; En vigueur : 1994-10-01>

§ 1. Tout exploit de signification d'un jugement ou arrêt prononçant le divorce (...) est communiqué immédiatement en copie au greffier. <L 2007-04-27/00, art. 29, 087; En vigueur : 01-09-2007>

§ 2. Lorsque le jugement ou l'arrêt ayant prononcé le divorce, a acquis force de chose jugée, un extrait comprenant le dispositif du jugement ou de l'arrêt (et la mention du jour où celui-ci a acquis force de chose jugée) est, dans le mois, adressé par le greffier sous pli recommandé avec accusé de réception à l'officier de l'état civil du lieu où le mariage a été célébré ou lorsque le mariage n'a pas été célébré en Belgique, à (l'officier de l'état civil de Bruxelles). <L 1997-05-20/47, art. 5, 033; En vigueur : 07-07-1997>

L'accusé de réception est dénoncé par le greffier aux parties.

Dans le mois de la notification à l'officier de l'état civil, celui-ci transcrit le dispositif sur ses registres; mention en est faite en marge de l'acte de mariage s'il a été dressé ou transcrit en Belgique.

Après avoir effectué la transcription, l'officier de l'état civil en avise sans tarder le procureur du Roi près le tribunal qui a statué sur la demande.



Art. 1276. <L 1994-06-30/33, art. 17, 026; En vigueur : 1994-10-01>

Le délai prévu à l'article 1275, § 2, alinéa 1er, ne commence à courir, à l'égard des jugements, qu'après l'expiration du délai d'appel lorsque le jugement est rendu contradictoirement et après l'expiration du délai d'opposition lorsque le jugement est rendu par défaut et, à l'égard des arrêts, qu'après l'expiration du délai de pourvoi en cassation ou, le cas échéant, après le prononcé de l'arrêt rejetant le pourvoi.

[1 Le délai d'appel, d'opposition et de pourvoi en cassation commence à courir à partir de la signification du jugement ou de l'arrêt.]<sup>1</sup>

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(1) <L 2010-06-02/23, art. 8, 110; En vigueur : 01-07-2010>

Art. 1277. (abrogé) <L 1994-06-30/33, art. 17, 026; En vigueur : 1994-10-01>

Art. 1278. <L 1-7-1974, art. 7> Le jugement ou l'arrêt qui (prononce) le divorce (produit ses effets à l'égard de la personne des époux du jour où la décision acquiert force de chose jugée, et) produit ses effets à l'égard des tiers du jour de la transcription. <L 1994-06-30/33, art. 19, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 6, 1°, 033; En vigueur : 07-07-1997>

(Il remonte, à l'égard des époux, en ce qui concerne leurs biens, au jour de la demande, et en cas de pluralité de demandes, au jour de la première d'entre elles, qu'elle ait abouti ou non.) <L 1994-06-30/33, art. 19, 026; En vigueur : 1994-10-01>

(En cas de décès d'un des époux, avant la transcription du divorce mais après que la décision le prononçant a acquis force de chose jugée, les époux sont considérés comme divorcés, à l'égard des tiers, sous la condition suspensive de la transcription effectuée conformément à l'article 1275.) <L 1997-05-20/47, art. 6, 2°, 033; En vigueur : 07-07-1997>

(Le tribunal peut, à la demande de l'un des époux, s'il l'estime équitable en raison de circonstances exceptionnelles propres à la cause, décider dans le jugement qui (prononce) le divorce qu'il ne sera pas tenu compte dans la liquidation de la communauté de l'existence de certains avoirs constitués ou de certaines dettes contractées depuis le moment où la séparation de fait a pris cours.) <L 1994-06-30/33, art. 19, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 7, 033; En vigueur : 07-07-1997>

Les parties peuvent également former pareille demande au cours de la liquidation de la communauté.

Art. 1279. (abrogé) <L 1995-04-13/37, art. 16, 031; En vigueur : 03-06-1995>

Art. 1280. [Le président du tribunal ou le juge qui en exerce les fonctions] statuant en référé, connaît, [jusqu'à la dissolution du mariage à la demande, soit des parties ou de l'une d'elles, soit du procureur du Roi] en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfants. <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 8, 1°, 033; En vigueur : 07-07-1997>

[2 Sauf circonstances exceptionnelles, la comparution personnelle des parties est requise à l'audience en référé au cours de laquelle les demandes portant sur les mesures provisoires relatives à la personne, aux aliments et aux biens des enfants sont examinées, à l'exception des audiences de mise en état où seule la mise en état est examinée. L'article 1263 s'applique par analogie. Sans préjudice de l'article 1734, le président du tribunal ou le juge qui en exerce les fonctions tente de concilier les parties. Il leur donne toutes informations utiles sur la procédure et, en particulier, sur l'intérêt de recourir à la médiation telle que prévue à la septième partie. S'il constate qu'un rapprochement est possible, il peut ordonner la surséance à la procédure, afin de permettre aux parties de recueillir toutes informations utiles à cet égard et d'entamer le processus de médiation. La durée de la surséance ne peut être supérieure à un mois.]2

[Le juge tient compte, le cas échéant, des opinions exprimées par les enfants dans les conditions prévues à l'article 931, alinéas 3 à 7.] <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

Le procureur du Roi peut prendre, à l'intervention [du service social compétent], tous renseignements utiles concernant la situation morale et matérielle des enfants. <L 1994-02-02/33, art. 35, 027; En vigueur : 27-09-1994>

[Le président du tribunal ou le juge qui en exerce les fonctions] peut demander au procureur du Roi de procéder à l'information prévue à l'alinéa précédent. <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

L'information est, en tout cas, communiquée aux parties.

[Le président du tribunal ou le juge qui en exerce les fonctions] peut exercer les mêmes pouvoirs que ceux conférés au juge de paix par l'article [221] du Code civil. [1 En ce cas son ordonnance est opposable à tous tiers débiteurs actuels ou futurs après la notification que leur en fait le greffier, par pli judiciaire, à la requête du demandeur. Lorsque l'ordonnance cesse de produire ses effets, les tiers débiteurs en sont informés par le greffier, par pli judiciaire. La notification faite par le greffier indique le montant que le tiers débiteur doit payer ou cesser de payer.]1 <L 14-7-1976, art. IV> <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

[Si un époux a commis à l'encontre de l'autre un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal ou a tenté de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code, ou s'il existe des indices sérieux de tels comportements, l'époux victime se verra attribuer, sauf circonstances exceptionnelles, la jouissance de la résidence conjugale s'il en fait la demande.] <L 2003-01-28/33, art. 6, 060; En vigueur : 22-02-2003>

[Les articles 1253sexies, § 1, 1253septies, alinéa premier, et 153octies sont d'application lorsque l'interdiction d'aliéner ou d'hypothéquer des biens susceptibles d'hypothèque est demandée ou ordonnée; est également d'application l'article 224 du Code civil.] <L 14-7-1976, art. IV>

[Le président du tribunal ou le juge qui en exerce les fonctions, reste saisi [jusqu'à la dissolution du mariage] durant toute la durée de la procédure en divorce. <L 1997-05-20/47, art. 8, 2°, 033; En vigueur : 07-07-1997>

Sans préjudice d'une nouvelle citation ou d'une comparution volontaire des parties, la cause peut être ramenée devant lui, dans les 15 jours, par simple dépôt au greffe des conclusions d'une des parties.] <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

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(1) <L 2010-03-19/05, art. 12, 108; En vigueur : 01-08-2010; voir également l'art. 17>

(2) <L 2011-04-05/17, art. 5, 113; En vigueur : indéterminée, au plus tard le 01-12-2011>

Art. 1281.

<Abrogé par L 2010-06-02/23, art. 9, 110; En vigueur : 01-07-2010>

Art. 1282. <L 1994-06-30/33, art. 23, 026; En vigueur : 1994-10-01>

Le demandeur ou le défendeur en divorce peut en tout état de cause, (à partir de la date de (l'introduction de la demande) en divorce), requérir, pour la conservation de ses droits, l'apposition des scellés sur tous les effets mobiliers de chacun des époux. Ces scellés ne sont levés qu'en faisant inventaire et à la charge par les parties de représenter les choses inventoriées ou de répondre de leur valeur comme gardien judiciaire. <L 1997-05-20/47, art. 9, 033; En vigueur : 07-07-1997> <L 2007-04-27/00, art. 30, 1°, 087; En vigueur : 01-09-2007>

(En tout état de cause, les parties ont la faculté de faire dresser inventaire conformément au chapitre II du livre IV.) <L 2007-04-27/00, art. 30,2°, 087; En vigueur : 01-09-2007>

Art. 1283. <L 1994-06-30/33, art. 24, 026; En vigueur : 1994-10-01> Toute obligation contractée par un des époux à charge du patrimoine commun postérieurement à la date de la demande en divorce, sera déclarée nulle s'il est prouvé qu'elle a été contractée en fraude des droits du conjoint (sans préjudice des droits des tiers de bonne foi). <L 1997-05-20/47, art. 10, 1°, 033; En vigueur : 07-07-1997>

(La preuve de sa bonne foi incombe au tiers contractant.) <L 1997-05-20/47, art. 10, 2°, 033; En vigueur : 07-07-1997>

Art. 1284. (Abrogé) <L 2007-04-27/00, art. 31, 1°, 087; En vigueur : 01-09-2007>

Art. 1285. (Abrogé) <L 2007-04-27/00, art. 31, 1°, 087; En vigueur : 01-09-2007>

Art. 1286. (Abrogé) <L 2007-04-27/00, art. 31, 1°, 087; En vigueur : 01-09-2007>

Art. 1286bis. (Abrogé) <L 2007-04-27/00, art. 31, 2°, 087; En vigueur : 01-09-2007>

## **Section II. Du divorce par consentement mutuel.**

Art. 1287. (Les époux déterminés à opérer le divorce par consentement mutuel sont tenus de régler préalablement leurs droits respectifs sur lesquels il leur sera néanmoins libre de transiger.

Ils ont la faculté de faire dresser préalablement inventaire conformément au Chapitre II - De l'Inventaire du Livre IV.

Ils doivent constater dans le même acte leurs conventions au sujet de l'exercice des droits prévus aux articles 745bis et 915bis du Code civil pour le cas où l'un d'eux décéderait avant le jugement ou l'arrêt prononçant définitivement le divorce.) <L 1994-06-30/33, art. 26, 026; En vigueur : 1994-10-01>

(Alinéa 4 abrogé) <L 2007-04-27/00, art. 31, 3°, 087; En vigueur : 01-09-2007>

(Un extrait littéral de l'acte qui constate ces conventions doit être transcrit, dans la mesure où il se rapporte à des immeubles, au bureau des hypothèques dans le ressort duquel les biens sont situés, de la manière et dans les délais prévus à l'article 2 de la loi hypothécaire du 16 décembre 1851, modifié par la loi du 10 octobre 1913.) <L 1-7-1972, art. 1>

Art. 1288. <L 1-7-1972, art. 2> (Ils sont (...) tenus de constater par écrit leur convention visant : <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

1° la résidence de chacun des époux pendant le temps des épreuves;

2° (l'autorité sur la personne et l'administration des biens des enfants et le droit aux relations personnelles visé à l'article 374, alinéa 4, du Code civil) en ce qui concerne (les enfants mineurs non mariés et non émancipés communs aux deux époux, les enfants qu'ils ont adoptés et les enfants de l'un d'eux que l'autre a adoptés), tant pendant le temps des épreuves qu'après le divorce; <L 1995-04-13/37, art. 17, 031; En vigueur : 03-06-1995> <L 2007-04-27/00, art. 32, 087; En vigueur : 01-09-2007>

3° (la contribution de chacun des époux à l'entretien, à l'éducation et à la formation adéquate desdits enfants, sans préjudice des droits qui leur sont reconnus par le Chapitre V, Titre V, Livre premier, du Code civil;) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

4° (le montant de l'éventuelle pension à payer par l'un des époux à l'autre pendant les épreuves et après le divorce, la formule de son éventuelle adaptation au coût de la vie, les circonstances dans lesquelles et les modalités selon lesquelles ce montant pourra être révisé après le divorce.) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

((Lorsque des circonstances nouvelles et indépendantes de la volonté des parties modifient sensiblement leur situation ou celle des enfants), les dispositions visées aux 2° et 3° de l'alinéa précédent peuvent être révisées après le divorce, par le juge compétent.) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 11, 033; En vigueur : 07-07-1997>

[1 Sauf si les parties ont convenu expressément le contraire, le juge compétent peut, ultérieurement, à la demande d'une des parties, augmenter, réduire ou supprimer la pension visée à l'alinéa 1er, 4°, si, à la suite de circonstances nouvelles et indépendantes de la volonté des parties, son montant n'est plus adapté.]1

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(1) <L 2010-06-02/23, art. 7, 110; En vigueur : 01-07-2010>

Art. 1288bis. <inséré par L 1994-06-30/33, art. 28, En vigueur : 1994-10-01> La demande est introduite par voie de requête.

Elle est déposée au greffe du tribunal de première instance choisi par les époux.

Outre les autres mentions obligatoires, (la requête renvoie, à peine de nullité, aux conventions y annexées) exigées aux articles 1287 et 1288. <L 1997-05-20/47, art. 12, 1°, 033; En vigueur : 07-07-1997>

Sont déposés en annexe à la requête :

1° les conventions dressées en vertu des articles 1287 et 1288;

2° le cas échéant, l'inventaire prévu à l'article 1287, alinéa 2;

3° un extrait des actes de naissance et de l'acte de mariage des époux;

4° un extrait des actes de naissance (des enfants visés à l'article (<1254>, § 1er, alinéa 2)). <L 1997-05-20/47, <art>. 12, 2°, 033; En vigueur : 07-07-1997> <L 2007-04-27/00, art. 33, 087; En vigueur : 01-09-2007>

(5° une preuve de nationalité de chacun des époux.) <L 1997-05-20/47, art. 12, 3°, 033; En vigueur : 07-07-1997>

De la requête et des annexes, il est déposé un original et deux copies. Si les époux n'ont pas d'enfant, une copie suffit.

L'original de la requête est signé par chacun des époux, ou par au moins un avocat ou un notaire.

Art. 1288ter. <inséré par L 1994-06-30/33, art. 29, En vigueur : 1994-10-01>

Dans les huit jours du dépôt, le greffe adresse au procureur du Roi, deux copies de la requête et de ses annexes.

Art. 1289. <L 1994-06-30/33, art. 30, 026; En vigueur : 1994-10-01>

Dans le mois du jour du dépôt de la requête, les époux se présentent ensemble et en personne devant le président du tribunal de première instance ou devant le juge qui en exerce les fonctions.

Ils lui font la déclaration de leur volonté.

Art. 1289bis. <inséré par L 1994-06-30/33, art. 31, En vigueur : 1994-10-01>

Dans des circonstances exceptionnelles, le président du tribunal ou le juge qui en exerce les fonctions, après avoir pris connaissance de la requête et de ses annexes peut, par une ordonnance motivée, accorder dispense de la comparution personnelle prescrite aux articles 1289 et 1294 et autoriser l'un ou l'autre des époux à se faire représenter par un mandataire spécial, avocat ou notaire.

Art. 1289ter. <inséré par L 1994-06-30/33, art. 32, En vigueur : 1994-10-01>

Le procureur du Roi émet un avis écrit sur les conditions de forme, sur l'admissibilité du divorce et sur le contenu des conventions entre les époux relatives aux enfants mineurs.

L'avis déposé au greffe au plus tard la veille de la comparution des époux visée à l'article 1289, à moins qu'en raison des circonstances de la cause il ne soit émis sur-le-champ, par écrit ou verbalement à l'audience de la comparution des époux; dans ce cas, il en est fait mention sur (le procès-verbal d'audience). <L 2006-07-10/39, art. 24, 078; En vigueur : indéterminée et au plus tard : 01-01-2013 (voir L 2010-12-29/01, art. 4)>

Si l'avis ne peut être donné en temps utile, le président du tribunal ou le juge qui en exerce les fonctions en est avisé au plus tard la veille de l'audience et il est fait mention de la cause du retard sur (le procès-verbal d'audience). <L 2006-07-10/39, art. 24, 078; En vigueur : indéterminée et au plus tard : 01-01-2013 (voir L 2010-12-29/01, art. 4)>

Art. 1290. Le juge fait aux deux époux réunis, et à chacun d'eux en particulier, (...), telles représentations et exhortations qu'il croit convenables; il leur développe toutes les conséquences de leur démarche. <L 1-7-1972, art. 4>

(Sans préjudice de l'article 931, alinéas 3 à 7, il peut proposer aux parties de modifier les dispositions des conventions relatives à leurs enfants mineurs si elles lui paraissent contraires aux intérêts de ces derniers.

Le juge peut, au plus tard lors de la comparution des époux prévue à l'article 1289, décider d'office d'entendre les enfants conformément à l'article 931, alinéas 3 à 7.

(Lorsqu'il fait application des dispositions prévues au deuxième ou au troisième alinéa, le juge fixe, dans le mois du dépôt au greffe du procès-verbal de la première comparution ou de l'audition prévue à l'alinéa précédent, une nouvelle date de comparution des époux.) <L 1997-05-20/47, art. 13, 033; En vigueur : 07-07-1997>

Au cours de cette comparution, le juge peut faire supprimer ou modifier les dispositions qui sont manifestement contraires aux intérêts des enfants mineurs.) <L 1994-06-30/33, art. 33, 026; En vigueur : 1994-10-01>

Art. 1291. <L 1994-06-30/33, art. 34, 026; En vigueur : 1994-10-01>

Si les époux ainsi informés persistent dans leur résolution, il leur est donné acte, par le juge, de ce qu'ils demandent le divorce et y consentent mutuellement.

Art. 1291bis. <Inséré par L 2007-04-27/00, art. 34; En vigueur : 01-09-2007> Si les époux établissent qu'ils sont séparés de fait depuis plus de six mois au moment de l'introduction de la demande, ils sont dispensés de la comparution prévue à l'article 1294.

Dans ce cas, il est fait application des articles 1295 et suivants.

Art. 1292. <L 1-7-1972, art. 6> Le greffier dresse procès-verbal détaillé de tout ce qui a été dit et fait en exécution des articles 1289 à 1291; les pièces produites demeurent annexées au procès-verbal.

Il adresse, dans les quinze jours, au procureur du Roi, une copie certifiée conforme du procès-verbal de la comparution (...). <L 1997-05-20/47, art. 14, 033; En vigueur : 07-07-1997>

Art. 1293. <L 1994-06-30/33, art. 35, 026; En vigueur : 1994-10-01>

Lorsque les époux ou l'un d'eux font état de circonstances nouvelles et imprévisibles, dont la preuve est dûment apportée, modifiant gravement leur situation, celle de l'un d'eux ou celle des enfants, ils peuvent soumettre ensemble à l'appréciation du juge, une proposition de modification de leurs conventions initiales.

Après avoir pris connaissance de l'avis du procureur du Roi ou après avoir fait application de l'article 931, alinéas 3 à 7, le juge peut convoquer les parties s'il estime souhaitable, pour leur proposer d'adapter les propositions de modification de leurs conventions concernant leurs enfants mineurs, lorsque celles-ci lui semblent contraires aux intérêts de ces derniers.

Le juge peut, au plus tard, lors de la comparution des époux prévue à l'article 1294, décider d'office d'entendre les enfants conformément à l'article 931, alinéas 3 à 7.

(Lorsqu'il fait application des dispositions prévues au deuxième ou au troisième alinéa, le juge fixe, dans le mois du dépôt au greffe du procès-verbal de la comparution prévue au deuxième alinéa ou de l'audition prévue au troisième alinéa, une nouvelle date pour la seconde comparution prévue à l'article 1294.

Au cours de cette comparution, le juge peut faire supprimer ou modifier les dispositions qui sont manifestement contraires aux intérêts des enfants mineurs.) <L 1997-05-20/47, art. 15, 033; En vigueur : 07-07-1997>

Art. 1294. <L 1994-06-30/33, art. 36, 026; En vigueur : 1994-10-01>

Sauf en cas d'application de l'article 1293, les époux comparaissent ensemble en personne (, ou représentés par un avocat ou par un notaire) devant le président du tribunal ou devant le juge qui en exerce les fonctions, dans le mois du jour où sont révolus les trois mois à compter du procès-verbal prévu par l'article 1292. <L 2007-04-27/00, art. 35, 087; En vigueur : 01-09-2007>

Ils renouvellent leur déclaration et requierent du magistrat chacun séparément, en présence néanmoins l'un de l'autre, la prononciation du divorce.

(Le délai de trois mois est suspendu tant que, le cas échéant, la procédure prévue à l'article 931, alinéas 3 à 7, ou à l'article 1290, alinéa 4, n'a pas pris fin.) <L 1997-05-20/47, art. 16, 033; En vigueur : 07-07-1997>

Art. 1294bis. <Inséré par L 2007-04-27/00, art. 36; En vigueur : 01-09-2007> § 1er. Si l'une des parties ne comparaît pas lors de l'audience prévue à l'article 1294, ou fait savoir en cours de procédure qu'elle ne souhaite pas poursuivre celle-ci, la partie la plus diligente peut solliciter l'application de l'article 1255. Dans ce cas, le délai d'un an pour la fixation de l'audience prévue à l'article 1255, § 2, alinéa 2, prend cours à la date de la comparution visée à l'article 1289.

§ 2. Si la procédure est abandonnée, les conventions prévues à (l'article 1288) lient les parties à titre provisoire, jusqu'à ce qu'il soit fait application des articles 1257 ou 1280. Si les conventions ne revêtent pas la forme d'un titre exécutoire, la cause est, à la

demande de la partie la plus diligente, fixée à l'audience des référés conformément à l'article 1256. Si l'une des parties en fait la demande, le président prononce une ordonnance provisoire conforme aux conventions. <L 2008-10-31/41, art. 2, 100; En vigueur : 02-02-2009>

Art. 1295. Après que le juge a fait les observations aux époux, s'ils persévèrent, il leur est donné acte de leur réquisition, (...): le greffier du tribunal dresse procès-verbal qui est signé tant par le juge et le greffier que par les parties, à moins qu'elles ne déclarent ne savoir ou ne pouvoir signer, auquel cas il en est fait mention. <L 1-7-1972, art. 9>

Art. 1296. Le juge met de suite, au bas de ce procès-verbal, son ordonnance portant que, dans les trois jours, il sera par lui référé du tout au tribunal [1 ...]1, sur les conclusions par écrit du procureur du Roi auquel les pièces sont, à cet effet, communiquées par le greffier.

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(1) <L 2010-06-02/35, art. 11, 111; En vigueur : 10-07-2010>

Art. 1297. <L 1994-06-30/33, art. 37, 026; En vigueur : 1994-10-01>

Si le procureur du Roi constate que les conditions de forme et de fonds prévues par la loi sont respectées, il donne ses conclusions en ces termes : " la loi permet".

Dans le cas contraire, ses conclusions d'empêchement sont motivées.

Art. 1298. Le tribunal, sur le référé, ne peut faire d'autres vérifications que celles indiquées par l'article 1297. S'il en résulte que, dans l'opinion du tribunal, les parties ont satisfait aux conditions et rempli les formalités déterminées par la loi, il (prononce) le divorce (et homologue les conventions relatives aux enfants mineurs); dans le cas contraire, le tribunal déclare qu'il n'y a pas lieu à (prononcer) le divorce et énonce les motifs de la décision. <L 1994-06-30/33, art. 38, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 17, 033; En vigueur : 07-07-1997>

Art. 1299. [1 L'appel du jugement qui a prononcé le divorce n'est admissible que pour autant qu'il soit fondé sur le non-respect des conditions légales pour prononcer le divorce.

Il peut être interjeté par le ministère public dans le mois du prononcé. Dans ce cas, il est signifié aux deux parties.

Il peut également être interjeté par l'un des époux ou par les deux, séparément ou conjointement, dans le mois du prononcé. Dans ce cas, il est signifié au procureur du Roi ainsi que, s'il n'est interjeté que par un seul époux, à l'autre époux.]1

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(1) <L 2010-06-02/23, art. 10, 110; En vigueur : 01-07-2010>

Art. 1300. L'appel du jugement qui a déclaré ne pas y avoir lieu à (prononcer) le divorce, n'est admissible qu'autant qu'il soit interjeté par les deux parties, séparément

ou conjointement, (dans le mois) à compter de la prononciation. Il est signifié au procureur du Roi. <L 1994-06-30/33, art. 40, 026; En vigueur : 1994-10-01>

Art. 1301. Dans les dix jours de la signification de l'appel, le procureur du Roi transmet au procureur général près la cour d'appel, l'expédition du jugement, et les pièces sur lesquelles celui-ci est intervenu.

Le procureur général donne ses conclusions par écrit, dans les dix jours qui suivent la réception des pièces; [1 en cas d'application de l'article 109bis, § 2, alinéa 2 ou 3,]1 le président, ou le conseiller qui le supplée, fait son rapport à la cour d'appel [2 ...]2 et il est statué définitivement dans les dix jours qui suivent la remise des conclusions du procureur général.

L'arrêt n'est pas susceptible d'opposition.

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(1) <L 2010-04-22/28, art. 4, 109; En vigueur : 28-06-2010>

(2) <L 2010-06-02/35, art. 12, 111; En vigueur : 10-07-2010>

Art. 1302. <L 1994-06-30/33, art. 41, 026; En vigueur : 1994-10-01>

Le délai pour se pourvoir en cassation contre l'arrêt de la cour d'appel est de trois mois à compter de la prononciation.

Le pourvoi des parties n'est admissible qu'autant qu'il soit formé par les deux époux séparément ou conjointement.

Le pourvoi contre l'arrêt prononçant le divorce est suspensif.

Art. 1303. (Lorsque le divorce a été prononcé par un jugement ou arrêt passé en force de chose jugée, un extrait contenant le dispositif de ce jugement ou de l'arrêt (et la mention du jour où celui-ci a acquis force de chose jugée) est, dans le mois, adressé par le greffier sous pli recommandé avec accusé de réception à l'officier de l'état civil du lieu où le mariage a été célébré ou lorsque le mariage n'a pas été célébré en Belgique, à (l'officier de l'état civil de Bruxelles).) <L 1994-06-30/33, art. 42, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 18, 033; ED : 07-07-1997>

(Le délais d'un mois ne commence à courir), à l'égard des jugements, qu'après l'expiration du délai d'appel, et, à l'égard des arrêts, qu'après l'expiration du délai de pourvoi en cassation. <L 1994-06-30/33, art. 42, 026; En vigueur : 1994-10-01>

(alinéa 3 abrogé) <L 1994-06-30/33, art. 42, 026; En vigueur : 1994-10-01>

(Dans le mois de la réception de l'extrait du jugement ou de l'arrêt), l'officier de l'état civil transcrit le dispositif sur ses registres; mention en est faite en marge de l'acte de mariage s'il a été dressé ou transcrit en Belgique. <L 1994-06-30/33, art. 42, 026; En vigueur : 1994-10-01>

Art. 1304. <L 1994-06-30/33, art. 43, 026; En vigueur : 1994-10-01> Le jugement ou l'arrêt, qui prononce le divorce ne produit d'effets à l'égard des tiers qu'à compter du jour où il est transcrit. (En cas de décès d'un des époux, avant la transcription du divorce mais après que la décision le prononçant a acquis force de chose jugée, les

époux sont considérés comme divorcés, à l'égard des tiers, sous la condition suspensive de la transcription effectuée conformément à l'article 1303). <L 1997-05-20/47, art. 19, 033; En vigueur : 07-07-1997>

Toutefois, à l'égard des époux et en ce qui concerne leurs biens, la décision a effet à partir du procès-verbal dressé en exécution de l'article 1292.

En ce qui concerne les effets personnels du divorce entre époux, ils se produisent du jour où la décision acquiert force de chose jugée.

## Article 1288 of the Judicial Code

### Extrait du Code judiciaire

Art. 1288. <L 1-7-1972, art. 2> (Ils sont (...) tenus de constater par écrit leur convention visant : <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

1° la résidence de chacun des époux pendant le temps des épreuves;

2° (l'autorité sur la personne et l'administration des biens des enfants et le droit aux relations personnelles visé à l'article 374, alinéa 4, du Code civil) en ce qui concerne (les enfants mineurs non mariés et non émancipés communs aux deux époux, les enfants qu'ils ont adoptés et les enfants de l'un d'eux que l'autre a adoptés), tant pendant le temps des épreuves qu'après le divorce; <L 1995-04-13/37, art. 17, 031; En vigueur : 03-06-1995> <L 2007-04-27/00, art. 32, 087; En vigueur : 01-09-2007>

3° (la contribution de chacun des époux à l'entretien, à l'éducation et à la formation adéquate desdits enfants, sans préjudice des droits qui leur sont reconnus par le Chapitre V, Titre V, Livre premier, du Code civil;) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

4° (le montant de l'éventuelle pension à payer par l'un des époux à l'autre pendant les épreuves et après le divorce, la formule de son éventuelle adaptation au coût de la vie, les circonstances dans lesquelles et les modalités selon lesquelles ce montant pourra être révisé après le divorce.) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01>

((Lorsque des circonstances nouvelles et indépendantes de la volonté des parties modifient sensiblement leur situation ou celle des enfants), les dispositions visées aux 2° et 3° de l'alinéa précédent peuvent être révisées après le divorce, par le juge compétent.) <L 1994-06-30/33, art. 27, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 11, 033; En vigueur : 07-07-1997>

[1 Sauf si les parties ont convenu expressément le contraire, le juge compétent peut, ultérieurement, à la demande d'une des parties, augmenter, réduire ou supprimer la pension visée à l'alinéa 1er, 4°, si, à la suite de circonstances nouvelles et indépendantes de la volonté des parties, son montant n'est plus adapté.]<sup>1</sup>

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(1) <L 2010-06-02/23, art. 7, 110; En vigueur : 01-07-2010>

## Article 1305 of the Judicial Code

### Extrait du Code judiciaire

Art. 1305. <L 2007-04-27/00, art. 37, 087; En vigueur : 01-09-2007> La demande en séparation de corps est traitée et jugée dans les mêmes formes que la demande en divorce.

La demande en divorce peut à tout moment être transformée en demande en séparation de corps.

La demande en séparation de corps peut à tout moment être transformée en demande en divorce.

## Article 1320 of the Judicial Code

### Extrait du Code judiciaire

Art. 1320. [1 Les demandes en allocation, majoration, réduction ou suppression de pension alimentaire peuvent être introduites par requête contradictoire, conformément aux articles 1034bis à 1034sexies.]<sup>1</sup>

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(1) <L 2010-03-19/05, art. 13, 108; En vigueur : 01-08-2010; voir également l'art. 17>

## Article 1322/1 of the Judicial Code

### Extrait du Code judiciaire

Art. 1322/1. [1 La décision qui statue sur une pension alimentaire est de plein droit exécutoire par provision, sauf si le juge en décide autrement, sur la demande d'une des parties.]<sup>1</sup>

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(1) <Inséré par L 2010-03-19/05, art. 16, 108; En vigueur : 01-08-2010; voir également l'art. 17>

## Article 1322bis of the Judicial Code

### Extrait du Code judiciaire

Art. 1322bis. <L 2007-05-10/52, art. 6, 090; En vigueur : 01-07-2007>

§ 1er. Sans préjudice de la procédure prévue à l'article 1322decies, §§ 2 à 7, le président du tribunal de première instance est saisi, selon la procédure prévue aux articles 1034bis à 1034quinquies :

1° des demandes fondées sur la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants;

2° des demandes fondées sur la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants, qui tendent à obtenir le retour immédiat de l'enfant, le respect du droit de garde ou de visite existant dans un autre Etat, ou qui tendent à l'organisation d'un droit de visite;

3° des demandes fondées sur la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants et sur l'article 11 du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, qui tendent à obtenir, soit le retour de l'enfant, soit la garde de celui-ci à la suite d'une décision de non-retour rendue dans un autre Etat membre de l'Union européenne en application dudit règlement;

4° des demandes fondées sur l'article 48 du Règlement visé au 3°, qui tendent à arrêter les modalités pratiques de l'exercice du droit de visite.

§ 2. Le président du tribunal de première instance est saisi, selon la procédure prévue aux articles 1025 à 1034, des demandes fondées sur l'article 28 du Règlement du Conseil visé au § 1er, 3°, qui tendent à obtenir la reconnaissance et l'exécution des décisions en matière de droit de visite et de retour de l'enfant.

## Articles 1322nonies – 1322quaterdecies of the Judicial Code

### Extrait du Code judiciaire

Art. 1322nonies. <Inséré par L 2007-05-10/52, art. 10; En vigueur : 01-07-2007>

§ 1er. La décision de non-retour de l'enfant, rendue en Belgique en application de la Convention de La Haye et du Règlement du Conseil visé à l'article 1322bis, 3°, ainsi que les documents qui l'accompagnent, qui doivent, en application de l'article 11, 6, dudit Règlement, être transmis à la juridiction compétente ou à l'Autorité centrale de l'Etat membre dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour illicite, sont communiqués par le greffier à l'Autorité centrale belge, dans les trois jours ouvrables à dater du prononcé.

§ 2. Cette Autorité centrale est seule habilitée à assurer la transmission des pièces aux Autorités compétentes de l'Etat requérant.

Art. 1322decies. <Inséré par L 2007-05-10/52, art. 11; En vigueur : 01-07-2007>

§ 1er. La décision de non-retour de l'enfant rendue à l'étranger, ainsi que les documents qui l'accompagnent, transmis à l'Autorité centrale belge en application de l'article 11, 6, du Règlement du Conseil visé à l'article 1322bis, 3°, sont envoyés par lettre recommandée au greffier du tribunal de première instance qui est établi au siège de la Cour d'appel dans le ressort de laquelle l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour illicite.

§ 2. Dès réception des pièces et au plus tard dans les trois jours ouvrables, le greffier notifie par pli judiciaire aux parties et au ministère public, l'information contenue à l'article 11, 7 du Règlement du Conseil visé au § 1er. Le pli judiciaire contient les mentions suivantes :

1° le texte de l'article 11 du Règlement du Conseil visé à l'article 1322bis, 3°;

2° une invitation aux parties à déposer des conclusions au greffe, dans les trois mois de la notification. Le dépôt de ces conclusions opère saisine du président du tribunal de première instance.

§ 3. Si l'une au moins des parties dépose des conclusions, le greffier convoque immédiatement les parties à la première audience utile.

§ 4. La saisine du président du tribunal opère suspension des procédures engagées devant les cours et tribunaux, saisis d'un litige en matière de responsabilité parentale ou d'un litige connexe.

§ 5. A défaut pour les parties de présenter des observations au tribunal dans le délai prévu au § 2, 2°, le président du tribunal rend une ordonnance le constatant, qui est notifiée par le greffier aux parties, à l'Autorité centrale et au ministère public.

§ 6. La décision rendue sur la question de la garde de l'enfant en application de l'article 11, 8 du Règlement du Conseil visé au § 1er, peut également, à la demande de

l'une des parties, porter sur le droit de visite dans l'hypothèse où elle ordonnerait le retour de l'enfant en Belgique.

§ 7. La décision visée au § 6 est notifiée par le greffier aux parties, au ministère public et à l'Autorité centrale belge par pli judiciaire.

§ 8. L'autorité centrale belge est seule habilitée à assurer la transmission de la décision et des pièces qui l'accompagnent aux Autorités compétentes de l'Etat dans lequel la décision de non-retour a été rendue.

§ 9. Pour l'application de l'article 11, 7 et 8, du Règlement du Conseil visé au § 1er, il est procédé à l'audition de l'enfant conformément à l'article 42, 2, a), dudit Règlement et au Règlement (CE) n° 1206/2001 du Conseil du 28 mai 2001 relatif à la coopération entre les juridictions des Etats membres dans le domaine de l'obtention des preuves en matière civile ou commerciale.

Art. 1322undecies. <Inséré par L 2007-05-10/52, art. 11; En vigueur : 01-07-2007>

En ordonnant le retour d'un enfant, en application de l'article 12 de la Convention de La Haye ou de l'article 11, 8, du Règlement du Conseil visés à l'article <1322bis>, 3°, le président du tribunal fixe les modalités d'exécution de sa décision au regard de l'intérêt de l'enfant et désigne, si nécessaire, les personnes habilitées à accompagner l'huissier de justice pour l'exécution de celle-ci.

Art. 1322duodecies, <Inséré par L 2007-05-10/52, art. 13; En vigueur : 01-07-2007>

§ 1er. Pour l'application de l'article 11, 4, du Règlement du Conseil visé à l'article 1322bis, 3°, le ministère public saisit, à la demande de l'Autorité centrale belge, le tribunal de la jeunesse du lieu de la résidence habituelle de l'enfant avant son déplacement ou son non-retour illicite.

§ 2. La décision rendue par le tribunal de la jeunesse ainsi que les documents qui l'accompagnent doivent être communiqués à l'Autorité centrale belge dans les trois jours ouvrables du prononcé.

§ 3. Cette Autorité centrale est seule habilitée à assurer la transmission des pièces aux Autorités compétentes de l'Etat requérant.

Art. 1322terdecies. <Inséré par L 2007-05-10/52, art. 14; En vigueur : 01-07-2007>

Aux fins de l'article 2 de la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, de l'article 6 de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants et de l'article 53 du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, l'Autorité centrale compétente est le Service public fédéral Justice.

Art. 1322quaterdecies. <Inséré par L 2007-05-10/52, art. 15; En vigueur : 01-07-2007>

§ 1er. Aux fins de l'application des articles 55, d) et 56, 1 à 3, du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance

et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, l'Autorité centrale belge, à savoir le Service public fédéral Justice, transmet à l'instance communautaire compétente, les demandes qui lui ont été adressées par la juridiction d'un autre Etat membre.

§ 2. Aux fins de l'application de l'article 56, 4, du Règlement visé au § 1er, l'Autorité centrale belge transmet à l'instance communautaire compétente, l'information qui lui a été communiquée par la juridiction d'un autre Etat membre.

## **Article 1322quinquies of the Judicial Code**

### **Extrait du Code judiciaire**

Art. 1322quinquies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>)  
(Lorsque la demande est formulée par l'intermédiaire de l'Autorité centrale désignée sur la base de l'une des Conventions ou du Règlement du Conseil visés à l'article 1322bis, la requête est signée et présentée au président du tribunal par le ministère public.) <L 2007-05-10/52, art. 8, 090; En vigueur : 01-07-2007>

En cas de conflit d'intérêts dans le chef de celui-ci, la requête est signée et présentée au président du tribunal par l'avocat désigné par l'autorité centrale.

## Article 1322sexies of the Judicial Code

### Extrait du Code judiciaire

Art. 1322sexies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Saisi dans les affaires visées à l'article 1322bis, le président du tribunal de première instance statue comme en référé.

(Aucun recours ne peut être exercé à l'encontre d'une décision de non-retour rendue en Belgique en application de l'article 11, 6, du Règlement du Conseil visé à l'article 1322bis, 3°.

Aucun recours ne peut être exercé à l'encontre d'une décision arrêtant des mesures protectionnelles en application de l'article 11, 4, du Règlement du Conseil visé à l'article 1322bis, 3°.

Aucun recours ne peut être exercé à l'encontre de l'ordonnance rendue par le président du tribunal en application de l'article 1322decies, § 5.) <L 2007-05-10/52, art. 9, 090; En vigueur : 01-07-2007>

## Article 1322ter of the Judicial Code

### Extrait du Code judiciaire

Art. 1322ter. <L 2007-05-10/52, art. 7, 090; En vigueur : 01-07-2007>

Sans préjudice de l'article 1322decies, la requête est déposée ou envoyée par lettre recommandée au greffe du tribunal de première instance visé à l'article 633sexies.

## Articles 1386 – 1389 of the Judicial Code

### Extrait du Code judiciaire

#### **CODE JUDICIAIRE - Cinquième partie : [SAISIES CONSERVATOIRES, VOIES D'EXECUTION ET REGLEMENT COLLECTIF DE DETTES.] (art. <1386> à 1675/19) <L 1998-07-05/57, art. 2, 024; En vigueur : 01-01-1999>**

(NOTE : Consultation des versions antérieures à partir du 09-03-1985 et mise à jour au 16-12-2011)

#### **TITRE PREMIER. REGLES PRELIMINAIRES.**

##### **CHAPITRE Ier. Dispositions générales.**

Art. 1386. Nul jugement ni acte ne peuvent être mis à exécution que sur production de l'expédition ou de la minute revêtue de la formule exécutoire déterminée par le Roi.

Art. 1387. Aucun acte d'exécution ne peut avoir lieu entre neuf heures du soir et six heures du matin, ou un samedi, un dimanche ou un jour férié légal, qu'en vertu de l'autorisation du juge des saisies accordée sur requête pour raison d'impérieuse nécessité.

Art. 1388. <L 24-6-1970, art. 32> Les décisions qui ordonnent ou imposent à un tiers une mainlevée, une radiation d'inscription hypothécaire, un paiement, ou quelque prestation ne sont exécutoires par ou contre lui que sur l'attestation du greffier de la juridiction qui a rendu la décision, qu'à sa connaissance il n'a été formé contre la décision ni opposition ni appel, dans les délais légaux.

Cette attestation n'est pas requise lorsque la décision, préalablement signifiée ou notifiée si la loi l'impose, est exécutoire nonobstant appel et, si elle a été rendue par défaut, nonobstant opposition, sauf la justification, s'il échet, de l'accomplissement des formalités qu'elle ordonne ou que la loi prescrit.

Art. 1389. A peine de nullité, l'exploit de saisie contient, outre les mentions prévues par l'article 43 :

- 1° l'élection de domicile du saisissant dans l'arrondissement où siège le juge qui doit le cas échéant connaître de la saisie à moins que le saisissant n'y demeure ;
- 2° les nom, prénom et domicile du débiteur saisi ;
- 3° l'indication de la somme réclamée et du titre en vertu duquel la saisie est faite ;
- 4° la description sommaire des biens saisis.

## Article 1412 of the Judicial Code

### Extrait du Code judiciaire

Art. 1412. <L 1987-03-31/52, art. 87, 004; En vigueur : 06-06-1987> (Les limitations et exclusions prévues aux articles 1409, 1409bis et 1410, § 1er, § 2, 1° à 7°, § 3 et § 4 ne sont pas applicables :) <L 1993-01-14/34, art. 11, 1°, 011; En vigueur : 1993-03-02>

1° lorsque la cession ou la saisie sont opérées en raison des obligations alimentaires prévues par les articles 203, 203bis, 205, 206, 207, 213, 223, 301, 303, (...), 336 ou 364 du Code civil, par l'article 1280, alinéa premier, du présent Code ou par une convention conclue en vertu de l'article 1288 (...) du présent Code; <L 2007-04-27/00, art. 39, 1°, 062; En vigueur : 01-09-2007>

2° lorsque la rémunération, la pension ou l'allocation doit être payée au conjoint ou à un autre créancier d'aliments en application des articles 203ter, 221, (301, § 11) du Code civil ou 1280, alinéa 5, du présent Code; <L 2007-04-27/00, art. 39, 2°, 062; En vigueur : 01-09-2007>

(3° lorsque le juge a fait application de l'article 387ter, alinéa 2, du Code civil.) <L 2006-07-18/38, art. 5, 057; En vigueur : 14-09-2006>

Lorsque tout ou partie des sommes dues au (débitéur d'aliments) ne peuvent lui être payées pour l'une des causes prévues à l'alinéa 1er, ces sommes ne sont saisissables ou cessibles d'un autre chef qu'à concurrence de la quotité déterminée conformément aux dispositions du présent chapitre, diminuée des montants cédés, saisis ou payés au conjoint ou au créancier d'aliments en vertu des dispositions légales indiquées au premier alinéa. <L 1993-01-14/34, art. 11, 2°, 011; En vigueur : 1993-03-02>

**National section**

# **BULGARIA**

**Bilyana Gyaurova-Wegertseder**

**Attorney at law, Mediator, Director of BILI Foundation**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 7. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The main material piece of legislation regulating the above mentioned instruments is the Bulgarian **Family Code (FC)** (*Promulgated State Gazette, No. 47/23.06.2009, effective 1.10.2009, amended, SG No. 74/15.09.2009, effective 1.10.2009, SG No. 82/16.10.2009, SG No. 98/14.12.2010, effective 1.01.2011, amended and supplemented, SG No. 100/21.12.2010, effective 21.12.2010*) - <http://www.lex.bg/bg/laws/ldoc/2135637484> (in Bulgarian).

As obvious, it is a relatively new piece of legislation, effective as of October 2009 and replacing the old one. The Code however, does not provide regulation of legal separation, as the Bulgarian law does not recognize the existence of the so called factual cohabitation (registered partnership).

Currently, there are no proposals for additional reforms in this area.

The applicable substantive provisions are regulated by **Chapter Five Dissolution of marriage Grounds from the Family Code**. According to it marriage can be dissolved based on any of the following reasons: 1) death of either spouse; 2) annulment of marriage, and 3) divorce.

With regard to the applicable procedural provisions, they are arranged in the **Civil Procedure Code (CPC)**, (*Promulgated, State Gazette No. 59/20.07.2007, effective 1.03.2008, amended and supplemented, SG No. 50/30.05.2008, effective 1.03.2008, modified by Judgment No. 3 of the Constitutional Court of the Republic of Bulgaria of 8.07.2008 - SG No. 63/15.07.2008, amended, SG No. 69/5.08.2008, SG No. 12/13.02.2009, effective 1.01.2010 - amended, SG No. 32/28.04.2009, supplemented, SG No. 19/13.03.2009, amended and supplemented, SG No. 42/5.06.2009, modified by Judgment No. 4 of the Constitutional Court of the Republic of Bulgaria of 16.06.2009 - promulgated SG No. 47/23.06.2009, SG No. 82/16.10.2009, amended and supplemented, SG No. 13/16.02.2010, SG No. 100/21.12.2010, effective 21.12.2010, Judgment No. 15/21.12.2010 of the Constitutional Court of the Republic of Bulgaria - SG No. 5/14.01.2011*) - <http://lex.bg/bg/laws/ldoc/2135558368> (in Bulgarian), more specifically in **Part Three Special Action Proceedings, Chapter Twenty-Six Proceeding in Matrimonial Suits**.

#### 8. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

Each district court (second instance courts) in Bulgaria has jurisdiction to consider a cross-border divorce, according to the internal rules of jurisdiction. Under the Civil Procedure Code a claim shall be brought in the court area where the defendant has its permanent address. Claims against a person of unknown address are brought into the court area at the permanent address of his proxy or representative, if none exists - the permanent address of the applicant. If the defendant does not object to jurisdiction, the case can be considered, regardless of domicile of the parties. If the applicant is not domiciled in the Republic of Bulgaria, the action shall be brought in the district court in Sofia.

**9. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?** There are no specific legal instruments/procedures, besides the fact that the court decisions which fall under the scope of Article 21.2 of Regulation (EC) 2201/2003 of the Council which derogates Regulation (EC) 1347/2000, are recognized by the bodies competent for the registration.

**10. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Bulgaria is participating in the enhanced cooperation implemented by Regulation Rome III.

There are no provisions in the Bulgarian legislation which go in a direct conflict with the ones of Regulation Rome III.

The ruling principle is that in cases of collision in the regulation of cross-border divorce what is applied is the Regulation which arranges the legal relationships in question.

In case there is no regulation at an EU level, the Private International Law Code is applied.

**11. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

There is no legal norm in the Bulgarian legislation prohibiting the choice of applicable law in front of the court during the court proceeding. The provision of Article 5 (3) of the Rome III Regulation, therefore, is completely applicable under the Bulgarian legislation as it does not contradict to any other norm.

**12. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

The answer to that question can go in two different directions depending on whether the consideration is on the formal requirements for an agreement choosing the applicable law or on the form of the agreement which terminates the marriage on the ground of mutual agreement. If the question refers only to the agreement on the choice of the applicable law, the Bulgarian legislation does not foresee any formal requirements thereof.

With regard to the agreement terminating the marriage on the ground of mutual agreement, both the Family Code and the Civil Procedure Code envision presence of both spouses in the court room and a written form of the agreement with the following obligatory elements on which the spouses must have reached an agreement: where the children will live, parental rights, personal relations and alimony, as well as the use of the family home, the maintenance and the family name (**Article 51 Family Code, Article. 330 Civil Procedure Code**).

## B. Cross-border maintenance

### 5. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?

The main sources for regulation of maintenance are the Bulgarian [Family Code](#), the [Civil Procedure Code](#) and the [Private International Law Code \(PILC\)](#) (*Promulgated, State Gazette No. 42/17.05.2005, amended, SG No. 59/20.07.2007, effective 1.03.2008, SG No. 47/23.06.2009, effective 1.10.2009, SG No. 100/21.12.2010, effective 21.12.2010*) - <http://www.lex.bg/bg/laws/ldoc/2135503651> (in Bulgarian), which covers family law issues with an international element. There is a special **Chapter Ten** in the Family Code which covers the following maintenance topics: 1) right to maintenance – general rules and exceptions; 2) amount of the maintenance; 3) how the maintenance is paid; 4) abandonment, modification and termination of maintenance; 5) maintenance for past periods, and 6) lost of the right to maintenance.

With regard to the maintenance of spouses after a divorce, the main regulation can be found in **Chapter Twenty Six Proceedings in matrimonial suites** from the Civil Procedure Code. It covers the divorce procedures both by proving guilt and by mutual consent. Regardless of the grounding for the divorce, the court always decides on the maintenance. However, in cases of divorce by mutual consent, the maintenance of children and spouses is an obligatory element of the divorce agreement. The latter cannot be approved by the court if it misses this item.

The Private International Law Code states that maintenance issues are under the jurisdiction of the Bulgarian courts with exception in cases where the Bulgarian courts have international jurisdiction and where the maintenance creditor is habitually resident in the republic of Bulgaria (**Article 11 Private International Law Code**). The general principle is that obligation for maintenance is covered by the law of the state where the maintenance creditor has his habitual residence. Exception is in cases, where the national law is more favourable to the creditor. PILC also deals with issues related to: 1) the amount of the maintenance; 2) who can claim it; 3) possibilities for modification; 4) grounds for extinguishment of the right to maintenance, and 5) the applicable law in cases of divorce.

Since both the Civil Procedure Code and the Family Code are relatively new pieces of legislation (CPC was enforced in 2008 and FC in 2009), currently there have not been any discussions for reform in that particular area.

### 6. Please describe the national enforcement procedure applicable in the case of maintenance claims.

The national enforcement procedure is provided in the [Civil Procedure Code](#). The Code establishes a process which is very favourable for the plaintiff. It also introduces some additional elements protecting the ones claiming maintenance. For instance, the maintenance claims cannot be subject to an arbitrary agreement (**Article 19 CPC**). Furthermore, the plaintiffs on maintenance claims do not pay court fees (**Article 83, 1 CPC**). The maintenance claims are cognizant to the first instance courts in Bulgaria (called also Regional courts). The grounding for the filing of maintenance claims is regulated by the Family Code which states explicitly who has the right to claim maintenance. The main features of the maintenance claims are under **Chapter Twenty Six Proceeding in Matrimonial Suit from the CPC**. However, the procedure itself is regulated under **Chapter Twenty Five Summary proceeding**

**from the CPC.** All matrimonial suits can be connected including the ones related to the maintenance. Moreover, if it comes to an injunction to secure certain matrimonial claims, there are usually specific requirements related to them. However, these are not relevant to the maintenance claims (**Article 392, 1 CPC**). Receivables for maintenance cannot be subject to a coercive enforcement.

**7. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Central Authority in Bulgaria dealing with the application of the Maintenance Regulation is the Ministry of Justice - <http://www.justice.government.bg/new/>

**8. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

Currently, there are no other national procedures/instruments.

## **C. Matrimonial property regimes in Europe**

**4. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The current source of law regulating the matrimonial property regime on a national level is the Bulgarian **Family Code**. With regard to marriages with an international element, the relevant piece of legislation is the **Private International Law Code**.

**The Family Code** covers issues related to: 1) types of property regimes between the spouses; 2) procedure for registration of matrimonial contracts at the Central Electronic Register at the Registry Agency; 3) the statutory regime of the matrimonial community of property including the transformation of personal property and 4) the protection of third parties. With regard to p. 2), it provides information on the three different types of regimes of matrimonial property regulation introduced for the first time with the new Code. These are: 1) matrimonial community property, i.e. what is acquired during the marriage belongs to the spouses; 2) regime of division – each one of the spouses is owner of the property he/she has acquired, and 3) contractual regime where the matrimonial property regime is arranged with a specific contract.

**Private International Law Code** deals with the following topics: 1) regulation of the relationship between the spouses including matrimonial property; 2) selection of the applicable law according to the principles of the international private law; 3) agreement and enforceability of choice of applicable law.

Currently, there are no reform proposals in this area of law.

**5. Which conflict of laws rules apply in matrimonial property disputes?**

There is no specific conflict of laws application. The regulation is provided in the **Private International Law Code, Articles 79 - 81:**

**Article 79.** - Interspousal Relationships in Personam and in Rem

(1) The relationships in personam between spouses shall be governed by the common national law thereof.

(2) The relationships in personam between spouses holding different nationalities shall be governed by the law of the State in which they have a common habitual residence or, in the absence of such habitual residence, by the law of the State with which both spouses are most closely connected.

(3) The relationships in rem between spouses shall be governed by the law applicable to the relationships in personam therebetween.

(4) Spouses may select an applicable law to govern the relationships in rem therebetween if this is admissible under the law determined in Paragraphs (1) and (2).

**Article 80.** - Agreement on Choice of Applicable Law

(1) The choice of applicable law under Article 79 (4) herein must be evidenced in writing, dated and signed by the spouses.

(2) The entry into and the validity of the agreement on choice shall be governed by the selected law.

(3) The choice may be made before or after entry into the marriage. The spouses may change or revoke the choice of applicable law. Where the choice has been made after entry into the marriage, the said choice shall take effect as from the time of entry into the marriage unless otherwise agreed between the parties.

**Article 81.** - Enforceability of Choice of Applicable Law

If the relationships in rem between spouses are governed by a selected foreign law, they shall be enforceable against third parties solely if the said parties were aware of the application of the said law or were unaware through negligence. Enforceability shall apply to rights in rem in immovable property solely if the requirements for recording, established by the law of the State in which the property is situated, have been satisfied.

## 6. Which are the property consequences of registered partnerships?

The Bulgarian legislation does not recognize registered partnerships as a legal form of a factual cohabitation, therefore it is not specifically regulated in any of the laws.

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive was transposed 2011 in the material law, namely in the **Mediation Act (MA)** (Promulgated, State Gazette No. 110/17.12.2004, amended and supplemented, SG No. 86/24.10.2006, supplemented, SG No. 9/28.01.2011, amended and supplemented, SG No. 27/1.04.2011. The procedural law – the Civil Procedure Code has already have Articles related to the introduction of mediation procedure in divorce and commercial cases) – <http://lex.bg/bg/laws/ldoc/2135496713> (in Bulgarian).

The Mediation Act introduces that subject to mediation can be also cross-border disputes (**Article 3, 1 MA**). With regard to the interpretation of the term “cross-

border dispute”, the MA refers directly to the explanations provided in the Directive. Furthermore, the refusal to testify during a court proceeding which has existed before in the Civil Procedure Code is now additionally regulated in the MA saying that “Mediators may not be interrogated as witnesses regarding circumstances which have been confided to them by mediation participants and which are relevant to the resolution of the dispute that is the subject of the mediation, unless having received the explicit consent of the confiding party” (**Articles 7, 2 MA**). The same article provides also the exception to mediation confidentiality which among others includes protection of the best interests of children and necessity to disclose the content of the mediation agreement in order to implement and/or enforce it (**Articles 7, 3 MA**). The Directive is further implemented in **Article 11 MA** regulating the initiation of the mediation process. The law accepts as a beginning of a mediation process the date on which the parties have reached an explicit agreement to commence such a process. In cases where no explicit agreement is available the date of the beginning of the mediation process is the one of the first meeting of all participants with the mediator. These texts are particularly important with regard to determining the limitation period. According to **Article 11a MA** “No limitation period shall run while the mediation process is ongoing”. The law provides also a term for termination of the mediation procedure – upon expiration of 6 months from its beginning. Additional amendments were adopted and enforced with regard to the mediation agreement. For instance, the parties may include a liability clause in the agreement in case some of the obligations maintained in it are not executed. Probably one of the most important amendments transposing the Mediation Directive is provided in **Article 18**. It stipulates that any agreement concerning a legal dispute and reached in a mediation process will have the effect of a court settlement and therefore, subject to approval by regional courts (first instance courts) in Bulgaria (**Article 18, 1**). Once acknowledged by the parties, the court approves the agreement, if it does not contradict with the law or the principles of morality. If, depending on the case a prosecutor is involved, the court has to hear his/hers opinion too, before ruling on the agreement (**Article 18, 2**).

## 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The Directive is transposed in the domestic **Legal Aid Act (LAA)** (*Promulgated, State Gazette No. 79/4.10.2005, effective 1.01.2006, amended, SG No. 105/29.12.2005, effective 1.01.2006, SG No. 17/24.02.2006, effective 1.05.2006, SG No. 30/11.04.2006, effective 12.07.2006, amended and supplemented, SG No 42/5.06.2009, SG No. 32/27.04.2010, effective 28.05.2010, amended, SG No. 97/10.12.2010, effective 10.12.2010, supplemented, SG No. 99/17.12.2010, effective 1.01.2011, amended, SG No. 9/28.01.2011, supplemented, SG No. 82/21.10.2011, effective 1.01.2012, amended, SG No. 99/16.12.2011, effective 1.01.2012*) - <http://www.lex.bg/bg/laws/ldoc/213551185> (in Bulgarian). More specifically, the regulation can be found in **Chapter Eight Specifics of granting legal aid in cross-border disputes**. The Chapter provides a legal definition of a “cross-border dispute”, being such “where the party applying for legal aid is a citizen of a Member State of the European Union or a person residing lawfully in a Member State of the European Union, and where the dispute is settled by a competent authority in another Member State of the European Union” (**Article 41, 2**). Furthermore, the Chapter provides that citizens of the European Union or other

persons residing legally in an EU member state can also be subjects to legal aid if their property status does not exceed the national social threshold. The latter is provided in the Bulgarian Social Assistance Act.

It is also important to explain that the Bulgarian Ministry of Justice is the authority competent to receive applications for legal aid in cross-border disputes from the competent authorities of Member States of the European Union. It is also the institution which transmits applications for legal aid in cross-border disputes to the competent authorities of Member States of the European Union (**Article. 43 LAA**).

Last but not least, the said Chapter Eight regulates the procedure for applying for legal aid in cross-border disputes and the procedure for appeal in case legal aid is refused. The national authority providing legal aid is the National Legal Aid Office (NLAO).

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

Without being exhaustive, below is a list of international instruments including family law matters on which Bulgaria is a party. The list shows the type and name of the act and the ratifying/adoption process with the respective time frame.

#### **I. Conventions**

1. **European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children** (*Ratified by law, adopted by the 39th National Assembly on 26.02.2003 - SG No. 21/7.03.2003, Issued by the Ministry of Justice, promulgated, SG No. 104/28.11.2003, effective for Republic of Bulgaria since 1.10.2003*);
2. **Convention on the Nationality of Married Women** (*Opened for signature and ratification by General Assembly resolution 1040 (XI) of 29.01.1957, entry into force 11.08.1958, Issued in Collection of international documents, 1992*);
3. **Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption** (Concluded 29 May 1993) (*Ratified by law, adopted by the 39th National Assembly on 31.01.2002 - SG No. 16/12.02.2002, Issued by the Ministry of justice, promulgated, SG No. 78/13.08.2002, effective for Republic of Bulgaria since 1.09.2002*);
4. **Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children** (*Ratified by law, adopted by the 40th National assembly on 18.01.2006 - SG No. 9/27.01.2006, Issued by the Ministry of justice, promulgated, SG No. 15/16.02.2007, effective for Republic of Bulgaria since 1.02.2007*);
5. **Convention on the Rights of the Child** (*Adopted by UN General Assembly resolution 44/25 of 20.11.1989. Ratified by Decision of the Grand National Assembly of 11.04.1991 - SG No. 32/23.04.1991, promulgated, SG No. 55/12.07.1991, effective since 3.07.1991*);

6. **Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages** (*Opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into force: 9 December 1964. Issued in Collection of international documents, 1992*);
7. **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse** (*Ratified by law, adopted by the 41-st National Assembly on 2.11.2011 - SG, No. 90/2011, with reservations under Article 20, paragraph 4, Article 21, paragraph 2, Article 24, paragraph 3 and declaration under Article 37, paragraph 2. Issued by the Ministry of Justice, promulgated SG, No. 33/27.04.2012, effective for the Republic of Bulgaria since 1.04.2012*).

## II. **Bilateral contracts**

1. **Contract between the Republic of Bulgaria and the Republic of Albania for legal aid on civil cases** (*Ratified by law, adopted by the 39-th National Assembly on 15.04.2004 – SG, No 35/2004 issued by the Ministry of Justice, promulgated in SG, No 9/2006, effective for the Republic of Bulgaria since 19.01.2006*);
2. **Contract between the Republic of Bulgaria and the Ukraine for legal aid on civil cases** (*Ratified by law, adopted by the 39-th National Assembly on 4.11.2004 – SG, No 102/2004, Issued by the Ministry of Justice, promulgated in SG, No 104/2005, effective since 29.12.2005, amended in SG, No 2/2006*);
3. **Contract between the Republic of Bulgaria and the Kingdom of Spain for a mutual legal aid on civil cases** (*Ratified by law, adopted by the 36-th National Assembly on 27.04.1994 – SG, No 39/1994, Issued by the Ministry of Justice, promulgated in SG, No 10/1995, effective for the Republic of Bulgaria since 1.07.1994*);
4. **Contract between the Republic of Bulgaria and the Republic of Azerbaijan for legal aid on civil cases** (*Ratified by law, adopted by the 37-th National Assembly on 16.05.1996 – SG, No 46/1996, Issued by the Ministry of Justice and European Integration, promulgated in SG, No78/1998, effective since 26.09.1997*);
5. **Contract between the Republic of Bulgaria and the Republic of Armenia for legal aid on civil cases** (*Ratified by law, adopted by the 37-th National Assembly on 15.02.1996 – SG, No 17/1996, Issued by the Ministry of Justice and European Integration, promulgated in SG, No 81/1998, effective since 7.12.1997*);
6. **Contract between the Republic of Bulgaria and the Republic of Georgia for legal aid on civil cases** (*Ratified by law, adopted by the 37-th National Assembly on 15.02.1996 – SG, No 17/1996, effective for the Republic of Bulgaria since 6.06.1996, Issued by the Ministry of Justice, promulgated in SG, No 3/1997*);
7. **Contract between the government of the Republic of Bulgaria and the government of the Republic of Lebanon for legal aid on civil cases** (*Ratified by law, adopted by the 39-th National Assembly on 25.10.2001 – SG, No 95/2001, Issued by the Ministry of Justice, promulgated in SG, No 45/2004, effective since 10.04.2004*);

8. **Contract between the Republic of Bulgaria and the Peoples' Republic of China for legal aid on civil cases** (*Ratified by law, adopted by the 36-th National Assembly on 12.01.1994 – SG, No 6/1994, Issued by the Ministry of Justice, promulgated in SG, No 60/1995, effective since 30.06.1995*);
9. **Contract between the Republic of Bulgaria and the Republic of Uzbekistan for legal aid on civil cases** (*Ratified by law, adopted by the 39-th National Assembly on 26.05.2004 – SG, No 49/2004, Issued by the Ministry of Justice, promulgated in SG, No 105/2004, effective for the Republic of Bulgaria since 11.11.2004*).

**4. Are there any databases or online tools providing information on family law matters available in your country?**

Perhaps the only specific online database related to family law matters in Bulgaria is the so called Registry on the Property Relations between the Spouses – [www.mrra.bg](http://www.mrra.bg) It provides information (in Bulgarian only) related to the different matrimonial property regimes (for more information, see C 1).

Other sources are:

- **European Judicial Atlas on civil matters**

**Matrimonial matters and parental responsibility –**

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_communications\\_bg\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_communications_bg_en.htm)

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_centralauthorities\\_bg\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_centralauthorities_bg_en.htm)

**Maintenance obligations –**

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_competentauthorities\\_en.jsp?countrySession=26&#statePage3](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_competentauthorities_en.jsp?countrySession=26&#statePage3)\*

\*The European Judicial Atlas uses the term “provincial court” which corresponds to the term “district court” used in the document, i.e. the second instance courts.

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_courtsappeal\\_en.jsp?countrySession=26&#statePage3](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_courtsappeal_en.jsp?countrySession=26&#statePage3)

- **European Judicial Network in Civil and Commercial Matters**

**Divorce –**

[http://ec.europa.eu/civiljustice/divorce/divorce\\_bul\\_bg.htm](http://ec.europa.eu/civiljustice/divorce/divorce_bul_bg.htm) (in Bulgarian only)

**Parental responsibility –**

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_bul\\_bg.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_bul_bg.htm)  
(in Bulgarian only)

**Maintenance obligations –**

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_bul\\_bg.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_bul_bg.htm)  
(in Bulgarian only)

- **Ministry of Foreign Affairs**

<http://www.mfa.bg/>

- **National Bureau for Legal Aid**  
<http://www.nbpp.government.bg/>

- **Social Assistance Agency**  
[http://www.asp.government.bg/ASP\\_Client/jsp/main.jsp](http://www.asp.government.bg/ASP_Client/jsp/main.jsp)

**5. Please provide information on accessing and applying foreign family law in your country.**

Foreign family law in Bulgaria is accessed and applied according to the rules stipulated in **Part Three Applicable Law, Chapter Four Common Provisions, Articles 43 - 45 from the [Private International Law Code](#)**:

**Article 43. Establishment of Content of Foreign Law**

*(1) The court or another authority applying the law shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions.*

*(2) The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or another authority applying the law.*

*(3) Upon choice of applicable law, the court or another authority applying the law may order the parties to assist in the establishment of the content of the said law.*

**Article 44. Interpretation and Application of Foreign Law**

*(1) The foreign law shall be interpreted and applied as it is interpreted and applied in the State which created the said law.*

*(2) Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal.*

**Article 45. Public Policy**

*(1) A provision of a foreign law determined as applicable by this Code shall not apply only if the consequences of such application are manifestly incompatible with Bulgarian public policy.*

*(2) Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law.*

*(3) Where an incompatibility referred to in Paragraph (2) is established, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.*

In practice, there are 3 ways in which foreign family law is applied:

1. The parties on a particular case present evidence on the application of a foreign family law;
2. The court can appoint a Bulgarian expert with knowledge on some foreign family law who can then present his/hers expert statement. Usually, there is a list of such experts at the respective court, and
3. Exchanging information on the application of a foreign family law based on the European Convention on Information on Foreign Law. In that case the Ministry

of Justice and the Ministry of Foreign Affairs are serving as official bodies for accepting and delivering information.

## **II. NATIONAL JURISPRUDENCE**

Unfortunately, there is not so much jurisprudence on the topics in question. Furthermore, there is no unified way of collecting the jurisprudence in this area. The cases described below are the result of an extensive research performed by the author and do not necessarily present an exhaustive list of the court's practice in the area subject of the current material.

### **Regulation Brussels IIbis in matters of cross-border divorce**

RULING № 637 on private civil case № 587/2009, reversing Ruling on private civil case № 260/2009 of the District Court in Gabrovo.

DECISION № 1614/2009 on civil case № 2294/2009 issued on civil case № 238/ 2009 of the District Court of Bourgas allowing the execution on the territory of the Republic of Bulgaria of decision /order/ № FD90P00008/2009 of the Supreme Court of England, family law division, chief registration of reporting judge Coleridge.

RULING of District Court Dobritch on civil case № 298/2012 on a private claim against a Ruling № 130/2012 on civil case № 1202/2012 of the Regional Court in Dobritch related to Article 17 from Regulation (EC) № 2201/2003 of the Council of Europe concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

RULING of District Court Yambol on civil case № 108/2012 against Ruling № 432/2012 issued on civil case № 123/2012 of the Regional Court Yambol.

### **Maintenance Regulation**

INSTRUCTION of the District Court Dobritch on civil case 464/2011 for the issuing of writ of execution for payment of maintenance based on a decision of a Polish court.

DECISION 637/2010 of the Sofia Court of Appeal confirming Instruction on civil case 715/2010 of the District Court Varna

INSTRUCTION 1057/2012 of the District Court Pazardzik on civil case 274/2012 related to payment of maintenance and parental responsibility based on a decision of a Romanian court

RULING of the District Court Dobritch on civil case 299/2012 based on a private claim against Ruling 128/2012 of the regional Court in Dobritch related to the lessening of maintenance determined by a Polish Court

RULING of the District Court Vratza on private civil case 349/2011 against a protocol Ruling of the Regional Court Vratza on civil case 6299/2010 related to parental responsibility and maintenance where the plaintiffs were two minors with the agreement of their father. The minors were living in Italy and their claim was against their mother.

### III. NATIONAL BIBLIOGRAPHY

Provided below is a general list of the existing literature in Bulgaria related to Regulation Brussels IIbis, Regulation Rome III, the Maintenance Regulation, Matrimonial property regimes and property consequences of registered partnerships, Preliminary ruling system on family matters, Family Mediation, etc. There is no break down per category as there are not so many books, articles or other publications. This is mainly because most of the legal instruments described in the current paper are relatively new to the legal practice in Bulgaria. Besides the national jurisprudence and other experience are still rather scarce. Most of the listed literature presents legal textbooks which contain texts related to the above mentioned topics.

1. **Тодор Тодоров**, Международно частно право – трето преработено и допълнено издание, издателство Сиби, 2010  
*Todorov Todor*, International private law - third revised and amended version, Sibi publishing house, 2010
2. **Йорданка Зидарова** - Приложимо право към задълженията за издръжка по Регламент (ЕО) № 4/2009 на Съвета, сп. Юридически свят, брой 1, 2010 г.  
*Zidarova Yordanka* – Applicable law to the maintenance obligations under Regulation (EC) 4/2009 of the Council, Legal world magazine, issue 1, 2010
3. **Цанка Цанкова, Методи Марков, Анна Станева, Велина Тодорова**, Коментар на новия семеен кодекс, ИК Труд и право, 2009 г.  
*Tzankova Tzanka, Markov Metodi, Staneva Anna, Todorova Welina*, Comment on the new Family Code, PH Trud I Pravo, 2009
4. **Николай Натоев**, Процесуални норми на съвременното българско международно частно право, сп. „Нотариален бюлетин“, бр.1/2009, с. 18 – 59  
*Natov Nikolai*, Procedural norms in the modern Bulgarian international private law, “Notary bulletin” magazine, issue 1/2009, p. 18 - 59
5. **Николай Натоев**, Международно частно право и някои разпоредби на част седма от ГПК в светлината на общностите източници, издателство Сиела, 2008  
*Natov Nikolai*, International private law and some regulations from Part Seven from the CPC in the light of the Community sources, Ciela publishing house, 2008
6. **Боряна Мусева**, Из лабиринта на международната компетентност по граждански търговски дела, сп. „Юридически свят“, бр. 2/2006  
*Musseva Borjana*, Through the labyrinth of the international competence on civil and commercial cases, “Legal world” magazine, issue 2/2006
7. **Весела Станчева-Минчева**, Коментар на Кодекса на международното частно право, първо издание, издателство Сиби, 2010  
*Stancheva-Mincheva Vessela*, Comment on the Private International Law Code, first edition, Sibi publishing house, 2010
8. **Валентина Попова**, Актуални проблеми на Европейския граждански процес и част VII на ГПК, издателство Сиела  
*Popova Valentina*, Current problems of the European civil process and Part VII from the CPC, Ciela publishing house
9. **Анна Станева**, Брачният договор по новия СК, издателство Сиела, 2009  
*Staneva Anna*, The marriage contract under the new FC, Ciela publishing house, 2009

Promulgated State Gazette, No. 47/23.06.2009, effective 1.10.2009, amended, SG No. 74/15.09.2009, effective 1.10.2009, SG No. 82/16.10.2009, SG No. 98/14.12.2010, effective 1.01.2011, amended and supplemented, SG No. 100/21.12.2010, effective 21.12.2010

Text in Bulgarian: Семейен кодекс

## Chapter One GENERAL PROVISIONS

### Subject-matter

**Article 1.** The Family Code shall regulate the relations based on marriage, kinship and adoption, as well as custody and guardianship.

#### Principles

**Article 2.** Family relations shall be settled in accordance with the following principles:

1. protection of marriage and the family by the state and society;
2. gender equality;
3. voluntary nature of matrimony;
4. special protection of children;
5. equal treatment of those born in wedlock, out of wedlock and adopted;
6. respect for the personality in the family;
7. respect, care and support among family members.

#### Right to Marriage and Family

**Article 3.** Every person shall have the right to marry and have a family under the terms and conditions set out in this Code.

## Chapter Two MARRIAGE UNION

### Civil Marriage

**Article 4.** (1) Only the civil marriage entered into in the form prescribed in this Code shall generate the effect associated with marriage by law.

(2) A religious rite shall have no legal effect.

#### Consent to Marriage

**Article 5.** Marriage shall be based on the mutual, free and explicit consent of a man and a woman given in person and simultaneously before a registrar.

#### Marriageable Age

**Article 6.** (1) Marriage shall be allowed to persons above the age of eighteen.

(2) By way of exception, where compelling reasons warrant it, a person aged sixteen may also get married with the consent of the district judge at the place of permanent residence of this person. Where both partners are minors and have different permanent addresses, the consent shall be given by the district judge at the place of permanent residence of one of the marrying partners at their choice.

(3) The district judge shall hear both marrying partners and the parents or the guardian of the minor. The opinion of the marrying adult, the parents or the guardian may be given also in writing with a notarized signature.

(4) Upon marriage, the minor shall acquire legal competence but may dispose with immovable property only with the consent of the district judge at the place of permanent residence of the minor.

#### Marriage Prohibitions

**Article 7.** (1) Marriage shall be prohibited to a person who:

1. is bound by another marriage;
2. is under full judicial interdiction or suffers from a mental disorder or imbecility which provides grounds for imposing full judicial interdiction;
3. suffers from a disease which seriously threatens the life or health of the offspring or the other spouse, unless the latter is aware of such disease.

(2) Marriage shall be prohibited to:

1. ascendants and descendants;
2. siblings, as well as other collateral kin up to four times removed;
3. persons between whom adoption generates relations of ascendants or descendants or siblings.

## Place of Marriage

**Article 8.** (1) Marrying partners shall be free to choose the municipality in which to marry.

(2) Marriage shall take place in public at a location designated by the mayor of the municipality.

(3) Marriage may take place also at another location at the discretion of the registrar provided there exist compelling reasons to do so.

## Marriage Documents

**Article 9.** (1) Each marrying partner shall submit to the registrar:

1. a declaration on the non-existence of the impediments to marriage under Article 7;
2. a medical certificate that the person does not suffer from the diseases laid down in Article 7, paragraph 1, subparagraphs 2 and 3;
3. a declaration that the person is aware of the diseases of the other partner under Article 7, paragraph 1, subparagraphs 2 and 3.

(2) Where they have chosen a property regime, marrying partners shall submit a joint declaration on their choice of regime with notarized signatures. Where a matrimonial contract has been concluded, they shall submit a notarial certificate on the date of the contract and its registration number, as well as the registration of the notary public at the Notary Office and the territory of the notary public.

## Marriage Procedure

**Article 10.** (1) The registrar shall verify the identity and age of the marrying partners, as well as the documents they have submitted under Article 9.

(2) Where no impediments to marriage exist, the registrar shall ask the marrying partners whether they agree to marry each other and, upon an explicit answer in the affirmative, the registrar shall draw up the civil marriage certificate. The civil marriage certificate shall specify the choice of property regime with the details under Article 9, paragraph 2. Where no choice of property regime has been made, the certificate shall indicate statutory regime of community of property.

(3) The certificate shall be signed by the marrying partners, the witnesses and the registrar.

## Validity of the Civil Marriage Certificate

**Article 11.** (1) The marriage shall be deemed valid upon the signing of the civil marriage certificate by the marrying partners and by the registrar.

(2) Marriage shall be valid provided it has taken place before a person who has

performed the functions of a registrar in public without having the capacity of a registrar, where the marrying partners were not aware of that.

Family Name of the Spouses

**Article 12.** When the civil marriage certificate is drawn up, each marrying partner shall declare whether he or she will keep his or her family name or accept the family name of the spouse or add the family name of the spouse to his or her own name. The family name accepted or added may be the name of the other spouse with which he or she is known to the public.

## **Chapter Three**

### **PERSONAL RELATIONS BETWEEN SPOUSES**

#### **Equality between Spouses**

**Article 13.** Spouses shall have equal rights and obligations in marriage.

Spouse Reciprocity

**Article 14.** The relations between spouses shall build on mutual respect, shared care of the family and understanding.

Cohabitation of Spouses

**Article 15.** Spouses shall live together, unless compelling reasons make them live separately.

Individual Freedom

**Article 16.** Each spouse shall be free to develop as a personality and to choose and exercise a profession or occupation.

Family Care

**Article 17.** Spouses shall provide for the wellbeing of the family and take care of the upbringing, nurturing, education and support of the children through mutual understanding and shared efforts and in accordance with their capabilities, property and income.

## **Chapter Four**

### **PROPERTY RELATIONS BETWEEN SPOUSES**

#### **Section I**

#### **General Provisions**

## Property Regime

**Article 18.** (1) Property regimes between spouses shall be as follows:

1. statutory regime of community of property;
2. statutory regime of separation of property;
3. contractual regime.

(2) The statutory regime of community of property shall govern, where the marrying partners have not chosen a property regime or they are minors or under limited judicial interdiction.

(3) The property regime shall be registered pursuant to the provisions of Article 19.

(4) The property regime may be subject to change during marriage. The change shall be entered into the civil marriage certificate and the register under Article 19.

### Register of the Property Relations between Spouses

**Article 19.** (1) Matrimonial contracts and the applicable property regime shall be entered into the central electronic register at the Registry Agency Recordation Office.

(2) The registration shall be performed ex officio on the basis of a notice from the municipality or mayoralty the register of which keeps the civil marriage certificate. The notice shall be sent forthwith to the local unit subdivision of the Registry Agency Recordation Office at the seat of the respective district court of the location of the municipality.

(3) The change of the statutory regime and the change and termination of the matrimonial contract shall be specified in the civil marriage certificate and registered pursuant to the provisions of paragraph 2 on the basis of the documents laid down in Article 9, paragraph 2 or Article 27, paragraphs 2 and 3.

(4) The register under paragraph 1 shall be in the public domain. Fees shall be charged for any transcripts and certificates from the register in accordance with the rates approved by the Council of Ministers.

(5) The Minister of Justice shall issue regulations on the procedures for keeping the register.

### Protection of Third Parties

**Article 20.** The statutory regime of community of property shall govern transactions between either spouse and a third party where no regime of property relations has been entered into the register.

## Section II Statutory Regime of Community of Property

## **Matrimonial Community of Property**

**Article 21.** (1) Rights in rem acquired during marriage as a result of joint contribution shall be shared in common by both spouses, regardless of the fact in whose name they have been acquired.

(2) The joint contribution may be expressed in the input of resources, labour, care of the children and housework.

(3) The joint contribution is presumed until proven otherwise.

(4) (Amended, SG No. 100/2010, effective 21.12.2010) A claim for lack of joint contribution may be filed by:

1. a spouse during marriage or after its dissolution;
2. an heir to a spouse.

### **Personal Property**

**Article 22.** (1) Rights in rem acquired before the marriage, as well as those acquired during marriage by inheritance or gift shall belong to the spouse who has acquired them. Personal shall also be the rights in rem acquired by either spouse, where a creditor seeks recovery of a personal debt from the other spouse pursuant to the provisions of Chapter Forty-four of the Code of Civil Procedure concerning rights in rem constituting matrimonial community of property.

(2) Personal shall be the chattels acquired by either spouse during marriage, which serve ordinary personal needs or the exercise of a profession or occupation.

(3) Personal shall be the rights in rem acquired by either spouse who is a sole proprietor during marriage for the purpose of engaging in business activities and included in his or her business.

### **Transformation of Personal Property**

**Article 23.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) Personal shall be the rights in rem acquired during marriage exclusively with personal property.

(2) Where rights in rem have been acquired in part with personal property under paragraph 1, the personal holding of the spouse shall be determined on a pro rata basis, unless this portion is insignificant.

### **Management of and Disposal with Common Property**

**Article 24.** (1) Spouses shall have equal rights to the common property. Neither spouse may dispose during marriage with the share that this spouse would receive upon termination of the community of property.

(2) Common property may be managed by either spouse.

(3) Spouses shall dispose jointly with common property.

(4) The disposal with a right in rem over common immovable property by either spouse may be challenged. The other spouse may challenge the disposal in court within six months of becoming aware of it but not later than three years after the disposal.

(5) In the case of disposal with a right in rem over common movable property for consideration by either spouse without the participation of the other, the third party shall acquire the right provided the third party was not aware or could not be aware because of the circumstances that the consent of the other spouse was lacking. The provisions of paragraph 4 shall apply to disposal with common movable property without any consideration or to disposal to be executed in writing with notarized signatures.

#### Disposal with Personal Property

**Article 25.** Either spouse shall be free to dispose with his or her personal property in a transaction with a third party or the other spouse.

#### Disposal with the Marital Home Which Is Personal Property

**Article 26.** 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. In the case of no consent, the disposal shall be carried out with the consent of the district judge with reassurance that the disposal will not be to the detriment of the children under age and to the family.

#### Termination of the Matrimonial Community of Property

**Article 27.** (1) The matrimonial community of property shall be terminated upon the dissolution of the marriage.

(2) The matrimonial community of property may be terminated in court also during marriage provided there exist compelling reasons to do so.

(3) The matrimonial community of property may be terminated during marriage in case the spouses choose the regime of separation of property or conclude a matrimonial contract.

(4) The execution by a creditor seeking recovery of a personal debt of either spouse from property within the matrimonial community of property pursuant to the provisions of Chapter Forty-four of the Code of Civil Procedure shall terminate the community of this property.

(5) The matrimonial community of property shall be terminated when a decision to declare in bankruptcy a spouse who is a sole proprietor or a partner with unlimited liability becomes enforceable.

## Shares of Spouses

**Article 28.** Spouses shall have equal shares upon termination of the community of property.

## Award of a Greater Share to a Spouse

**Article 29.** (1) Where the matrimonial community of property is terminated due to divorce, the court may award a greater share of the common property to the spouse exercising the parental rights over children under age where this creates particular difficulties to this spouse.

(2) The spouse exercising the parental rights over children under age shall be awarded, beyond his or her share, the movable property needed for their upbringing and nurturing.

(3) Where the community of property is terminated due to divorce or under Article 27, paragraph 2, the court may award a greater share of the common property to either spouse provided that the contribution of this spouse substantially exceeds that of the other spouse.

## Partial Apportioning of the Personal Property

**Article 30.** (1) In case of divorce, each spouse shall be entitled to receive a portion of the value of the property needed for the exercise of a profession or occupation and of the accounts receivable of the other spouse acquired during marriage, where their value is substantial and this spouse has contributed to their acquisition with labour, resources, care of the children or housework. This portion may be claimed also prior to the divorce, where the conduct of the spouse who has acquired the property endangers the interests of the other spouse or the children.

(2) Paragraph 2 shall apply also to the cases under Article 22, paragraph 3.

## Time Limits for Filing Claims

**Article 31.** The claims under Article 29, paragraph 3 and Article 30 may be filed within a year of the dissolution of the marriage or the termination of the matrimonial community of property, while those under Article 29, paragraphs 1 and 2 shall be filed within a year of the date of enforceability of the judgment on parental rights.

## Liability for Debts

**Article 32.** (1) The costs incurred to meet family needs shall be borne by both spouses.

(2) Spouses shall be jointly liable for debts incurred to meet family needs.

# Section III Statutory Regime of Separation of Property

## Separation of Property

**Article 33.** (1) The rights acquired by each spouse during marriage shall remain his or her personal property.

(2) Where dissolution of marriage is petitioned, each spouse shall be entitled to receive a portion of the value of the acquisitions of the other spouse during marriage insofar as this spouse has contributed labour, resources, care of the children, housework or in any other way.

Disposal with the Marital home

**Article 34.** Article 26 shall apply to the disposal with the marital home.

Awarding of Personal Property for Use

**Article 35.** Where either spouse has given property for use to the other spouse, the user shall be liable only up to the amount of the usufruct as at the date of the claim in writing, unless agreed otherwise.

Liability for Family Debts

**Article 36.** (1) The costs incurred to meet family needs shall be borne by both spouses.

(2) Spouses shall be jointly liable for debts incurred to meet current family needs.

## **Section IV Contractual Regime**

### **Matrimonial Contract**

**Article 37.** (1) Marrying partners may settle their property relations in a matrimonial contract.

(2) Matrimonial contracts may be concluded only by persons of full legal competence.

(3) A matrimonial contract may be concluded also during marriage.

Contents of the Matrimonial Contract

**Article 38.** (1) The matrimonial contract shall contain arrangements pertaining only to the property relations of spouses, such as:

1. the rights of the parties over property to be acquired during marriage;
2. the rights of the parties over their prenuptial property;
3. the ways of managing and disposing with property, including the marital home;

4. the participation of the parties in costs and liabilities;
5. the proprietary effects of a divorce;
6. the maintenance of spouses during marriage and in the event of a divorce;
7. the maintenance of the children born in the marriage;
8. other property relations insofar as this will not contravene the provisions of this Code.

(2) The property relations of the parties may be settled also through reference to a statutory regime. A clause envisaging the transformation of prenuptial property of either party into common patrimonial property shall not be allowed.

(3) The matrimonial contract may not include clauses concerning the event of death. This restriction shall not apply to the disposal with the shares of the spouses upon termination of agreed matrimonial community of property.

(4) The statutory regime of community of property shall govern the property relations which are not settled in the matrimonial contract.

#### Conclusion of a Matrimonial Contract

**Article 39.** (1) The matrimonial contract shall be concluded by the parties in person and given in writing with notarized content and signatures.

(2) A matrimonial contract transferring ownership rights or instating or transferring another right in rem over immovable property shall be attested by a notary public at the location of the property. Where the properties envisaged in the contract are located in the territories of different notaries, the parties shall be free to choose a notary public in either location.

(3) (Supplemented, SG No. 100/2010, effective 21.12.2010) A contract transferring property rights or instating or transferring another right in rem over immovable property shall have the effect of transfer and shall be entered into the property register on the day of the attestation by the notary public, where the contract is concluded during the marriage. Where it is concluded prior to the marriage, the contract shall be submitted for entry by the notary public on the date on which the notary public receives the certificate of civil marriage. Where the contract is subject to entry in another judicial district, the provisions of Article 25, paragraph 5 of the Notaries and Notarial Practice Act shall apply.

(4) Where the matrimonial contract is concluded during marriage, its conclusion shall be noted in the civil marriage certificate and the contract shall be subject to registration pursuant to the provisions of Article 19, paragraph 2.

#### Validity of a Matrimonial Contract

**Article 40.** (1) A matrimonial contract shall have effect as from the time of marriage or, when concluded during marriage, as from the date of conclusion of the contract or any other date specified therein.

(2) The contract shall have no prejudice to rights acquired by third parties prior to its conclusion.

#### Amendment to a Matrimonial Contract

**Article 41.** (1) A matrimonial contract shall be amended in the form prescribed for its conclusion.

(2) Article 40, paragraph 2 shall apply to third parties.

#### Termination and Voidance of a Matrimonial Contract

**Article 42.** (1) A matrimonial contract shall be terminated in any of the following cases:

1. at the mutual consent of the parties, whereby they may choose a statutory regime or conclude another contract, otherwise the statutory regime of community of property shall govern;

2. at the request 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;

3. upon dissolution of marriage, except for the clauses settling the effects of termination and intended to apply afterwards.

(2) A matrimonial contract may become void judicially pursuant to the provisions of Article 87, paragraph 1 of the Obligations and Contracts Act provided that the voidance does not contravene the principles of this Code and good morals. A contract may become void only in part. The voidance shall have effect in the future.

#### Invalidity of a Matrimonial Contract

**Article 43.** (1) The general rules concerning the invalidity of contracts shall apply to a matrimonial contract.

(2) The annulment shall have effect in future. In such cases, spouses may choose a statutory regime or conclude another contract. Otherwise, the statutory regime of community of property shall govern.

## Chapter Five DISSOLUTION OF MARRIAGE

### Grounds

**Article 44.** Marriage shall be dissolved in any of the following cases:

1. death of either spouse;

2. annulment of marriage;
3. divorce.

#### Dissolution of Marriage in the Case of a Declared Death

**Article 45.** (1) Where either spouse is declared dead by court, the marriage shall be dissolved at the time when the judgment becomes enforceable.

(2) Where the person declared dead turns out to be alive, the dissolved marriage shall not be restored.

#### Grounds for Annulment of Marriage

**Article 46.** (1) Marriage shall be annulled in any of the following cases:

1. violation of the provisions of Article 6 and 7 upon marriage;
2. giving consent for marriage due to intimidation with a serious and imminent threat to the life, health or dignity of the marrying partner or his or her kin.

(2) Nobody shall be entitled to invoke annullability of marriage until it is ruled by court.

#### Filing a Claim to Annul Marriage

**Article 47.** (1) A claim to annul marriage may be filed in any of the following cases:

1. violation of the provisions of Article 6 - by the minor spouse not later than six months after coming of age provided there are no children from this marriage and the wife is not pregnant;

2. Article 46, paragraph 1, subparagraph 2 - by the spouse under duress not later than a year after marriage;

3. Article 7, paragraph 1, subparagraph 1 - by either spouse, by the public prosecutor or by the spouse from the previous marriage;

4. Article 7, paragraph 1, subparagraphs 2 and 3 and paragraph 2 - by either spouse or by the public prosecutor.

(2) Marriage may not be annulled in the case of bigamy, where the earlier marriage has been dissolved.

(3) Where marriage took place in contravention of the provisions of Article 7, paragraph 1, subparagraph 1, the spouse from the previous marriage, the spouse from the annulable marriage or the public prosecutor may request establishment of the grounds for annulment of the marriage also after the death of the bigamous spouse.

(4) In the case of violation of Article 7, paragraph 1, subparagraph 2, the claim may be

filed by the sick or interdicted spouse not later than six months from the recovery or lifting of the interdiction or by the other spouse or by the public prosecutor before the recovery or lifting of the interdiction.

(5) In the cases of violation of Article 7, paragraph 1, subparagraph 3, marriage may not be annulled provided that the sick spouse has recovered.

(6) In the cases of violation of Article 7, paragraph 2, subparagraph 3, marriage may not be annulled provided that the adoption has been terminated.

#### Effects from the Annulment of Marriage

**Article 48.** (1) The annulment of marriage shall have effect in the future.

(2) The presumed paternity under Article 61 shall apply also to children conceived or born during the annulled marriage.

(3) The provisions concerning the effects of divorce on the personal and property relations between spouses and the relations between them and the children shall apply also to the cases of annulment of marriage. Bad faith in the annulment of marriage shall be tantamount to fault in divorce.

#### Divorce due to Breakdown of Marriage

**Article 49.** (1) Either spouse may request divorce in the case of deep and irremediable breakdown of marriage.

(2) The court shall guide spouses to reconcile through mediation or another voluntary dispute resolution mechanism.

(3) In its judgment on granting a divorce, the court shall rule also on the fault for the breakdown of marriage, where either spouse has requested this.

(4) In all stages of the proceedings, the spouses may submit to court an agreement on all or some effects of their divorce.

(5) The court shall approve the agreement under paragraph 4, having verified the protection of the interests of the children. The court may request an opinion from the Social Welfare Directorate.

#### No Fault Divorce

**Article 50.** In case of serious and unswerving consent of the spouses to divorce, the court shall grant divorce without seeking their grounds for the dissolution of marriage.

#### Marital Agreement in No Fault Divorce

**Article 51.** (1) In case of no fault divorce, spouses shall submit an agreement on the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children, as well as the use of the marital home, the maintenance of spouses

and the family name. They may agree also on other effects of the divorce.

(2) The court shall approve the agreement under paragraph 1, having verified the protection of the interests of the children. The court may request an opinion from the Social Welfare Directorate.

(3) Where the agreement is incomplete or the interests of children are not well protected, the court shall rule on a time limit to remove deficiencies. Failing to remove deficiencies within the prescribed time limit, the court shall not grant a divorce.

(4) Any change in the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children may be requested in case of changed circumstances.

#### Continuation of Divorce Proceedings by Heirs

**Article 52.** (1) The right to divorce shall not be transferred to heirs.

(2) Summoned descendants or parents may continue the proceedings, where the claimant has requested a ruling on the fault in order to establish the justification of the claim on the basis of the fault of the surviving spouse indicated by the claimant.

(3) The court shall not grant the claim, where the surviving spouse has no fault for the breakdown of marriage.

#### Family Name after Divorce

**Article 53.** A spouse may restore his or her name before marriage after the divorce.

#### Elimination of Succession and Will after Death

**Article 54.** (1) After the divorce, former spouses shall cease to be legitimate heirs to each other and lose the benefits ensuing from earlier will after death. These effects shall occur also where the justification of a divorce claim has been established under Article 52, paragraph 2.

(2) Paragraph 1 shall not apply to cases in which the testator has explicitly stated that the will shall have effect after divorce as well.

#### Cancellation of Gifts

**Article 55.** Gifts made in connection or during marriage to a spouse may be cancelled after divorce in the cases prescribed by civil law or where the cancellation is envisaged in the gift agreement or matrimonial contract.

#### Awarding of the Marital home after Divorce

**Article 56.** (1) In granting a divorce, where the marital home cannot be used by the two spouses separately, the court shall award its use to one of the spouses provided he or she has requested that and is in need of housing. Where minors are children from the marriage, the

court shall rule on the use of the marital home ex officio.

(2) Where minors are children from the marriage and the marital home is owned by one of the spouses, the court may award its use to the other spouse to whom the exercise of parental rights is awarded as long as he or she exercises these rights.

(3) Where minors are children from the marriage and the marital home is owned by kin of one of the spouses, the court may award its use to the other spouse to whom the exercise of parental rights is awarded for a period of up to one year.

(4) The use of the marital home shall be terminated earlier, where the housing need of the user becomes irrelevant and, in the cases under paragraphs 2 and 3, in case the user remarries.

(5) Where the spouses are co-owners or have a shared right to use the marital home, the court shall award its use to one of them, taking into account the interests of minor children, the fault, the health condition and other circumstances.

(6) Where the circumstances relevant to the awarded use under paragraph 5 change, either former spouse may request change in the use of the marital home.

#### Lease Relations

**Article 57.** (1) By force of the court judgment awarding the use of the marital home under Article 56, paragraphs 1, 2, 3 and 5, a lease relation shall occur. The judgment may be entered into the property register and the registration shall have the effect under Article 237, paragraph 1 of the Obligations and Contracts Act.

(2) Either party may request the court to rule on the amount of the rent in the divorce judgment. No rent shall be payable for the housing space used by minor children. The awarded amount of the rent may be changed in case of change in circumstances.

#### Prevalence of the Matrimonial Contract

**Article 58.** The provisions of Articles 54 to 57 shall apply, unless the matrimonial contract provides otherwise.

#### Parental Rights after Divorce

**Article 59.** (1) In the case of divorce, the spouses shall reach mutual consent on the issues related to the upbringing and nurturing of minor children from the marriage in the best interests of the children. The court shall approve the agreement pursuant to the provisions of Article 49, paragraph 5.

(2) Failing to reach an agreement under paragraph 1, the court shall rule ex officio on which parent the children will live with, on which parent will exercise parental rights, on the measures for the exercise of these rights, as well as on the regime of personal relations between children and parents and the maintenance of the children.

(3) The establishment of the regime of personal relations between parents and children

shall include the specification of a period or a day when the parent may see and take the children, including school holidays, public holidays and personal holidays of the child, as well as at other times.

(4) The court shall rule on the issues under paragraph 2, having assessed all circumstances in the best interests of the children, such as: the nurturing capabilities of the parents, the care of and attitude to the children displayed hitherto, the willingness of the parents, the closeness of the children to their parents, the gender and age of the children, the opportunities for assistance by third parties who are kin to the parents, the social environments and the financial capabilities.

(5) The amount of maintenance shall ensure the same living conditions which the child had before the divorce, unless this would create particular difficulties to the maintaining parent.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The court shall hear the parents and the children pursuant to the provisions of Article 15 of the Child Protection Act, take the opinion of the Social Welfare Directorate and, if appropriate, hear other persons as well. In the case of suspected parental alienation, the court shall hear an expert psychologist.

(7) (Amended and supplemented, SG No. 100/2010, effective 21.12.2010) By way of exception, where the interests of the children warrant it, the court may rule on their living with grandparents or with the family of other kin with the consent of the latter. Failing that, the child shall be accommodated with a foster family, a specialized institution designated by the Social Welfare Directorate or shall receive a social service of the resident type. In all cases, the court shall grant an appropriate regime of personal relations between the child and its parents.

(8) The court shall rule, if necessary, on appropriate protective measures to ensure the implementation of the judgment under paragraphs 2 and 7 such as:

1. conduct of personal relations in the presence of a designated person;
2. conduct of personal relations at a designated place;
3. covering the travelling costs of the child and, if necessary, of the accompanying person.

(9) In case of change in the circumstances, the court may modify earlier measures and impose new ones at the request of either parent, at the request of the Social Welfare Directorate, or on an ex officio basis.

(10) The judgment under paragraph 2 shall have no prejudice to the implementation of child protection measures pursuant to the provisions of the Child Protection Act.

## **Chapter Six**

### **ORIGIN**

## Maternal Origin

**Article 60.** (1) Maternal origin shall be established by birth.

(2) Mother of the child is the woman who has given birth to it, including cases of assisted reproduction.

(3) The maternal origin established in a birth certificate may be challenged in court by the child, by the women specified in the certificate as the mother, by her husband, by the woman claiming to be the mother of the child, and by the man claiming that the child was born by his wife.

(4) Parties to the proceedings shall be also the mother's husband, the husband of the woman challenging the origin, as well as the child.

(5) The maternal origin from the woman who gave birth to the child through assisted reproduction may not be challenged on these grounds.

### Paternal Origin

**Article 61.** (1) The mother's husband shall be considered to be father of the child born during marriage or within three hundred days from its dissolution.

(2) Where the child was born earlier than three hundred days from the dissolution of the marriage but the mother re-married, the husband of the mother in the new marriage shall be considered father of the child.

(3) In cases of declared absence of the husband the presumptions under paragraphs 1 and 2 shall not apply, where the child was born after the lapse of three hundred days from the date of the last news about the husband and, in cases of declared death, since the date of the presumed death.

(4) Paragraphs 1 to 3 shall apply also to cases of birth through assisted reproduction under Article 60, paragraph 2.

### Challenge of Paternity

**Article 62.** (1) The mother's husband may challenge his paternity by proving that it could not have been conceived by him. This claim may be filed within a year of becoming aware of the birth.

(2) The mother may challenge her husband's paternity by proving that it could not have been conceived by him. This claim may be filed within a year of becoming aware of the birth.

(3) In the cases under Article 61, paragraph 2, where the second husband's challenge of paternity is granted, the former husband shall be considered father of the child. The former husband and the mother may challenge paternity within a year of becoming aware of the judgment but not later than three years from the date of its enforceability.

(4) The child may challenge paternity within a year of coming of age.

(5) No challenge of paternity shall be allowed in cases of birth through assisted reproduction, where the mother's husband has given his informed consent in writing.

#### Parties to Paternity Challenging Proceedings

**Article 63.** The parties summoned to paternity challenging proceedings shall be the mother, the child and the husband and, where paternity is challenged by the new husband, the former husband shall also be summoned as a party.

#### Acknowledgment

**Article 64.** (1) Each parent may acknowledge his or her child. Subject to acknowledgement may also be children conceived, as well as deceased children who have left descendants.

(2) A child may be acknowledged also by a parent who is sixteen years of age or above.

#### Forms of Acknowledgement

**Article 65.** (1) Acknowledgement shall be performed in person and given in writing before the registrar or through a statement with notarized signature submitted to the registrar. The statement may also be submitted through the manager of the medical establishment where the child was born.

(2) (Amended and supplemented, SG No. 100/2010, effective 21.12.2010) Within seven days, the registrar shall communicate the acknowledgement to the other parent if the latter is known, to the child if it is fourteen years of age or above, as well as to the Social Welfare Directorate at the current address of the child.

#### Challenging of Acknowledgement

(Title amended, SG No. 100/2010, effective 21.12.2010)

**Article 66.** (1) The parent or the child aged fourteen or above may challenge the acknowledgement through a statement in writing to the registrar within three months of notification. Where it is not challenged, the acknowledgement shall be entered into the birth certificate.

(2) Where the acknowledgement is challenged, the acknowledging parent may claim establishment of origin in court within three months of notification.

(3) Where the acknowledgement was done prior to the drawing up of the child's birth certificate and the parent declared that he or she would not challenge it pursuant to the provisions of Article 65, paragraph 1, the acknowledging parent shall be entered into the birth certificate forthwith. The parent shall not be allowed to challenge the acknowledgement after the birth certificate was drawn up.

(4) Where the child was a minor at the time of acknowledgement, the child may

challenge it in court within a year of coming of age or of becoming aware of the acknowledgement. Where the claim is granted, the acknowledgement shall be deleted with an appropriate remark in the birth certificate.

(5) (New, SG No. 100/2010, effective 21.12.2010) In cases other than those under paragraphs 1 and 4, the acknowledgment may be challenged in court with a claim submitted within a year of its performance by the Social Welfare Directorate at the current address of the child.

#### Annulment of Acknowledgement

**Article 67.** The acknowledging parent may claim annulment of the acknowledgement on grounds of error or fraud within a year of the acknowledgement, in cases of acknowledgement under duress - within a year of the discontinuation of the duress, and in cases of legal incompetence - within a year of the acquisition of legal competence.

#### Claims to Establish Maternal Origin

**Article 68.** Maternal origin may be established through a claim filed by the child, the mother or the father. The mother's husband who could have been considered father of the child under Article 61 shall also be summoned as a defendant.

#### Claims to Establish Paternal Origin

**Article 69.** Paternal origin may be established through a claim filed by the mother within three years of the child's birth or by the child within three years of coming of age. The mother shall also be summoned where the claim is filed by the child.

#### Parental Rights in Claims to Establish Origin

**Article 70.** Where it grants the claims under Article 68 and 69, the court shall rule ex officio on which parent the children will live with, on the measures for the exercise of these rights, on the regime of personal relations between the child and the parents and its maintenance, while applying the provisions of Article 59.

#### Impediments to the Establishment of Origin

**Article 71.** A claim to establish origin may not be filed and acknowledgement may not be performed before a claim challenging the existing origin is granted on grounds of the presumption under Article 61 or through acknowledgement. The two claims may be consolidated.

#### Claims Filed by or against Heirs

**Article 72.** (1) Heirs shall not be allowed to file the claims envisaged in this Chapter but they may continue the proceedings started on the basis of the claim filed by their testator.

(2) Where the father or the mother is deceased, the claim to establish or challenge origin shall be filed against their heirs.

## Time Limits

**Article 73.** The time limits under this Chapter shall apply ex officio and shall not be subject to staying, stopping and resumption.

# Chapter Seven KINSHIP

## Lineal and Collateral Kin

**Article 74.** (1) Lineal kinship shall mean the relationship between two persons one of whom descends from the other directly or indirectly.

(2) Collateral kinship shall mean the relationship between two persons who share a common ancestor but do not descend from each other.

## Degrees of Kinship

**Article 75.** (1) Two lineals shall be as many times removed as is the number of generations.

(2) Two collaterals shall be as many times removed as is the number of generations from one of them to the common ancestor and from the latter to the other.

## Affinal Relatives

**Article 76.** (1) The kin to either spouse shall be affinal relatives to both the other spouse and his or her kin.

(2) A person shall be affinal relative to a spouse in the relationship and degree to which this person is kin to the other spouse.

(3) The degree of affinal relationship between the kin to one spouse and the kin to the other shall be established by adding the degrees of kinship between one spouse and his or her kin and between the other spouse and his or her kin.

(4) The spouses of two siblings shall be affinal relatives two times removed.

(5) Affinal relationship shall be legally relevant only in the cases prescribed by law.

(6) Affinal relationship shall be terminated upon the dissolution of marriage.

# Chapter Eight ADOPTION

## Section I

# Adoptability

## Adopted Child

**Article 77.** (1) Adoptable shall be only a person below the age of eighteen as of the date of the petition for adoption.

(2) Twins shall be adopted together. By way of exception, twins may be adopted separately provided they could not be adopted together in the course of six months of the date of entry into the register under Article 83 and their best interests warrant it.

(3) Siblings shall be adopted together if they have an emotional relationship between them.

### Adoptive Parent

**Article 78.** Eligible to be an adoptive parent shall be a person of legal capacity who has not been deprived of parental rights.

### Age Difference

**Article 79.** The adoptive parent shall be at least fifteen years older than the adopted child. No age difference shall be required for adoption of a child by birth of a spouse by the other spouse. Where the adoption is carried out simultaneously or consecutively by both spouses and one of them meets the age difference requirement, no such age difference shall be required from the other.

### Non-adoptability of Kin

**Article 80.** (1) No adoption shall be allowed between lineal kin and between siblings.

(2) Grandparents or a grandparent may adopt a grandchild if the latter was born out of wedlock or a parent or the parents are deceased. The court shall hear also the other grandparents of the prospective adopted child.

(3) In cases of petitions for adoption by maternal or parental grandparents, the court shall rule with a view to the best interests of the child.

### Non-adoptability by Two Persons

**Article 81.** (1) Nobody shall be adopted by two persons, unless the latter are spouses.

(2) Nobody shall be adopted for a second time before the existing adoption is terminated.

(3) The prohibitions under paragraphs 1 and 2 shall not apply to the spouse of the adoptive parent.

### Additional Requirements for Full Adoptability

**Article 82.** (1) Full adoption shall be allowed provided that:

1. the prospective adopted child is entered into the register under Article 83; and
2. the adoptive parent is entered into the register under Article 85.

(2) Paragraph 1 shall not apply to the adoption of a spouse's child by the other spouse, to the adoption of a grandchild by the grandparents or either of them, as well as to the adoption by collateral kin three times removed.

(3) The requirement for entry into the register of adoptive parents under Article 85 shall not apply to the adoption by a custodian or a guardian or by the family of kin or relatives in which the child is accommodated by court pursuant to the provisions of the Child Protection Act.

(4) The persons under paragraph 3 shall be vetted by the Social Welfare Directorate at their permanent residence.

#### Registers of Children for Full Adoption

**Article 83.** (1) The Social Welfare Agency shall maintain a national electronic information system for adoptable children eligible for full adoption.

(2) Regional Social Welfare Directorates shall maintain registers for adoptable children eligible for full adoption.

(3) The details relevant to the adoption and the procedures for maintaining and keeping the registers shall be set out in a regulation of the Minister of Labour and Social Policy.

#### Entry of Children for Full Adoption in Regional Registers

**Article 84.** (1) (Supplemented, SG No. 100/2010, effective 21.12.2010) The Social Welfare Directorate shall notify in writing the Regional Social Welfare Directorate of a child accommodated administratively pursuant to the provisions of the Child Protection Act whose parents are unknown or have given their consent with full adoption within seven days of the accommodation. Where the consent is given after the accommodation, the seven-day time limit shall commence as of the date of the consent.

(2) (Supplemented, SG No. 100/2010, effective 21.12.2010) Where a child has been accommodated administratively at a specialized institution pursuant to the provisions of the Child Protection Act and the parent has not requested discontinuation of the accommodation or change in the protective measure without any cogent reason, the Social Welfare Directorate at the current address of the child shall notify in writing the Regional Social Welfare Directorate of the entry into the register within seven days of the expiration of the time limit under Article 93, paragraph 2, first sentence. A copy of the petition for judicial accommodation pursuant to the provisions of Article 27, paragraph 2 of the Child Protection Act shall be attached to the notification. Where the child is offered a social service of the resident type or is accommodated with a foster family and the parent has not requested termination of the accommodation without cogent reasons within the time limit under Article

93, para 2, the Social Welfare Directorate shall advise the Regional Social Welfare Directorate of the entry of the child into the register provided that the child's interests require it to do so.

(3) A child whose parents are deceased, deprived of parental rights or placed under full legal interdiction may be entered into the register at the request of the custodian or guardian submitted to the director of the Regional Social Welfare Directorate. The director shall seek the opinion on the best interests of the child from the Social Welfare Directorate and from the custody and guardianship authority.

(4) A person under custodianship may request to be entered into the register under paragraph 3.

(5) The entry of a child into the register may be carried out also on the basis of a request by the parents submitted through the Social Welfare Directorate, where such registration is in the best interests of the child.

(6) The entry into the register and the refusal to make an entry shall be based on an order by the director of the Regional Social Welfare Directorate, which shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

#### National Register of Full Adoptive Parents

**Article 85.** The Social Welfare Agency shall keep a register of prospective full adoptive parents. The entry into the register shall be made by the Regional Social Welfare Directorates pursuant to the provisions of the regulation under Article 83, paragraph 3.

#### Admission to the National Register of Full Adoptive Parents

**Article 86.** (1) A prospective full adoptive parent shall file a petition with the Social Welfare Directorate at his or her place of permanent residence to be entered into the register.

(2) The Social Welfare Directorate shall vet the eligibility of the person to become an adoptive parent.

(3) A person approved by the Social Welfare Directorate shall be entered into the register ex officio.

(4) The refusal to give approval shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

(5) The approval shall be valid for two years.

(6) The procedures for the vetting and for issuance and withdrawal of the approval of the entry into the register shall be set out in the regulation under Article 83, paragraph 3.

#### Notes and Deletions in the Register

**Article 87.** (1) The prospective adoptive parent shall notify the Social Welfare Directorate of any change in the circumstances relevant to the issuance of the approval.

(2) Changes in the circumstances shall be noted in the register. An approval shall be withdrawn in cases of material change of circumstances after a new vetting procedure.

(3) The withdrawal of the approval shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

(4) Notes and deletions shall be entered on the basis of an order by the director of the Regional Social Welfare Directorate.

#### Personal Data Protection

**Article 88.** The Social Welfare Agency shall take measures to ensure personal data protection in the registers.

## **Section II Granting of Adoption**

### **Consent with the Adoption**

**Article 89.** (1) The consent of the following persons shall be required for adoption purposes:

1. the adoptive parent;
2. the parents of the person to be adopted;
3. the spouses of the adoptive parent and the person to be adopted;
4. the person to be adopted in case he or she is fourteen years of age or above.

(2) The mother may give her consent not earlier than 30 days after birth.

(3) The parents of the person to be adopted shall give their consent also in case they are minors.

(4) The consent of the persons under paragraph 1, subparagraphs 2 and 3 shall not be required in case they are below the age of fourteen or placed under legal interdiction.

(5) In cases of full adoption the Social Welfare Directorate shall explain to the persons under paragraph 1 the consequences of granting adoption prior to their giving of consent. In cases of limited adoption clarifications shall be given by court.

(6) The persons under paragraph 1 shall submit a declaration with notarized signature that their consent is not associated to any material gain.

#### Opinion on the Adoption

**Article 90.** (1) The court shall hear the prospective adopted child pursuant to the provisions of the Child Protection Act, unless its is below the age of fourteen.

(2) The following parties shall give an opinion on the adoption:

1. the custodian or guardian;
2. the parents in case they are minors, placed under limited legal interdiction or deprived of parental rights;
3. the spouses of the adoptive parent and the person to be adopted in case they are placed under limited legal interdiction.

#### Forms of the Consent and the Opinion

**Article 91.** (1) The consent under Article 89 and the opinion of the persons under Article 90 may be given to court in person, through a declaration with notarized signature or through a special proxy. The court may summon and hear in person some of these persons if its finds it necessary to do so.

(2) The person to be adopted shall give his or her consent to court in person.

(3) In cases of full adoption, where the parent gives his or her opinion in person, the parent and the adoptive parent shall be heard in separate court sessions, except for the cases under Article 82, paragraph 2.

#### Withdrawal of Consent

**Article 92.** (Amended, SG No. 100/2010, effective 21.12.2010) The parent may withdraw his or her consent with full adoption through a petition with notarized signature prior to the filing of an adoption petition under Article 95, paragraph 5 or prior to the consent with the adoption by the adoptive parent as specified by the Intercountry Adoption Board pursuant to the provisions of Article 114, paragraph 7.

#### Adoption with Parental Consent

**Article 93.** (1) Adoption without parental consent shall be granted, where the parent systematically fails to take care of the child, fails to provide maintenance or brings up and nurtures the child in a manner detrimental to its development.

(2) Adoption without parental consent shall be granted also in case the child is accommodated at a specialized institution and the parent has not requested discontinuation of the accommodation or change of the measure and return or accommodation of the child in a family of kin or relatives pursuant to the provisions of the Child Protection Act without any cogent reason for six months since the date of administrative accommodation under the Child Protection Act. This request may be filed also in the judicial accommodation proceedings pursuant to the provisions of the Child Protection Act.

(3) (New, SG No. 100/2010, effective 21.12.2010) Adoption without the consent of the parent under paragraph 2 shall be allowed also where the child has been offered a social

service of the resident type or has been accommodated with a foster family and has been entered into the register of children for full adoption.

(4) (Renumbered from Paragraph 3, SG No. 100/2010, effective 21.12.2010) In the cases under paragraph 1, the parent shall be summoned to be heard in court.

#### Adoption Board

**Article 94.** (1) The Adoption Board shall be established at the Regional Social Welfare Directorate.

(2) (Amended, SG No. 98/2010, effective 1.01.2011, amended and supplemented, SG No. 100/2010, effective 21.12.2010) The director of the Regional Social Welfare Directorate shall serve as chairperson of the Adoption Board. Members of the Board shall be as follows: a lawyer designated by the Regional Governor, a physician designated by the director of the Regional Health Inspectorate, a pedagogue designated by the head of the Regional Inspectorate for Education, a psychologist designated by the director of the Social Welfare Directorate at the current place of residence of the child, the head of the specialized institution where the child is accommodated, as well as the institution providing social services of the resident type.

(3) The authorities under paragraph 2 shall designated also permanent alternates to the Board members.

(4) The Board shall hold weekly meetings.

(5) The Board shall make decisions by show of hands and by a majority of at least two-thirds of the membership.

(6) (Amended, SG No. 74/2009, effective 1.10.2009) The Minister of Labour and Social Policy shall issue rules of the Board under paragraph 1 in consultation with the Minister of Health, the Minister of Education, Youth and Science and the Minister of Justice.

(7) The chairperson and the members of the Adoption Board shall receive remuneration in an amount determined by the Minister of Labour and Social Policy for their participation in each Board meeting.

#### Selection of a Full Adoptive Parent

**Article 95.** (1) Within a month from the entry of the child into the register, the Adoption Board shall select suitable adoptive parents for the child, depending on the sequence of their registration, their preferences and the circumstances relevant to the best interests of the child.

(2) Beyond the cases under paragraph 1, the Adoption Board may select as a suitable adoptive parent of the child a person acting as foster family provided the latter is entered into the register under Article 85 and has taken care of the child for at least a year after its accommodation with the foster family.

(3) The Regional Social Welfare Directorate shall notify in writing the top selected suitable adoptive parent of its decision under paragraph 1 and provide the details of the child.

The Social Welfare Directorate at the current place of residence of the child shall provide assistance for the establishment of personal contact.

(4) In the cases under paragraph 2, the Regional Social Welfare Directorate shall notify the adoptive parent in writing.

(5) The adoptive parent may file a petition for adoption to the court through the Regional Social Welfare Directorate within a month of reception of the notification. The Directorate shall refer the petition for adoption together with the file to the court within three days of reception of the petition.

(6) Where the notified adoptive parent rejects the proposal in writing or fails to file a petition within the time limit under paragraph 5, the Regional Social Welfare Directorate shall notify the next suitable adoptive parent.

(7) The rejection or failure to file a petition within the time limits under paragraph 5 shall be noted in the National Register of Full Adoptive Parents.

#### Jurisdiction

**Article 96.** (1) The petition for full adoption shall be filed by the adoptive parent through the Regional Social Welfare Directorate whose Adoption Board has selected the adoptive parent to the regional court at the location of the regional directorate.

(2) A petition for full adoption under Article 82, paragraphs 2 and 3 may be filed by the adoptive parent, the parents of the prospective adopted child or by the prospective adopted child provided the latter is fourteen years of age or above through the respective Regional Social Welfare Directorate to the regional court at the place of permanent residence of the petitioner.

(3) A petition for limited adoption shall be filed by the adoptive parent to the regional court at the place of permanent residence of the petitioner.

#### Judgment on the Petition for Adoption

**Article 97.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) The regional court shall examine the petition for adoption in an open session held in camera within 14 days of reception of the petition. In cases of full adoption, the court shall require a report of the Social Welfare Directorate and collect evidence pursuant to the provisions of the Civil Procedure Code. The court shall hear the conclusion of the public prosecutor and rule a judgment with reasons attached thereof.

(2) Adoption shall be granted provided it is in the best interests of the adopted child.

(3) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment shall be announced in court session and, after it becomes enforceable, the judgment shall be sent ex officio to the municipality at the place of permanent residence of the adoptive parent and to respective regional Social Welfare Directorate or, where the adoptive parent is a foreign national, to the City of Sofia and to the Ministry of Justice.

## Appeal of Judgment

**Article 98.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment under Article 97, paragraph 1 may be appealed by the adoptive parent, by the parents of the adopted child, except for the cases under Article 100, paragraph 2, by the adopted child and by the public prosecutor before the court of appeal within seven days of the announcement of the judgment. Where it is fourteen years of age or above, the adopted child may appeal against the judgment in person.

(2) Within 14 days of reception of the appeal, the court shall hear the case in an open session held in camera and rule the final judgment.

## Scope of Provisions

**Article 99.** The provisions of Articles 77 to 98 shall apply also to the adoption of a child with habitual residence in the Republic of Bulgaria, as well as adoption by a foreign national with habitual residence in the Republic of Bulgaria.

# Section III Effects of Adoption

## Types of Adoption

**Article 100.** (1) Adoption may be either full or limited.

(2) Full adoption shall be granted in any of the following cases:

1. the adopted person is a child of unknown parentage;
2. the parents have given their consent with full adoption in advance;
3. (supplemented, SG No. 100/2010, effective 21.12.2010) in the case under Article 93, paragraphs 2 and 3.

(3) In all other cases, adoption may be either full or limited. The type of adoption shall be determined by the persons whose consent is required under Article 89.

## Full Adoption

**Article 101.** (1) In case of full adoption, the rights and obligations arising between the adopted child and its descendants, onof the one part, and the adoptive parent and his kin and relatives, onof the other part shall be tantamount to those between kin by origin, while the rights and obligations between the adopted child and its descendants and its kin by origin shall be terminated. The impediments to marriage due to kinship under Article 7, paragraph 2, subparagraphs 1 and 2 shall be retained.

(2) The court shall rule on the issuance of a new birth certificate in which the adoptive parent shall be specified as the parent. The birth certificate shall be issued by the registrar at

the municipality, mayoralty or ward at the place of permanent residence of the adoptive parent or at the place ruled by the court where the adoptive parents are two.

#### Limited Adoption

**Article 102.** (1) In case of limited adoption, rights and obligations identical to those between kin by origin shall arise only between the adopted child and its descendants, of the one part, and the adoptive parent, of the other part shall be tantamount to those between kin by origin, while the rights and obligations between the adopted child and its descendants and its kin by origin shall be retained. The parental rights and obligations shall be transferred to the adoptive parent.

(2) The parents by birth shall owe maintenance, where the adoptive parent is not in a position to provide it. Parents by birth shall not be heirs to the adopted child.

#### Adoption by the Spouse of a Parent

**Article 103.** (1) Where a child is adopted by the spouse of a parent, the rights and obligations arising between this parent and his kin and relatives, onof the one part, and the adopted child and its descendants, onof the other part, shall be retained.

(2) In the case under paragraph 1, the existing birth certificate shall feature the details of the adoptive parent, alongside with the details of the parent by birth with whom relations are retained.

#### Post-adoption Monitoring

**Article 104.** The Social Welfare Directorate at the current place of residence of the adoptive parent shall monitor the upbringing of the child and the respect for its rights and legitimate interests in the course of two years.

#### Right to Information

**Article 105.** (Amended, SG No. 100/2010, effective 21.12.2010) (1) Adoptive parents or adopted persons above the age of sixteen may request the regional court which has ruled on the admissibility of the adoption to obtain information about the origin of the adopted person provided there exist compelling reasons to do so. The regional court shall hold a session in camera to hear the birth parents of the adopted person and the conclusion of the public prosecutor and shall rule thereof.

(2) The decision of the regional court may be challenged by the adoptive parents and the adopted person and it may be attacked by the public prosecutor.

## **Section IV**

### **Termination of Adoption**

#### **Termination Grounds**

**Article 106.** (1) The regional court shall terminate the adoption in any of the following cases:

1. need for annulment due to violation of Article 77, paragraph 1, Articles 78, Article 79, Article 80, paragraphs 1 and 2, first sentence, Article 81, Article 82, paragraph 1, subparagraphs 1, 2 and 4 and paragraphs 2 and 3;

2. serious fault of either party or existence of other circumstances which lead to deep breakdown of the relations between the adoptive parent and the adopted person.

(2) A petition for annulment of adoption due to violation of Article 89, paragraph 1, subparagraphs 1, 2 and 4 may be filed by the person who has not given his or her consent within a one-year time limit prescribed for the adoptive parent and each parent of the adopted child as from the time of becoming aware of the adoption. The time limit for the adopted person shall commence on the date of coming of age or becoming aware of the adoption, whichever is later. The same rule shall apply also to the person whose consent has been given due to mistake or fraud or under duress or in violation of Article 89, paragraph 2.

(3) A petition for annulment of adoption due to violation of Article 82, paragraph 1, subparagraph 1 may be filed by the adoptive parent, the adopted child and either parent of the adopted child within a year of the granting of the adoption.

(4) In all other cases of need for annulment, termination may be requested by the adoptive parent, the adopted child and either parent of the adopted child until the adopted child comes of age.

(5) In the cases under paragraph 1, subparagraph 2, termination of the adoption may be requested by the adoptive parent and the adopted child.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The public prosecutor shall be entitled to request termination of adoption in the best public interests. In the cases under paragraph 1, subparagraph 1 the claim shall be filed within the time limits under paragraphs 3 and 4 and in the cases under paragraph 1, subparagraph 2 prior to the child coming of age.

(7) (Amended, SG No. 100/2010, effective 21.12.2010) The Social Welfare Directorate shall be entitled to request termination of adoption under paragraph 1 where it contravenes the child's interests. In the cases under paragraph 1, subparagraph 1 the claim shall be filed within the time limits under paragraphs 3 and 4 and in the cases under paragraph 1, subparagraph 2 prior to the child coming of age.

(8) Adoption may be terminated by the district court at the mutual consent of the adoptive parent and the adopted person provided both have legal competence.

(9) (New, SG No. 100/2010, effective 21.12.2010) The public prosecutor shall take part in the proceedings on termination of the adoption, except for the cases under paragraph 8.

#### Termination of Adoption upon Death

**Article 107.** (1) In cases of full adoption, the court may terminate the adoption at the request of the adopted child, his or her parents, the custodian, the guardian or the Social

Welfare Directorate, where either or both adoptive parents are deceased, the adopted child is a minor and its best interests warrant it.

(2) In cases of limited adoption, adoption shall be terminated upon the death of the adoptive parent or upon the death of the adopted person who has left no descendants but the survivor shall inherit the deceased.

#### Continuation of Proceedings for Termination of Adoption

**Article 108.** Where the adoptive parent or the prospective adopted child dies during the proceedings for termination of adoption under Article 106, paragraph 1, the proceedings may be continued by the heirs of the petitioner. Where the court grants the petition, the surviving adoptive parent or adopted child at fault shall not inherit the deceased.

#### Effects of Termination

**Article 109.** The effects of adoption shall discontinue upon its termination.

## **Section V** **Special Rules for Intercountry Adoption**

### **Adopted Child**

**Article 110.** (1) A child habitually resident in the Republic of Bulgaria may be adopted by a person habitually resident abroad if all possibilities for domestic adoption have been exhausted and the child is entered into the register under Article 113, paragraph 1, subparagraph 1, except for the cases under Article 82, paragraph 2.

(2) The adoption of a child who is a Bulgarian citizen habitually resident in other State shall be carried out, while observing the requirements of the legislation of this State.

#### Adoptive Parent

**Article 111.** (1) A person habitually resident abroad may adopt a child habitually resident in the Republic of Bulgaria if this person is entered into the register under Article 113, paragraph 1, subparagraph 2, except for the cases under Article 82, paragraph 2.

(2) A person under paragraph 1 may not adopt a child habitually resident in the Republic of Bulgaria if he or she is habitually resident in a State which will not recognize the judgment of the Bulgarian court on the adoption.

#### Powers of the Minister of Justice

**Article 112.** (1) The Ministry of Justice shall perform the functions of a Central Authority under the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption drawn up in the Hague on 29 May 1993 (ratified by law - State Gazette, No. 16 of 2002) (SG, No. 78 of 2002), hereinafter referred to as "the Hague Convention".

(2) The Minister of Justice shall:

1. perform the activities related to intercountry adoption;
2. supervise the activities of accredited intermediary bodies in intercountry adoption;
3. issue regulations on the procedures for keeping intercountry adoption registers.

(3) Where a child habitually resident in the Republic of Bulgaria is adopted in accordance with the Hague Convention, the Minister of Justice shall certify this fact.

(4) The Minister of Justice shall give opinion on the cases under Article 110, paragraph 2, where the legislation of the State in which the child is habitually resident requires a ruling by the Bulgarian Central Authority on intercountry adoption.

(5) Where violation of the rights and legitimate interests of the adopted child is observed within two years of granting adoption, the Minister of Justice shall notify the Competent Authority of the State in which the adoptive parent is habitually resident.

(6) Where no suitable adoptive parents are entered into the register, the Intercountry Adoption Board cannot select suitable registered adoptive parents or the selected adoptive parents have failed to adopt a child with health problems, special needs or above the age of seven, the Minister of Justice shall undertake the measures laid down in the regulation under Article 113, paragraph 4.

#### Intercountry Adoption Registers

**Article 113.** (1) The Ministry of Justice shall keep:

1. a register of children adoptable by persons habitually resident abroad on full adoption basis;
2. a register of adoptive parents habitually resident abroad who are willing to adopt a child habitually resident in the Republic of Bulgaria on full adoption basis;
3. (amended, SG No. 100/2010, effective 21.12.2010) a register of adoptive parents habitually resident in the Republic of Bulgaria who are willing to adopt a child habitually resident abroad;
4. a public register of accredited intermediary bodies in intercountry adoption.

(2) The Adoption Board under Article 94 shall notify the Intercountry Adoption Board on the entry of a child in the register of children if at least three adoptive parents were selected for the child pursuant to the provisions of Article 95 and none has filed a petition for adoption or where no suitable adoptive parent can be selected in spite of all efforts.

(3) The entry of the child into the register under paragraph 1, subparagraph 1 shall be noted in the regional register, providing no obstacle for the respective Adoption Board to select a suitable adoptive parent.

(4) The content and procedure of keeping the registers under paragraph 1 shall be set out in a regulation of the Minister of Justice.

(5) (New, SG No. 100/2010, effective 21.12.2010) Fees established in the rates of the Council of Ministers shall be payable for the entering into the registers under paragraph 1, subparagraphs 2 and 3.

#### Intercountry Adoption Board

**Article 114.** (1) (Amended, SG No. 74/2009, effective 1.10.2009) The Intercountry Adoption Board shall be established at the Ministry of Justice, consisting of a chairperson who is Deputy Minister of Justice and members who represent the Ministry of Justice, the Ministry of Health, the Ministry of Education, youth and Science, the Ministry of Labour and Social Policy, the Ministry of Foreign Affairs and the State Child Protection Agency each.

(2) The chairperson and each member shall have alternates.

(3) The Board shall hold at least three meetings monthly.

(4) The Board shall make decisions by show of hands and by a majority of at least two-thirds of the membership.

(5) The Minister of Justice shall designate the members of the Board under paragraphs 1 and 2 by name at the proposal of the heads of the respective institutions and issue rules for its activity.

(6) The chairperson and the members of the Intercountry Adoption Board shall receive remuneration in an amount determined by the Minister of Justice for their participation in each Board meeting.

(7) Within 60 days of the entry of the children into the register, the Intercountry Adoption Board shall examine the candidates to select a suitable adoptive parent, while observing the criteria under Article 95, paragraph 1.

(8) The Board shall examine all eligible candidates to select a suitable adoptive parent.

#### Competence of the Intercountry Adoption Board

**Article 115.** The Intercountry Adoption Board shall:

1. make a proposal to the Minister of Justice on the selection of a suitable adoptive parent;

2. express an opinion before the Minister of Justice on the petitions of persons habitually resident in the Republic of Bulgaria for adoption of a child habitually resident abroad;

3. make proposals to the Minister of Justice on the issuance of licences under Article 121;

4. express opinions and give recommendations to the Minister of Justice with respect to intercountry adoption;

5. make a proposal to the Minister of Justice on the withdrawal of the license licence of an accredited body.

#### Intermediation in Intercountry Adoption

**Article 116.** (1) Intermediation in intercountry adoption may be carried out by a legal entity pursuing non-profit objectives in public interest, hereinafter referred to as "an accredited body" entered into the Central Register under Article 45, paragraph 1 of the Non-profit Legal Persons Act and licensed for this purpose by the Minister of Justice.

(2) A foreign non-profit legal entity accredited to serve as an intermediary in respect of intercountry adoption by a foreign authority may perform its tasks in the Republic of Bulgaria only on the basis of a licence issued by the Minister of Justice for intermediation with the respective State.

(3) The Minister of Justice shall issue a regulation on the procedures for the issuance and withdrawal of licences and on the activities of accredited bodies, including their termination.

#### Consent of the Minister of Justice

**Article 117.** (1) The Minister of Justice shall give his or her consent with the adoption of a child habitually resident in the Republic of Bulgaria by the adoptive parent proposed by the Intercountry Adoption Board.

(2) The Minister of Justice shall refuse to give his or her consent in any of the following cases:

1. establishment of circumstances which are not in the best interests of the child;
2. material violations in the adoption proceedings.

(3) In the cases under paragraph 2, the Intercountry Adoption Board shall make a new proposal.

(4) A fee shall be charged for giving consent with the adoption at rates approved by the Council of Ministers.

#### Proceedings on the basis of Petitions for Intercountry Adoption

**Article 118.** (1) Where consent is given under Article 117, the Ministry of Justice shall refer the petition for adoption to the Sofia City Court. Proceedings shall take place pursuant to the provisions of Article 97.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment under paragraph 1 may be appealed under Article 98.

## Termination of Intercountry Adoption

**Article 119.** (1) The Minister of Justice shall be entitled to request termination of adoption, where the grounds under Article 106, paragraphs 1 and 7 exist and within the time limits prescribed therein.

(2) The Minister of Justice shall file a petition to terminate the adoption in case the judgment of the Bulgarian court on its granting is not recognized by the receiving State.

## Data Protection

**Article 120.** The Minister of Justice shall take measures to ensure personal data protection.

## License for Intermediation

**Article 121.** (1) An application shall be filed with the Minister of Justice for the issuance of a licence for intermediation in intercountry adoption.

(2) The validity of the licence shall be five years.

(3) A fee shall be charged for the examination of an application for a licence at rates approved by the Council of Ministers.

(4) A licence shall be withdrawn at a proposal of the Intercountry Adoption Board with reasons attached thereof.

# Chapter Nine RELATIONS BETWEEN PARENTS AND CHILDREN

## Parental Rights and Obligations

**Article 122.** (1) Bearer of parental rights and obligations with respect to minor children shall be each parent.

(2) Parents have equal rights and obligations, regardless of whether they are married or not.

(3) The parent's spouse shall assist the parent in performing his or her obligations.

## Exercise of Parental Rights and Discharge of Parental Obligations

**Article 123.** (1) Parental rights shall be exercised and parental obligations shall be discharged in the best interests of the child by both parents jointly and severally. Acting on his or her own, the parent shall advise the other parent thereof.

(2) Parental rights shall be exercised and parental obligations shall be discharged at the parents' mutual consent. In case of dispute, they may seek mediation or file a petition with

the district court at the current place of residence of the child, which shall resolve the dispute, having heard the parents and, if necessary, the child. The court judgment shall be subject to appeal in accordance with the general rules.

#### Rights and Obligations of the Child

**Article 124.** (1) The child shall have the right to be brought up and nurtured in a way that will ensure its normal physical, mental, moral and social development.

(2) The child shall have the right to personal relations with its parents, unless the court has ruled otherwise.

(3) In case of dispute between a parent and a child, the child may approach the Social Welfare Directorate in person to receive assistance. Where the child is fourteen years of age or above and the dispute concerns issues of material significance, the child may approach the district court at its current place of residence through the Directorate. The court judgment shall be subject to appeal in accordance with the general rules.

(4) Children shall respect their parents and grandparents and help them. Children have the same obligation to the other family members, as well as to the parent's spouse.

(5) Adult children shall take care of their aged or sick parents.

#### Care, Nurturing and Monitoring of Children

**Article 125.** (1) The parent shall have the right and obligation to take care of the physical, mental, moral and social development of the child, its education and its personal and property interests.

(2) The parent shall nurture the child, shape its views and provide for its education, depending on his capabilities and in accordance with the needs and aptitudes of the child and with a view to ensuring its development as an independent and responsible personality. The parent shall not use violence or nurturing methods which infringe upon the child's dignity.

(3) The parent shall ensure continuous monitoring of his or her child below the age of fourteen and appropriate control of the behaviour of his or her minor child.

#### Co-habitation

**Article 126.** (1) Parents and minor children shall live together, unless compelling reasons warrant their living separately.

(2) Where a child deviates or is deviated from its place of residence, the district court at the current place of residence of the parent, at the latter's request, shall rule on the return of the child, having heard it. The court ruling may be subject to appeal before the regional court but the appeal shall not stay enforcement. The child shall be returned administratively.

(3) Where the court finds compelling reasons under paragraph 1, it shall deny return of the child to the parent and notify the Social Welfare Directorate at the current place of residence of the child, which shall undertake measures forthwith.

## Dispute over Parental Rights

**Article 127.** (1) In case the parents do not live together, they may reach an agreement on the place of residence of the child, the exercise of parental rights, the personal relations with it and its maintenance. They may request the district court at the current place of residence of the child to endorse their agreement. The agreement shall have the effect of grounds for execution under Article 404, subparagraph 1 of the Code of Civil Procedure.

(2) Failing to reach an agreement under paragraph 1, the parents shall refer the dispute to the district court at the current place of residence of the child, which shall rule on the place of residence of the child, the exercise of parental rights, the personal relations with the child and its maintenance pursuant to the provisions of Articles 59, 142, 143 and 144. The court judgment shall be subject to appeal in accordance with the general rules.

(3) At the request of the parent, the court shall rule on provisional measures in the best interests of the child, having taken the opinion of the Social Welfare Directorate. The court ruling shall not be subject to appeal but it may be modified by the same court.

(4) The court may apply the protective measures under Article 59, paragraph 8.

## Dispute in Case of Disagreement between Parents on the Child Travelling Abroad

**Article 127a.** (New, SG No. 100/2010, effective 21.12.2010) (1) The issues related to the travelling abroad of the child and the issuance of the necessary identity documents thereof shall be resolved upon the common consent of the parents.

(2) Failing to reach an agreement under paragraph 1, the parents shall refer the dispute to the regional court at the current address of the child.

(3) The proceedings shall start at the request of either parent. The court shall hear the other parent, unless his or her absence is due to cogent reasons. The court may collect evidence at its own initiative as well.

(4) The court may allow preliminary enforcement of the decision made.

## Personal Relations with Kin

**Article 128.** (1) Grandparents may request the district court at the current place of residence of the child to impose measures for personal relations with the child provided this is in the best interests of the child. The child shall have the same right.

(2) The court shall apply the provisions of Article 59, paragraphs 8 and 9 respectively.

(3) Where the parent to whom the court has ruled a regime of personal relations with the child is not in a position to exercise it temporarily due to absence or illness, the regime may be carried out by the child's grandparents.

## Representation and Guardian Assistance

**Article 129.** (1) Each parent may represent his or her child below the age of fourteen on his or her own and give consent with the legal actions of his or her minor child in its best interests.

(2) A special representative shall be appointed in cases of contradiction between the interests of the parent and the child.

#### Management and Disposal of the Child's Property

**Article 130.** (1) Parents shall manage the child's property in its best interests and with good care.

(2) The income from the child's property which is not needed for its own needs may be used to meet family needs.

(3) Any action of disposal of immovable property, movable property with a formal transaction and deposits, as well as securities owned by the child shall be allowed with the permission of the district court at its current place of residence provided the disposal does not contravene the child's interests.

(4) Any gift, abandonment of rights, lending and securing of other person's debts by a minor child shall be null and void. By way of exception, other person's debts may be secured through pledge or mortgage pursuant to the provisions of paragraph 3 in case of need or obvious benefit to the child or emergency needs of the family.

(5) Only the restriction under Article 6, paragraph 4 shall apply to the transactions of a married minor.

#### Restriction of Parental Rights

**Article 131.** (1) Where the parent's behaviour threatens the personality, health, nurturing or property of the child, the district court shall take measures in the best interests of the child by restricting parental rights - depriving the parent of some of them or imposing conditions on their exercise - and may assign their exercise to another person. The place of residence of the child may be changed, if needed, or the child may be accommodated outside the family.

(2) The measures under paragraph 1 shall be taken also in case the parent is not in a condition to exercise his or her parental rights due to prolonged physical or mental disorder or other reasons beyond the parent's control.

#### Deprivation of Parental Rights

**Article 132.** (1) The parent may be deprived of parental rights in any of the following cases:

1. particularly serious cases under Article 131;
2. the parent takes no care of the child and provides no maintenance for a long period of time without any cogent reason.

(2) Where a parent is deprived of parental rights and there is no other parent or the exercise of parental rights by the other parent is not in the best interests of the child, the court shall take protective measures and accommodate the child outside the family.

#### Proceedings to Restrict Parental Rights or Deprive from Parental Rights

**Article 133.** (1) Proceedings to restrict parental rights or deprive from parental rights shall be brought at the petition of the other parent, the public prosecutor or the Social Welfare Directorate before the district court at the current place of residence of the child.

(2) The public prosecutor, a representative of the Social Welfare Directorate and the parent whose restriction or deprivation of parental rights is petitioned, unless the parent does not appear without any cogent reasons, shall be heard in the proceedings.

(3) The court shall rule on appropriate provisional measures in the best interests of the child, taking into consideration the opinion of the Social Welfare Directorate. The court ruling shall not be subject to appeal but it may be modified by the same court.

#### Maintenance and Measures with respect to Personal Relations

**Article 134.** When restricting parental rights through accommodation of the child outside the family or depriving of parental rights, the court shall determine:

1. the child's maintenance, unless it has been adjudicated;
2. the measures with respect to the personal relations between the parent and the child, while applying Article 59, paragraph 8 respectively.

#### Modification of Measures and Recovery of Parental Rights

**Article 135.** (1) In case of change in circumstances, the court may modify the measures under Articles 131, 132 and 134.

(2) The parent may request the court to recover his or her parental rights, where the grounds for the deprivation of parental rights have been removed.

#### Recordation

**Article 136.** In the cases under Articles 131 and 132, the court shall notify ex officio the municipality at the place of permanent residence of the parent to record the deprivation of parental rights, their recover or modification under Article 135. The court shall send a copy also to the Social Welfare Directorate at the current place of residence of the child, which shall undertake appropriate measures and, if necessary, propose the instatement of custody or guardianship.

#### Surrogate Care

**Article 137.** (1) Persons assigned with the care of the child shall not acquire parental rights and obligations.

(2) The persons under paragraph 1 may take decisions and undertake actions to protect the life and health of the children they are taking care of, without the consent of the parents.

(3) The persons with whom the child has been accommodated judicially shall have the right and obligation to live with it, as well as the obligation to undertake practical action under Article 125. They shall also be entitled to the right under Article 126, paragraph 2.

(4) (Amended, SG No. 82/2009) The persons under paragraph 3 shall undertake the necessary legal action to protect the child's personal rights related to its health, education and civil status, as well as to have its identity documents issued pursuant to the provisions of the Bulgarian Personal Documents Act, having obtained a positive opinion from the Social Welfare Directorate. These persons shall have the obligation under Article 165, paragraph 3.

(5) In cases of administrative accommodation of the child pursuant to the provisions of Article 27 of the Child Protection Act, the actions under paragraph 4 shall be undertaken by the Social Welfare Directorate.

#### Participation of the Child in Proceedings

**Article 138.** The child shall be heard in proceedings under this Chapter pursuant to the provisions of Article 15 of the Child Protection Act.

## **Chapter Ten MAINTENANCE**

### **Right to Maintenance**

**Article 139.** Any person who is not able to work and cannot support himself or herself from his or her property shall be entitled to maintenance.

#### Sequence of Persons Liable to Provide Maintenance

**Article 140.** (1) The person entitled to maintenance may seek it in the following sequence:

1. children and spouse;
2. parents;
3. former spouse;
4. grandchildren and great-grandchildren;
5. siblings;
6. grandparents and ancestors more times removed.

(2) Where the persons from a preceding order are not in a position to provide

maintenance, the persons from the following order shall become liable to provide maintenance.

(3) Where several persons from the same order are liable to provide maintenance, the obligations shall be distributed among them, depending on their capabilities. If maintenance has been provided by only one of them, the person may seek from the other the relevant portion together with the statutory interest rate.

#### Sequence of Persons Entitled to Maintenance

**Article 141.** A person liable to provide maintenance to several persons shall provide it in the following sequence:

1. children and spouse;
2. parents;
3. former spouse;
4. grandchildren and great-grandchildren;
5. siblings;
6. grandparents and ancestors more times removed.

#### Amount of Maintenance

**Article 142.** (1) The amount of maintenance shall be determined in accordance with the needs of the person entitled to maintenance and the capabilities of the person liable to provide it.

(2) The minimum maintenance of a child shall be equal to one quarter of the minimum wage.

#### Maintenance of Minors by Parents

**Article 143.** (1) Each parent shall provide, within his or her capabilities and financial condition, the living conditions needed for the development of the child.

(2) Parents shall be liable to provide maintenance to their minor children, regardless of whether the latter are able to work or support themselves from their property.

(3) Parents shall be liable to provide maintenance also in case the child is accommodated outside the family.

(4) The court may adjudicate, at the request of a parent or surrogate carer under Article 137, an additional allowance to the maintenance established by the court to cover emergency needs of the child in an amount which will not create excessive burden to the parent. The court shall establish also the period for which the additional allowance shall be provided.

### Maintenance of Adult Student Children by Parents

**Article 144.** Parents shall be liable to provide maintenance to their adult children provided the latter attend regular courses at secondary and higher schools during the term of education until the child becomes twenty years of age at secondary school and twenty-five years of age at an establishment of higher learning and cannot support themselves from their income or use of their property and the parents can provide it without excessive burden.

### Maintenance of a Former Spouse

**Article 145.** (1) A spouse who has no fault for the divorce shall be entitled to maintenance.

(2) The maintenance shall be provided for up to three years after the dissolution of marriage, unless the parties have agreed a longer period. The court may renew the period, where the maintained person is in a particularly difficult condition, while the provider can provide it without excessive burden.

(3) The right to maintenance of the former spouse shall be terminated upon his or her re-marriage.

### Payment of Maintenance in Cash

**Article 146.** (1) Maintenance in cash shall be paid on a monthly basis. The statutory interest rate shall be charged on delayed payments.

(2) Petitions for maintenance shall be examined in summary proceedings pursuant to the provisions of the Code of Civil Procedure.

### Abandonment of Maintenance

**Article 147.** The abandonment of maintenance for future periods shall be null and void.

### Prohibition of Netting

**Article 148.** The netting of debt against maintenance shall be prohibited.

### Maintenance for Past Periods

**Article 149.** Maintenance for past periods may be sought for up to one year prior to the filing of the petition.

### Modification and Termination of Maintenance

**Article 150.** The adjudicated maintenance or the additional allowance thereto may be modified or terminated in case of change in circumstances.

### Loss of the Right to Maintenance

**Article 151.** (1) A person who has committed a serious malfeasance against the provider

of the maintenance, his or her spouse, ascendant or descendant may not seek maintenance.

(2) Paragraph 1 shall not apply to the maintenance of children until they become sixteen years of age.

(3) A person deprived of parental rights shall not be relieved from the obligation to provide maintenance to his or her child. A person culpably deprived of parental rights may not seek maintenance from the child with respect of whom the deprivation has been ruled.

#### Payment of Adjudicated Maintenance by the State

**Article 152.** (1) (Supplemented, SG No. 100/2010, effective 21.12.2010) The State shall pay the maintenance adjudicated to a Bulgarian citizen under age at the expense of the defaulting debtor in the amount established in the court judgment but not more than the maximum amount specified in the annual State Budget Act of the Republic of Bulgaria.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) The payment under paragraph 1 shall be made, where it is established in the course of the recovery proceedings that the debtor in default has no income or property to seek recovery in the recovery action.

(3) (Repealed, SG No. 100/2010, effective 21.12.2010).

(4) (Amended, SG No. 100/2010, effective 21.12.2010) The State shall pay no maintenance adjudicated under Article 145.

(5) (Amended, SG No. 100/2010, effective 21.12.2010) Maintenance shall be paid as from the first day of the month following the month when the circumstances under paragraph 2 were established.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The defaulting debtor shall recover the maintenance paid by the State together with the statutory interest accrued.

(7) (New, SG No. 100/2010, effective 21.12.2010) The state shall be considered an adjoined claimant on the private public receivable for the maintenance paid by the municipality under the recovery proceedings, together with the statutory interest accrued. The fees and expenses due shall be collected directly from the debtor in such cases.

(8) (Renumbered from Paragraph 7, SG No. 100/2010, effective 21.12.2010) The Council of Ministers shall adopt a regulation on the procedures for payment of adjudicated maintenance by the State.

## **Chapter Eleven** **CUSTODY AND GUARDIANSHIP**

### **Conditions for Instatement**

**Article 153.** (1) Custody shall be instated over children below the age of fourteen, whose parents are unknown, deceased, placed under full legal interdiction or deprived of

parental rights. Custody shall be instated also over persons placed under full legal interdiction.

(2) Custody shall be instated over minors whose parents are unknown, deceased, placed under full legal interdiction or deprived of parental rights. Custody shall be instated also over persons placed under full legal interdiction.

(3) Any person who becomes aware of the need for custody or guardianship to be instated shall report to the custody and guardianship authority forthwith and, in cases of a child, also the Social Welfare Directorate. Where the child is accommodated at a specialized institution, the report shall be made by the director within seven days of the accommodation.

#### Custody and Guardianship Authority

**Article 154.** The mayor of the municipality or a person designated by the mayor shall serve as custody and guardianship authority.

#### Custody and Guardianship Instatement Procedure

**Article 155.** (1) The custody and guardianship authority shall appoint a custody board or a guardian and a deputy guardian within 30 days. The time limits shall commence as from the date of reception of the court judgment on the interdiction or deprivation of parental rights or as from the date of becoming aware of the parent's death.

(2) In cases of a report under Article 153, paragraph 3, the custody and guardianship authority shall carry out an inspection and, if such grounds exist, appoint a custody board or a guardian and a deputy guardian within the time limits under paragraph 1.

(3) The custody and guardianship authority shall hear the child pursuant to the provisions of Article 15 of the Child Protection Act and take the opinion of the Social Welfare Directorate. Where guardianship is instated over a person placed under limited legal interdiction, the authority shall hear also this person.

#### Custody Board

**Article 156.** (1) The custody and guardianship authority at the place of permanent residence of the person shall appoint a custodian, a deputy custodian and two advisors from among the kin and relatives of the person under the age of fourteen or the person placed under full legal interdiction who will best take care of his or her best interests and have given their consent in writing. They shall make up the custody board.

(2) The custody board may involve also other suitable members.

#### Guardian

**Article 157.** The custody and guardianship authority at the place of permanent residence of the person shall appoint a guardian and a deputy guardian from among the persons under Article 156 who have given their consent in writing.

#### Impediments to Appointment

**Article 158.** Persons lacking legal competence, deprived of parental rights and convicted for felony shall not be eligible to become members of a custody board or guardians or deputy guardians.

#### Protective Measures

**Article 159.** (1) Pending the appointment of a custodian or a guardian, the custody and guardianship authority shall take protective measures with respect to the personality and property of the person to be placed under custody or guardianship. The custody and guardianship authority shall draw up a list of his or her property or have such a list drawn up. The authority may assign a specific person to serve as a temporary custodian or guardian.

(2) Where custody or guardianship is instated over a child, the custody and guardianship authority may ask the Social Welfare Directorate to take special protective measures.

#### Changes in Membership

**Article 160.** (1) The custody and guardianship authority may change the membership of the custody board, where the best interests of the person under the age of fourteen or the person placed under full legal interdiction warrant it. Members of the custody board may be changed at their own request as well.

(2) Paragraph 1 shall apply also to the guardian and deputy guardian.

(3) Prior to its ruling on the changes under paragraphs 1 and 2, the custody and guardianship authority shall take the opinion also of kin to the person placed under custody or guardianship, while the provisions of Article 155, paragraph 3 shall additionally apply to minors.

#### Appeal against the Actions of the Custody and Guardianship Authority

**Article 161.** The actions of the custody and guardianship authority, as well as the refusal to instate custody or guardianship or take the measures under Article 159 may be appealed by the parties concerned or by the public prosecutor before the district court. The Social Welfare Directorate shall have the same right with regard to children. The judgment of the district court shall be ruled on the merit of the case and shall not be subject to appeal.

#### Assistance

**Article 162.** The custody and guardianship authority shall assist the custodian and the guardian in the discharge of their duties. Where the person placed under custody or guardianship is a child, such assistance shall be provided also by the Social Welfare Directorate.

#### Place of Residence of the Person Placed under Guardianship

**Article 163.** (1) A person placed under custody shall live with the custodian, unless compelling reasons warrant that they live separately.

(2) Where a person placed under custody deviates or is deviated from his or her place of residence, the custodian may request the district court to return the person, having heard him or her. The court ruling may be subject to appeal before the regional court but the appeal shall not stay enforcement. The person shall be returned administratively.

(3) Article 126, paragraph 3 shall apply to the cases under paragraph 2 respectively.

#### Rights and Obligations of the Custodian

**Article 164.** (1) The activity of the custodian shall be honorary.

(2) The custodian of a child below the age of fourteen shall have also the obligations under Articles 125 and 129 and also those under Article 129 where the child is accommodated with a foster family.

(3) The guardian of a person placed under legal interdiction shall take care of this person, manage his or her property and represent him or her before third parties.

#### Management and Disposal of the Property of a Person Placed under Guardianship

**Article 165.** (1) The guardian shall manage the property of the person placed under guardianship with good care and in his or her best interests.

(2) The guardian shall notify the custody and guardianship authority, within a month, of the acquisition of property of material value after the instatement of custody, whereby this property shall be entered into the list under Article 159, paragraph 1.

(3) The custodian shall remit the cash of the person placed under custody to his or her name with a bank within seven days of receipt. The custodian shall pay the statutory interest rate for any delay of remittance.

(4) Article 130, paragraph 3 and paragraph 4, first sentence shall apply to the disposal of property of a person placed under custody. The custodian shall attach the opinion of the custody board to the petition.

#### Rights and Obligations of Advisors in the Custody Board

**Article 166.** (1) Advisors shall assist the custodian and deputy custodian in the discharge of their duties and notify the custody and guardianship authority of any disturbances in the upbringing and nurturing of the child under the age of fourteen or the protection of the rights and interests of the person placed under custody. They shall hear the report of the custodian and take part in its adoption by the custody and guardianship authority. Advisors may propose dismissal of the custodian and give opinion in the cases prescribed by law.

(2) The custody board shall give its opinion in writing on the adoption of the child placed under custody by the custodian in the cases under Article 82, paragraph 3.

## Place of Residence of Persons Placed under Guardianship

**Article 167.** (1) A person placed under guardianship shall live with the guardian, accommodated elsewhere as prescribed by law. The guardian shall have the right under Article 163, paragraph 2.

(2) The deputy guardian shall give his or her opinion in cases of adoption of the person placed under guardianship by the guardian.

## Rights and Obligations of the Guardian

**Article 168.** (1) The activity of the custodian shall be honorary.

(2) The provisions of Article 164 and Article 165, paragraphs 2 and 4 shall apply also to the guardian. The cash of the person placed under guardianship shall be remitted in his or her name with a bank.

## Deputy Custodian and Deputy Guardian

**Article 169.** (1) The deputy custodian shall replace the custodian in cases the latter is prevented from discharging his or her duties or in cases of conflict of interest between the interests of the custodian and the interests of the person placed under custody. In such cases, the custody and guardianship authority may appoint a special representative.

(2) The deputy custodian may propose to the custody and guardianship authority to dismiss the custodian.

(3) Paragraphs 1 and 2 shall apply also to the deputy guardian.

## Supervision of Custodians and Guardians

**Article 170.** (1) The custody and guardianship authority shall supervise the activities of the custodian. It may stop his or her actions and prescribe action to be taken, having taken the opinion of the custody board.

(2) Paragraph 1 shall apply also to the guardian.

## Reports of Custodians and Guardians

**Article 171.** (1) The custodian shall report his or her activities to the custody board each year by the end of February and submit the report to the custody and guardianship authority. The custodian shall report also upon dismissal and at any time upon the request of the custody and guardianship authority.

(2) The guardian shall give explanations about his or her actions upon the request of the custody and guardianship authority in the presence of the deputy guardian.

(3) The custody and guardianship authority shall rule on the report of the custodian and the explanations of the guardian and, if irregularities are observed, demand the removal of such irregularities. Where the custody or guardianship is instated over a minor, the Social

Welfare Directorate shall give its opinion as well.

(4) The district court shall issue a writ of execution against the custodian for unreported amounts of money on the basis of a petition by the custody and guardianship authority.

(5) Where the custodian fails to appear or submit the report without any cogent reason, the custody and guardianship authority shall impose a fine ranging from BGN 50 to BGN 500. The authority shall seek the report from the deputy custodian.

(6) Where the guardian fails to appear or give explanations without any cogent reason, the custody and guardianship authority shall impose the fine under paragraph 5. The authority shall seek the explanations from the deputy custodian.

(7) The establishment of the misdemeanour and the issuance, appeal and execution of the penalty order shall follow the procedures prescribed in the Administrative Violations and Sanctions Act.

#### Transition from Custody to Guardianship

**Article 172.** (1) When the child becomes fourteen, custody shall be terminated and the custody and guardianship authority shall appoint a guardian and a deputy guardian. Pending their appointment, these functions shall be performed by the custodian.

(2) In cases of transition from full to limited legal interdiction, pending the appointment of a guardian, these functions shall be performed by the custodian.

#### Custody and Guardianship by Right

**Article 173.** (1) Custodian or guardian respectively of a child of unknown parentage shall be the head of the specialized institution in which the child is accommodated.

(2) Custodian of a spouse placed under full legal interdiction or guardian of a spouse placed under limited legal interdiction shall be the spouse with legal competence. If there is no such spouse, parental rights shall be exercised and parental obligations shall be discharged by his or her parents, unless they are unknown, deceased or deprived of parental rights.

(3) In the cases under paragraphs 1 and 2, no custody board or guardian and deputy guardian shall be appointed and no custody proceedings shall be opened.

(4) The custody and guardianship authority shall dismiss the custodian or guardian under paragraph 2, where the best interests of the person placed under legal interdiction warrant it. In these cases, a custody board or a guardian and a deputy guardian shall be appointed following the general rules.

#### Register

**Article 174.** (1) In cases of appointment of a custody board or a guardian and a deputy guardian and in the cases under Article 173, paragraph 2, the custodian and the guardian shall be entered into a register. The register shall be kept by the custody and guardianship authority at the place of permanent residence of the person placed under custody or guardianship.

(2) In the cases under Article 173, paragraph 2, the entry shall be made at the request of the spouse or the parents and after that the applicant shall be issued a certificate on his or her status of a custodian or guardian.

## **Chapter Twelve**

### **ADMINISTRATIVE PENALTY PROVISIONS**

**Article 175.** (1) Any official committing a violation or having a violation committed under Article 83 to 88 and Article 95 and the related secondary legislation shall be punished with a fine ranging from BGN 1,000 to BGN 2,000, unless the action constitutes an offence.

(2) Where the action is repeated, the fine shall range from BGN 2,500 to BGN 5,000.

**Article 176.** (1) Violation statements shall be drawn up by officials authorized by the Minister of Justice or the Minister of Labour and Social Policy respectively.

(2) Penalty orders shall be issued by the Minister of Justice or the Minister of Labour and Social Policy respectively or officials authorized by them.

(3) The establishment of violations and the issuance, appeal and execution of penalty orders shall follow the procedures prescribed in the Administrative Violations and Sanctions Act.

### **ADDITIONAL PROVISIONS**

§ 1. "Marital home", within the meaning of this Code, shall be the home inhabited by both spouses and their minor children.

§ 2. "Repeated", within the meaning of this Code, shall be a violation committed within a year of the date of enforceability of the penalty order imposing a penalty on the perpetrator for the same type of violation.

### **TRANSITIONAL AND FINAL PROVISIONS**

§ 3. The Family Code (Promulgated, SG No. 41 of 1985; Amended, No. 11 of 1992; Emended, No. 15 of 1991; Amended, Nos. 63 and 84 of 2003, 42 of 2005, 30 of 2006 and 59 of 2007) is hereby repealed.

§ 4. (1) The rules of this Code with respect to spousal property relations shall apply also to properties acquired by spouses in marriage existing prior to its entry into force.

(2) Spouses in marriage existing prior to the entry of this Code into force may choose the regime of separation of property or conclude a matrimonial contract pursuant to the provisions of this Code.

§ 5. (1) Pending the establishment of the maximum amount of the adjudicated maintenance under Article 152, paragraph 1 in accordance with the annual State Budget Act

of the Republic of Bulgaria, the State shall pay the adjudicated maintenance at the expense of the defaulting debtor in the amount set out in the judgment but not more than BGN 80.

(2) Prior to the establishment of the maintenance under paragraph 1 in pending execution proceedings and files opened before the entry of this Code into force, the State shall pay maintenance in the adjudicated amounts but not more than BGN 80.

(3) The State shall terminate the payment of maintenance adjudicated pursuant to the provisions of Article 82, paragraph 2 and Article 83 of the repealed Family Code in the cases and files under paragraph 2 as from the first day of the month following the entry of this Code into force.

**§ 6.** (1) The national electronic information system under Article 83 and the register under Article 85 shall be established within a year of the entry of this Code into force.

(2) Pending the establishment of the register under Article 85, the prospective full adoptive parents shall be entered into the registers under Article 57b of the repealed Family Code.

**§ 7.** Within a month of the entry of this Code into force, the Civil Registration and Administrative Services General Directorate at the Ministry of Regional Development and Public Works shall provide the Recordation Office with free access to the data in the automatic information arrays of the Integrated Civil Registration and Administrative Services System at the nationwide level.

**§ 8.** (1) A parent whose child is accommodated at a specialised institution by court without any term specified in the judgment or whose child has stayed at the institution for more than a year shall ask for termination of the accommodation or change of the protective measure within three months of the entry of this Code into force with a view to the upbringing of the child in a family environment.

(2) The relevant Social Welfare Directorate shall notify the parent at his or her place of permanent residence for the undertaking of the measures under paragraph 1 within a month of the entry of this Code into force. Failing to find the parent at the place of permanent or current residence, a notice shall be exhibited visibly on the premises of the Directorate, specifying the deadline. The notice shall be delivered also pursuant to the provisions of the Code of Civil Procedure.

(3) The Social Welfare Directorate shall notify in writing the relevant Regional Social Welfare Directorate within seven days for entry of the child into the regional register at the location of the specialized institution in cases of non-performance under paragraph 1. Adoption shall proceed without the parent's consent.

**§ 9.** The Private International Law Code (Promulgated, SG No. 42/2005, amended, No. 59/2007) Article 84 shall be amended as follows:

1. Paragraph 3:

(a) the first sentence shall be amended as follows: "The consent of the Minister of Justice shall be required where the adopted child is habitually resident in the Republic of

Bulgaria, unless the adoptive parent is habitually resident in the Republic of Bulgaria";

(b) in the second sentence, the words "from a foreign national to a person who is a Bulgarian citizen" shall be deleted.

2. In paragraph 4, the words "Bulgarian or foreign national" shall be deleted.

**§ 10.** In the Code of Civil Procedure (Promulgated, SG No. 59 of 2007; Amended, No. 50 of 2008, Judgment No. 3 of the Constitutional Court of 2008 - No. 63 of 2008, No. 69 of 2008, Nos. 12, 19 and 42 of 2009), Article 327, first sentence, the word "ascendants" shall be replaced by the word "parents".

**§ 11.** In the Criminal Code (Promulgated, SG No. 26 of 1968; Emended, No. 29 of 1968; Amended, No. 92 of 1969, Nos. 26 and 27 of 1973, No. 89 of 1974, No. 95 of 1975, No. 3 of 1977, No. 54 of 1978, No. 89 of 1979, No. 28 of 1982; Emended, No. 31 of 1982; Amended, No. 44 of 1984, Nos. 41 and 79 of 1985; Emended, No. 80 of 1985; Amended, No. 89 of 1986; Emended, No. 90 of 1986; Amended, Nos. 37, 91 and 99 of 1989, Nos. 10, 31 and 81 of 1990, Nos. 1 and 86 of 1991; Emended, No. 90 of 1991; Amended, No. 105 of 1991, No. 54 of 1992, Nos. 10 of 1993, No. 50 of 1995, No. 97 of 1995 - Judgment No. 19 of the Constitutional Court of 1995; Amended, No. 102 of 1995, No. 107 of 1996, Nos. 62 and 85 of 1997, No. 120 of 1997 - Judgment No. 19 of the Constitutional Court of 1997; Amended, Nos. 83, 85, 132, 133 and 153 of 1998, Nos. 7, 51 and 81 of 1999, Nos. 21 and 51 of 2000, No. 98 of 2000 - Judgment No. 14 of the Constitutional Court of 2000; Amended, Nos. 41 and 101 of 2001, Nos. 45 and 92 of 2002, Nos. 26 and 103 of 2004, Nos. 24, 43, 76, 86 and 88 of 2005, Nos. 59, 75 and 102 of 2006, Nos. 38, 57, 64, 85, 89 and 94 of 2007, Nos. 19, 67 and 102 of 2008, Nos. 12, 23 and 32 of 2009), Article 183, paragraph 1, the words "with imprisonment of up to one year or" shall be inserted after the word "punished".

**§ 12.** The Civil Registration Act (Promulgated, SG No. 67 of 1999; Amended, Nos. 28 and 37 of 2001, No. 54 of 2002, No. 63 of 2003, Nos. 70 and 96 of 2004, No. 30 of 2006, Nos. 48 and 59 of 2007, No. 105 of 2008, Nos. 6 and 19 of 2009) shall be amended as follows:

1. Article 25:

(a) The existing text shall become paragraph 1;

(b) Paragraph 2 shall be inserted as follows:

"(2) The format of the personal registration card shall be approved through an order of the Minister of Regional Development and Public Works".

2. In Article 50, paragraph 1, first sentence, the words "within three days of reception of the copy" shall be inserted at the end.

3. Article 53:

(a) A new subparagraph 6 shall be inserted as follows:

"6. regime of property relations";

(b) The existing subparagraphs 6, 7, 8 and 9 shall be re-numbered into subparagraphs 7, 8, 9 and 10 respectively.

**§ 13.** The Child Protection Act (Promulgated, SG No. 48 of 2000; Amended, Nos. 75 and 120 of 2002, Nos. 36 and 63 of 2003, Nos. 70 and 115 of 2004, Nos. 28, 94 and 103 of 2005, Nos. 30, 38 and 82 of 2006, No. 59 of 2007, No. 69 of 2008, No. 14 of 2009) shall be amended as follows:

1. In Article 45, paragraph 13 shall be inserted as follows:

"(13) An official failing to perform an obligation under Article 27, paragraph 2 shall be punished with a fine ranging from BGN 1,000 to BGN 2,000 for a first violation and from BGN 1,500 to BGN 3,000 for a repeated violation, unless the official is subject to a more severe administrative punishment prescribed by a special law or the action constitutes an offence."

2. In Article 46, paragraph 3, the words "and 13" shall be added after the words "paragraph 7" in the text before subparagraph 1.

**§ 14.** In the Bulgarian Identity Documents Act (Promulgated, SG No. 93 of 1998; Amended, Nos. 53, 67, 70 and 113 of 1999, No. 108 of 2000, No. 42 of 2001, Nos. 45 and 54 of 2002, Nos. 29 and 63 of 2003, Nos. 96, 103 and 111 of 2004, Nos. 43, 71, 86, 88 and 105 of 2005, Nos. 30, 82 and 105 of 2006, Nos. 29, 46 and 52 of 2007, Nos. 66, 88 and 110 of 2008 and No. 35 of 2009), Article 76, subparagraph 9, a second sentence shall be inserted as follows: "In case of dispute between the parents, the dispute shall be resolved pursuant to the provisions of Article 123, paragraph 2 of the Family Code".

**§ 15.** The Notaries and Notarial Practice Act (Promulgated, SG, No. 104/1996; Amended, Nos. 117, 118 and 123/1997, No. 24/1998, No. 69/1999, No. 18/2003, Nos. 29 and 36/2004, Nos. 19 and 43/2005, Nos. 30, 39 and 41/2006, Nos. 59 and 64/2007, Nos. 50 and 69/2008 and No. 42/2009) shall be amended as follows:

1. Article 25, paragraph 4:

(a) a new second sentence shall be inserted: "The matrimonial contract in the cases under Article 39, paragraph 3 of the Family Code shall be submitted for recordation upon reception of the civil marriage certificate";

(b) the existing second sentence shall become the third sentence.

3. In Article 28a, paragraph 1, subparagraph 4, the words "as well as the matrimonial contracts under Article 39 of the Family Code" shall be inserted at the end.

**§ 16.** In the Control of Juvenile Anti-social Behaviour Act (Promulgated, Izv., No. 13 of 1958; Amended, No. 11 of 1961; SG, No. 35 of 1966, No. 30 of 1969, No. 89 of 1974, No. 53 of 1975; Emended, No. 55 of 1975; Amended, No. 63 of 1976, No. 36 of 1979, No. 75 of 1988, No. 110 of 1996; Emended, No. 3 of 1997; Amended, No. 69 of 1999, Nos. 66 and 96 of 2004, Nos. 28, 94 and 103 of 2005 and No. 25 of 2009), Article 15, subparagraph 7, the words "Articles 74 to 76" shall be replaced by the words "Articles 131, 132 and 134".

§ 17. In the Succession Act (Promulgated, SG, No. 22 of 1949; Emended, No. 41 of 1949; Amended, No. 275 of 1950, No. 41 of 1985, No. 60 of 1992, Nos. 21 and 104 of 1996, No. 117 of 1997, No. 96 of 1999, No. 34 of 2000 and No. 59 of 2007), Article 5, paragraph 3, the words "Article 62" shall be replaced by the words "Article 102".

§ 18. This Code shall enter into force on 1 October 2009.

This law was adopted by the 40th National Assembly on 12 June 2009 and the official seal of the National Assembly was affixed thereto.

Act to Amend and Supplement the Family Code

(SG No. 100/2010, effective 21.12.2010)

#### TRANSITIONAL AND FINAL PROVISIONS

§ 19. (Effective 1.10.2009 - SG No. 100/2010) Bulgarian citizens with habitual residence abroad who have been entered into the register under Article 57b, paragraph 1 of the repealed Family Code (Promulgated State Gazette, No. 41 of 1985; amended, SG No. 11 of 1992; emended, SG No. 15 of 1992; amended, SG Nos. 63 and 84 of 2003, No. 42 of 2005, No. 30 of 2006 and No. 59 of 2007; repealed, SG No. 47 of 2009) may take part in the adoption procedure under this Code without applying Article 84, paragraph 3 of the Private International Law Code pending the expiration of their permission for entry into the register. Adoptive parents who have not adopted a child before 1 October 2001 may apply for entry into the register under Article 113, paragraph 1, subparagraph 2 of this Code.

§ 20. (Effective 1.10.2009 - SG No. 100/2010) The permissions for entry into the register under Article 57b, paragraph 1 of the repealed Family Code of Bulgarian citizens with habitual residence abroad shall be valid until 1 October 2011 provided that the term of these permissions had not expired before 1 October 2009.

§ 21. (Effective 1.10.2009 - SG No. 100/2010) Any pending proceedings under Article 53e, paragraph 1 of the repealed Family Code shall be completed under the terms and conditions provided therein, whereby the child shall be entered into the register under Article 83, paragraph 2 of this Code after the effective date of the court decision under Article 53e, paragraph 4 of the repealed Family Code.

§ 22. The pending procedures for payment of maintenance adjudicated under Article 152 by the state started prior to the effective date of this Act shall be continued under the new terms and conditions.

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§ 24. This Act shall enter into force on the date of its promulgation in The State Gazette, except for § 19, 20 and 21 which shall enter into force as from 1 October 2009.

Promulgated, State Gazette No. 59/20.07.2007, effective 1.03.2008, amended and supplemented, SG No. 50/30.05.2008, effective 1.03.2008, modified by Judgment No. 3 of the Constitutional Court of the Republic of Bulgaria of 8.07.2008 - SG No. 63/15.07.2008, amended, SG No. 69/5.08.2008, SG No. 12/13.02.2009, effective 1.01.2010 - amended, SG No. 32/28.04.2009, supplemented, SG No. 19/13.03.2009, amended and supplemented, SG No. 42/5.06.2009, modified by Judgment No. 4 of the Constitutional Court of the Republic of Bulgaria of 16.06.2009 - promulgated SG No. 47/23.06.2009, SG No. 82/16.10.2009, amended and supplemented, SG No. 13/16.02.2010, SG No. 100/21.12.2010, effective 21.12.2010, Judgment No. 15/21.12.2010 of the Constitutional Court of the Republic of Bulgaria - SG No. 5/14.01.2011

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\*Note: An update of the English text of this Act is being prepared

following the amendments in SG No. 45/15.06.2012, SG No. 49/29.06.2012

Text in Bulgarian: Граждански процесуален кодекс

## **PART ONE GENERAL RULES**

### **Chapter One BASIC PROVISIONS**

#### **Subject Matter**

**Article 1.** This Code regulates proceedings in civil cases.

Due Protection and Facilitation

**Article 2.** Courts shall be obligated to examine and adjudicate in each petition submitted thereto for protection and facilitation of personal and property rights.

Good Faith

**Article 3.** The persons participating in court proceedings and the representatives thereof, on pain of liability for damages, shall be obligated to exercise the procedural rights conferred thereon in good faith and in compliance with good morals. The said persons shall be obligated to present to the court nothing but the truth.

Court Language, Oral Interpreters and Sign-Language Interpreters

**Article 4.** (1) Court proceedings shall be conducted in the Bulgarian language.

(2) Where any persons participating in the case have no command of the Bulgarian language, the court shall appoint an oral interpreter with the assistance of whom such persons shall perform the court procedural steps and shall be provided with an explanation of the steps taken by the court.

(3) Where a deaf or a mute person participates in the case, a sign-language interpreter shall be appointed thereto.

## **Chapter Two**

### **FUNDAMENTAL PRINCIPLES**

#### **Legality**

**Article 5.** The court shall examine and adjudicate in cases according to the precise meaning of the laws, and where the laws are deficient, obscure or conflicting, according to the common sense thereof. In the absence of an applicable law, the court shall found the judgment thereof on the fundamental principles of law, custom and ethics.

##### Dispositive Principle

**Article 6.** (1) Court proceedings shall commence on a petition by the interested person or on a motion by the prosecutor in the cases specified by a law.

(2) The subject matter of the case and the amount of the protection and facilitation due shall be determined by the parties.

##### Ex Officio Principle

**Article 7.** (1) The court shall perform ex officio the procedural steps necessary for the progress and close of the case and shall see to the admissibility and due performance of the procedural steps by the parties. The court shall facilitate the parties to clarify the factual and legal aspects of the case.

(2) The court shall serve upon the parties a duplicate copy of the acts which are subject to appellate review by separate appeal.

##### Adversarial Principle

**Article 8.** (1) Each party shall have the right to be heard by the court before rendition of an act relevant to the rights and interests of the said party.

(2) The parties shall indicate the facts underlying the demands thereof and shall present evidence supporting the said facts.

(3) The court shall afford the parties an opportunity to familiarize themselves with the

demands and arguments of the opposing party, with the subject matter of the case and the progress thereof, as well as to express a stand on the said demands, arguments and subject matter.

#### Equality of Parties

**Article 9.** The court shall afford the parties an equal opportunity to exercise the rights conferred thereon. The court shall apply the law equally in respect of all.

#### Establishment of the Truth

**Article 10.** The court shall afford the parties an opportunity and shall facilitate the parties to establish the facts relevant to adjudication of the case.

#### Publicity and Immediacy

**Article 11.** Cases shall be examined orally in public session, save as where a law provided that such examination take place in camera.

#### Inner Conviction

**Article 12.** The court shall weigh all evidence in the case and the arguments of the parties, guided by its inner conviction.

#### Examination and Adjudication of Cases within Reasonable Time

**Article 13.** The court shall examine and adjudicate in the cases within a reasonable period of time.

## **Chapter Three JURISDICTION**

### **Jurisdiction over Civil Cases**

**Article 14.** (1) The courts shall have jurisdiction over all civil cases.

(2) The court shall have discretion to determine whether a case instituted is entertainable thereby.

(3) No other institution shall have the right to admit for examination a case which is already being examined by the court.

#### Verification of Jurisdiction

**Article 15.** (1) The question of whether a case instituted is under the jurisdiction of the court may be raised either by the parties or ex officio by the court during any stage of the proceeding, save as where a time limit for this is established in a law.

(2) The ruling of the court on this issue shall be appealable by an interlocutory appeal.

#### Jurisdiction Dispute

**Article 16.** Where the courts and the other institutions have refused to examine a case by reason of declining jurisdiction, the plaintiff may bring a jurisdiction dispute before the Supreme Court of Cassation.

#### Competence over Pre-conditioning Questions

**Article 17.** (1) The court shall take a stand on all questions which are relevant to adjudication of the case, with the exception of the question as to whether a criminal offence has been committed.

(2) The court shall pronounce on the validity of administrative acts as an incidental question regardless of whether the said acts are subject to judicial review. The court may not pronounce on the legal conformity of administrative acts as an incidental question, save as where any such act is opposed to a party to the case who did not participate in the administrative proceeding for the issuing and appellate review of the said act.

#### Judicial Immunity

**Article 18.** (1) The Bulgarian court shall be competent to examine actions whereto a foreign State, as well as a person enjoying judicial immunity, is a party in the following cases:

1. where judicial immunity is waived;
2. under actions based on contractual relations, where the obligation is performed in the Republic of Bulgaria;
3. under actions for damages sustained as a result of a tort or delict where the harmful act was committed in the Republic of Bulgaria;
4. under actions regarding rights to succession property and vacant succession in the Republic of Bulgaria;
5. under cases which are under the exclusive jurisdiction of the Bulgarian courts.

(2) The provisions of Items 2, 3 and 4 of Paragraph (1) shall not apply to any legal transactions and moves performed in execution of official functions of the persons or, respectively, in connection with the exercise of sovereign rights of the foreign State.

#### Arbitration Agreement

**Article 19.** (1) The parties to a property dispute may agree that the said dispute be settled by an arbitration court, unless the said dispute has as its subject matter any rights in rem or possession of a corporeal immovable, maintenance obligations or rights under an employment relationship.

(2) The arbitration may have a seat abroad if one of the party has his, her or its habitual residence, registered office according to the basic instrument thereof or place of the actual management thereof abroad.

## Chapter Four COURTS

### Court Panel

**Article 20.** First-instance cases shall be examined by a one-judge panel, and intermediate appellate review cases and cassation cases shall be examined by a three-judge panel, including a presiding judge.

#### Deliberation

**Article 21.** (1) The deliberation and the voting of the court panel shall be moderated by the presiding judge and shall be conducted in camera.

(2) None of the judges may abstain from voting.

(3) The members of the panel shall vote in the order of seniority. The first to vote shall be the junior member, and the presiding judge shall vote last.

(4) Where, upon adjudication of the case on the merits, the court has to pronounce on several actions, a separate vote shall be taken on each of the said actions.

(5) Judgments of the court shall be adopted by a majority of the votes of the judges.

(6) Any judge who dissents from the opinion of the majority shall sign the judgment, reasoning separately for his or her dissenting opinion.

#### Grounds for Recusal

**Article 22.** (1) Participation in a case as a judge shall be inadmissible for any person:

1. who is a party to the case or, together with any of the parties to the case, has entered into the contested legal relation or into a legal relation linked thereto;

2. who is a spouse of or a lineal relative up to any degree of consanguinity, or a collateral relative up to the fourth degree of consanguinity, or an affine up to the third degree of affinity, to any of the parties or to any representative of any such party;

3. who is a de facto cohabitee with any party to the case or with any representative of any such party;

4. who has been a representative or an attorney-in-fact, as the case may be, of any party to the case;

5. who has taken part in adjudication in the case in a court of another instance or who has been a witness or an expert witness in the case;

6. in respect of whom other circumstances exist which give rise to reasonable doubts as to the impartiality of the said person.

(2) The judge shall be obligated to exclude himself or herself in the cases covered under Items 1 to 5 of Paragraph (1), and should he or she decline the recusal under Item 6 of Paragraph (1), to disclose the circumstances.

#### Recusal Procedure

**Article 23.** (1) Each of the parties may move for exclusion during a hearing after the grounds for an exclusion have arisen or have become known.

(2) The court shall determine the question of the exclusion with the participation of the judge in respect of whom the motion was made.

(3) If, owing to the exclusion of judges, the examination of the case at the relevant court is impossible, the superior court shall decree the transmittal of the case for examination to another court of equal rank.

#### Recusal of Other Officials

**Article 24.** The prosecutor and the clerk of court may be excluded on the grounds covered under Article 22 (1) herein.

#### Rogatory Commissions

**Article 25.** (1) Where evidence has to be taken outside the geographical jurisdiction of the court, the court may commission the territorial regional court to take the said evidence.

(2) The court shall communicate to the commissioned court the time limit wherewithin the evidence must be taken and, if possible, the day of the next succeeding hearing of the case.

(3) The commissioned court shall notify the commissioning court forthwith of all circumstances which delay or impede the fulfilment of the commission.

(4) The commissioned court shall render a ruling on all questions in connection with the fulfilment of the commission.

## **Chapter Five** **PARTIES. REPRESENTATION**

### **Parties**

**Article 26.** (1) Parties to civil cases shall be the persons who or which sue and who or

which are sued.

(2) Save in the cases provided for by a law, no one may claim under another's rights on one's own behalf before a court of law.

(3) A prosecutor may participate in the proceeding, enjoying the rights of a party, in the cases provided for by a law. A prosecutor may not perform any steps which constitute disposition of the subject matter of the case.

(4) In a case under which any person claims under another's right, the person under whose right the first-mentioned person claims shall likewise be summoned as a party.

#### Capacity to Have Procedural Rights and Duties

**Article 27.** (1) A person shall be capable of having procedural rights and duties if the said person is of full capacity to have rights and duties under the substantive law.

(2) The government institutions which are spending units shall likewise be capable of having procedural rights and duties. If a government institution is not a spending unit, the court procedural steps shall be performed by and against the superior institution which is a spending unit.

#### Procedural Capacity to Sue

**Article 28.** (1) The natural persons of full capacity to act shall perform procedural steps at court in person.

(2) Minors and limited interdicts shall perform procedural steps at court in person, but with the consent of the parents or curators thereof.

(3) Minors may sue in person for any disputes over employment relationships or for any disputes arising from transactions referred to in Article 4 (2) of the Persons and Family Act, as well as in other cases specified by a law.

(4) Minors and full interdicts shall be represented by the legal representatives thereof: parents or tutors.

#### Ad Hoc Procedural Representation

**Article 29.** (1) Absent persons unheard of shall be represented by representatives thereof appointed by the court, and persons declared absent shall be represented by the heirs whereto possession has been delivered.

(2) The party who wishes to perform a procedural step which brooks no delay in respect of any person who lacks procedural capacity to sue and who does not have a legal representative or curator, may approach the court wherebefore the case is pending with a motion to appoint an ad hoc representative of the said party. In such case, the costs shall be initially borne by the said party.

(3) A person whose permanent and present address is unknown shall be represented by a

person expressly appointed by the court. In such case, the costs shall be initially borne by the opposing party.

(4) If there is a conflict between the interests of a represented person and a representative, the court shall appoint an ad hoc representative. In such case, the court, acting according to the circumstances, shall rule whether the costs shall be initially borne by the represented person or by the representative.

(5) The ad hoc representative may perform steps for which an express power of attorney is required solely with the approval of the court wherebefore which the case is pursued.

#### Representation of Legal Persons

**Article 30.** (1) Legal persons shall be represented before the courts by the persons who represent the said persons by law or according to the rules of organization thereof.

(2) In the absence of a rule for representation, the legal person shall be represented by two members of the management thereof.

(3) Government institutions shall be represented by the heads thereof according to the rules of organization of the said institutions.

(4) Municipalities shall be represented by the mayors.

#### Representation of the State

**Article 31.** (1) The State shall be represented by the Minister of Finance, unless otherwise provided for in a law.

(2) In cases concerning corporeal immovables constituting state property, the State shall be represented by the Minister of Regional Development and Public Works.

#### Representation Per Procuracionem

**Article 32.** The following may be representatives of the parties by authorization:

1. the lawyers;
2. the parents, the children or the spouse;
3. the legal advisers or other employees possessing legal qualifications at the institutions, the enterprises, the legal persons and the sole trader;
4. the regional governors, authorized by the Minister of Finance or by the Minister of Regional Development and Public Works, in the cases referred to in Article 31 herein;
5. other persons provided for in a law.

#### Power of Attorney

**Article 33.** The attorneys-in-fact shall identify themselves by means of a power of attorney signed by the party or by the representative thereof. The power of attorney shall state the forename, patronymic and surname, the exact address and telephone number of the attorney-in-fact. Authorization may furthermore be made orally before the court, and shall be included in the judicial record of the court hearing.

#### Representative Authority

**Article 34.** (1) A general power of attorney shall confer a right to perform all procedural steps at court, including receipt of costs deposited and sub-delegation.

(2) Bringing actions for civil status, including matrimonial actions, shall require an express power of attorney.

(3) Conclusion of a settlement, diminution of the demand, withdrawal from or abandonment of the action, admission of the demands of the other party, receipt of money or of other valuables, as well as any steps constituting disposition of the subject matter of the case, shall require an express power of attorney.

(4) A power of attorney shall remain valid until completion of the case in the courts of all instances, unless otherwise agreed.

#### Withdrawal of Authorization

**Article 35.** The principal shall have the right to withdraw at any time the authorization granted thereby, notifying the court thereof, but this shall not stay the examination of the case. All steps performed lawfully by the attorney-in-fact until withdrawal of the power of attorney shall remain valid.

#### Adjournment of Case upon Termination of Authorization

**Article 36.** In the event of death, mental derangement or disqualification of the principal, as well as upon renunciation of the authorization thereof, of which the said principal has notified the court, the proceeding in the case shall not be stayed but examination of the case may be adjourned for another hearing if the court determines that these circumstances could not have become known to the party or that the party has learnt of the said circumstances too late to be able to replace the attorney-in-fact in due time.

## **Chapter Six COMMUNICATIONS AND SUMMONSES**

### **Section I Communications**

#### **Addressee**

**Article 37.** Addressee shall be the person wherefor the communication is destined.

## Address for Service

**Article 38.** A communication shall be served at the address named under the case. Where the addressee has not been found at the address named, the communication shall be served at the present address of the said addressee, and in the absence of a present address, at the permanent address.

## Service upon Representative

**Article 39.** (1) Where the party has named a person for service of communications in the seat of the court (a legal addressee), or where the party has an attorney-in-fact for the case, service shall be effected upon the said person or upon the attorney-in-fact.

(2) Where several plaintiffs or respondents have named a shared legal addressee or have a shared attorney-in-fact in the seat of the court, a single communication shall be issued for all persons, wherein the names thereof shall be stated.

(3) If there are multiple plaintiffs or respondents, where the interests thereof are not conflicting, the court, acting either on a motion by the opposing party or at its own discretion, may order the said plaintiffs or respondents to name one of them or another person as a shared legal addressee. Upon failure to comply with this obligation, the court may appoint a representative of the said plaintiffs or respondents for service of papers at their own expense and risk.

(4) Where the addressee lacks procedural capacity to sue, the communication shall be served upon the legal representative thereof.

## Legal Addressee

**Article 40.** (1) Any party, who resides abroad or leaves the country for more than one month, shall be obligated to name a person in the seat of the court for service of communications: a legal addressee, if the said party does not have an attorney-in-fact for the case in the Republic of Bulgaria. The same obligation shall apply to the legal representative, the curator and the attorney-in-fact of any such party.

(2) Where the persons referred to in Paragraph (1) fail to name a legal addressee, all communications shall be filed with the case records and shall be presumed served. The said persons must be warned of these consequences by the court upon service of the first communication.

## Obligation to Notify

**Article 41.** (1) Any party, who is absent for more than one month from the address which the said party has communicated under the case or whereat a communication has been served thereon once, shall be obligated to notify the court of the new address thereof. The same obligation shall furthermore apply to the legal representative, the curator and the attorney-in-fact of any such party.

(2) Upon failure to comply with the obligation referred to in Paragraph (1), all

communications shall be filed with the case records and shall be presumed served. The said persons must be warned of these consequences by the court upon service of the first communication.

#### Server

**Article 42.** (1) Communications shall be served by a court official, by post or through a courier service by means of a registered item with an addressee's acknowledgment of receipt. Where there is no court institution in the place of service, service may be effected care of the municipality or the mayoralty.

(2) On a motion by the party, the court may order that communications be served by a private enforcement agent. The costs of the private enforcement agent shall be borne by the party.

(3) Where the communication has not been served in another manner, the court may decree, as an exception, that service be effected by a court official by means of telephone, telex, telefax or by telegram.

(4) Communications may furthermore be served upon the party at an electronic address named thereby. Any such communications shall be presumed served upon the receipt thereof in the named information system.

#### Manner of Service

**Article 43.** (1) A communication shall be served personally or through another person.

(2) The court may order that service be effected by means of filing of the communication with the case records or by means of posting of a notification.

(3) The court may order that service be effected by means of publication.

#### Attestation of Service

**Article 44.** (1) (Supplemented, SG No. 42/2009) The server shall attest, by the signature thereof, the date and the manner of service, as well as all steps in connection with the service. The server shall furthermore note the capacity of the person whereupon the communication has been served after requiring from the said person to identify himself or herself by presenting an identity document. Upon refusal to present the identity document, the server may request the assistance of the Chief Directorate of Security at the Ministry of Justice. The recipient shall likewise attest, by the signature thereof, that the said recipient has received the communication. A refusal to accept a communication shall be noted on the receipt and shall be attested by the signature of the server. The refusal of the recipient shall not affect the dueeness of the service.

(2) Service by telephone or by telefax shall be attested in writing by the server, and service by telegram shall be attested by an advice of delivery of the said telegram, and where service has been effected by means of telex, service shall be attested by a written confirmation of delivery of the message. Service by post shall be attested by the addressee's acknowledgment of receipt.

(3) Service at an electronic address shall be attested by a copy of the electronic record of the service.

(4) The receipt attesting service by a court official or by a private enforcement agent, the addressee's acknowledgment of receipt attesting service by a postal officer, the advice of delivery of a telegram, as well as the written confirmation of delivery of a message by telex, shall be returned to the court immediately after being drafted.

#### Personal Service

**Article 45.** A communication shall be served upon the addressee personally. Service upon a representative shall be considered personal service.

#### Service upon Another Person

**Article 46.** (1) Where a communication cannot be served upon the addressee personally, the said communication shall be served upon another person who is willing to accept it.

(2) Another person may be any member of the household or any person who resides at the address, or who is a factory or office worker employed by or, respectively, an employer of the addressee and who has attained the age of 18 years. The person wherethrough service is effected shall sign the receipt, undertaking to pass the summons to the addressee. Service may not be effected upon persons who participate in the case as an opposing party to the addressee.

(3) The court shall exclude from the range of other persons those who are interested in the outcome of the case or who are expressly named in a written statement by the addressee. These persons shall be listed in the communication and in the addressee's acknowledgment of receipt.

(4) Upon receipt of the communication by the other person, service shall be presumed effected upon the addressee. The addressee may move for resumption of the time limit if the addressee was absent from the address and was unable to learn of the service in due time. The time limit referred to in Article 64 (2) herein shall begin to run as from the time when the addressee was able to learn of the service.

#### Service through Posting of Notification

**Article 47.** (1) Where the respondent cannot be found at the address named under the case and a person willing to accept the communication cannot be found, the server shall post a notification on the door or on the mailbox, and where no access is afforded thereto, on the front door or in a conspicuous place around the front door. Where the mailbox is accessible, the server shall place a notification therein as well.

(2) The notification shall state that the papers have been left at the office of the court, where service is effected through a court official or a private enforcement agent or, respectively, at the municipality, where service is effected through a municipal official, as well as that the said papers can be claimed there within two weeks after the posting of the notification.

(3) Where the respondent does not present himself or herself to claim the papers, the court shall instruct the plaintiff to present a statement of search of records regarding the residence registration of the respondent, except in the cases referred to in Article 40 (2) and Article 41 (1) herein, when the communication shall be filed with the case records. If the address named [in the statement] is other than the permanent and present address of the party, the court shall order service at the current or permanent address according to the procedure established by Paragraphs (1) and (2).

(4) Where the server finds that the respondent does not reside at the address named, the court shall instruct the plaintiff to present a statement of search of records regarding the residence registration of the respondent notwithstanding the posting of the notification under Paragraph (1).

(5) The communication shall be presumed served upon expiry of the time limit for claiming the said communication from the office of the court or the municipality.

(6) Having established that the service has been duly effected, the court shall order that the communication be filed with the case records and shall appoint an ad hoc representative at the expense of the plaintiff.

(7) (Supplemented, SG No. 42/2009) The provisions of Paragraphs (1) to (5) shall apply, mutatis mutandis, to the service of communications on an assisting party, as well as to the service of an enforcement order.

(8) The provisions of Paragraphs (1) and (2) shall apply to the service of communications on a witness, an expert witness and a person who does not participate in the case, with any such communication being deposited in the mailbox and, where no access is afforded thereto, through posting of a notification.

#### Service through Publication

**Article 48.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) If, when the case is instituted, the respondent does not have a registered permanent or present address, on a motion by the plaintiff, communication thereto of the case instituted shall be effected through publication in the Unofficial Section of the State Gazette. The court shall authorize the effecting of service according to this procedure after the plaintiff certifies by a statement of search of records that the respondent does not have a residence registration and the plaintiff confirms by a declaration that the said plaintiff is not aware of the address of the respondent abroad.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) If, despite the publication, the respondent fails to appear in court, in order to receive duplicate copies of the statement of action and the attachments, the court shall appoint an ad hoc representative of the said respondent at the expense of the plaintiff.

#### Place of Service

**Article 49.** The place of service shall be the residence, the weekend house, the place of employment, the place of civil service, the registered office, the place of implementation of

economic activity or another place which is inhabited by the addressee, as well as any other place wherein the addressee can be found.

#### Service upon Merchants and Legal Persons

**Article 50.** (1) The place of service of a merchant and of a legal person which is recorded in the relevant register shall be the last address named in the register.

(2) If the person has left the address thereof and the new address thereof is not recorded in the register, all communications shall be filed with the case records and shall be presumed duly served.

(3) Service upon merchants and upon legal persons shall take place at the offices thereof and may be effected upon each office or factory worker who is willing to accept them. Upon attestation of the service, the server shall indicate the names and position of the recipient.

(4) Where the server does not obtain access to the office and does not find a person willing to accept the communication, the server shall post a notification under Article 47 (1) herein. A second notification shall not be posted.

#### Service upon Lawyer

**Article 51.** (1) Service upon a lawyer shall be effected personally at the office of the said lawyer or in any place where the said lawyer is on business. Service at the office may be effected upon any person who works for or assists the lawyer. Upon attestation of the service, the server shall indicate the name and capacity of the recipient.

(2) Where a person to receive the communication cannot be found at the lawyer's office, the server shall post a notification under Article 47 (1) herein. A second notification shall not be posted.

(3) The lawyer may not refuse to receive a communication of a client thereof, except after withdrawal of the power of attorney according to the procedure established by Article 35 herein, renunciation of authorization under Article 36 herein, as well as where the power of attorney unambiguously shows that it does not refer to the court of the instance whereto the summoning applies. A refusal of the lawyer to accept the communication shall be noted in the receipt and shall be attested by the signature of the server. Any such refusal shall not affect the dueeness of the service.

#### Service upon Government Institutions and Municipalities

**Article 52.** Government institutions and municipalities shall be obligated to ensure an official to accept communications within normal business hours.

#### Service upon Foreigners Resident in Bulgaria

**Article 53.** Service upon foreigners resident in Bulgaria shall be effected at the address stated to the relevant administrative services.

#### Cure of Non-conformities upon Service

**Article 54.** If there are any non-conformities upon the service, the said service shall be presumed effected at the time at which the communication actually reached the addressee.

Standard Forms

**Article 55.** The Minister of Justice shall issue an ordinance endorsing thereby the standard forms of all papers related to service.

## **Section II Summoning**

### **Summonses**

**Article 56.** (1) The court shall summon the parties for the hearings of the case.

(2) Upon adjournment of the case, the parties who are duly summoned shall not be summoned for the next succeeding hearing where the date of the said hearing has been announced during the hearing.

(3) Summoning shall be effected not later than one week before the hearing. This rule shall not apply in the enforcement procedure.

Summons: Content

**Article 57.** A summons shall state:

1. the issuing court;
2. the name and address of the person summoned;
3. the case and the capacity in which the person is summoned;
4. the place and time of the hearing, and
5. the legal consequences of non-appearance.

Procedure for Service of Summonses

**Article 58.** Summonses under a case shall be served according to the procedure applicable to service of communications.

## **Chapter Seven TIME LIMITS AND RESUMPTION OF TIME LIMITS**

### **Section I**

# Time Limits

## Setting of Time Limits

**Article 59.** The time limits in the procedure, which are not established by the law, shall be set by the court.

### Calculation of Time Limits

**Article 60.** (1) A time limit shall be calculated in years, months, weeks and days.

(2) A time limit which is counted in years shall expire on the respective day of the last year, and if the month in the last year lacks a respective day, the time limit shall expire on the last day of the said month.

(3) A time limit which is counted in months shall expire on the respective day of the last month, and if the last month lacks a respective day, the time limit shall expire on the last day of the said month.

(4) A time limit which is counted in weeks shall expire on the respective day of the last week.

(5) A time limit which is counted in days shall be calculated as from the day next succeeding the day from which the time limit begins to run, and shall expire at the end of the last day.

(6) Where the last day of a time limit is a non-working day, the time limit shall expire on the first next succeeding working day.

### Suspension of Time Limit

**Article 61.** As the proceeding is stayed, all time limits which have begun to run but have not expired shall be suspended. In such case, the suspension of the time limit shall begin as from the event in connection with which the proceeding has been stayed.

### Expiry of Time Limit

**Article 62.** (1) The last day of the time limit shall continue until the end of the twenty-four hour, but if any step has to be performed or if anything has to be presented in court, the time limit shall expire at the time of close of normal business hours.

(2) A time limit shall not be considered exceeded where the petition has been dispatched by post. A time limit shall not be considered exceeded, either, where the petition has been submitted to another court or to the prosecution office within the time limit, except where submitted by electronic means.

(3) Where the court sets a time limit longer than the time limit established by a law, a step performed after the expiry of the statutory time limit but before the expiry of the time limit set by the court shall not be considered overdue.

## Extension of Time Limit

**Article 63.** (1) The statutory time limits and the time limits set by the court may be extended by the court on a petition by the interested party submitted before the expiry of the time limits, if there are valid reasons.

(2) The newly set time limit may not be shorter than the initial time limit. An extension of the time limit shall run as from the expiry of the initial time limit.

(3) Paragraph (1) shall not apply to the time limits for appellate review and for submission of a petition for a reversal of an effective judgment.

## **Section II Resumption of Time Limits**

### **Conditions**

**Article 64.** (1) Any procedural steps performed after the expiry of the time limits as set shall be ignored by the court.

(2) A party, which has exceeded any time limit established by the law or set by the court, may move for resumption of the said time limit if the said party proves that the excess was due to special unforeseen circumstances which the said party was unable to overcome.

(3) The petition for resumption shall be submitted within one week after the communication of the excess of the time limit. Resumption shall not be granted if extension of the time limit for performance of the omitted step was possible.

(4) The time limit for submission of a petition for resumption of a time limit may not be extended.

### Petition for Resumption

**Article 65.** (1) The petition shall state:

1. all circumstances which justify the petition;
2. all items of evidence proving that the petition is well-founded.

(2) Any papers for the issuing whereof a resumption of the time limit is required shall be submitted simultaneously with the petition for resumption of the time limit, and where the time limit is for depositing of amounts for costs, the court shall set a new time limit for depositing the said amounts.

(3) Submission of the petition shall not suspend the course of the proceedings.

### Procedure

**Article 66.** (1) The petition shall be submitted accompanied by a duplicate copy for the opposing party, who may give an answer within one week. The petition shall be examined in public session.

(2) An interlocutory appeal may be lodged against a ruling whereby resumption of the time limit is refused.

(3) Where granting of the petition necessitates the holding of a public court session, the court may, where necessary, vacate the steps performed before resumption of the time limit.

Costs

**Article 67.** All costs, which have arisen for the opposite party from the excess of the time limit and in the proceeding for resumption of the time limit, shall be borne by the petitioner.

## **Chapter Eight FEES AND COSTS**

### **Section I Cost of Action**

#### **Cost of Action**

**Article 68.** The value of the subject matter of the case, appraised in money, shall be the cost of action.

Cost of Action: Amount

**Article 69.** (1) The amount of the cost of action shall be:

1. in actions for pecuniary receivables: the sum claimed;
2. in actions for ownership and other rights in rem to an immovable: the tax assessed value or, in the absence of such value, the market price of the right in rem;
3. in actions for disturbed possession: one-fourth of the amount referred to in Item 2;
4. in actions for existence, for annulment or for rescission of a contract and for conclusion of a final contract: the value of the contract, and where the contract has, as a subject matter, any rights in rem to an immovable, the amounts referred to in Item 2;
5. in actions for existence or termination of a lease contract: the rent for one year;
6. in actions for term annuities: the sum total of all payments;

7. in actions for perpetual annuities or for life annuities: the sum total of the payments for three years.

(2) In actions which are not specified under Paragraph (1), the court shall determine the initial cost of action.

#### Cost of Action: Determination

**Article 70.** (1) The cost of action shall be named by the plaintiff. An issue of the cost of action may be raised either by the respondent or ex officio by the court at the latest during the first hearing for examination of the case. In the event of discrepancy between the cost named and the actual cost, the court shall determine the cost of action.

(2) The ruling of the court, whereby the cost of action is increased, shall be appealable by an interlocutory appeal.

(3) In actions whereunder an appraisal gives rise to difficulties at the time when the action is brought, an approximate cost of action shall be determined by the court and an additional fee shall subsequently be charged or the overcollected fee shall be refunded depending on the cost which the court determines upon adjudication of the case.

## **Section II** **Stamp Duties and Costs**

### **Incurrence of Fees and Costs**

**Article 71.** (1) Stamp duties on the cost of action and court costs shall be collected upon conduct of the case. Where the action is unappraisable, the amount of the stamp duty shall be determined by the court.

(2) Where the subject matter of the case is a right of ownership or other rights in rem to an immovable, the amount of the stamp duty shall be determined on one-fourth of the cost of action.

#### Stamp Duties upon Joinder of Actions

**Article 72.** (1) In cumulatively joined actions brought by a single petition, stamp duty shall be collected for each action.

(2) In alternatively or eventually joined actions brought by a single petition against a single person, stamp duty shall be collected for a single action.

(3) In alternatively or eventually joined actions brought by a single petition against multiple persons, stamp duty shall be collected for the actions against each person.

#### Stamp Duty

**Article 73.** (1) There shall be simple and proportionate stamp duties.

(2) Simple duties shall be determined on the basis of the material, technical and administrative expenses required for the proceeding. Proportionate taxes shall be determined on the basis of the proprietary interest.

(3) The stamp duty shall be collected upon presentation of a motion for protection or facilitation and upon the issuing of the document for which duty is paid, according to a rate schedule adopted by the Council of Ministers.

#### Modification of Demand

**Article 74.** Upon diminution of the demand, the stamp duty paid shall not be refunded. Upon increase of the demand, the stamp duty on the difference shall be paid additionally.

#### Determination of Costs

**Article 75.** The remuneration of witnesses shall be determined by the court considering the time allocated and the expenses incurred, and the remuneration of expert witnesses shall be determined by the court considering the work done and the expenses incurred.

#### Advance Deposit for Costs

**Article 76.** Each party shall make an advance deposit to the court for the costs for the steps which the said party has moved for. The amounts for costs for steps on a motion by both parties or on the initiative of the court shall be deposited by both parties or by one party depending on the circumstances.

#### Coercive Collection of Costs

**Article 77.** If any costs remain due by a party, the court shall render a ruling on the coercive collection of the said costs.

#### Award of Costs

**Article 78.** (1) The fees paid by the plaintiff, the costs of the proceeding and the fees for one lawyer, if any, shall be paid by the respondent commensurate to the portion of the action granted.

(2) If the respondent has not provided an occasion for institution of the case by the behaviour thereof or if the respondent admits the demand, the costs shall be awarded against the plaintiff.

(3) The respondent, too, shall have the right to move for payment of the costs incurred thereby commensurate to the portion of the action dismissed.

(4) The respondent shall be entitled to costs even upon dismissal of the case.

(5) If the fees for a lawyer paid by the party are excessive considering the actual legal and factual complexity of the case, the court, acting on a motion by the opposing party, may award a lower amount of the costs in this part, but not less than the minimum amount set

according to Article 36 of the Bar Act.

(6) Where the case has been adjudicated in favour of a person for whom payment of stamp duty or of costs of the proceeding is waived, the person found against shall be obligated to pay all fees and applicable costs due. The respective amounts shall be awarded in favour of the court.

(7) If the claim of a recipient of legal aid is granted, the lawyers' fees paid shall be awarded in favour of the National Legal Aid Office commensurate to the portion of the action granted. In the cases of a judgment adverse to the recipient of legal aid, the said recipient shall owe costs commensurate to the portion of the action dismissed.

(8) A lawyer's fee shall be awarded, inter alia, in favour of legal persons and sole traders, if the said persons and traders have been defended by a legal adviser.

(9) Upon conclusion of the case by a settlement, half of the stamp duty deposited shall be refunded to the plaintiff. The costs of the proceeding and of the settlement shall be borne by the parties who incurred the said costs, unless otherwise agreed.

(10) A third-party intervenor shall not be awarded costs, but any such intervenor shall owe the costs inflicted by the procedural steps thereof.

(11) Where the prosecutor participates in the case as a party, the costs due shall be awarded to the State or shall be paid thereby.

#### Costs of Enforcement

**Article 79.** (1) The costs of enforcement shall be borne by the State except in the cases where:

1. the case is dismissed according to Article 433 herein, except by reason of a payment effected after commencement of the enforcement proceeding, or
2. the enforcement steps are abandoned by the execution creditor or are vacated by the court.

(2) Where the fees on enforcement are not deposited by the execution creditor, the said fees shall be collected from the execution debtor.

#### List of Costs

**Article 80.** (Amended, SG No. 100/2010, effective 21.12.2010) The party who has moved for the award of costs shall present to the court a list of costs not later than before the close of the last hearing in the court of the relevant instance. Failing this, the said party shall not have the right to move for a modification of the judgment in its part concerning the costs.

#### Award of Costs

**Article 81.** In each act which concludes the case in the court of the relevant instance, the court shall pronounce, inter alia, on the demand of costs.

## Order Regarding Amounts Deposited for Costs and Bonds

**Article 82.** Any amounts for costs and bonds deposited and furnished in money and valuables shall be credited to State budget revenue unless claimed within one year after the date at which the said amounts became exigible.

### Waiver of Fees and Costs

**Article 83.** (1) Fees and costs of the proceeding in the cases shall not be deposited:

1. by the plaintiffs who are factory or office workers or cooperative members in respect of any actions arising from employment relationships;
2. by the plaintiffs: in respect of any actions for maintenance obligations;
3. on any actions brought by a prosecutor;
4. by the plaintiff: in respect of any actions for damages sustained as a result of a tort or delict, for which a sentence has entered into effect;
5. by the ad hoc representatives of the party whose address is unknown, appointed by the court.

(2) Fees and costs of the proceeding shall not be deposited by any natural persons who have been found by the court to lack sufficient means to pay the said fees and costs. Considering the petition for waiver, the court shall take into consideration:

1. the income accruing to the person and to the family thereof;
2. the property status, as certified by a declaration;
3. the family situation;
4. the health status;
5. the employment status;
6. the age;
7. other circumstances ascertained.

(3) In the cases covered under Paragraphs (1) and (2), the costs of the proceeding shall be paid from the amounts allocated under the budget of the court.

### Waiver in Special Cases

**Article 84.** Payment of stamp duty but not of court costs shall be waived for:

1. (amended, SG No. 50/2008, effective 1.03.2008; amended by Judgment No. 3 of the

Constitutional Court of the Republic of Bulgaria, SG No. 63/2008) the State and the government institutions, except in actions for private state receivables and rights to corporeal things constituting private state property;

2. the Bulgarian Red Cross;

3. the municipalities, except in actions for private municipal receivables and rights to corporeal things constituting private municipal property.

## **Chapter Nine**

### **FINES**

#### **Witness, When Fined**

**Article 85.** (1) If a witness summoned to appear in court fails to appear without reasonable excuse, the court shall impose a fine thereon and shall decree that the attendance of the said witness during the next succeeding hearing be compelled.

(2) If a witness refuses to testify without reasonable excuse, the court shall impose a fine thereon.

#### **Expert Witness, When Fined**

**Article 86.** If an expert witness fails to appear, refuses to give a conclusion, or fails to present a conclusion in due time without reasonable excuse, the court shall impose a fine thereon.

#### **Third Party, When Fined**

**Article 87.** If a third party who does not participate in the case refuses to present a document or a tangible thing for inspection demanded therefrom by the court, which has been established to be in the possession of the said party, the court shall impose a fine thereon and shall urge to present the said document or thing.

#### **Fine for Breaches upon Service**

**Article 88.** (1) The court shall impose a fine on any server who has misserved a communication, who has failed to duly attest the service, or who has not returned to court, in due time, the receipt proving service, or who has failed to comply with any other commands of the court in connection with the service.

(2) The court shall impose a fine on the manager of the office, where a person willing to accept a communication cannot be found in the office of a government institution or a municipality within normal business hours.

#### **Fine for Breaches upon Examination of Case**

**Article 89.** The court shall impose a fine for:

1. disorderly behaviour during a court hearing;
2. disobedience of the orders of the court;
3. insult of the court, a party, a representative, a witness or an expert witness.

#### Wrongful Receipt of Legal Aid

**Article 90.** (1) The court shall impose a fine on a party who has stated any untrue or incomplete data in an application for legal aid and, as a result of this, has received or has attempted to receive legal aid.

(2) A fine shall likewise be imposed in the cases where a party who has been granted legal aid fails to notify the court in due time of any circumstances relevant to the judgment referred to in Articles 96 and 97 herein.

#### Amount of Fine

**Article 91.** (1) The fine for any breaches covered under Article 85 to 90 herein shall be BGN 50 or exceeding this amount but not exceeding BGN 300.

(2) The fine for any breaches which impede the course of proceedings or which are re-committed shall be BGN 100 or exceeding this amount but not exceeding BGN 1,200.

#### Appellate Review

**Article 92.** (1) A petition for vacation of a fine as imposed may be submitted within one week to the court which has imposed the said fine. The time limit shall begin to run as from the day of the court hearing, and in the cases where the person does not attend the hearing, as from the day of the communication.

(2) The court shall examine the petition in camera and, if it finds the reasons set forth valid, the court shall reduce or vacate the fine, as well the compelled attendance.

(3) The ruling shall be appealable by an interlocutory appeal.

#### Fine of Party

**Article 92a.** (New, SG No. 42/2009) Any party, which groundlessly causes an adjournment of the case, shall bear the costs of the new hearing regardless of the outcome of the case and shall pay a fine to the amounts referred to in Article 91 herein. The ruling of the court shall be appealable according to the procedure established by Article 92 herein.

#### Fines upon Coercive Enforcement

**Article 93.** (1) The enforcement agent shall impose a fine in the amounts referred to in Article 91 herein for:

1. any breaches covered under Articles 85 to 88 herein;

2. posing any obstacles to the viewing of the corporeal thing offered for sale;
3. failure to obey any other commands of the enforcement agent.

(2) The decree whereby the enforcement agent imposes the fine shall be appealable within one week after communication before the regional judge, who shall pronounce in camera, rendering a ruling which shall be unappealable.

## **Chapter Ten LEGAL AID**

### **Content of Legal Aid**

**Article 94.** Legal aid shall consist in ensuring defence by legal counsel free of charge.

#### Grant of Legal Aid

**Article 95.** (1) An application for legal aid shall be submitted in writing to the court wherebefore the case is pending.

(2) In the ruling whereby the application is granted, the court shall specify the type and scope of the legal aid granted.

(3) The ruling on the grant of legal aid shall have effect as from the submission of the application, unless the court decrees otherwise.

(4) The ruling shall be rendered in camera, unless the court deems it necessary to hear the party in order to clarify all circumstances.

(5) The ruling whereby legal aid is refused shall be appealable by an interlocutory appeal.

(6) The ruling of the court on the interlocutory appeal shall be final.

#### Termination of Legal Aid

**Article 96.** (1) Legal aid shall be terminated:

1. upon change of the circumstances on the grounds of which the said aid has been granted;

2. by the death of the natural person whereto the said aid has been granted.

(2) The court, acting either ex officio or on a motion by a party or by the assigned counsel, shall decree termination in whole or in part of the legal aid granted, effective from the time of occurrence of a change in the circumstances which justified the grant of the said aid.

## Deprivation of Legal Aid

**Article 97.** (1) The court, acting either ex officio or on a motion by a party or by the assigned counsel, shall deprive the party of legal aid in whole or in part if it is established that the conditions for the grant of the said aid did not exist at all or in part.

(2) (Amended, SG No. 50/2008) In the case referred to in Paragraph (1), the party shall be obligated to deposit or to restore all amounts from the payment of which the said party has been groundlessly exempted, as well as to pay the fee to the counsel assigned thereto.

## Consequences of Termination and Deprivation of Legal Aid

**Article 98.** (1) The assigned counsel shall exercise the powers thereof until the entry into effect of the ruling on termination or on deprivation of legal aid, if this is necessary to safeguard the party against adverse legal consequences.

(2) The time limits for appellate review shall be interrupted as from the rendition and until the entry into effect of the ruling on termination or on deprivation of legal aid and shall commence anew thereafter.

## Advice of Parties on Legal Aid

**Article 99.** The court shall apprise the parties of their legitimate rights and obligations in connection with legal aid, as well as of the legal consequences upon failure to comply with the obligations thereof.

# Chapter Eleven

## PROCEDURAL STEPS BY PARTIES

### Form

**Article 100.** The parties shall perform procedural steps orally during a court hearing. The procedural steps outside a court hearing shall be performed in writing.

## Non-conformity of Procedural Step

**Article 101.** (1) The court, acting ex officio, shall see to the due performance of procedural steps. The court shall instruct the party as to the nature of the non-conformity of the procedural step performed thereby and to the manner in which the said non-conformity can be cured, and shall set a time limit for the curing.

(2) The cured procedural step shall be deemed conforming as from the time of performance thereof.

(3) Upon failure to cure the non-conformity within the time limit set, the procedural step shall be deemed non-performed.

## Written Statements

**Article 102.** (1) Any written statements to the court shall contain:

1. a reference to the court;
2. the name and address of the party making the statement or, respectively, the name and address of the representative wherethrough the statement is effected;
3. the nature of the statement;
4. signature.

(2) The following shall be attached to written statements:

1. a power of attorney, where the statement is effected through a representative;
2. documentary proof of payment of fees and costs, where such are due;
3. duplicate copies of the statement and the attachments according to the number of opposing parties.

## **PART TWO STANDARD ACTION PROCEDURE**

### **TITLE ONE PROCEEDING BEFORE COURT OF FIRST INSTANCE**

#### **Chapter Twelve COGNIZANCE**

#### **Section I Generic Cognizance**

#### **Basic Cognizance**

**Article 103.** The regional court shall take cognizance of all civil cases, with the exception of such as are cognizable in the district court acting as a court of first instance.

#### Cognizance of District Court

**Article 104.** The district court, acting as a court of first instance, shall take cognizance of:

1. any actions to establish or disavow filiation, to terminate adoption, any actions for interdiction or for vacation of interdiction;

2. (repealed, SG No. 50/2008);

3. any actions for ownership and other rights in rem to an immovable with a cost of action exceeding BGN 50,000;

4. (supplemented, SG No. 50/2008) any actions on civil and commercial cases with a cost of action exceeding BGN 25,000, with the exception of any actions for maintenance obligations, for labour disputes, and for receivables under deficit deeds;

5. any actions to establish inadmissibility or nullity of a recording, as well as for non-existence of a recorded circumstance, where so provided for in a law;

6. any actions which, under other laws, are subject to examination by the district court.

## **Section II**

### **Territorial Cognizance**

#### **General Territorial Cognizance**

**Article 105.** An action shall be brought before the court within whose geographical jurisdiction the permanent address or the registered office of the respondent is located.

##### **Actions against Minors or Full Interdicts**

**Article 106.** Actions against minors or full interdicts shall be brought before the court exercising jurisdiction over the permanent address of the legal representative thereof.

##### **Actions against Persons whose Address Is Unknown**

**Article 107.** (1) An action against a person whose address is unknown shall be brought before the court exercising jurisdiction over the permanent address of the attorney-in-fact or representative of the said person or, should there be no such attorney or representative, over the permanent address of the plaintiff.

(2) The rules under Paragraph (1) shall furthermore apply to any respondent who does not reside at the permanent address thereof within the territory of the Republic of Bulgaria.

(3) If the respondent does not have a permanent address in the Republic of Bulgaria, either, the action shall be brought before the competent court in Sofia.

##### **Actions against Government Institutions and Legal Persons**

**Article 108.** (1) Actions against government institutions and legal persons shall be brought before the court within whose geographical jurisdiction the place of management or registered office thereof is located. In respect of any disputes which have arisen from direct

relations with divisions or branches of any such institutions or persons, actions may alternatively be brought before the court exercising jurisdiction over the location of the said divisions or branches.

(2) Actions against the State shall be brought before the court within whose geographical jurisdiction the contested legal relation has arisen, except in the cases referred to in Articles 109 and 110 herein. Where the said relation has arisen abroad, the court shall be brought before the competent court in Sofia.

#### Cognizance in Place of Corporeal Immovable

**Article 109.** Actions for rights in rem to a corporeal immovable, for partition of a co-owned corporeal immovable, for boundaries, and for remedy against disturbed possession of a corporeal immovable shall be brought before the court exercising jurisdiction over the place where the immovable is located. Actions for conclusion of a final contract for creation and transfer of rights in rem to a corporeal immovable, as well as for rescission, annulment and declaration of nullity of contracts for rights in rem to a corporeal immovable, shall likewise be brought before the court exercising jurisdiction over the place where the immovable is located.

#### Cognizance in Place of Opening of Succession

**Article 110.** (1) Actions for succession, for annulment or reduction of testaments, for partition of succession and for annulment of voluntary partition shall be brought before the court exercising jurisdiction over the place where the succession has been opened.

(2) If the decedent is a Bulgarian citizen but the succession has been opened abroad, the actions referred to in Paragraph (1) may be brought before the court exercising jurisdiction over the last permanent address of the said decedent in the Republic of Bulgaria or before the court within whose geographical jurisdiction the immovables of the said decedent are located.

#### Action for Pecuniary Receivables on Contractual Grounds

**Article 111.** An action for pecuniary receivables on contractual grounds may be brought, alternatively, before the court exercising jurisdiction over the present address of the respondent.

#### Action for Maintenance Obligations

**Article 112.** An action for maintenance obligations may be brought, alternatively, before the court exercising jurisdiction over the permanent address of the plaintiff.

#### Consumers' Actions

**Article 113.** A consumer may bring an action, alternatively, before the court exercising jurisdiction over the current or permanent address of the said consumer.

#### Actions in Labour Cases

**Article 114.** A worker may bring an action against the employer thereof, alternatively, before the court exercising jurisdiction over the place where the said worker habitually performs the work thereof.

#### Actions for Tort or Delict

**Article 115.** An action for damages sustained as a result of a tort or delict may be brought, alternatively, before the court exercising jurisdiction over the place where the act was committed.

#### Concurrent Cognizance

**Article 116.** An action against respondents from different geographical jurisdictions or for an immovable located in different geographical jurisdictions shall be brought, at the choice of the plaintiff, before the court of any of the said geographical jurisdictions.

#### Agreed Cognizance

**Article 117.** (1) The cognizance determined by the law may not be altered by agreement between the parties.

(2) By written agreement, the parties to a property dispute may name a court other than the court wherein the case is cognizable conforming to the rules of territorial cognizance. This provision shall not apply to the cognizance referred to in Article 109 herein.

(3) An agreement on choice of court under consumers' actions and under labour disputes shall take effect only if concluded after the dispute has arisen.

## **Section III Cognizance Proceeding**

### **Verification of Cognizance**

**Article 118.** (1) Each court shall have discretion to decide whether a case commenced before it is cognizable therein.

(2) If the court determines that the case is not cognizable therein, the court shall transmit the said case to the competent court. In such case, the case shall be considered pending before that court as from the day of submission of the petition to the non-competent court, and the steps performed by the latter shall retain the validity thereof.

#### Opposition over Lack of Cognizance

**Article 119.** (1) An opposition to the generic cognizance of the case may be lodged prior to the close of the proceeding in the court of second instance and may furthermore be raised ex officio by the court.

(2) An opposition over lack of cognizance of the case in the court exercising jurisdiction

over the place where the corporeal immovable is located may be lodged by the party and may be raised ex officio by the court prior to the conclusion of the trial in the court of first instance.

(3) In all cases other than those referred to in Paragraphs (1) and (2), an opposition over lack of cognizance of the case may be lodged solely by the respondent and then within the time limit for an answer to the statement of action.

(4) Simultaneously with the lodgment of the opposition, the party shall be obligated to present the evidence thereof.

#### Stabilization of Cognizance

**Article 120.** Any changes in the factual circumstances, justifying the territorial cognizance, which have occurred after submission of the statement of action, shall be no grounds for transmittal of the case.

#### Appellate Review of Ruling on Cognizance

**Article 121.** The interested party may appeal the ruling in connection with cognizance.

#### Cognizance Disputes

**Article 122.** Any cognizance disputes between courts shall be resolved by the common superior court thereof. If the said courts are located within the geographical jurisdictions of different superior courts, the dispute shall be resolved by the superior court within whose geographical jurisdiction the court which last accepted or refused to examine the case is located. Any cognizance disputes involving an appellate court shall be resolved by the Supreme Court of Cassation. The court shall pronounce on any cognizance dispute sitting in camera.

#### Determination of Cognizance by Supreme Court of Cassation

**Article 123.** Where the competent court cannot be determined according to the rules of this Chapter, Supreme Court of Cassation, acting on a motion by the party and sitting in camera, shall determine the court wherebefore the action must be brought.

## **Chapter Thirteen**

### **ORDINARY PROCEEDING**

#### **Section I**

#### **Bringing an Action**

#### **Types of Action**

**Article 124.** (1) Every person may bring an action in order to restore a right thereof where the said right has been impaired, or to establish the existence or non-existence of a

legal relation or of a right, where the said person has standing to do so.

(2) An action may be brought for the respondent to be ordered to comply with recurrent obligations, even if the said obligations become exigible after rendition of the judgment.

(3) An action for the arising, modification or termination of civil legal relations may be brought solely in the cases provided for in a law.

(4) An action may be brought to establish the truthfulness or falsity of a document. An action to establish the existence or non-existence of other facts of legal relevance shall be admitted solely in the cases provided for in a law.

(5) An action to establish a criminal circumstance relevant to a civil legal relation or to reversal of an effective judgment shall be admitted solely in the cases where criminal prosecution may not be instituted or has been terminated on any of the grounds referred to in Items 2 to 5 of Article 24 (1) or has been suspended on any of the grounds referred to in Item 2 of Article 25 or Article 26 of the Criminal Procedure Code, and in the cases where the perpetrator of the act has remained undiscovered.

#### Bringing the Action

**Article 125.** An action shall be brought by the receipt of the statement of action in the court.

#### Dismissal in Pending Procedure

**Article 126.** (1) Where two cases between the same parties are pending before the same court or before different courts on the same grounds and in respect of the same demand, the case which has been instituted later shall be dismissed ex officio by the court.

(2) Where the dismissal is decreed by the intermediate appellate review court, the said court shall invalidate the judgment of the court of first instance.

#### Statement of Action: Content

**Article 127.** (1) The statement of action must be written in the Bulgarian language and must contain:

1. a reference to the court;
2. the name and address of the plaintiff and respondent, of the legal representatives or attorneys-in-fact thereof, if any, as well as the Standard Public Registry Personal Number of the plaintiff and the telefax and telex number, if any;
3. the cost of action, where the action is appraisable;
4. a narrative of the circumstances upon which the action is based;
5. the nature of the demand;

6. signature of the person who submits the statement.

(2) In the statement of action, the plaintiff shall be obligated to cite the evidence and the specific circumstances which the said plaintiff is to prove thereby, and to present, together with the said statement, all written evidence.

(3) If the submitter of the statement does not know or is unable to sign the said statement, the said statement shall be signed by the person whom the submitter has assigned to do so, stating the reason for which the submitter himself or herself has not signed the statement.

Statement of Action: Attachments

**Article 128.** The following shall be presented attached to the statement of action:

1. the power of attorney, where the statement is submitted by an attorney-in-fact;
2. documentary proof of payment of stamp duties and costs, where such are due;
3. duplicate copies of the statement of action and of the attachments thereto according to the number of respondents.

Statement of Action: Verification

**Article 129.** (1) The court shall verify the conformity of the statement of action.

(2) Where the statement of action does not conform to the requirements covered under Article 127 (1) and under Article 128 herein, a communication shall be sent to the plaintiff instructing the plaintiff to cure the non-conformities within one week, as well as apprising the plaintiff of the possibility to use legal aid, if necessary and if entitled thereto. Where the address of the plaintiff is not named and is unknown to the court, the communication shall be effected by means of posting of a notice in a place designated for this purpose at the court in the course of one week.

(3) Where the plaintiff fails to cure the non-conformities, the statement of action together with the attachments shall be returned, and where the address is unknown, the said statement shall be left in the office of the court at the disposal of the plaintiff. An interlocutory appeal may be lodged against the return of the statement of action without presenting a duplicate copy of the said appeal for service.

(4) It shall be proceeded in the same manner where the non-conformities in the statement of action are noticed in the course of the proceeding.

(5) The cured statement of action shall be considered conforming as from the day of submission.

(6) Any official, who forwards a statement without the full amount of stamp duty having been paid, shall be liable under Article 6 of the Stamp Duty Act.

Verification of Admissibility of Action

**Article 130.** Where, upon verification of the statement of action, the court establishes that the action brought is inadmissible, the court shall return the statement of action. An interlocutory appeal may be lodged against the return of the statement of action without presenting a duplicate copy for service.

#### Answer to Statement of Action

**Article 131.** (1) After accepting the statement of action, the court shall transmit a duplicate copy of the said statement together with the attachments to the respondent, instructing the said respondent to submit a written answer within one month, specifying the mandatory content of the answer and the consequences of non-submission of an answer or of the non-exercise of rights, as well as the possibility to use legal aid, if necessary and if entitled thereto.

(2) The written answer of the respondent must contain:

1. a reference to the court and to the case number;
2. the name and address of the respondent, as well as of the legal representative or attorney-in-fact, if any;
3. a stand on the admissibility of the action and on whether the action is well-founded;
4. a stand on the circumstances upon which the action is founded;
5. the oppositions to the action and the circumstances upon which the said oppositions are founded;
6. (amended, SG No. 50/2008) signature of the person who submits the answer.

(3) In the answer to the statement of action, the respondent shall be obligated to cite the evidence and the specific circumstances which the said respondent is to prove thereby, and to present all written evidence in the possession thereof.

#### Answer to Statement of Action: Attachments

**Article 132.** The following shall be presented attached to the answer to the statement of action:

1. a power of attorney, where the answer is submitted by an attorney-in-fact;
2. duplicate copies of the answer and of the attachments thereto according to the number of plaintiffs.

#### Consequences of Non-submission of Answer

**Article 133.** (Amended and supplemented, SG No. 50/2008, amended, SG No. 100/2010, effective 21.12.2010) Where the respondent fails, within the established time limit, to submit a written answer, to take a stand, to lodge oppositions, to contest the truthfulness of

a document presented or to exercise the rights thereof under Article 211 (1), Article 212 and Article 219 herein, the said respondent shall forfeit the possibility to do so later, unless the omission is due to special unforeseen circumstances.

## **Section II Court Hearings**

### **Types of Session**

**Article 134.** (1) The court shall examine the cases sitting in public session and in camera.

(2) Hearings shall be conducted in camera in the cases provided for by the law without the parties attending.

#### Place and Time

**Article 135.** (1) Hearings of the cases shall be conducted at the building of the court. Conduct of hearings outside the building of the court shall be admissible if larger costs can be avoided in this way.

(2) The court shall assign a place, day and hour for the public sessions.

(3) Hearings may not be conducted on non-working days.

#### Exclusion of Publicity

**Article 136.** (1) The court, acting either ex officio or on a motion by any of the parties, may decree that the case be examined or only some steps be performed behind closed doors where:

1. the public interest so necessitates;
2. the protection of the privacy of the parties, of the family, or of the persons under curatorship so necessitates;
3. the case involves a trade, industrial, inventor's or tax secret whereof the public disclosure would impair any defensible interests;
4. other valid reasons apply.

(2) In the cases covered under Paragraph (1), the parties, the attorneys-in-fact thereof, the expert witnesses and the witnesses, as well as the persons permitted by the presiding judge to attend, shall be admitted to the courtroom.

#### Examination of Motion to Exclude Publicity

**Article 137.** The motion shall be examined in public session behind closed doors. The

ruling rendered on any such motion shall be published.

#### Obligation to Maintain Confidentiality

**Article 138.** Where a hearing has been conducted behind closed doors, the public disclosure of the content of the said hearing shall be prohibited.

#### Persons Who May Not Attend Hearing

**Article 139.** The following may not attend a court hearing without permission of the court:

1. any minors who are not parties to the case or witnesses;
2. any armed persons, except court security.

## **Section III Examination of Case**

### **Preparation of Case in Camera**

**Article 140.** (1) After verifying the conformity and admissibility of the actions brought, as well as the other demands and oppositions of the parties, the court shall render a ruling on all preliminary issues and on admission of the evidence.

(2) Where counter demands are made in the answer, the court may alternatively pronounce on the said demands and on admission of some of the items of evidence during the first hearing of the case.

(3) The court shall schedule a hearing of the case in public session, for which the court shall summon the parties, serving thereon a duplicate copy of the ruling referred to in Paragraph (1). The court may furthermore communicate to the parties the court's draft of a report on the case, as well as direct the parties to mediation or another procedure for voluntary resolution of the dispute.

#### Presiding Judge's Duties

**Article 141.** (1) The hearing shall be chaired by the presiding judge.

(2) The presiding judge shall see to order in the courtroom and may impose fines for breach of the said order.

(3) The presiding judge may expel any person who breaches the order.

(4) Where, despite a warning of expulsion, order in the courtroom is breached by any party or by any representative thereof, the court may expel the offender for a specified period of time. After the expelled person returns to the courtroom, the presiding judge shall apprise him or her of the steps performed in the absence thereof by means of reading of the judicial

record.

#### Proceeding with and Adjournment of Case

**Article 142.** (1) The non-appearance of any of the parties, who has been duly summoned, shall be no impediment to examination of the case. The court shall proceed with examination of the case after examining the cases to which the parties have appeared.

(2) The court shall adjourn the case if the party and the attorney-in-fact thereof cannot appear due to an obstacle which the party cannot remove.

(3) Upon adjournment of the case, the court shall announce the date of the next succeeding hearing, for which the parties and the witnesses and expert witnesses who have appeared in the case shall be considered summoned.

(4) Where another date for conduct of the hearing has to be assigned, the court, sitting in camera, shall set the said date and shall summon the parties, the witnesses and the expert witnesses.

#### Examination of Case in Public Session

**Article 143.** (1) The court, sitting in public session, after addressing the preliminary issues, shall proceed with clarification of the factual aspect of the dispute.

(2) The plaintiff may explain and amplify the statement of action, as well as cite and present evidence in connection with the contestations made by the respondent, and the respondent may cite and present new evidence which the said respondent was unable to cite and present in the answer to the statement of action.

(3) The parties shall be obligated to make and justify all demands and oppositions thereof and to take a stand on the circumstances alleged by the opposing party.

#### Additional Time

**Article 144.** (1) The respondent may move to be allowed additional time in order to take a stand on the motions for evidence made by the respondent during this hearing and to cite additional evidence in connection with the contestations made.

(2) Where the motion referred to in Paragraph (1) is granted, the court, sitting in camera, shall render a ruling on the contestations and demands made, which shall be communicated to the parties.

#### Instructions of Court

**Article 145.** (1) The court shall pose questions to the parties for clarification of the facts, specifying the relevance of the said facts to the case.

(2) (Amended, SG No. 50/2008) The court shall instruct the parties to particularize the allegations thereof and to eliminate any contradictions therein.

(3) Thereafter, the court shall invite the parties to reach a settlement and shall specify the consequences thereof. If no settlement is reached, the court shall make a report which shall be included in the judicial record.

#### Report on Case

**Article 146.** (1) The report on the case shall contain:

1. the circumstances wherefrom the claimed rights and oppositions arise;
2. the legal qualification of the rights claimed by the plaintiff, of the counter rights and the oppositions of the respondent;
3. which rights and which circumstances are admitted;
4. which circumstances need to be proved;
5. how the burden of proving the facts to be proved is apportioned.

(2) The court shall instruct the parties as to the facts alleged thereby in respect of which they do not cite evidence.

(3) (Supplemented, SG No. 100/2010, effective 21.12.2010) The court shall afford the parties an opportunity to set forth the stand thereof in connection with the instructions given and the report on the case, as well as to undertake the relevant procedural steps. If the parties do not avail themselves of the opportunity afforded thereto to make motions for evidence, the parties shall forfeit the opportunity to do so later, except in the cases covered under Article 147 herein.

(4) The court shall render a ruling on the motions for evidence of the parties, admitting the evidence which is relevant, admissible and requisite.

#### New Facts and Circumstances

**Article 147.** Prior to the conclusion of the trial, the parties may:

1. allege any new circumstances and cite and present any new evidence solely if the parties were unable to learn of such circumstances and to cite and present such evidence in due time;
2. allege any intervening circumstances, which are relevant to the case, and cite and present evidence of any such circumstances.

#### Taking of Evidence

**Article 148.** The court shall take all items of evidence admitted with the participation of the parties. If necessary, the court shall schedule a new hearing for taking of evidence which has not been taken for reasons beyond the control of the parties.

#### Conclusion of the Trial

**Article 149.** (1) After taking of the evidence, the court shall reinvite the parties to reach a settlement. If no settlement is reached, the court shall proceed with the oral arguments.

(2) When the case is clarified, the court shall declare the oral arguments concluded and shall assign a day whereon the said court is to publish the judgment.

(3) If the case is of factual and legal complexity, the court, acting on a motion by any of the parties, may set a suitable time limit for presentation of written defences. Written defences shall be presented with duplicate copies according to the number of parties.

#### Judicial Record of Hearing

**Article 150.** (1) A judicial record on the examination of the case shall be prepared, entering therein the place and time of the hearing, the composition of the court, the name of the clerk, the parties who appeared and the representatives thereof, the essence of the parties' statements, demands and speeches, the written evidence presented, the testimony of the witnesses and of the other persons in the case, and the findings and rulings of the court.

(2) The judicial record shall be prepared under the dictation of the presiding judge. The said record shall be made available to the parties within three days after the hearing.

(3) If technically possible, a sound recording of the hearing shall be made and the judicial record shall be prepared on the basis of the said recording within three days.

(4) The judicial record shall be signed by the presiding judge and by the clerk.

#### Correction and Amplification of Judicial Record

**Article 151.** (1) Within one week after the judicial record is made available to the parties, each participant in the procedure may move for the amplification or correction of the said record.

(2) If a sound recording has been made during the hearing, any corrections and amplification of the judicial record shall be admitted solely on the basis of the sound recording.

(3) If no sound recording has been made during the hearing, any corrections and amplification of the judicial record shall be admitted solely on the basis of notes taken on the content of the said record.

(4) The court shall pronounce on the motion for corrections and amplification of the judicial record after summoning the parties and the petitioner and after hearing the sound recording or, respectively, the explanations of the clerk.

(5) The sound recording shall be preserved until expiry of the time limit for motion for corrections and amplification of the judicial record or, if such a motion has been made, until the entry into effect of the judgment in the case.

#### Evidential Value of Judicial Record

**Article 152.** The judicial record of the court hearing shall be evidence of the court procedural steps performed during the court hearing. Any steps which are not attested in the judicial record shall be considered non-performed.

## **Chapter Fourteen EVIDENCE**

### **Section I General Rules**

#### **What Is to Be Proved**

**Article 153.** The contested facts relevant to adjudication of the case and the links therebetween shall be subject to proving.

##### Burden of Proof

**Article 154.** (1) Each party shall be obligated to establish the facts upon which the demands or oppositions thereof are founded.

(2) Facts in respect of which a presumption established by law exists need not be proved. Refutation of such presumptions shall be granted in all cases except where a law prohibits this.

##### Facts Not to Be Proved

**Article 155.** Any facts of common knowledge and any facts known to the court ex officio, of which the court shall be obligated to inform the parties, shall not have to be proved.

##### Motion for Evidence

**Article 156.** (1) In a motion for evidence, a party shall cite the facts and the means by which the said facts will be proved.

(2) In a motion for admission of an examination of a witness, the party shall cite the facts about which the said witness is to be examined, the forename, patronymic and surname of the said witness and the address, where the party motions for the summoning thereof.

(3) A motion for admission of explanations by the other party shall formulate the questions which the other party is to answer.

(4) A motion for admission of an expert examination shall specify the field in which special knowledge is required, the subject and the task of the expert examination.

##### Admission of Evidence

**Article 157.** The court shall render a ruling on admission of evidence, setting thereby a time limit for the taking of such evidence as well. The said time limit shall begin to run as from the day of the court hearing during which the said time limit was set, and this beginning shall apply as well to the party who did not appear.

#### Time Limit for Taking of Evidence

**Article 158.** (1) If the taking of any item of evidence is doubtful or presents a special difficulty, the court may set a relevant time limit for the taking of the said item, after the expiry of which the case shall be heard without the said item of evidence.

(2) Upon the further examination of the case, the said item of evidence may be taken, if this does not delay the proceeding.

#### Non-admission of Evidence

**Article 159.** (1) Any motions by the parties for admission of evidence regarding facts which are irrelevant to adjudication of the case, as well as any untimely motions for admission of evidence, shall be denied by the court by a ruling.

(2) Where a party names multiple witnesses for the establishment of the same fact, the court may admit only some of the said witnesses. The rest of the witnesses shall be admitted if the witnesses summoned do not establish the contested fact.

#### Costs of Taking of Evidence

**Article 160.** (1) Where costs have to be incurred on the taking of evidence, the court shall set an amount and a time limit for depositing of the said costs. The said time limit shall begin to run as from the day of the court hearing during which the said time limit was set, and this beginning shall apply as well to the party who did not appear.

(2) The evidence shall be taken after presentation of documentary proof of making the deposit set for costs.

(3) The time limit for depositing of costs shall be interrupted by the submission of a petition for waiver of the depositing of such costs and shall not run while the said petition is examined.

#### Consequences of Obstruction of Proving

**Article 161.** Considering the circumstances of the case, the court may hold as proved the facts in respect of which a party has created impediments to the taking of admitted evidence.

#### Discretionary Power

**Article 162.** Where the action is established as to cause but there is no sufficient information about the amount of the said action, the court shall determine the said amount at its own discretion or shall consult the conclusion of an expert witness.

## **Section II Testimony**

### **Duty to Testify**

**Article 163.** (1) A witness shall be obligated to appear before court in order to give testimony.

(2) If there is an important reason, the examination of the witness may be conducted even before the day assigned for the hearing, as well as outside the premises of the court. The parties shall be summoned for any such examination.

#### Admissibility of Testimony

**Article 164.** (1) Testimony shall be admitted in all cases except where:

1. legal transactions, for the validity whereof a law requires a written instrument, have to be established;

2. the content of an official document has to be denied;

3. circumstances have to be established, for the proving whereof a law requires a written instrument, as well as for establishment of contracts to a value exceeding BGN 5,000, except where concluded between spouses or lineal relatives, collateral relatives up to the fourth degree of consanguinity and affines up to the second degree of affinity;

4. obligations, established by a written instrument, have to be extinguished;

5. written accords have to be established, wherein the party moving for the witnesses has participated, or such accords have to be modified or repudiated;

6. the content of a private document originating from the party has to be denied.

(2) In the cases referred to in Items 3, 4, 5 and 6 of Paragraph (1), testimony shall be admitted solely with the express consent of the parties.

#### Exceptions to Inadmissibility

**Article 165.** (1) In the cases where the law requires a written document, testimony shall be admitted if it is proved that the document has been lost or destroyed not through the fault of the party.

(2) Testimony shall furthermore be admitted where the party seeks to prove that the consent expressed in the document is simulated, and then if there is written evidence in the case originating from the other party or attesting statements of the other party before a state body, which lend probability to the allegation of the party that the consent is simulated. This limitation shall not apply to the third parties, as well as to the heirs, where the transaction is

directed thereagainst.

#### Refusal to Testify

**Article 166.** (1) No one has the right to refuse to testify except:

1. the attorneys-in-fact of the parties to the same case and the persons who were mediators in the same dispute;

2. the lineal relatives to the parties, the siblings and the affines in the first degree of affinity, the spouse and the former spouse, as well as the de facto cohabitee with a party.

(2) The persons who, by the answers thereof, would incur or inflict on the persons referred to in Item 2 of Paragraph (1) any immediate damage, defamation or criminal prosecution, may not refuse to testify but may refuse to give an answer to a particular question, stating the reasons for this.

(3) The witnesses in the case may not be attorneys-in-fact of the parties to the same case.

#### Dereliction of Duty to Testify

**Article 167.** (1) Any witness, who refuses to give testimony or to answer particular questions, shall be obligated to state the reasons for this in writing and to attest the said reasons before the hearing whereat the said witness is to be examined, or orally before the court.

(2) Any witness, who has failed to comply with the obligation thereof under Article 163 herein and has so delayed the proving:

1. shall reimburse the parties for the costs incurred as a result of non-compliance with the said obligation;

2. shall forfeit the entitlement to claim remuneration.

#### Witness's Entitlement to Remuneration

**Article 168.** A witness shall be entitled to remuneration and to costs for appearance in court, if claimed by the said witness before the end of the court hearing. The remuneration and the costs shall be paid from the deposit made.

#### Summoning a Witness

**Article 169.** (1) If a witness cannot be summoned at the address named by the party, the court shall set a time limit for naming another address.

(2) If the party fails to act on the instructions of the court, the witness shall not be summoned.

(3) The parties may bring the admitted witnesses even without summoning.

#### Promise to Tell the Truth

**Article 170.** (1) Before the examination of a witness, the court shall establish the identity thereof, shall clarify the information as to whether the said witness may be interested, and shall remind the witness of the liability incurrable under the law for perjury.

(2) The witness shall promise to tell the truth.

#### Conduct of Examination

**Article 171.** (1) Each witness shall be examined separately in the presence of the parties who have appeared. Any witnesses, who have not yet given testimony, may not be present at the examination of the other witnesses.

(2) A witness may be re-examined during the same hearing or during another hearing on a motion by the said witness, on a petition by the party, or on the initiative of the court.

(3) The court, acting on a motion by a party or on its own initiative, may include in the judicial record any specific peculiarities in the behaviour of the witness under examination.

#### Evaluation of Testimony

**Article 172.** The testimony of relatives, of the tutor or of the curator of the party who has named the witness, of the adopters, of the adoptees, of those who are in a civil or criminal dispute with the opposing party or with the relatives thereto, of the attorneys-in-fact named by the principals thereof, as well as of everybody else who are interested toward or against one of the parties, shall be evaluated by the court considering all other information on the case, giving consideration to the possibility of any such persons being interested witnesses.

#### Witness's Examination on Court's Initiative

**Article 173.** The party may abandon the examination of a witness whom the said party has invoked, but the said witness shall be examined if the other party so moves or if the court determines that the examination of the said witness is necessary for clarification of the circumstances of the case.

#### Confrontation

**Article 174.** In case of discrepancy between the testimonies of the witnesses, the court may decree the conduct of a confrontation. A confrontation may furthermore be decreed between a witness and the parties.

## **Section III**

### **Explanations by Parties**

### **Judicial Admission of Fact**

**Article 175.** An admission of a fact, made by a party or by a representative thereof, shall be evaluated by the court considering all circumstances of the case.

#### Explanations by Party

**Article 176.** (1) The court may order a party to appear in person in order to provide explanations about the circumstances of the case.

(2) The court shall communicate to the party obligated to appear in person the questions which the said party must answer, warning the said party of the consequences of non-compliance with this obligation.

(3) The court may hold as proved the circumstances for the clarification of which the party has failed to appear or has refused to answer without reasonable excuse, as well as where the party has given evasive or unclear answers.

(4) Where the party is unable to appear before the court owing to a hardly surmountable impediment, the explanations of the said party may be provided to a delegated court.

#### Scope of Application

**Article 177.** (1) The following shall provide explanations as parties to the case:

1. the natural persons;
2. the legal representatives of the legal persons;
3. the debtors and the trustee in bankruptcy in cases related to the bankruptcy estate;
4. the partners in a general partnership;
5. the personally liable partner in a limited partnership;

(2) Where the party is an infant or a full interdict, the court may hear the legal representative of the said party. Where the party is a minor or a limited interdict, the court may examine the said party in the presence of the parent or curator thereof.

## **Section IV Written Evidence**

### **Evidential Value**

**Article 178.** (1) The evidential value of documents shall be determined conforming to the law which was in force at the time and in the place where the said documents were drafted.

(2) The court shall evaluate the evidential value of the document which contains any crossings, deletions, insertions between the lines and other apparent blemishes, considering

all circumstances of the case. This rule shall not apply to a signed electronic document.

#### Official Document

**Article 179.** (1) An official document, issued by an official within the official responsibilities thereof in the established form and according to the established procedure, shall constitute evidence of the statements made before the said official and of the steps performed by and before the said official.

(2) Officially authenticated duplicate copies or excerpts of official documents shall have the same evidential value as the originals.

#### Private Document

**Article 180.** Private documents, signed by the persons who issued the said documents, shall constitute evidence that the statements contained therein were made by the said persons.

#### Valid Date of Private Document

**Article 181.** (1) A private document shall be validly dated in respect of third parties as from the day of authentication of the said document or from the day of death, or from the occurrence of a physical incapacity of being signed by the person who signed the document, or as from the day on which the content of the document was reproduced in an official document, or as from the day on which another fact occurred, proving beyond doubt the preceding drafting of the document.

(2) To establish the date of receipts on a payment effected, the court may admit any means of proof, considering the circumstances of the case.

#### Account Book Entries

**Article 182.** Entries in account books shall be evaluated by the court according to the regularity of the said entries and considering the other circumstances of the case. Any such entries may serve the person or organization who or which has kept the books as evidence.

#### Presentation of Documents on Paper-Based Data Medium

**Article 183.** Where a document is filed with the case records, the said document may alternatively be presented in a duplicate copy authenticated by the party, but in such case, upon request, the said party shall be obligated to present the original of the document or an officially authenticated duplicate copy thereof. Failing this, the duplicate copy presented shall be excluded from the evidence in the case.

#### Presentation of Electronic Document

**Article 184.** (1) An electronic document may be presented reproduced on a paper-based data medium in the form of a duplicate copy authenticated by the party. Upon request, the party shall be obligated to present the document on an electronic data medium.

(2) If the court does not have at its disposal technical means and experts making it

possible to reproduce the electronic document and to duly verify the electronic signature in the courtroom in the presence of the persons who appeared, electronic copies of the document shall furthermore be presented to each of the parties to the case. In such case, the truthfulness of the electronic document may be contested during the next succeeding court hearing.

#### Presentation of Document in Foreign Language

**Article 185.** Any document presented in any language other than Bulgarian shall be accompanied by an accurate translation into the Bulgarian language, authenticated by the party. If the court is unable to verify the accuracy of the translation on its own or if the accuracy of the translation is contested, the court shall appoint an expert witness to perform verification.

#### Presentation of Official Documents

**Article 186.** Official documents and certificates shall be presented by the parties. The court may require such documents from the relevant institution or may furnish the party with a court certificate on the basis of which the said party is to obtain the said documents. The institution shall be obligated to issue the documents required or to explain the reasons for not issuing the said documents.

#### Presentation of Published Items

**Article 187.** Items published in print shall be presented by the parties, but when the court can procure such items on its own without particular difficulty, it shall be sufficient for the party to cite where the said items were published.

#### Conversion of Official Document

**Article 188.** Any document issued by a non-competent authority or not in the prescribed form shall be relevant as a private document if signed by the parties.

#### Document Issued by Illiterate or Blind Person

**Article 189.** (1) Any private document issued by an illiterate person must bear, in lieu of a signature, an impression of the right thumb of the said person and must be countersigned by two witnesses. If the impression of the right thumb cannot be affixed, the reason for this must be noted in the document, as well as the impression of which other finger has been affixed.

(2) Any private document issued by a blind but literate person must be countersigned by two witnesses.

#### Obligating Party to Present Document

**Article 190.** (1) Each party may approach the court with a motion to obligate the other party to present a document in the possession thereof, explaining the relevance of the said document to the dispute.

(2) Non-presentation of the document shall be evaluated according to Article 161 herein.

## Grounds for Refusal to Present

**Article 191.** (1) Presentation of a document may be refused where:

1. the content of the document concerns circumstances of the personal or family life of the party;

2. this would lead to defamation or to criminal prosecution of the party or of any relatives thereto within the meaning given by Article 166 herein.

(2) Where the grounds covered under Paragraph (1) affect parts of the document, the party may be obligated to present an abstract of the document authenticated thereby.

## Obligating Third Party to Present Document

**Article 192.** (1) Each party may approach the court with a written petition to obligate a person non-participating in the case to present a document in the possession thereof.

(2) A duplicate copy of the petition shall be transmitted to the third party, and a time limit shall be set thereto for presentation of the document.

(3) In addition to the liability under Article 87 herein, the third party, who groundlessly fails to present the required document, shall furthermore incur liability to the party for the damages inflicted thereon.

## Contesting Truthfulness of Document

**Article 193.** (1) The interested party may contest the truthfulness of a document at the latest by the answer to the court procedural step whereby the said document was presented. Where the document is presented during a court hearing, contestation may be made at the latest before the end of the hearing.

(2) The court shall decree the performance of verification of the truthfulness of the document if the other party states that it wishes to avail itself of the said document.

(3) The burden of proving the falsity of the document shall be upon the party contesting the said document. Where the truthfulness of a private document, which does not bear the signature of the contesting party, is contested, the burden of proving the truthfulness shall be upon the party who presented the said document.

## Verification of Document

**Article 194.** (1) The court shall perform verification by means of comparison with other uncontested documents, by means of examination of witnesses, or by means of expert witnesses.

(2) After the verification, the court shall render a ruling acknowledging either that the contestation is not proved or that the document is false. In the latter case, the court shall exclude the said document from the evidence, transmitting the said document to the

prosecutor together with the ruling of the court.

(3) The court may alternatively pronounce on the contestation of the document by the judgment thereof in the case. In such case, the document, together with a duplicate copy of the judgment, shall be transmitted to the prosecutor.

## **Section V Expert Witnesses**

### **Appointment of Expert Witness**

**Article 195.** (1) An expert witness shall be appointed either on a motion by a party or ex officio where special knowledge in the field of science, art, skilled crafts and other such is necessary for clarification of certain questions which have arisen in the case.

(2) The court may appoint multiple expert witnesses as well, where this is necessitated considering the circumstances of the case.

#### Exclusion of Expert Witness

**Article 196.** (1) The provisions of Article 22 (1) herein shall apply, mutatis mutandis, to expert witnesses as well.

(2) Each of the parties may move for the exclusion of an expert witness if any of the grounds referred to in Paragraph (1) applies.

(3) The expert witness shall be obligated to communicate to the court immediately all circumstances which may be grounds for exclusion. The expert witness shall be obligated to express an opinion on the allegations in the petition for the exclusion thereof.

(4) The court shall render a ruling on the motion for exclusion of an expert witness.

#### Assignment of Expert Examination

**Article 197.** (1) The ruling whereby the court appoints an expert witness shall specify: the subject and the task of the expert examination; the materials which are provided to the expert witness; the name, education and specialist qualifications of the expert witness.

(2) The court shall allow the expert examination a suitable time for preparation of the conclusion. The expert witness shall notify the court when the said expert witness is unable to prepare the conclusion within the time limit set, and shall state the time limit that the said expert witness will need.

#### Excusal of Expert Witness

**Article 198.** An expert witness as appointed shall be excused from the task assigned thereto where the said expert witness is unable to fulfil the said task for lack of qualifications, an illness or another reason beyond the control thereof, under the terms established by Article

166 herein, or where the conclusion has not been prepared in due time.

#### Presentation of Conclusion

**Article 199.** The expert witness shall be obligated to present the conclusion thereof at least one week before the court hearing.

#### Hearing of Expert Witness

**Article 200.** (1) The court shall remind the expert witness of the liability incurable thereby for giving a false conclusion.

(2) The expert witness shall set forth orally the conclusion thereof. The parties may pose questions for clarification of the conclusion.

(3) Upon contestation of the conclusion, the court may appoint another or multiple expert witnesses. Contestation may be made *pendente lite*.

#### Additional and Second Conclusion

**Article 201.** An additional conclusion shall be assigned where the conclusion is not sufficiently complete and clear, and a second conclusion shall be assigned where the conclusion is not justified and gives rise to any doubt as to the correctness thereof.

#### Evaluation of Conclusion

**Article 202.** The court shall not be obligated to accept the conclusion of the expert witness but shall consider the said conclusion together with the rest of the evidence in the case.

#### Dissent between Expert Witnesses

**Article 203.** In the event of dissent between expert witnesses, each group shall set forth the separate opinions thereof. Where the court cannot take a stand on the dissent, the court shall require from the same expert witnesses additional research or shall appoint other expert witnesses.

## **Section VI Inspection and Certification**

### **Admission of Inspection and Certification**

**Article 204.** (1) The court, acting on a motion by the parties or at its own discretion, may assign an inspection of movable or immovable things or certification of persons with the participation or without the participation of witnesses and expert witnesses.

(2) Inspection and certification shall be methods of taking and verification of evidence. They shall be performed by the entire panel of the court, by a delegated member of the court,

or by another delegated court.

(3) The court shall notify the parties of the place and time of the inspection. A memorandum shall be drawn up on the inspection performed, including the findings of the inspection, the explanations of the expert witnesses, and the explanations of the witnesses who have been examined in the place of the inspection.

#### Duty to Cooperate

**Article 205.** The provisions regarding documents shall apply to the duty to provide, surrender or afford access to the subject of inspection.

#### Certification

**Article 206.** (1) A person may be certified solely with the consent thereof.

(2) Certification shall be performed in a manner which does not impair the personal dignity of the person certified. To this end, the judge need not attend the certification in person and may assign the performance of the certification to appropriate expert witnesses.

(3) A refusal of a person to be certified shall be evaluated according to Article 161 herein.

## Section VII Perpetuation of Evidence

### Perpetuation of Evidence

**Article 207.** Where there is a risk that some item of evidence may be lost or the taking thereof may be impeded, the party may move for the anticipatory taking of the said item of evidence.

#### Proceeding for Perpetuation of Evidence

**Article 208.** (1) The petition for perpetuation of evidence shall be submitted to the court which examines the case, and if the case has not yet been instituted, any such petition shall be submitted to the regional court exercising jurisdiction over the permanent address of the person to be examined or over the location of the immovable to be inspected.

(2) A duplicate copy of the petition for perpetuation of evidence shall be served upon the other party.

(3) The ruling of the court, whereby the petition is dismissed, shall be appealable by an interlocutory appeal.

(4) Within the same proceeding, the court may take evidence cited by the other party if the said evidence is closely related to the evidence cited by the petitioner.

(5) Where the petitioner is not in a position to name the name and address of the other party, the court shall appoint a representative of the said other party.

(6) The general rules shall apply regarding the procedure for taking of evidence and the value thereof.

#### Costs

**Article 209.** The costs of taking of evidence shall not be awarded in favour of the party in the proceeding for perpetuation of evidence. The said costs shall be taken into consideration subsequently upon resolution of the dispute.

## **Chapter Fifteen** **DEVIATIONS IN CONNECTION WITH SUBJECT** **MATTER OF CASE**

### **Initial Joinder of Actions**

**Article 210.** (1) The plaintiff may bring several actions against the same respondent by a single statement of action if the said actions are cognizable in the same court and are subject to examination according to the procedure of the same proceeding.

(2) Where the actions brought are not subject to examination according to the procedure of the same proceeding or where the court determines that the joint examination of the said actions will be considerably impeded, the court shall decree a disjoinder of the said actions.

#### Counter Action

**Article 211.** (1) Within the time limit for an answer to the statement of action, the respondent may bring a counter action if the said action is generically cognizable in the same court and is connected with the original action or if the said action can be set off against the original action.

(2) The counter action shall be brought according to the rules applicable to the bringing of an action. Where the court determines that the joint examination of the counter action will be considerably impeded, the court shall decree a disjoinder of the said counter action.

#### Incidental Action

**Article 212.** During the first hearing for examination of the case, the plaintiff and, in the answer to the statement of action, the respondent, may approach the court with a motion to pronounce, in the judgment thereof, inter alia regarding the existence or non-existence of a disputed legal relation upon which the outcome of the case depends in whole or in part.

#### Ex Officio Joinder of Actions

**Article 213.** Where several cases, in which the same persons participate for the plaintiff and for the respondent and which are interconnected, are pending before the court, the court

may join the said cases in a single proceeding and may render a joint judgment in the said cases.

#### Modification of Action

**Article 214.** (1) During the first hearing for examination of the case, the plaintiff may modify the grounds of the action thereof if the court deems this appropriate considering the defence of the respondent. The plaintiff may furthermore, without modifying the grounds, modify the demand thereof. Prior to the conclusion of the trial in the court of first instance, the plaintiff may modify solely the amount of the demand made, as well as transfer from an action for a declaratory judgment to an action for performance and vice versa.

(2) The addition of overdue interest or of yields of the thing collected after the action is brought shall not be treated as an increase of the demand.

## **Chapter Sixteen**

### **DEVIATIONS IN CONNECTION WITH PARTIES**

#### **Section I**

#### **Joinder of Parties**

#### **Admissibility**

**Article 215.** An action may be brought by several plaintiffs or against several respondents if the subject matter of the dispute are:

1. their common rights or obligations, or
2. rights or obligations resting on the same grounds.

#### Procedural Steps

**Article 216.** (1) Each of the co-parties shall act independently. The procedural steps performed or omitted by each co-party shall neither benefit nor injure the rest of the co-parties.

(2) Where, considering the nature of the contested legal relation or as dictated by the law, the judgment of the court must be identical in respect of all co-parties (necessary joinder of parties), the steps performed by some of them shall be also relevant to the co-parties who have not appeared or who have not performed such steps. In this case, too, however, the consent of all co-parties shall be required for conclusion of a settlement and for withdrawal or abandonment of the action.

#### Allegations Regarding Common Facts

**Article 217.** If the factual allegations by the co-parties regarding the common facts conflict each other, the court shall evaluate the said allegations in relation to all

circumstances of the case.

## **Section II Third Parties**

### **Third Party Intervention**

**Article 218.** A third party may intervene prior to the conclusion of the trial in the court of first instance in order to assist one of the parties if the said third party has an interest in the judgment being rendered in favour of the said party.

#### Impleader of Third Party

**Article 219.** (1) During the first hearing for examination of the case, the plaintiff and, by the answer to the statement of action, the respondent may implead a third party where the said party has the right to intervene in order to assist.

(2) The impleader shall not be granted if the third party does not have a permanent address in the Republic of Bulgaria or is resident abroad.

(3) The party who has a recourse action against the third party may bring the said action for joint examination simultaneously with the motion for impleader.

#### Admission of Participation

**Article 220.** The court shall render a ruling on admission of the third party. The ruling whereby the third party is not admitted shall be appealable by an interlocutory appeal.

#### Third Party's Rights

**Article 221.** (1) The third party shall have the right to perform all court procedural steps with the exception of the steps constituting disposition of the subject matter of the dispute.

(2) In the event of a conflict between the steps and the explanations of the party and of the third party, the court shall evaluate the said steps and explanations in connection with all circumstances of the case.

#### Substitution for Party Assisted

**Article 222.** With the consent of both parties, the third party who has intervened or who has been impleaded may substitute himself or herself for the party assisted thereby and may excuse the said party.

#### Effect of Judgment

**Article 223.** (1) The judgment rendered shall have a declaratory effect in the relations of the third party and the opposing party.

(2) What the court has declared in the reasoning to the judgment thereof shall be binding upon the third party in the relations thereof with the party assisted thereby or with the party who has impleaded the said third party. What the court has declared in the reasoning to the judgment thereof may not be contested under the pretext that the party has misconducted the case, except where the said party, acting wilfully or by gross negligence, has omitted to raise circumstances or evidence unknown to the third party.

#### Impleader of Person Claiming Own Rights

**Article 224.** (1) The respondent shall be excused from participation in the case if the said respondent deposits the amount or corporeal thing claimed and impleads the person who also claims rights of his or her own thereto. In such case, the case shall proceed solely between the two creditors.

(2) If the person impleaded fails to intervene in the case, the proceeding shall be terminated and the amount or corporeal thing deposited shall be delivered to the plaintiff.

(3) Where the respondent makes the motion for impleader by the answer to the statement of action, the said respondent shall not be liable for the costs.

#### Principal Intervention

**Article 225.** (1) The third party, who holds independent rights to the subject matter of the dispute, may intervene in the case by bringing an action against both parties.

(2) The bringing of an action by a third party shall be admitted prior to the completion of the trial in the court of first instance.

## **Section III**

### **Transfer of Contested Right and Replacement of Party**

#### **Transfer of Contested Right**

**Article 226.** (1) If in the course of the proceeding the contested right is transferred to another, the case shall follow its course between the original parties.

(2) The transferee may intervene or be impleaded in the case as a third party. The said transferee may substitute himself or herself for the grantor thereof solely under the terms established by Article 222 herein.

(3) The judgment rendered shall in any case constitute res judicata in respect of the transferee as well, with the exception of the steps of recording, where a corporeal immovable is involved (Article 114 of the Ownership Act), and where acquisition of ownership by bona fide possession (Article 78 of the Ownership Act), where movable things are involved.

#### Succession in Procedure

**Article 227.** Where the party dies or the legal person ceases to exist, the proceeding in

the case shall continue with the participation of the successor.

#### Replacement of Party

**Article 228.** (1) A modification of the action through replacement of any of the parties by another party shall be admissible during any stage of the proceeding in the court of first instance with the consent of both parties and of the person who intervenes as a party to the case.

(2) The consent of the respondent shall not be necessary where the plaintiff abandons the action thereof in respect of the said respondent.

(3) The plaintiff may direct the action thereof against a respondent who does not agree to intervene in the case. In such case, however, the action against the new respondent shall be considered brought as from the day on which the statement of action against the said respondent has been received in the court.

## **Chapter Seventeen**

### **DEVIATIONS IN PROGRESS OF PROCEEDING**

#### **Section I**

#### **Stay, Resumption and Termination of Proceeding**

#### **Stay of Proceeding**

**Article 229.** (1) The court shall stay the proceeding:

1. by consent of the parties;
2. in the event of death of any of the parties;
3. where it is necessary to institute tutorship or curatorship for any of the parties;
4. where a case is examined in the same or in another court and the judgment in the said case will be relevant to the correct resolution of the dispute;
5. where, upon examination of a civil case, criminal circumstances are discovered and the outcome of the civil dispute depends on the establishment of the said circumstances;
6. where the Constitutional Court has admitted to examination on the merits a motion whereby the constitutionality of a law applicable to the case is contested;
7. in the cases expressly provided for in a law.

(2) In the cases referred to in Item 1 of Paragraph (1), if the prosecutor participates in the case together with any of the parties, the stay shall require the consent of the said prosecutor as well. In the cases referred to in Items 2 and 3 of Paragraph (1), if the trial has

been concluded, the proceeding shall be stayed after rendition of the judgment in the case.

(3) A stay of the case with the consent of the parties shall be granted on a single occasion during the proceeding in the court of any instance.

#### Resumption of Proceeding

**Article 230.** (1) The proceeding shall be resumed either ex officio or on a motion by one of the parties, after removal of the impediments to the progress of the case, for which the court, in the cases of a death of the plaintiff and under Items 3 to 6 of Article 229 (1) herein, shall take the appropriate measures of its own motion.

(2) Upon death of the respondent, the plaintiff shall be obligated, within six months after the communication, to name the successors to the said respondent and the addresses of the said successors or to take measures for appointment of an administrator of the vacant succession or for summoning of the successors according to the procedure established by Article 48 herein. Upon failure to comply with this obligation, the case shall be dismissed.

(3) Upon resumption, the proceeding shall commence from the step whereat the proceeding was stayed.

#### Termination of Proceeding

**Article 231.** (1) A proceeding stayed by mutual consent of the parties shall be terminated if none of the parties has moved for the resumption of the proceeding within six months after the stay thereof. If a judgment has been rendered, it shall be invalidated.

(2) Sentence two of Article 232 herein shall apply in the case referred to in Paragraph (1).

## **Section II**

### **Withdrawal of Action, Abandonment of Action, Court Settlement**

#### **Withdrawal of Action**

**Article 232.** The plaintiff may withdraw the statement of action thereof without the consent of the respondent before the end of the first hearing of the case. If the plaintiff brings the same action again, the said plaintiff may use the evidence taken in the new case solely if there is a hardly surmountable impediment to the taking anew of the said evidence.

#### Abandonment of Action

**Article 233.** The plaintiff may abandon, in whole or in part, the contested right during any stage of the proceeding. In such case, the plaintiff may not bring the same action again. Where the abandonment has been made before the court of intermediate appellate review instance or the court of cassation instance, the judgment appealed shall be invalidated.

## Court Settlement

**Article 234.** (1) A memorandum shall be drawn up on any settlement which does not conflict with the law and with good morals, and the said memorandum shall be approved by the court and shall be signed thereby and by the parties.

(2) Where the prosecutor participates as a party to the case, the court shall approve the settlement after consulting the prosecutor as well.

(3) The court settlement shall have the relevance of an effective judgment and shall not be appealable before a superior court.

(4) Where the settlement refers to only part of the dispute, the court shall proceed with examination of the case in respect of the unsettled part.

## **Chapter Eighteen** **ADJUDICATION OF CASES**

### **Section I** **Judgment in Case**

#### **Rendition of Judgment**

**Article 235.** (1) The judgment shall be rendered by the court panel which has participated in the hearing during which the examination of the case was completed.

(2) The court shall found the judgment thereof on the circumstances of the case held thereby as established and on the law.

(3) The court shall furthermore take into account the facts which have intervened since the action was brought, which are relevant to the contested right.

(4) The judgment, together with the reasoning thereto, shall be reduced to writing.

(5) The court shall publish the judgment thereof with the reasoning within one month after the hearing during which the examination of the case was completed. The judgment shall be published in the register of judgments of courts, which shall be open to public inspection and shall be freely accessible to everyone.

#### Judgment: Content

**Article 236.** (1) The judgment must contain:

1. the date and place of rendition;
2. a reference to the court, the names of the judges, of the clerk and of the prosecutor, where a prosecutor has participated in the case;

3. the number of the case in which the judgment is rendered;
4. the names or, respectively, the designation and the address of the parties;
5. what the court decrees on the merits of the dispute;
6. against whom the costs are awarded;
7. whether the judgment is appealable, before which court and within what time limit.

(2) The court shall set forth reasoning to the judgment, stating therein the demands and oppositions of the parties, the evaluation of evidence, the findings of fact and the legal conclusions reached by the court.

(3) The judgment shall be signed by all judges who have participated in the rendition thereof. Where any of the judges is unable to sign the judgment, the presiding judge or the senior judge shall note the reasons for this on the judgment.

#### Judgment upon Admission of Demand

**Article 237.** (1) Where the respondent admits the demand, the court, acting on a motion by the plaintiff, shall terminate the trial and shall render judgment conforming to the admission.

(2) The reasoning to the judgment shall suffice to state that the said judgment is based on the admission of the demand.

(3) The court may not render judgment upon admission of the demand where:

1. the right admitted conflicts with the law or with good morals;
2. the right admitted is indisposable by the party.

(4) An admission of the demand may not be withdrawn.

#### Judgment by Default

**Article 238.** (1) If the respondent has failed to present an answer to the statement of action in due time and fails to appear during the first hearing of the case without having moved for examination of the case in the absence thereof, the plaintiff may move for rendition of a judgment by default against the respondent or may withdraw the action.

(2) The respondent may not move for dismissal of the case and award of costs or for rendition of a judgment by default against the plaintiff if the said plaintiff fails to appear during the first hearing of the case, has not taken a stand on the answer to the statement of action, and has failed to move for examination of the case in the absence thereof. If the plaintiff brings the same action again, sentence two of Article 232 herein shall apply.

(3) If the plaintiff has not cited and has not presented evidence by the statement of

action thereof and the respondent has not submitted an answer in due time, and if both parties fail to appear during the first hearing of the case without having moved that the case be examined in the absence thereof, the case shall be dismissed.

#### Rendition of Judgment by Default

**Article 239.** (1) The court shall render a judgment by default where:

1. the parties have been instructed about the consequences of a failure to observe the time limits for exchange of papers and of the non-appearance of the parties during a court hearing;

2. the action is probably well-founded considering the circumstances cited in the statement of action and the evidence presented or is probably unfounded considering the oppositions raised and the evidence supporting the said oppositions.

(2) A judgment by default shall not be reasoned on the merits. It shall suffice to indicate in any such judgment that it is founded on the existence of the prerequisites for rendition of a judgment by default.

(3) Where the court determines that the prerequisites for rendition of a judgment by default do not apply, the court shall deny the motion by a ruling and shall proceed with examination of the case.

(4) A judgment by default shall be unappealable.

#### Remedy against Judgment by Default

**Article 240.** (1) Within one month after the service of the judgment by default, the party whereagainst the said judgment has been rendered may approach the intermediate appellate review court with a motion for reversal of the said judgment if the said party has been deprived of an opportunity to participate in the case owing to:

1. undue service of the duplicate copy of the statement of action or the summonses for the court hearing;

2. an impossibility to learn in due time of the service of the duplicate copy of the statement of action or the summonses for the court hearing owing to special unforeseen circumstances;

3. an impossibility to appear in person or through counsel owing to special unforeseen circumstances which the party was unable to overcome.

(2) (Amended, SG No. 50/2008) The party whereagainst a judgment by default has been rendered may claim the same right by an action or may contest the same right, where newly discovered circumstances or new written evidence of material relevance to the case are discovered, which could not have been known to the said party upon adjudication of the said case or which the said party could not procure in due time.

(3) The action referred to in Paragraph (2) may be brought within three months after the

day whereon the party learnt of the intervening circumstance or after the day whereon the party could procure the new written evidence, but not later than one year after extinguishment of the receivable.

## **Section II**

### **Deferral and Rescheduling of Enforcement. Anticipatory Enforcement**

#### **Deferral and Rescheduling of Enforcement**

**Article 241.** (1) Upon rendition of the judgment, the court may defer or reschedule the enforcement thereof considering the property status of the party or other circumstances.

(2) The court may not reschedule the enforcement of any judgment in respect of which rescheduling is provided for by law.

#### Admission to Anticipatory Enforcement

**Article 242.** (1) The court shall decree anticipatory enforcement of the judgment where the court awards maintenance, remuneration and compensation for work.

(2) The court, acting on a motion by the plaintiff, may furthermore admit the judgment to anticipatory enforcement where:

1. the court awards a receivable based on an official document;
2. the court awards a receivable which has been admitted by the respondent;
3. the delay of enforcement may result in material and irreparable damages to the plaintiff or the enforcement itself would become impossible or be considerably impeded.

(3) In the cases referred to in Paragraph (2), the court may order the plaintiff to furnish due security in advance.

#### Inadmissibility of Anticipatory Enforcement

**Article 243.** (1) Anticipatory enforcement shall be inadmissible even against security if the enforcement may result in the infliction on the respondent of an irreparable damage or a damage which is unappraisable in terms of a specific monetary amount. Sentence one shall not apply to any judgments whereby maintenance or remuneration for work is awarded.

(2) Enforcement of any judgment against the State, the government institutions and the medical-treatment facilities covered under Article 5 (1) of the Medical-Treatment Facilities Act, which has not entered into effect, shall be inadmissible.

#### Appellate Review of Ruling

**Article 244.** The ruling, whereby the judgment is admitted to anticipatory enforcement

or such enforcement is refused, shall be appealable by an interlocutory appeal.

#### Stay and Termination of Anticipatory Enforcement

**Article 245.** (1) The execution debtor whereagainst anticipatory enforcement has been admitted may, except in the cases referred to in Article 242 (1) herein, stay the enforcement by furnishing security to the execution creditor according to Articles 180 and 181 of the Obligations and Contracts Act.

(2) Enforcement shall furthermore be stayed where the judgment appealed is reversed.

(3) If the action is thereafter dismissed by an effective judgment, enforcement shall be terminated. In such case the court which has rendered the judgment shall issue the execution debtor a writ of execution against the execution creditor for recovery of the amounts or corporeal things received on the basis of the anticipatory enforcement of the reversed judgment as admitted.

## Section III Correction of Judgment

### Judgment Non-Withdrawable

**Article 246.** After publishing the judgment in the case, the court may not reverse or modify the said judgment of its own motion.

#### Correction of Apparent Error of Fact

**Article 247.** (1) The court, acting on its own initiative or on a petition by the parties, may correct any apparent errors of fact made in the judgment.

(2) The court shall send a communication to the parties regarding the correction sought, instructing the parties to present an answer within one week.

(3) The court shall summon the parties to a public session where the said court deems this necessary.

(4) The judgment of correction shall be served upon the parties and shall be appealable according to the procedure applicable to appellate review of the judgment.

#### Modification of Judgment in Part Concerning Costs

**Article 248.** (1) Within the time limit for appellate review and, if the judgment is unappealable, within one month after rendition of the said judgment, the court, acting on a motion by the parties, may amplify or modify the judgment as rendered in the part thereof concerning the costs.

(2) The court shall send a communication to the opposing party regarding the amplification or modification sought, instructing the said party to present an answer within

one week.

(3) The ruling on the costs shall be rendered in camera and shall be served upon the parties. The said ruling shall be appealable according to the procedure applicable to appellate review of the judgment.

#### Settlement after Conclusion of Trial

**Article 249.** The court shall invalidate the judgment rendered thereby if, before the entry into effect of the said judgment, the parties declare that they have reached a settlement and move for a dismissal of the case.

#### Amplification of Judgment

**Article 250.** (1) A party may move for amplification of the judgment if the court has not pronounced on the entire motion of the said party. A petition for such amplification may be submitted within one month after the service of the judgment or after the entry into effect of the said judgment.

(2) The court shall send a communication to the opposing party regarding the amplification sought, instructing the said party to present an answer within one week. The petition shall be examined in public session with the parties being summoned, where the court deems this necessary with a view to clarifying the unresolved part of the dispute.

(3) The court shall render an additional judgment which shall be appealable according to the standard procedure.

#### Interpretation of Judgment

**Article 251.** (1) Any disputes over interpretation of an effective judgment shall be examined by the court which has rendered the said judgment.

(2) An interpretation may not be sought after the judgment has been enforced.

(3) The court shall send a communication to the parties regarding the interpretation sought, instructing the said parties of the possibility to present an answer within one week.

(4) The court shall summon the parties to a public session, where the said court deems this necessary.

(5) The judgment of interpretation shall be appealable according to the procedure applicable to appellate review of the judgment which is interpreted.

## **Section IV**

### **Rendition of Rulings**

#### **Scope of Application**

**Article 252.** The court shall render a ruling where the court pronounces on any issues whereby the dispute is not resolved on the merits.

#### Rulings Withdrawable

**Article 253.** Any rulings which do not conclude the case may be modified or vacated by the same court consequent to a change of circumstances, an error or an omission.

#### Ruling: Content

**Article 254.** (1) Any ruling whereby the court pronounces on conflicting motions by the parties, as well as any ruling whereby a motion is denied, shall be reasoned. The motions by the parties and the circumstances of the case in connection with the said motions shall be cited in the reasoning, insofar as this is necessary.

(2) Where the ruling is rendered in camera, it must contain:

1. the date and place of rendition;
2. a reference to the court, the names of the judges of the court panel and of the parties;
3. the number of the case in which the ruling is rendered;
4. what the court decrees;
5. against whom the costs are awarded;
6. whether the ruling is appealable, before which court and within what time limit;
7. signatures of the judges.

## **Chapter Nineteen** **SETTING TIME LIMIT IN CASE OF** **UNREASONABLE DELAY**

### **Petition to Set Time Limit in Case of Unreasonable Delay**

**Article 255.** (1) Where the court fails to perform a particular procedural step in due time, the party may, during any stage of the proceeding, submit a petition to set an appropriate time limit for performance of the said step.

(2) The petition shall be submitted care of the same court to the superior court. The court which examines the case shall forthwith transmit the petition together with the observations thereof to the superior court.

#### Granting of Petition

**Article 256.** (1) Where the court performs forthwith all steps stated in the petition and

sends the party a communication regarding this performance, the petition shall be presumed withdrawn.

(2) The petition shall be transmitted for examination to the superior court if the party declares within one week after receipt of the communication under Paragraph (1) that it continues to maintain the said petition.

#### Examination and Adjudication of Petition to Set Time Limit

**Article 257.** (1) A petition to set a time limit shall be examined by a judge of the superior court within one week after receipt of the said petition.

(2) If the court finds an unreasonable delay, the court shall set a time limit for performance of the step. Otherwise, the court shall deny the petition. The ruling shall be unappealable.

## **TITLE TWO APPELLATE REVIEW OF JUDGMENTS AND RULINGS. REVERSAL OF EFFECTIVE JUDGMENTS**

### **Chapter Twenty INTERMEDIATE APPELLATE REVIEW**

#### **Subject of Appellate Review and Competent Court**

**Article 258.** (1) The judgments of regional courts shall be appealable before the district courts, whereas the judgments of district courts acting as courts of first instance shall be appealable before the appellate courts.

(2) An appeal may be lodged either against the entire judgment or against separate parts thereof.

#### Time Limit for Intermediate Appellate Review

**Article 259.** (1) The appeal shall be lodged care of the court which has rendered the judgment within two weeks after service of the said judgment upon the party.

(2) The time limit for intermediate appellate review shall be interrupted by the submission of an application for legal aid and shall not run while the said application is considered.

(3) A new time limit shall begin to run as from the entry into effect of the decision rejecting the application referred to in Paragraph (2), and in case any such application is granted, the new time limit shall begin to run as from the service of the first-instance judgment upon the assigned counsel as appointed.

(4) The submission of a subsequent application for legal aid shall not suspend and shall not interrupt the time limit for intermediate appellate review.

#### Intermediate Appellate Review Appeal: Content

**Article 260.** The appeal shall contain:

1. the name and address of the lodging party;
2. an indication of the judgment appealed;
3. a specification of the vice of the judgment;
4. formulation of the prayer;

5. the newly discovered or intervening facts which the appellant wishes to be taken into account upon adjudication of the case by the court of intermediate appellate review instance, and an exact listing of the reasons which have prevented the appellant from citing the newly discovered facts;

6. the new evidence which the appellant wishes to be taken upon examination of the case by the court of intermediate appellate review instance, and a narrative of the reasons which have prevented the appellant from citing or presenting the said evidence;

7. signature of the appellant.

#### Attachments to Appeal

**Article 261.** The following shall be attached to the appeal:

1. duplicate copies of the appeal and of the attachments thereto according to the number of persons who participate in the case as an opposing party;
2. a power of attorney, where the appeal is lodged by an attorney-in-fact;
3. the new written evidence cited in the appeal;
4. documentary proof of payment of stamp duty.

#### Verification by First-Instance Court

**Article 262.** (1) If the appeal does not conform to the requirements referred to in Items 1, 2, 4 and 7 of Article 260 and Article 261 herein, a communication shall be sent to the party, instructing the party to cure the non-conformities within one week.

(2) The appeal shall be returned where:

1. the said appeal has been lodged after expiry of the time limit for appellate review, and

2. the non-conformities are not cured in due time.

(3) The order of return shall be appealable by an interlocutory appeal.

#### Answer to Intermediate Appellate Review Appeal and Intermediate Appellate Review Cross-Appeal

**Article 263.** (1) After accepting the appeal, the court shall transmit a duplicate copy thereof together with the attachments to the other party, which may submit an answer to the appeal within two weeks after receipt of the said copy and attachments. The provisions of Article 259 (2) to (4), Items 1, 2, 4 and 7 of Article 260 and Article 261 herein shall apply, *mutatis mutandis*, to any such answer.

(2) Within the time limit for an answer, the opposing party may lodge an intermediate appellate review cross-appeal. The intermediate appellate review cross-appeal must conform to the requirements applicable to an intermediate appellate review appeal.

(3) The court shall verify the conformity of the intermediate appellate review cross-appeal according to Article 262 herein. After accepting the said cross-appeal, the court shall transmit a duplicate copy thereof together with the attachments to the other party, which may submit an answer within one week after receipt of the said duplicate copy and attachments.

(4) The intermediate appellate review cross-appeal shall not be examined if the intermediate appellate review appeal is withdrawn or returned.

(5) After expiry of the time limits referred to in Paragraphs (1) and (3), the case, together with the appeals and the answers, shall be transmitted to the superior court.

#### Withdrawal of Intermediate Appellate Review Appeal and Waiver of Right of Appeal

**Article 264.** (1) During any stage of the proceeding, a party may withdraw, in whole or in part, an appeal lodged.

(2) Any advance waiver of the right of appeal shall be invalid.

#### Joining Intermediate Appellate Review Appeal

**Article 265.** (1) Not later than during the first hearing in the court of intermediate appellate review instance, each of the co-parties to the case may join the appeal lodged by the co-plaintiff or co-respondent thereof. Joinder shall be effected by means of submission of a petition in writing with duplicate copies according to the number of parties.

(2) In the cases of necessary joinder of parties, the court shall constitute the co-parties of the appellant *ex officio*.

#### Citing New Facts and Evidence Prohibited

**Article 266.** (1) In an intermediate appellate review proceeding, the parties may not allege new circumstances, cite and present evidence which the said parties could have cited and presented in due time in the first-instance proceeding.

(2) Prior to the conclusion of the trial, the parties may:

1. allege any new circumstances and cite and present any new evidence solely if the parties were unable to learn of such circumstances and to cite and present such evidence prior to the lodgment of the appeal or within the time limit for an answer, as the case may be;

2. allege any circumstances which have occurred after the lodgment of the appeal or after expiry of the time limit for an answer, as the case may be, circumstances which are relevant to the case, and cite and present evidence of any such circumstances.

(3) Taking of evidence which was not admitted by the first-instance court by reason of procedural breaches may not be moved for in an intermediate appellate review proceeding.

#### Preparatory Hearing

**Article 267.** (1) The intermediate appellate review court, sitting in camera, shall verify the admissibility of the appeals applying, mutatis mutandis, Article 262 herein, shall pronounce on admission of the new evidence cited by the parties, and shall schedule an examination of the case in public session. The issues of the admissibility of the appeals and the motions for evidence may alternatively be addressed during the first hearing of the case, if the court determines that the oral explanations of the parties must be heard as well.

(3) The court may hear again witnesses and expert witnesses, if the court deems this necessary.

#### Public Session of Intermediate Appellate Review Court

**Article 268.** (1) The intermediate appellate review court shall examine the appeals, sitting in public session with the parties being summoned, and the appeals and the answers shall be reported during the hearing.

(2) The taking of evidence shall follow the general rules and, if necessary, the hearing of the case shall be adjourned.

(3) After addressing the issues referred to in Article 267 herein and taking of the evidence, the court shall proceed with the oral arguments, whereto Article 149 (3) herein shall apply, mutatis mutandis.

#### Intermediate Appellate Review Court: Powers

**Article 269.** The intermediate appellate review court shall pronounce ex officio on the validity of the judgment and on the admissibility in the appealed part of the said judgment. On the rest of the issues, the said court shall be limited by what is stated in the appeal.

#### Adjudication in Case of Null and Inadmissible First-Instance Judgment

**Article 270.** (1) Where a first-instance judgment is null, the intermediate appellate review court shall declare the nullity and, if the case is not dismissible, shall return the said case to the first-instance court for rendition of a new judgment.

(2) The nullity of the judgment may be raised according to an action procedure sine die or by means of an opposition.

(3) Where the judgment is inadmissible, the intermediate appellate review court shall invalidate the said judgment and shall dismiss the case. Where the grounds for invalidation are lack of cognizance of the dispute, the case shall be transmitted to the competent court. If an unbrought action has been examined, the judgment shall be invalidated and the case shall be returned to the first-instance court for pronouncement on the action brought.

(4) The judgment of the district court may not be invalidated solely due to the fact that the action was cognizable in the regional court.

#### Judgment in Case of Incorrect First-Instance Judgment

**Article 271.** (1) Where the first instance judgment is valid and admissible, the intermediate appellate review court shall resolve the dispute on the merits, upholding or reversing the first instance judgment in whole or in part. If the judgment is not appealed by the other party, the position of the appellant may not be affected adversely by the new judgment.

(2) Upon reversal of the judgment on the principal action, the pendency of any actions which may be joined thereto and on which the first-instance court has not pronounced shall be restored.

(3) (Supplemented, SG No. 50/2008) The court shall reverse the judgment also in respect of the necessary co-parties of the appellant who have not appealed.

#### Judgment in Case of Correct First-Instance Judgment

**Article 272.** Where the intermediate appellate review court upholds the first-instance judgment, the said court shall reason the judgment thereof, inter alia by reference to the reasoning of the first-instance court.

#### Applicability of First-Instance Proceeding Rules

**Article 273.** Save insofar as there are any special rules for the proceeding before the court of intermediate appellate review instance, the rules applicable to the proceeding before the court of first instance shall apply, mutatis mutandis.

## **Chapter Twenty-One APPELLATE REVIEW OF RULINGS**

### **Appellate Review by Interlocutory Appeal**

**Article 274.** (1) Interlocutory appeals may be lodged against the rulings of the court:

1. where the ruling bars the further progress of the case, and

2. in the cases expressly specified in the law.

(2) Where the rulings referred to in Paragraph (1) are rendered by a court of intermediate appellate review instance, the said rulings shall be appealable by an interlocutory appeal before the Supreme Court of Cassation. The rulings referred to in Paragraph (1), rendered by a panel of the Supreme Court of Cassation, shall be appealable before another panel of the same court.

(3) Where the prerequisites covered under Article 280 (1) herein apply, appealability by an interlocutory appeal before the Supreme Court of Cassation shall apply to:

1. the rulings of the intermediate appellate review courts whereby any interlocutory appeals against rulings barring the further progress of the case are left without consideration;

2. the rulings whereby other proceedings are resolved on the merits or the progress of any such proceedings is barred.

(4) (Amended, SG No. 100/2010, effective 21.12.2010) Appealability shall not apply to any rulings in cases wherein the judgments are not subject to cassation appellate review.

#### Time Limit for Appellate Review and Interlocutory Appeal Content

**Article 275.** (1) Interlocutory appeals shall be lodged within one week after communication of the ruling. If a ruling rendered during a court hearing is appealed, this time limit shall begin to run in respect of the party who appeared during the said hearing as from the day of the said hearing.

(2) (Amended, SG No. 50/2008) In respect of interlocutory appeals, the provisions of Article 259 (2) to (4), Articles 260, 261, 262 and 273 herein shall apply, *mutatis mutandis*.

#### Answer to Interlocutory Appeal

**Article 276.** (1) After accepting the appeal, the court shall transmit a duplicate copy to the other party, which may submit an answer within one week after receipt of the said duplicate copy.

(2) After expiry of the time limit referred to in Paragraph (1), the appeal, together with the answer and the attachments thereto, if any such have been submitted, shall be transmitted to the superior court. The court shall attach a duplicate copy of the ruling appealed.

#### Stay of Proceeding

**Article 277.** An interlocutory appeal shall not stay the proceeding in the case, nor the enforcement of the ruling appealed, unless otherwise provided for in a law. The court competent to examine the appeal may stay the proceeding or the enforcement of the ruling appealed until adjudication of the interlocutory appeal, if the said court deems this necessary.

#### Examination and Adjudication of Interlocutory Appeal

**Article 278.** (1) Interlocutory appeals shall be examined in camera. The court, if it deems it necessary, may examine the appeal sitting in public session.

(2) If it vacates the ruling appealed, the court itself shall address the issue under the appeal. The court may also take evidence, if the court deems this necessary.

(3) The ruling rendered on the interlocutory appeal shall be binding upon the inferior court.

(4) Save insofar as there are any special rules in this Section, the rules applicable to the appellate review of judgments shall apply, mutatis mutandis, to the proceeding in interlocutory appeals.

#### Appellate Review of Orders

**Article 279.** The provisions of Articles 274 to 278 herein shall furthermore apply, mutatis mutandis, to the interlocutory appeals against the orders of the court.

## **Chapter Twenty-Two CASSATION APPELLATE REVIEW**

### **Scope of Application**

**Article 280.** (1) (Declared unconstitutional by the Constitutional Court of the Republic of Bulgaria in respect of the word "material" - SG No. 47/2009)

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Cassation appealability before the Supreme Court of Cassation shall apply to any intermediate appellate review judgments wherein the court has pronounced on a material issue of substantive law or procedural law which:

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1. is addressed in conflict with the case law of the Supreme Court of Cassation;
2. has been addressed by the courts in a conflicting manner;
3. is relevant to the accurate application of the law, as well as to the progress of law.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) Cassation appealability shall not apply to the judgments in any intermediate appellate review cases with a cost of action not exceeding BGN 5,000, applicable to civil cases, and not exceeding BGN 10,000, applicable to commercial cases.

#### Grounds for Cassation Appellate Review

**Article 281.** A cassation appeal shall be lodged where:

1. the judgment is null;
2. the judgment is inadmissible;
3. the judgment is incorrect by reason of violation of the substantive law, a material breach of the rules of court procedure, or lack of justification.

#### Stay of Enforcement of Intermediate Appellate Review Judgment

**Article 282.** (1) The lodging of a cassation appeal shall not stay the enforcement of the judgment.

(2) The appellant may move for a stay of the enforcement of the intermediate appellate review judgment. In such case, the appellant shall be obligated to furnish due security. The amount of the security shall be set at:

1. in judgments on pecuniary receivables: the amount awarded;

2. in judgments regarding rights in rem: the appealable interest.

(3) In all other cases, the amount of security shall be set by the court.

(4) Where security has been furnished in connection with the enforcement of a judgment regarding rights in rem to corporeal immovables or movable things, the said security shall be retained if, within two weeks after the cassation appeal has been left without consideration, the holder of the receivable brings an action for compensation for the damages resulting from the delay of enforcement.

(5) Where enforcement of the awarded receivable has been secured, the security shall be released after the action is dismissed or the proceeding is terminated.

(6) If the intermediate appellate review judgment is reversed, the enforcement of the said judgment shall be stayed. In case the new judgment is different from the previous judgment, the provision of sentence two of Article 245 (3) herein shall apply, *mutatis mutandis*.

#### Time Limit for Cassation Appellate Review

**Article 283.** The appeal shall be lodged care of the court which has rendered the intermediate appellate review judgment within one month after service of the said judgment upon the party. The time limit for cassation appellate review shall be interrupted according to Article 259 (2), (3) and (4) herein.

#### Cassation Appeal: Content

**Article 284.** (1) The appeal must contain:

1. the name and address of the lodging party;

2. an indication of the judgment appealed;

3. an accurate and reasoned narrative of the cassation grounds;
4. formulation of the prayer;
5. signature of the appellant.

(2) The cassation appeal shall be countersigned by a lawyer or a legal adviser, save as where the appellant or the representative thereof possesses a licensed competence to practise law. A power of attorney to countersign or a certificate of licensed competence to practise law shall be attached to the appeal.

(3) The following shall be attached to the appeal:

1. a narrative of the grounds for cassation appealability under Article 280 (1) herein;
2. duplicate copies of the appeal and of the attachments thereto according to the number of persons who participate in the case as an opposing party;
3. a power of attorney, where the appeal is lodged by an attorney-in-fact;
4. documentary proof of payment of stamp duty.

#### Verification of Conformity of Cassation Appeal

**Article 285.** (1) The intermediate appellate review court shall verify the conformity of the appeal, and if the said appeal does not conform to the requirements covered under Article 284 herein, the said court shall send a communication to the party, instructing the party to cure the non-conformities within one week.

(2) If the appeal is conforming, the intermediate appellate review court shall transmit the said appeal together with the papers exchanged and the case to the Supreme Court of Cassation.

#### Return of Cassation Appeal

**Article 286.** (1) The appeal shall be returned by the intermediate appellate review court where:

1. the said appeal has been lodged after expiry of the time limit for appellate review;
2. the non-conformities are not cured in due time;
3. the intermediate appellate review judgment is not subject to cassation appellate review under Article 280 (2) herein.

(2) The order of return shall be appealable by an interlocutory appeal.

#### Answer to Cassation Appeal and Cassation Cross-Appeal

**Article 287.** (1) After accepting the appeal, the intermediate appellate review court shall transmit a duplicate copy thereof together with the attachments to the other party, which may

submit an answer to the appeal within one month after receipt of the said copy and attachments. The provisions of Article 259 (2) to (4) and Article 284 herein shall apply, mutatis mutandis, to any such answer.

(2) The opposing party under the appeal may lodge a cassation cross-appeal within the time limit for an answer. The cassation cross-appeal must conform to the requirements applicable to a cassation appeal.

(3) If a cassation cross-appeal is lodged in due time, the intermediate appellate review court shall verify the conformity of the said appeal and shall transmit a duplicate copy thereof together with the attachments thereto to the other party, which may submit an answer within two weeks after receipt of the said duplicate copy and attachments.

(4) The cassation cross-appeal shall not be examined if the cassation appeal is not examined.

#### Admission of Cassation Appellate Review

**Article 288.** The Supreme Court of Cassation, sitting in camera in a three-judge panel, shall render a ruling on admission of the cassation appellate review.

#### Summoning of Parties in Cassation Proceeding

**Article 289.** Prior to the first day of each month, the Supreme Court of Cassation shall promulgate in the State Gazette the days on which the said Court is to sit during the next succeeding month, and the cases subject to examination. Where circumstances necessitate any departures from this procedure, the parties shall be notified by means of communication.

#### Examination of Cassation Appeal

**Article 290.** (1) The appeal shall be examined by a three-judge panel of the Supreme Court of Cassation sitting in public session.

(2) The Supreme Court of Cassation shall verify the correctness of the intermediate appellate review judgment solely on the grounds cited in the appeal.

#### Reconciliation of Case Law

**Article 291.** Where the intermediate appellate review judgment has been rendered with a conflicting case law, the Supreme Court of Cassation:

1. shall specify, by a reasoned judgment, the conflicting judgment wherein the case law it considers correct; in such case, the said Court shall render a judgment in the case on the basis of the said case law;
2. where it holds that the case law in the judgments is incorrect, the said Court shall specify, by a reasoned judgment, why the said case law is incorrect; in such case, the said Court shall render a judgment interpreting the law on the basis of the circumstances of the case;
3. where it holds that the case law in the conflicting judgments is inapplicable to the pending dispute, the said Court shall specify, by a reasoned judgment, why the said case law is

inapplicable; in such case, the said Court shall render a judgment interpreting the law on the basis of the circumstances of the case.

#### Proposal for Interpretative Judgment

**Article 292.** Where issues have been addressed in a conflicting manner by the Supreme Court of Cassation, the panel shall propose to the general meeting to render an interpretative judgment and shall stay the proceeding in the case.

#### Cassation Judgment

**Article 293.** (1) The Supreme Court of Cassation shall leave standing or shall reverse, in part or in whole, the judgment appealed.

(2) The judgment shall be reversed as wrong where the substantive law has been violated or where material breaches of the rules of court procedure have been committed or the judgment is unjustified.

(3) The court shall return the case for a new examination by another panel of the intermediate appellate review court solely if any procedural steps at court have to be repeated or new such steps have to be performed.

(4) Where the judgment appeal is null or inadmissible, the rules of Article 270 herein shall apply.

#### Re-examination of Case

**Article 294.** (1) The court whereto the case has been transmitted shall examine the said case according to the standard procedure, with the proceeding commencing from the legally non-conforming step which has served as grounds for reversal of the judgment. The instructions of the Supreme Court of Cassation regarding the application and interpretation of the law shall be binding upon the court whereto the case has been returned.

(2) Upon re-examination of the case, the court shall furthermore pronounce on the costs of conduct of the case at the Supreme Court of Cassation.

#### Cassation Appellate Review of Judgment upon Re-examination of Case

**Article 295.** (1) Where the prerequisites covered under Article 280 (1) herein apply, the second judgment of the court of intermediate appellate review instance may be appealed over violations committed upon the re-examination of the case. Any such appeal shall be examined by a three-judge panel of the Supreme Court of Cassation which, upon reversal, shall resolve the dispute on the merits.

(2) Where the grounds for reversal necessitate the performance of any procedural steps at court, the Supreme Court of Cassation shall reverse the intermediate appellate review judgment and shall render a new judgment, whereafter the said Court shall perform the requisite steps. In such case, the rules applicable to the intermediate appellate review proceeding shall apply, *mutatis mutandis*.

## **Chapter Twenty-Three**

### **EFFECT OF JUDGMENTS**

#### **Entry into Effect**

**Article 296.** The following judgments shall enter into effect:

1. which are unappealable;
2. whereagainst no intermediate appellate review appeal or cassation appeal has been lodged within the time limit set by the law, or an appeal lodged has been withdrawn; in the latter case, the judgment shall enter into effect as from the day of entry into effect of the ruling whereby the case is dismissed;
3. in respect of which a cassation appeal has not been admitted to examination or has been denied consideration.

#### Respect of Judgment

**Article 297.** An effective judgment shall be binding upon the court which has rendered the said judgment and on all courts, institutions and municipalities in the Republic of Bulgaria.

#### Extent of Effect

**Article 298.** (1) A judgment shall enter into effect solely between the same parties, in respect of the same demand, and on the same grounds.

(2) An effective judgment shall furthermore have effect in respect of the heirs of the parties, as well as in respect of the successors thereto.

(3) A judgment rendered in actions for civil status, including in matrimonial actions, shall have effect in respect of everybody.

(4) A judgment shall furthermore enter into effect in respect of any motions and oppositions regarding a right of retention and set-off granted by the said judgment.

#### Non-Re-resolvability

**Article 299.** (1) A dispute, which has been resolved by an effective judgment, may not be re-resolved save in the cases where the law provides otherwise.

(2) The re-instituted case shall be dismissed ex officio by the court.

(3) The effective judgment may not be contested by the party as rendered in a simulated procedure.

#### Binding Effect of Sentence

**Article 300.** An effective sentence of a criminal court shall be binding upon the civil court which examines the civil consequences of the act, regarding whether the act has been committed, the wrongfulness of the said act and the guilt of the perpetrator.

#### Extension of Effect on Action by Prosecutor

**Article 301.** Where the case has been commenced on an action brought by a prosecutor, the effective judgment shall be furthermore binding upon the party in the interest whereof the prosecutor has brought the action.

#### Binding Effect of Judgment on Administrative Dispute

**Article 302.** An effective judgment on an administrative dispute shall be binding upon the civil court regarding whether the administrative act is valid and legally conforming.

## **Chapter Twenty-Four REVERSAL OF EFFECTIVE JUDGMENTS**

### **Grounds for Reversal**

**Article 303.** (1) The interested party may move for a reversal of an effective judgment where:

1. new circumstances or new written evidence of material relevance to the case are discovered which could not have been known upon adjudication of the said case or which the party could not procure in due time;

2. falsity of a document, of testimony of a witness, of a conclusion of an expert witness, upon which the judgment is founded, is established according to the due judicial procedure, or a criminal act by the party, by the representative thereof, by a member of the court panel or by a server in connection with the adjudication of the case, is so established;

3. the judgment is based upon a decree by a court or by another government institution which has subsequently been vacated;

4. another effective judgment, which conflicts with the judgment, has previously been rendered between the same parties, in respect of the same demand, and on the same grounds;

5. the party, consequent to a breach of the respective rules, has been deprived of an opportunity to participate in the case or has not been duly represented, or where the said party has been unable to appear in person or through counsel owing to special unforeseen circumstances which the said party was unable to overcome;

6. the party, upon a breach of the respective rules, was or, respectively, was not represented by a person referred to in Article 29 herein.

7. (new, SG No. 42/2009) the European Court of Human Rights has, by final judgment,

found that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (ratified by a law, State Gazette No. 66 of 1992) ([Convention promulgated in the] State Gazette No. 80 of 1992; as amended by Protocol No. 11 of 1994), or of the Protocols thereto and the new examination of the case is necessary in order to eliminate the consequences of the violation.

(2) It shall be inadmissible to reverse a judgment whereby a divorce or a marriage annulment is decreed or a marriage is declared non-existent.

(3) A reversal of a judgment by default may not be sought for a reason for which a reversal of the said judgment could have been sought or is sought under Article 240 (1) herein, or an action could have been brought or is brought under Article 240 (2) herein.

#### Reversal on Petition by Third Party

**Article 304.** The party in respect of whom the judgment has effect may also move for a reversal of the judgment, even though the said person has not been party to the case (Article 216 (2) herein).

#### Time Limit for Reversal

**Article 305.** (1) (Redesignated from Article 305, SG No. 42/2009) A petition for reversal shall be submitted within three months reckoned from the day:

1. whereon the petitioner learnt of the intervening circumstances, or from the day whereon the petitioner could procure the new written evidence: in the cases referred to in Item 1 of Article 303 (1) herein;

2. of entry into effect of the judgment or of learning of the sentence, but not later than one year after the entry into effect of the said sentence: in the cases referred to in Item 2 of Article 303 (1) herein;

3. of learning of the act of reversal, but not later than one year after the entry into effect of the said act: in the cases referred to in Item 3 of Article 303 (1) herein;

4. of entry into effect of the last judgment: in the cases referred to in Item 4 of Article 303 (1) herein;

5. (amended, SG No. 50/2008) of learning of the judgment: in the cases referred to in Items 5 and 6 of Article 303 (1) and Article 304 herein.

(2) (New, SG No. 42/2009) In the cases referred to in Item 7 of Article 303 (1) herein, the petition for reversal shall be submitted within six months after the day on which the judgment became final.

#### Petition for Reversal: Content

**Article 306.** (1) A petition for reversal must conform to the requirements covered under Articles 260 and 261 herein and must contain an accurate and reasoned narrative of the grounds for reversal. If the petition does not conform to these requirements, the party shall be

sent a communication, instructing the party to cure the non-conformities within one week.

(2) Upon failure to cure the non-conformities of the petition for reversal in due time, the provisions of Article 286 herein shall apply.

(3) The petition shall be submitted care of the first-instance court. A duplicate copy shall be attached to the said petition, and the said duplicate copy shall be served upon the opposing party. The said party may give an answer within one week after receipt of the duplicate copy.

#### Petition for Reversal: Examination and Adjudication

**Article 307.** (1) The Supreme Court of Cassation, sitting in camera, shall pronounce on the admissibility of the petition for reversal.

(2) The petition for reversal shall be examined by the Supreme Court of Cassation sitting in public session, within which the parties shall be heard and the requisite evidence shall be taken. Where a reversal of a judgment of the Supreme Court of Cassation is sought, the petition shall be examined by another three-judge panel of the Supreme Court of Cassation.

(3) If it determines that the petition is well-founded, the Supreme Court of Cassation shall reverse the judgment in whole or in part and shall return the case for a new examination by another panel of the competent court, also specifying the point wherefrom the new examination of the case must commence.

(4) In the case referred to in Item 4 of Article 303 (1) herein, the court shall reverse the incorrect judgment.

#### New Examination of Case

**Article 308.** The general rules shall apply upon the new examination of the case in which the judgment has been reversed.

#### Stay of Enforcement

**Article 309.** (1) The submission of a petition for reversal shall not stay the enforcement of the judgment. The court, acting on a motion by the party, may stay the enforcement under the terms established by Article 282 (2) to (6) herein.

(2) If the judgment is reversed, the enforcement of the said judgment shall be stayed. In case the new judgment is different from the previous judgment, the provision of sentence two of Article 245 (3) herein shall apply, *mutatis mutandis*.

## **PART THREE SPECIAL ACTION PROCEEDINGS**

### **Chapter Twenty-Five SUMMARY PROCEEDING**

## Scope of Application

**Article 310.** (1) (Redesignated from Article 310, SG No. 100/2010, effective 21.12.2010) The procedure established by this Chapter shall apply to examination of any actions:

1. for labour remuneration, to pronounce a dismissal wrongful and to revoke such dismissal, for compensation for the period of unemployment due to the dismissal, and for correction of the grounds for the dismissal as entered in the work book or in other documents;

2. for eviction from premises leased or loaned for use;

3. for establishment and cessation of an infringement of rights under the Copyright and Neighbouring Rights Act, the Patents and Utility Models Registration Act, the Marks and Geographical Indications Act, the Industrial Designs Act, the Topographies of Integrated Circuits Act, and the Protection of New Plant Varieties and Animal Breeds Act;

4. for ascertainment and cessation of violation of rights under the Consumer Protection Act;

5. (new, SG No. 42/2009, amended, SG No. 82/16.10.2009, repealed, SG No. 100/2010, effective 21.12.2010);

6. (Renumbered from Item 5, SG No. 42/2009) other actions whereof the examination in a summary proceeding is regulated in a law.

(2) (New, SG No. 100/2010, effective 21.12.2010) Upon objective joinder of an action provided for in Paragraph (1) with an action which is subject to examination according to the standard action procedure, a summary proceeding shall be inadmissible.

(3) (New, SG No. 100/2010, effective 21.12.2010) Upon joinder in a single statement of action of any action covered under Paragraph (1) with an action which is subject to examination according to the standard action procedure, a summary proceeding shall be inadmissible.

### Verification of Statement of Action

**Article 311.** (1) On the day of receipt of the statement of action, the court shall verify the conformity thereof and the admissibility of the action.

(2) The court shall instruct the plaintiff to amplify, particularize the allegations thereof and to eliminate the contradictions therein, where the said allegations are obscure, deficient or imprecise.

### Preparation of Case in Camera

**Article 312.** (1) On the day of receipt of the answer of the respondent or of the expiry of the time limit for receipt of the said answer, the court, sitting in camera, shall:

1. schedule a hearing of the case for a date within three weeks;
2. prepare a written report on the case;
3. invite the parties to reach a settlement and explain thereto the advantages of the various procedures for voluntary resolution of the dispute;
4. pronounce on the motions for evidence, admitting the evidence which is relevant, admissible and requisite;
5. determine an amount and a time limit for depositing of the costs of taking of evidence.

(2) The court shall serve upon the parties a duplicate copy of the order, and, in addition to the said duplicate copy, shall serve upon the respondent a duplicate copy of the written answer and the evidence attached thereto, and shall instruct the parties to take a stand, within one week, in connection with the instructions given and the report on the case and to undertake the relevant procedural steps, as well as advise the parties of the consequences of non-compliance with the instructions.

(3) The court shall pronounce on any motions made in due time in connection with the instructions and the report on the case on the day of receipt of the said motions. The order on the motions made shall be communicated to the parties.

#### Consequences of Non-compliance with Instructions

**Article 313.** Where the parties fail to comply with the instructions of the court within the time limit set, the said parties shall forfeit the possibility to do so later, unless the omission is due to special unforeseen circumstances.

#### Joinder of Actions

**Article 314.** (1) The plaintiff may, by the stand thereof on the report of the court, and the respondent may, by the written answer, approach the court with a motion to pronounce, by the judgment thereof, regarding the existence or non-existence of a disputed legal relation upon which the outcome of the case depends in whole or in part.

(2) Counter actions may not be brought, third parties may not be impleaded, and actions may not be brought against any such third parties according to the procedure of this proceeding.

(3) In actions for eviction from premises leased or loaned for use, oppositions as to ownership and to improvements made in the immovable shall be inadmissible.

#### Examination of Case

**Article 315.** (1) During the hearing for examination of the case, the court shall reinvite the parties to reach a settlement, and if no such settlement is reached, the court shall take the evidence presented and shall hear the oral arguments.

(2) During the same hearing, the court shall assign a day whereon the said court is to publish the judgment thereof and which shall be the day as from which the time limit for appellate review of the said judgment shall begin to run.

#### Time Limit for Rendition of Judgment

**Article 316.** The court shall publish the judgment thereof with the reasoning within two weeks after the hearing during which the examination of the case was concluded.

#### Applicability of Rules before Intermediate Appellate Review Court

**Article 317.** The rules of this Chapter shall apply, mutatis mutandis, to the proceeding before the intermediate appellate review court.

## **Chapter Twenty-Six PROCEEDING IN MATRIMONIAL SUITS**

### **Matrimonial Actions**

**Article 318.** The actions for divorce, for marriage annulment and for establishment of the existence or non-existence of a marriage between the parties shall be examined according to the procedure established by this Chapter.

#### Special Capacity to Sue

**Article 319.** Spouses who are minors and limited interdicts may bring matrimonial actions and be sued under such actions of their accord.

#### Divorce When Wife Pregnant

**Article 320.** The proceeding in a matrimonial action shall be stayed on a motion by the wife if she is pregnant and until the child attains the age of twelve months.

#### Examination of Case

**Article 321.** (1) During the first hearing for examination of the case on an action for divorce, the parties must appear in person. In case of non-appearance of the plaintiff without reasonable excuse, the proceeding shall be dismissed.

(2) After addressing the preliminary issues and the issues pertaining to the conformity of the statement of action, the court shall be obligated to redirect the parties to mediation or another procedure for voluntary resolution of the dispute.

(3) If the parties reach agreement on commencement of mediation or another procedure for voluntary resolution of the dispute, the case shall be stayed.

(4) Each of the parties may move for a resumption of the proceeding in the case within

six months. Unless such a motion is made, the case shall be dismissed.

(5) Where agreement is reached, depending on the content of the said agreement the case shall be dismissed or a proceeding for divorce by mutual consent shall be proceeded with.

(6) If the parties fail to reach agreement on a mediation procedure or another procedure for voluntary resolution of the dispute, the examination of the case shall continue.

#### Exhaustive Grounds

**Article 322.** (1) In an action for divorce, the plaintiff must raise all grounds for the deep and irrevocable break-down of the marriage. Any uncited grounds, which have occurred and have become known to the spouse prior to the conclusion of the oral arguments, may not serve as grounds for bringing a new action for divorce.

(2) All matrimonial actions may be joined therebetween. The demands for exercise of parental rights, interspousal personal relations and child maintenance, use of the matrimonial home, interspousal maintenance and the surname shall mandatorily be brought and examined by such actions.

(3) The provisions of Paragraphs (1) and (2) shall furthermore apply to the respondent regarding the actions which the said respondent could have brought.

(4) An action for marriage annulment by reason of a violation of the age qualification under Article 12 and by reason of threat under Item 2 of Article 96 (1) of the Family Code may not be brought after the action for divorce is dismissed.

#### Interim Measures

**Article 323.** (1) Acting on a petition by any of the parties, the court wherebefore the action for divorce or for marriage annulment has been brought shall rule on interim measures regarding the maintenance, the matrimonial home and the use of the property acquired during the marriage, as well as regarding the care of the children and the maintenance thereof.

(2) The court shall pronounce on any such petition during the hearing during which the said petition is submitted, unless additional evidence has to be taken. In such case, a new hearing shall be scheduled within two weeks.

(3) The ruling referred to in Paragraph (1) shall be unappealable but may be modified by the same court.

#### Judgment on Matrimonial Actions

**Article 324.** A judgment by default and a judgment upon admission of the demand shall not be rendered on matrimonial actions.

#### Entry into Effect of Judgment of Divorce

**Article 325.** A judgment on divorce shall enter into effect, even if the said judgment has

been appealed solely in the part thereof concerning the fault.

#### Surname after Divorce

**Article 326.** By the judgment whereby the divorce is granted, the court shall also address the issue of the surname which the spouses will be able to use in future.

#### Continuing Case upon Plaintiff's Death

**Article 327.** (1) (Amended, SG No. 47/2009, effective 1.10.2009) When the plaintiff spouse dies and the action for divorce is based on the fault of the surviving spouse, the court shall allow the descendants or parents called to accept the succession to state whether they wish to continue the case. This rule shall furthermore apply to an action for marriage annulment, if the surviving spouse acted in bad faith.

(2) If nobody states a wish to continue the case within the time limit allowed, the said case shall be dismissed. The case shall also be dismissed if the action for divorce is not based on the fault of the surviving spouse or if, upon an action for marriage annulment, the surviving spouse acted in good faith.

(3) Where the case is continued, the court shall pronounce solely on the culpable behaviour of the survivor cited by the deceased spouse as grounds for marriage annulment.

#### Continuing Case upon Respondent's Death

**Article 328.** Upon the death of the respondent, the persons referred to in Article 327 herein may continue the case if the action brought is in reference to Article 13 of the Family Code and the plaintiff acted in bad faith when the marriage was contracted.

#### Costs of Case

**Article 329.** (1) The court costs of matrimonial suits shall be awarded against the spouse at fault or the spouse who acted in bad faith. Where there is no fault or bad faith, or where both spouses are at fault or acted in bad faith, the costs shall be left borne by each one of them as incurred.

(2) Upon dismissal of the action for divorce, the costs shall be determined according to the procedure established by Article 78 herein. The same procedure shall furthermore apply to determination of costs upon appellate review of the judgment.

#### Divorce by Mutual Consent

**Article 330.** (1) Upon a motion for divorce by mutual consent, the spouses shall appear in person during the court hearing.

(2) Where any of the spouses fails to appear without reasonable excuse, the case shall be dismissed.

(3) After satisfying itself that the consent of the spouses to divorce is serious and firm, and after determining that the agreement reached under Article 101 of the Family Code does

not conflict with the law and is in the interest of the children, the court shall grant the divorce and shall endorse the agreement by a judgment.

(4) Examination of the petition shall be adjourned solely if additional evidence has to be taken.

(5) The judgment whereby divorce by mutual consent is granted shall be unappealable.

## **Chapter Twenty-Seven PROCEEDING IN CIVIL STATUS CASES**

### **Governing Provisions**

**Article 331.** (1) Any actions to establish or disavow filiation, as well as any actions to terminate adoption, shall be examined according to the procedure established by this Chapter.

(2) Articles 319 and 327 herein shall apply, mutatis mutandis, to any actions covered under Paragraph (1) regarding the continuing of the case by the heirs of the adopter to establish that it is well-founded.

#### Joinder of Actions for Maintenance

**Article 332.** (1) An action for maintenance of the child may be joined to the action to establish paternity or maternity, but interim maintenance may not be awarded in such cases.

(2) An action for compensation of the adoptee who has contributed to an augmentation of the property status of the adopter may be joined to the action to terminate adoption. Any such action may be brought as a counter action as well.

#### Duty to Cooperate

**Article 333.** (1) The parties to a filiation case shall be obligated to cooperate upon the preparation of the conclusion by the expert witness, unless the research involves a substantial or sustained risk to the life or health of the said parties.

(2) The court shall pronounce on a refusal to cooperate by a ruling which shall be subject to appellate review by separate appeal. Where the refusal is rightful, the court shall determine another method of research into filiation which does not involve any such risk.

(3) For obtaining any samples whereupon the inviolability of the body is not impaired, the court shall command, where necessary, the application of appropriate methods of compulsion.

(4) If evidence cannot be taken according to the procedure established by Paragraphs (1) to (3), the court may decree that the requisite post-mortem samples be taken except in the cases where this is prohibited by a law.

#### Judgment on Civil Status Action

**Article 334.** A judgment by default and a judgment upon admission of the demand shall not be rendered on any action for civil status.

#### Termination of Proceeding upon Child's Death

**Article 335.** The proceeding in cases to disavow paternity shall be terminated in the event of death of the child.

## Chapter Twenty-Eight INTERDICTION

### Commencement of Proceeding

**Article 336.** (1) The full or limited interdiction of a person may be moved for by a statement of action by the spouse, by members of the immediate family, by a prosecutor and by any person who has standing to do so.

(2) The participation of a prosecutor in the proceedings referred to in Paragraph (1) shall be mandatory.

#### Immediate Impressions of Person

**Article 337.** (1) The person sought to be interdicted must be examined in person and, if necessary, the attendance thereof shall be compelled. Where the said person is placed in a medical-treatment facility and the health condition thereof precludes that he or she be brought in person to a court hearing, the court shall be obligated to obtain an immediate impression of the condition of the said person.

(2) If, after the examination, the court deems it necessary, the court shall appoint a provisional curator to take care of the personal and property interests of the person referred to in Paragraph (1).

#### Examination of Action

**Article 338.** (1) The court shall pronounce on the statement of action after an examination of the person sought to be interdicted and of the family members thereof. If this proves insufficient, the court shall proceed with taking of other evidence and hearing of expert witnesses.

(2) If the person is placed in a medical-treatment facility, the court shall procure information on the condition of the said person.

(3) After the entry into effect of the judgment whereby the person is interdicted, the court shall communicate this to the authority on tutorship and on curatorship in order to institute tutorship or curatorship.

(4) The plaintiff shall not be entitled to costs in the interdiction proceeding. If the action

is dismissed, the plaintiff shall owe the respondent the costs incurred thereby in connection with the case.

#### Judgment on Action for Interdiction

**Article 339.** A judgment by default and a judgment upon admission of the demand shall not be rendered on any action for interdiction.

#### Vacation of Interdiction

**Article 340.** (1) The provisions of this Chapter shall furthermore apply to a vacation of interdiction.

(2) A vacation of interdiction may be requested, inter alia, by the authority on tutorship and on curatorship or by the tutor.

## Chapter Twenty-Nine JUDICIAL PARTITION

### Commencement of Proceeding

**Article 341.** (1) Any co-heir who wishes a partition shall submit a written petition to the regional court, attaching thereto:

1. a certificate of death of the decedent and a certificate of heirship of the said decedent;
2. a certificate or other written evidence of the succession immovables;
3. duplicate copies of the petition and the attachments for the other co-heirs.

(2) During the first hearing of the case, each of the remaining co-heirs may move, by a written petition, for incorporation of other immovables into the decedent's estate.

#### First Hearing

**Article 342.** During the first hearing, each of the co-heirs may oppose the right of any of the said co-heirs to participate in the partition, to the amount of the share of each of the said co-heirs, as well as to the incorporation of certain immovables into the decedent's estate.

#### Pre-conditioning Questions

**Article 343.** Disavowals of filiation, contestations of adoptions, of testaments and of the truthfulness of written evidence, as well as motions for reduction of testamentary dispositions and of donations, shall be examined in the partition proceeding.

#### Judgment Granting Partition

**Article 344.** (1) In the judgment whereby partition is granted, the court shall pronounce

on the questions as to between which persons and in respect of which immovables the said partition is to be made, as well as what share appertains to each co-heir. Where partition of movable things is granted, the court shall furthermore pronounce on the question as to which of the co-partitioners holds the said things.

(2) In the judgment referred to in Paragraph (1) or later, if all heirs do not use the succession immovables in conformity with the rights thereof, the court, acting on a motion by some of the said heirs, shall decree which of the heirs are to avail themselves of which immovables until the partition is finally made or what amounts the former must pay the latter in consideration of the use.

(3) The ruling under Paragraph (2) may be modified by the same court. Any such ruling shall furthermore be appealable by an interlocutory appeal.

#### Exclusion of Immovables from Partition

**Article 345.** Where the succession includes any immovables which the decedent owned in co-ownership with third parties, the said immovables shall be excluded from the divisible estate, if a partition is not made between the heirs, of the one part, and the third parties, of the other hand, prior to the drawing up of the memorandum of division.

#### Demands for Accounts

**Article 346.** During the first hearing after the granting of the petition, the co-heirs may raise demands for accounts therebetween, citing the evidence in their possession.

#### Memorandum of Division

**Article 347.** The court shall draft the memorandum of division on the basis of the conclusion of an expert witness in compliance with the rules of the Succession Act.

#### Offering for Public Sale

**Article 348.** Where any immovable is indivisible and cannot be allocated to any of the shares, the court shall decree that the said immovable be offered for public sale. The parties to the partition may bid in the public sale.

#### Award of Indivisible Dwelling Unit

**Article 349.** (1) If the indivisible immovable is a dwelling unit which constituted matrimonial community property terminated by the death of one spouse or by divorce, and the surviving or former spouse, who has been awarded the exercise of parental rights in respect of the children from the marriage, does not have a dwelling unit of his or her own, the court, acting on a motion by the said spouse, may allocate any such dwelling unit to a share, the shares of the rest of the co-partitioners being balanced by other immovables or by money.

(2) If the indivisible immovable is a dwelling unit, each of the co-partitioners who, upon the opening of the succession resided therein and does not own another dwelling unit, may move that the said dwelling unit be allocated to the share thereof, with the shares of the rest of the co-partitioners being equalized by another immovable or by money. Where several co-

partitioners satisfying the conditions of sentence one lay claims to allocation of the immovable to the share thereof, preference shall be given to the co-partitioner who offers a higher price.

(3) The interested parties may record a legal mortgage for the claims for balancing of the shares.

(4) A motion for award may be made at the latest during the first hearing after the entry into effect of the judgment granting the partition under Article 344 (1) herein. The immovable shall be appraised at the actual value thereof.

(5) Where the balancing is by money, the said balancing must be paid together with the statutory interest within six months after the entry into effect of the judgment of award.

(6) The co-partitioner, to whose share the immovable is allocated according to the procedure established by Paragraphs (1) and (2), shall become owner of the said immovable after paying the money balancing as set together with the statutory interest within the time limit referred to in Paragraph (5). If the balancing is not paid within the said time limit, the judgment of award shall be invalidated ex lege and the property shall be offered for public sale. The immovable may not be offered for public sale and may be awarded to another co-partitioner who satisfies the conditions under Paragraph (2) and has moved for an award within the time limit referred to in Paragraph (4) if the said partitioner forthwith pays the price whereat the immovable was appraised upon the partition, debited with the value of the share of the said partitioner in the said immovable. The resulting amount shall be apportioned among the rest of the co-partitioners according to the quotas thereof.

#### Final Memorandum of Division

**Article 350.** After drawing up the draft of the memorandum of division, the court shall summon the parties in order to present the said draft thereto and to hear the oppositions thereof to the said draft. Thereafter, the court shall draw up and publish the final memorandum of division.

#### Appellate Review of Judgments

**Article 351.** The judgments under Articles 346, 348, 349 and 350 herein shall be appealable by a general appeal within the time limit for appellate review of the latest judgment.

#### Drawing of Lots

**Article 352.** After the judgment on the memorandum of division enters into effect, the court shall summon the parties for a drawing of lots.

#### Apportionment of Immovables

**Article 353.** The court may make the partition by apportioning the succession immovables among the co-partitioners without drawing of lots, where the formation of shares and the drawing of lots proves impossible or very inconvenient.

#### Buy-out by Co-partitioner

**Article 354.** (1) Where the immovable is offered for public sale as indivisible, each of the co-partitioners in the partition may buy out the said immovable under the terms established by Article 505 (2) herein.

(2) If several co-partitioners wish to buy out the immovable under the terms established by Paragraph (1), a new sale shall be conducted solely between the said co-partitioners, with the highest price offered in the first sale as the starting bid. The said new sale shall continue for one week and shall follow the general rules.

(3) If none of the co-partitioners buys out the immovable in the sale referred to in Paragraph (2), the said immovable shall be awarded to the third-party bidder in respect of the partition who offered the highest price in the first sale.

#### Costs of Proceeding

**Article 355.** The parties shall pay the costs in proportion to the shares thereof. The costs under the joined actions in the partition proceeding shall be determined under Article 78 herein.

## **Chapter Thirty** **REMEDY AGAINST AND RECOVERY OF** **DISTURBED POSSESSION**

### **Generic Cognizance**

**Article 356.** Any actions for remedy against disturbed possession and holding and for recovery of disturbed possession and holding (Articles 75 and 76 of the Ownership Act) shall be cognizable in the regional court acting as a court of first instance.

#### Establishment of Fact of Possession

**Article 357.** (1) Under these cases, the court shall verify solely the fact of possession or of the disturbance thereof.

(2) The documents attesting the right of ownership shall be taken into account solely insofar as the said documents establish the fact of possession.

#### Verification as to Legal Conformity

**Article 358.** Where possession has been forfeited at a command or with the cooperation of an enforcement agent or another state body, the court shall verify the legal conformity of the command or, respectively, of the acts performed, regardless of whether they are appealable or have been appealed.

#### Inadmissibility where Action for Ownership Brought

**Article 359.** The person, who has brought an action for ownership of a corporeal immovable, may not bring an action for possession against the same respondent in respect of the same immovable while the suit for the ownership is pending, unless dispossession has been effected through violent means or through concealment after the said action has been brought.

Fine for Disturber

**Article 360.** Where the possession or holding has been forfeited through violent means or through concealment (Article 76 of the Ownership Act), the court may, inter alia, impose on the disturber a fine not exceeding BGN 1,000.

Anticipatory Enforcement

**Article 361.** The judgment regarding the delivery of the immovable shall be subject to anticipatory enforcement and may not be stayed.

## **Chapter Thirty-One**

### **PROCEEDING FOR CONCLUSION OF FINAL CONTRACT**

#### **Declaring Finality of Contract in Case of Cross-Obligation**

**Article 362.** (1) In an action under Article 19 (3) of the Obligations and Contracts Act, if, according to the preliminary contract, the plaintiff must perform a cross-obligation thereof upon conclusion of the final contract, the court shall render judgment in lieu of the final contract, subject to the condition that the plaintiff is to perform the obligation thereof. In such case, the plaintiff must perform the obligation thereof within two weeks after the entry into effect of the judgment, inter alia through setting off the obligations to the State paid thereby for the account of the respondent.

(2) If the plaintiff fails to perform the obligation thereof within the time limit referred to in Paragraph (1), the first-instance court, acting on a motion by the respondent, shall invalidate the judgment.

Verification of Ownership

**Article 363.** Where the obligation is for transfer of a right of ownership to an immovable, the court shall verify whether the prerequisites for transfer of the ownership according to a notarial procedure apply, including whether the transferor is owner of the said immovable.

Fees and Costs

**Article 364.** (1) By the judgment thereof, the court shall order the plaintiff to pay the State the costs due for the transfer of the immovable and shall command the recording of a preventive attachment of the said immovable until payment of the said costs.

(2) (Supplemented, SG No. 50/2008) The court shall not issue a duplicate copy of the judgment until the plaintiff proves that the costs of the transfer and the taxes and fees due for the immovable have been paid.

## **Chapter Thirty-Two**

### **PROCEEDINGS IN COMMERCIAL DISPUTES**

#### **Governing Provisions**

**Article 365.** According to the procedure established by this Chapter, the district court, acting as a court of first instance, shall examine actions for a right or a legal relation arising from or appertaining to:

1. a commercial transaction, including the conclusion, interpretation, validity, performance, non-performance or termination of any such transaction, the consequences of the termination thereof, as well as for filling gaps in a commercial transaction or adjustment of any such transaction to intervening circumstances;

2. a privatization contract, a public procurement contract, or a concession agreement;

3. participation in a commercial corporation or in another legal person which is a merchant, as well as for establishment of admissibility or nullity of a recording and for non-existence of a circumstance recorded in the commercial register;

4. replenishment of the bankruptcy estate, including the actions of creditors for a declaratory judgment;

5. cartel agreements, decisions and concerted practices, concentration of economic activities, unfair competition, and abuse of a monopoly position or of a dominant position.

#### Attachments to Statement of Action

**Article 366.** As an attachment to a statement of action for a pecuniary receivable, the party shall be obligated to present a statement containing the calculations required for determination of the amount of the said receivable.

#### Answer to Statement of Action

**Article 367.** (1) After accepting the statement of action, the court shall transmit a duplicate copy of the said statement together with the attachments to the respondent, instructing the said respondent to submit a written answer within two weeks, specifying the mandatory content of the answer and the consequences of the non-submission of an answer or of the non-exercise of rights.

(2) The written answer of the respondent must contain:

1. a reference to the court and to the case number;

2. the name and address of the respondent, as well as of the legal representative or attorney-in-fact thereof, if any;

3. a stand on the admissibility of the action and on whether the action is well-founded;

4. a stand on the circumstances upon which the action is founded;

5. the oppositions to the action and the circumstances upon which the said oppositions are founded;

6. signature of the person who submits the answer.

(3) In the answer to the statement of action, the respondent shall be obligated to cite exactly the evidence and the specific circumstances which the said respondent is to prove thereby, as well as to present all written evidence in the possession thereof.

(4) Within the time limit for an answer, the respondent may bring a counter action, may implead third parties and may bring actions thereagainst.

#### Attachments to Answer to Statement of Action

**Article 368.** Duplicate copies of the answer and of the attachments thereto according to the number of plaintiffs shall be presented attached to the answer to the statement of action.

#### Opposition to Examination According to Standard Procedure

**Article 369.** (1) An opposition alleging that the dispute is not subject to examination according to the standard procedure may be lodged solely by the respondent at the latest by the answer to the statement of action, or may be raised ex officio by the court within the same time limit.

(2) A ruling that the dispute is subject to examination according to the standard procedure shall be appealable by an interlocutory appeal.

#### Consequences of Non-submission of Answer

**Article 370.** (Supplemented, SG No. 50/2008) Where the respondent fails, within the established time limit, to submit a written answer, to take a stand, to lodge oppositions, to contest the truthfulness of a document presented, to cite evidence or to present written evidence, the said respondent shall forfeit the possibility to do so later, unless the omission is due to special unforeseen circumstances.

#### Opposition to Set-Off after Time limit for an answer

**Article 371.** An opposition to set-off may be raised prior to the conclusion of the trial in the court of first instance, where taking of new evidence is not required to prove the said set-off, or prior to the conclusion of the trial in the court of intermediate appellate review instance, where the existence or non-contestation of the said set-off are established by an effective judgment of court or an enforcement order.

### Additional Statement of Action

**Article 372.** (1) After accepting the answer, the court shall transmit a duplicate copy of the said answer together with the attachments to the plaintiff, who may submit an additional statement of action within two weeks.

(2) In the additional statement of action, the plaintiff may explain and amplify the initial statement of action. Within the time limit for submission of an additional statement of action, the plaintiff may modify the demand raised, may implead third parties and bring actions thereagainst, may approach the court with a motion to pronounce by the judgment itself inter alia regarding the existence or non-existence of a legal relation disputed in the answer to the statement of action upon which the outcome of the case depends in whole or in part, as well as cite and present new evidence which the plaintiff was unable to cite and present by the statement of action.

### Additional Answer

**Article 373.** (1) After accepting the additional statement of action, the court shall transmit a duplicate copy of the said statement together with the attachments to the respondent who may submit an answer within two weeks.

(2) In the additional answer, the respondent shall be obligated to respond to the additional statement of action. Within the time limit for submission of an additional statement of action, the respondent may approach the court with a motion to pronounce by the judgment itself inter alia regarding the existence or non-existence of a legal relation disputed in the additional statement of action upon which the outcome of the case depends in whole or in part, as well as cite and present new evidence which the respondent was unable to cite and present by the answer to the statement of action.

### Preparation of Case in Camera

**Article 374.** (1) After verifying the conformity of the papers exchanged and the admissibility of the actions brought, including the cost of the said actions, as well as the other motions and oppositions by the parties, the court shall render a ruling on all preliminary issues and on admission of the evidence. Alternatively, the court may pronounce on the admission of certain evidence in public session solely if the court determines that the oral explanations of the parties must be heard as well.

(2) The court shall schedule a hearing of the case in public session, transmitting the additional answer to the plaintiff. The court shall communicate the ruling thereof referred to in Paragraph (1) to the parties. The court may furthermore communicate to the parties the court's draft of a report on the case, as well as direct the parties to mediation or another procedure for voluntary resolution of the dispute.

### Examination of Case in Public Session

**Article 375.** (1) The court, sitting in public session, shall deliver an oral report, shall give instructions to the parties, and shall afford the parties an opportunity to set forth the stand thereof in connection with the report on the case and the instructions given, as well as to undertake the procedural steps they wish, whereafter the court shall take the evidence

admitted and shall hear the oral arguments.

(2) If the case is of factual and legal complexity, the court may allow each of the parties time to present a written defence and a reply.

#### Examination of Case in Camera

**Article 376.** (1) Where all evidence has been presented by the exchange of papers and if the court holds that hearing of the parties is not necessary, the court may examine the case in camera, affording the parties an opportunity to present written defences and replies.

(2) The court shall examine and adjudicate in the case in camera where the parties move for this.

(3) The court shall assign a day whereon the said court is to publish the judgment thereof and which shall be the day as from which the time limit for appellate review shall begin to run.

#### Applicability of General Rules

**Article 377.** Save insofar as there are any special rules for the proceeding in commercial cases, the general rules applicable to the proceeding before the court of first instance shall apply.

#### Applicability of Rules before Intermediate Appellate Review Court

**Article 378.** The rules of this Chapter shall apply, *mutatis mutandis*, to the proceeding before the intermediate appellate review court.

## **Chapter Thirty-Three PROCEEDINGS IN CLASS ACTIONS**

### **Class Actions**

**Article 379.** (1) A class action may be brought on behalf of persons who are harmed by the same infringement where, according to the nature of the infringement, the circle of the said persons cannot be defined precisely but is identifiable.

(2) Any persons who claim that they are harmed by an infringement under Paragraph (1), or any organizations responsible for the protection of injured persons or for protection against such infringements, may bring, on behalf of all injured persons, an action against the infringer for establishment of the harmful act or omission, an action for the wrongfulness of the said act or omission, and an action for the blame.

(3) Any persons who claim that the collective interest thereof has been harmed or is likely to be harmed by an infringement referred to in Paragraph (1), or any organization responsible for the protection of injured persons, of the harmed collective interest or for protection against such infringements, may bring, on behalf of all injured persons, an action

against the infringer for cessation of the infringement, for rectification of the consequences of the infringement of the harmed collective interest, or for compensation for the damages inflicted on the said interest.

#### Bringing Class Action

**Article 380.** (1) Class actions shall be examined by the district court acting as a court of first instance according to the procedure established by this Chapter.

(2) The statement of action, apart from the circumstances upon which the action is founded, shall specify the circumstances which identify the circle of injured persons and the form in which publication of the bringing of the action is proposed.

(3) Evidence of the capacity of the plaintiff to protect the harmed interest seriously and in good faith, as well as to incur the charges related to the conduct of the case, including the costs, shall be presented attached to the statement of action.

#### Verification of Conditions for Bringing Class Action

**Article 381.** (1) After verification of the admissibility of the action brought and the conformity of the statement of action, the court shall verify ex officio the capacity of the person or persons who have brought the action to protect the harmed interest seriously and in good faith and to incur the charges related to the conduct of the case, including the costs.

(2) The court may hear the person or persons who have brought the action in public session.

(3) The court shall not admit the case to examination if none of the persons who have brought the action satisfies the conditions referred to in Paragraph (1) or if all such persons together do not satisfy the said conditions.

(4) The ruling of the court whereby the case is not admitted to examination shall be appealable by an interlocutory appeal.

#### Preparation of Case for Examination

**Article 382.** (1) The court, sitting in public session with the parties being summoned, shall hear the stands of the parties regarding the circumstances which identify the circle of injured persons and the form of publication of the bringing of the action.

(2) The court shall rule on:

1. an adequate form of publication of the bringing of the action: number of announcements, through which media and for what length of time the said announcements must be made;

2. an adequate time limit after the publication within which the injured persons may declare that they will participate in the procedure or will pursue a remedy independently.

(3) The ruling shall be appealable by an interlocutory appeal.

## Acceptance of New Participants and Exclusion from Participation

**Article 383.** (1) The court, sitting in camera, shall:

1. accept for participation in the procedure other injured persons, organizations responsible for the protection of the injured persons, of the harmed collective interest or for protection against such infringements, who or which have declared, within the time limit set, a motion for participation in the procedure;

2. exclude the injured persons who have declared, within the time limit set, that they will pursue a remedy independently in a separate procedure.

(2) The ruling whereby inclusion of new participants or exclusion from participation is refused shall be appealable by an interlocutory appeal.

(3) The court shall issue a duplicate copy of the ruling on exclusion to the persons who have declared, within the time limit set, that they will pursue a remedy independently in a separate procedure.

## Accommodation on Voluntary Resolution of Dispute

**Article 384.** (1) The court shall direct the parties to a settlement and shall explain thereto the advantages of the various procedures for voluntary resolution of the dispute.

(2) The court shall approve the settlement, agreement, conciliation or another accommodation reached on a partial or comprehensive resolution of the dispute if the said accommodation does not conflict with the law and good morals and if the harmed interest can be protected in a sufficient degree through the measures included in the said accommodation.

(3) The accommodation on resolution of the dispute shall take effect after being approved by the court.

## Measures for Protection of Harmed Interest

**Article 385.** (1) The court may order the respondent to perform a specific act, to refrain from performing a specific act, or to pay a specific amount.

(2) Acting on a petition by the plaintiff, the court wherebefore the action has been brought may rule on adequate interim measures for protection of the harmed interest. The ruling may be modified or vacated by the same court consequent to a change of circumstances, an error or an omission.

(3) The ruling shall be subject to intermediate appellate review and cassation appellate review regardless of the prerequisites for cassation appealability covered under Article 280 (1) herein. An appellate review of the ruling shall not stay the enforcement thereof, unless the court competent to examine the appeal decrees otherwise.

(4) Upon rendition of the judgment, the court shall not be bound by the measures for protection cited by the plaintiff. Considering the specifics of the case and after taking into

account the stand of the respondent, the court may decree other measures which ensure adequate protection of the harmed interest.

#### Judgment on Class Action

**Article 386.** (1) The judgment of the court shall have effect in respect of the infringer, the person or persons who have brought the action, as well as in respect of those persons who claim that they are harmed by the established infringement and who have not declared that they wish to pursue a remedy independently in a separate procedure. The excluded persons may avail themselves of the judgment whereby the class action has been granted.

(2) A list of the excluded persons shall be attached to the judgment of the court.

(3) The judgment shall be subject to intermediate appellate review and cassation appellate review regardless of the prerequisites for cassation appealability covered under Article 280 (1) herein.

(4) A judgment on a class action may not be reversed under Article 304 herein.

#### Disposition of Compensation

**Article 387.** (1) The court may decree that the compensation be credited to an account of one of the persons who have brought the action, to a special account jointly disposable by the persons who have brought the action, or to a special account jointly disposable by the injured persons.

(2) After rendition of the judgment, the court may obligate the persons who have brought the action to transfer the compensation to a special account jointly disposable by the injured persons, taking adequate measures to secure the execution of this obligation.

#### Injured Persons' General Meeting and Committee

**Article 388.** (1) The first-instance court may convene a general meeting of the injured persons by publishing the notice in the form in which the bringing of the action has been published. The general meeting of the injured persons shall be presided over by the judge and may act if at least six injured persons present themselves.

(2) The general meeting of the injured persons shall elect a committee to dispose of the assets on the special account and may resolve on the acts which the said general meeting assigns the said committee to perform.

## **PART FOUR PRECAUTIONARY PROCEEDINGS**

### **Chapter Thirty-Four GRANTING INJUNCTION**

## **Injunction Securing Action Brought**

**Article 389.** (1) During any stage of the proceeding prior to the conclusion of the trial in the intermediate appellate review proceeding, the plaintiff may approach the court wherebefore the case is pending with a motion to grant an injunction securing the action brought.

(2) An injunction may be granted to secure all types of action.

### **Injunction Securing Future Action**

**Article 390.** (1) Even before the action is brought, an injunction may be sought from the generically competent court exercising jurisdiction over the permanent address of the plaintiff or over the location of the immovable which is to serve as security.

(2) (New, SG No. 42/2009) In actions in which the generic competence is determined by the amount of the tax-assessed value of a corporeal immovable, the competent court shall be the district court exercising jurisdiction over the place where the immovable is located regardless of the cost of action.

(3) (Renumbered from Paragraph (2), SG No. 42/2009) In the case referred to in Paragraph (1), the court shall set a time limit for bringing of the action which may not be longer than one month. Unless proof of bringing an action within the time limit set is presented, the court shall dissolve the injunction ex officio.

(4) (Renumbered from Paragraph (3), SG No. 42/2009, amended, SG No. 100/2010, effective 21.12.2010) The petition to grant an injunction securing a future action by means of a stay of enforcement shall be submitted to the generically competent court exercising jurisdiction over the place of the enforcement. A stay of enforcement shall be granted solely upon furnishing of a bond.

### **Prerequisites for Granting Injunction**

**Article 391.** (1) An injunction securing the action shall be granted where, without such an injunction, it will be impossible or difficult for the plaintiff to realize the rights under the judgment and if:

1. the action is supported by convincing written evidence, or
2. a bond is furnished in an amount determined by the court according to Articles 180 and 181 of the Obligations and Contracts Act.

(2) The court may obligate the plaintiff to furnish a bond of money or property in an amount determined by the court even in the case referred to in Item 1 of Paragraph (1).

(3) The amount of the bond shall be determined on the basis of the amount of the direct and immediate damages which the respondent will incur if the injunction is unfounded.

(4) The State, the government institutions and the medical-treatment facilities covered under Article 5 (1) of the Medical-Treatment Facilities Act shall be exempted from

furnishing a bond.

(5) An injunction securing the action shall be granted even when the case is stayed.

#### Injunction Securing Action for Maintenance Obligations

**Article 392.** An injunction securing actions for maintenance obligations shall be granted even without compliance with the requirements of Article 391 herein. In such case, the court may alternatively take measures to secure the action ex officio.

#### Inadmissibility of Injunction

**Article 393.** (1) (Supplemented, SG No. 50/2008) An injunction securing an action for a pecuniary receivable against the State, the government institutions, the municipalities and the medical-treatment facilities covered under Article 5 (1) of the Medical-Treatment Facilities Act shall be inadmissible.

(2) An injunction securing an action for a pecuniary receivable by means of garnishment of receivables whereagainst coercive enforcement is inadmissible shall be inadmissible.

#### Partial Injunction

**Article 394.** The court may grant an injunction securing the full amount of the action or only such portions of the action as are supported by sufficient evidence.

#### Petition to Grant Injunction

**Article 395.** (1) The petition for an injunction shall specify the precautionary measure and the cost of the action. A duplicate copy of the said petition shall not be served upon the opposing party.

(2) The petition shall be adjudicated in camera on the day on which the said petition is submitted.

(3) On the basis of the ruling whereby the petition is granted, the court shall issue an injunctive order. Where a bond has been set, the court shall issue an injunctive order after the said bond has been deposited.

#### Appellate Review

**Article 396.** (1) The ruling of the court on an injunction securing the action shall be appealable by an interlocutory appeal within one week which shall begin to run, in respect of the petitioner, as from the service of the said ruling and, in respect of the respondent, as from the day of service thereupon of a communication of the precautionary measure imposed by the enforcement agent, by the Recording Office or by the court in the cases referred to in Item 3 of Article 397 (1) herein.

(2) (Supplemented, SG No. 100/2010, effective 21.12.2010) A duplicate copy of the interlocutory appeal shall be served upon the opposing party for an answer within one week. In an appellate review of a ruling whereby a motion to grant an injunction securing the action

has been denied, a duplicate copy of the interlocutory appeal of the petitioner shall not be served upon the respondent. In case the intermediate appellate review court grants the injunction, the ruling of the said court shall be appealable by an interlocutory appeal before the Supreme Court of Cassation if the prerequisites covered under Article 280 (1) herein apply.

(3) The ruling whereby an injunction securing the action is granted may not be stayed by reason of being appealed by an interlocutory appeal.

## **Chapter Thirty-Five PRECAUTIONARY MEASURES**

### **Types of Measures**

**Article 397.** (1) An injunction shall be effected:

1. by means of imposition of a preventive attachment of a corporeal immovable;
2. by means of garnishment of movable things and receivables of the debtor;
3. through other appropriate measures determined by the court, including through a suspension from operation of a motor vehicle and through a stay of enforcement.

(2) The court may grant several types of injunction up to the amount of the cost of action as defined in Article 69 (1) herein.

#### Replacement of Injunction

**Article 398.** (1) The court, acting on a motion by one of the parties, may, after notifying the other party and taking into account the oppositions thereof lodged within three days after the communication, grant the replacement of one type of injunction by another type.

(2) Where the injunction secures an action appraisable in money, the respondent may always replace the injunction as granted by the court by a pledge of money or of securities according to Articles 180 and 181 of the Obligations and Contracts Act without the consent of the other party. This shall not apply to any injunction securing actions for ownership.

(3) In the cases referred to in Paragraphs (1) and (2), the garnishment and preventive attachment shall be dissolved.

#### Consent Regarding Object of Injunction

**Article 399.** If the action is based on a contract which specifies the immovable which is to serve as security, the injunction shall be granted solely in respect of the said immovable, unless the said immovable is not available or has been encumbered, in the intervening time, by other charges which render the security insufficient.

#### Imposition of Precautionary Measure

**Article 400.** (1) Garnishment shall be imposed immediately by the enforcement agent on a motion by the petitioner on the basis of the injunctive order of the court according to Article 449 (1), Article 450 (1) and (2), Articles 507, 515, 516 and 517 herein, and a communication instead of a summons to voluntary compliance shall be served upon the respondent. In case of garnishment of a movable thing, the enforcement agent shall take an inventory, conduct an appraisal and deliver the thing for safekeeping according to Articles 465 to 472 herein.

(2) Preventive attachment shall be imposed by recording of the injunctive order of the court in the notarial books. The Recording Office shall notify the respondent of the recording effected.

#### Effect of Precautionary Measure

**Article 401.** A garnishment and a preventive attachment, imposed to secure an action, shall take the effect provided for in Articles 451 to 453, Article 456 (1), Articles 508, 509 and Articles 512 to 514 herein. The secured creditor may bring an action against the garnishee for the amounts or the corporeal things which the said garnishee refuses to surrender voluntarily. Articles 435 (4) and Article 440 herein shall apply to this case.

#### Dissolution of Injunction

**Article 402.** (1) Dissolution of the injunction shall be decreed on a petition by the interested party. A duplicate copy of the petition shall be served upon the person on whose motion the injunction has been imposed. The said person may lodge oppositions within three days after receipt of the duplicate copy.

(2) The court, sitting in camera, shall dissolve the injunction after satisfying itself that the reason for which the said injunction was granted no longer exists, or that the conditions referred to in Article 398 (2) herein apply. The ruling of the court shall be appealable by an interlocutory appeal.

(3) The lifting of the garnishment, the striking of the preventive attachment, as well as the dissolution of the other precautionary measures shall be effected on the basis of the effective ruling of the court.

#### Compensation for Damages

**Article 403.** (1) If the action for the securing of which the injunction has been granted is dismissed or if the said action is not brought within the time limit set to the plaintiff, or if the case is dismissed, the respondent may seek from the plaintiff recovery of the damages inflicted as a result of the injunction.

(2) In the cases referred to in Paragraph (1), for the release of the bond furnished, the interested party shall submit a petition with a duplicate copy for the opposing party. Within one week after service of the petition, the respondent may lodge an opposition to the release of the bond and, within one month, bring an action for the damages inflicted thereon. If the respondent fails to lodge an opposition and to bring such an action within the said time limits, the bond shall be released.

# **PART FIVE ENFORCEMENT PROCEEDINGS**

## **TITLE ONE GENERAL DISPOSITIONS**

### **Chapter Thirty-Six ISSUING OF WRIT OF EXECUTION**

#### **Enforcement Title**

**Article 404.** The following shall be subject to coercive enforcement:

1. the effective judgments and rulings of the court, the adverse judgments of the intermediate appellate review courts, the enforcement orders, the memoranda on court settlement, the judgments of enforcement and enforcement orders which are subject to or are admitted to anticipatory or immediate enforcement, as well as the awards of the arbitration courts and the settlements reached before such courts in arbitration cases;

2. the judgments, acts and memoranda on court settlement of the foreign courts which are enforceable within the territory of the Republic of Bulgaria without an express proceeding;

3. the judgments, acts and memoranda on court settlement of the foreign courts, as well as the awards of the foreign arbitration courts and the settlement reached before such courts in arbitration cases, which have been admitted to enforcement within the territory of the Republic of Bulgaria.

Proceeding for Issuing of Writ of Execution

**Article 405.** (1) A writ of execution shall be issued on a written petition on the basis of any of the acts specified in Article 404 herein. A duplicate copy of the said petition shall not be served upon the debtor.

(2) A petition based on the acts covered under Item 1 of Article 404 herein shall be submitted to the first-instance court which has examined the case or to the court which has issued the enforcement order, and where the act is subject to immediate enforcement, any such petition shall be submitted to the court which has rendered the judgment of enforcement or has decreed the enforcement order.

(3) A petition based on the awards of the domestic arbitration courts and the settlements reached before such courts in arbitration cases shall be submitted to the Sofia City Court.

(4) The court competent to admit the enforcement shall issue a writ of execution on the basis of the acts covered under Items 2 and 3 of Article 404 herein. A writ of execution

issued on the basis of the acts covered under Item 3 of Article 404 herein shall not be delivered to the creditor until the judgment admitting the enforcement enters into effect.

(5) In respect of any amounts awarded in favour of the State, the court shall issue a writ of execution *ex officio*.

(6) A petition based on the acts covered under Item 1 of Article 404 herein shall be examined *in camera* within seven days by a judge of the competent court.

#### Order to Issue Writ of Execution

**Article 406.** (1) A writ of execution shall be issued after the court verifies whether the act is *prima facie* conforming and whether the said act attests the receivable enforceable against the debtor.

(2) In the cases covered under Items 2 and 3 of Article 404 herein, the court shall furthermore verify whether the receivable is enforceable by the methods of the Bulgarian law. Where this is impossible, the court shall decree a substitute enforcement which can satisfy the creditor.

(3) The judge shall make a due note on the act regarding the issuing of the writ of execution.

(4) Articles 247, 250 and 251 herein shall apply, *mutatis mutandis*, in the proceeding for the issuing of a writ of execution.

#### Appellate Review of Order to Issue Writ of Execution

**Article 407.** (1) An order whereby a petition to issue a writ of execution is granted or refused in whole or in part shall be appealable by an interlocutory appeal within two weeks which shall begin to run, in respect of the petitioner, as from the service of the order and, in respect of the respondent, as from the service of the notice of voluntary compliance.

(2) The appellate review of the order whereby the petition is granted shall not stay the enforcement.

(3) Where the writ of execution has been issued under the terms established by Article 406 (2) herein, the order shall be appealable according to the standard procedure.

#### Original Writ of Execution

**Article 408.** (1) A writ of execution shall be issued in a single copy, signed by a judge of the competent court.

(2) Where several separate immovables have to be delivered or where the judgment has been rendered in favour of or adverse to several persons, separate writs of execution may be issued, specifying the part of the judgment which is enforceable under each writ.

#### Replacement Writ of Execution

**Article 409.** (1) If the original writ of execution is lost or destroyed, the court which has issued the said writ, acting on a written petition by the petitioner, shall issue a replacement of the said writ on the basis of the act under which the original was issued.

(2) The petition shall be examined in public session after a duplicate copy of the said petition is served upon the execution debtor.

(3) Apart from the lack of conditions under Paragraph (1), the execution debtor may furthermore raise an opposition of redemption of the debt on the basis of circumstances which have intervened after the establishment of the existence of the said debt.

(4) The judgment rendered shall be appealable according to the standard procedure. After the judgment enters into effect, the execution debtor may not contest the existence of the debt on grounds which the said debtor could have raised in the proceeding for the issuing of the replacement.

(5) If the act itself has been lost or destroyed and the content thereof cannot be restored by means of official documents, the petitioner may bring an action for performance against the execution debtor.

## **Chapter Thirty-Seven**

### **ORDER FOR PAYMENT PROCEEDING**

#### **Enforcement Order: Application for Issuing**

**Article 410.** (1) The applicant may request the issuing of an enforcement order:

1. for receivables of sums of money or of fungible things, where the action is cognizable in the regional court;

2. for the delivery of a movable thing which the execution debtor has received with an obligation to return the said thing or which is encumbered by a pledge or has been transferred to the debtor with an obligation to surrender possession, where the action is cognizable in the regional court.

(2) The application shall contain a prayer to issue a writ of execution and must comply with the requirements covered under Article 127 (1) and (3) and Items 1 and 2 of Article 128 herein.

Enforcement Order: Issuing

**Article 411.** (1) (Amended, SG No. 42/2009) The application shall be submitted to the regional court exercising jurisdiction over the permanent address or over the registered office of the execution debtor.

(2) The court shall examine the application in private deliberation and shall issue an enforcement order within three days, except where:

1. the prayer does not comply with the requirements covered under Article 410 herein;
2. the prayer conflicts with the law or with good morals;
3. the execution debtor does not have a permanent address or a registered office within the territory of the Republic of Bulgaria;
4. the execution debtor does not have a habitual residence or a place of business within the territory of the Republic of Bulgaria.

(3) Where the application is granted, the court shall issue an enforcement order, a duplicate copy of which shall be served upon the execution debtor.

#### Enforcement Order: Content

**Article 412.** The enforcement order shall contain:

1. the indication "Enforcement Order";
2. date and place of rendition;
3. a reference to the court and the name of the judge who rendered the order;
4. the forenames, patronymics and surnames and addresses of the parties;
5. the case in which the order is issued;
6. the obligation wherewith the execution debtor must comply, and the costs which the execution debtor must pay;
7. an invitation to the execution debtor to comply within two weeks after service of the order;
8. (amended, SG No. 42/2009) an instruction to the effect that the execution debtor may lodge an within the time limit referred to in Item 7;
9. an instruction to the effect that if the execution debtor fails to lodge oppositions to the issuer of the order or to comply, the enforcement order will enter into effect and coercive enforcement will be proceeded with;
10. the extent of appealability, before which court and within what time limit;
11. signature of the judge.

#### Appellate Review

**Article 413.** (1) The enforcement order shall be unappealable by the parties, except in the part regarding the costs.

(2) (Supplemented, SG No. 100/2010, effective 21.12.2010) The order whereby the

application is rejected in whole or in part shall be appealable by the applicant by an interlocutory appeal, a duplicate copy of which shall not be presented for service.

### Opposition

**Article 414.** (1) The execution debtor may oppose in writing the enforcement order or a part thereof. Justification of the opposition shall not be required.

(2) An opposition shall be lodged within two weeks after service of the order, and the said time limit may not be extended.

### Effect of Opposition

**Article 415.** (1) (Amended, SG No. 42/2009) Where the opposition has been lodged in due time, the court shall instruct the applicant that the said applicant may bring an action to establish the receivable thereof within one month, depositing the balance of the stamp duty due.

(2) Where the applicant fails to present evidence that the said applicant has brought the action within the time limit set, the court shall invalidate the enforcement order in part or in whole, as well as the writ of execution issued under Article 418 herein.

### Entry into Effect of Enforcement Order

**Article 416.** (Supplemented, SG No. 42/2009) Where an opposition has not been lodged in due time or has been withdrawn or after entry into effect of the judgment establishing the receivable, the enforcement order shall enter into effect. On the basis of the said order, the court shall issue a writ of execution and shall note this on the order.

### Enforcement Order Based on Document

**Article 417.** Alternatively, the applicant may request the issuing of an enforcement order where the receivable, regardless of the amount thereof, is based upon:

1. an act of an administrative authority, whereunder the admission to enforcement is vested in the civil courts;
2. a document or an abstract of the books of account, whereby receivables of the government institutions, the municipalities and the banks are established;
3. a notarial act, a settlement or another contract bearing notarized signatures in respect of the obligations contained therein to pay sums of money or other fungible things, as well as obligations to deliver particular things;
4. an abstract of the registered pledges registry on a recorded security interest and on commencement of foreclosure: in respect of the delivery of pledged things;
5. an abstract of the registered pledges registry on a recording of a contract for sale with retention of title until payment of the purchase price or a lease contract: in respect of the return of corporeal things sold or leased;

6. a contract of pledge or a mortgage deed under Article 160 and Article 173 (3) of the Obligations and Contracts Act;

7. an effective act establishing a State or municipal receivable, where the enforcement of this act is effected according to the procedure established by this Code;

8. a deficit deed;

9. a promissory note, a bill or exchange or another negotiable security payable to order which is Equivalent thereto, as well as a bond or coupons attached thereto.

#### Immediate Enforcement

**Article 418.** (1) Where a document covered under Article 417 herein, whereupon the receivable is based, has been presented with the application, the creditor may approach the court with a motion to decree an immediate enforcement and to issue a writ of execution.

(2) The writ of execution shall be issued after the court verifies whether the document is prima facie conforming and whether the said document attests an obligation enforceable against the execution debtor. The court shall make a due note on the document presented and on the enforcement order regarding the issuing of the writ of execution.

(3) Where, according to the document presented, the exigibility of the receivable is contingent on the compliance with a cross-obligation or on the occurrence of another circumstance, the compliance with the said obligation or the occurrence of the said circumstance must be attested by an official document or by a document originating from the execution debtor.

(4) (Amended and supplemented, SG No. 100/2010, effective 21.12.2010) The order whereby the petition for the issuing of a writ of execution is refused in whole or in part shall be appealable by the petitioner within one week after communication of the said order by an interlocutory appeal, a duplicate copy of which shall not be presented for service.

(5) The enforcement order with the noting of the issuing of a writ of execution shall be served by the enforcement agent.

#### Immediate Enforcement Order: Appellate Review

**Article 419.** (1) The order whereby the petition for immediate enforcement is granted shall be appealable by an interlocutory appeal within two weeks after service of the enforcement order.

(2) The interlocutory appeal of the immediate enforcement order shall be submitted together with the opposition to the enforcement order as issued and may be founded only upon considerations derived from acts covered under Article 417 herein.

(3) The appellate review of the immediate enforcement order shall not stay the enforcement.

## Stay of Enforcement

**Article 420.** (1) An opposition to the enforcement order shall not stay the coercive enforcement in the cases covered under Items 1 to 8 of Article 417 herein, except where the execution debtor furnishes due security to the creditor according to the procedure established by Articles 180 and 181 of the Obligations and Contracts Act.

(2) Where a motion for stay, supported by convincing written evidence, has been made within the time limit for opposition, the court which has decreed immediate enforcement may stay the said enforcement.

(3) The ruling on the motion for stay shall be appealable by an interlocutory appeal.

## Partial Stay of Enforcement

**Article 421.** (1) Where there are multiple obligated persons, the security referred to in Article 420 (1) herein shall serve solely in respect of the person or persons for whom the said security has been furnished.

(2) Where the opposition refers only to part of the receivable, as well as where the security furnished is partial, the court shall stay the anticipatory enforcement solely for the relevant part of the receivable.

## Action for Existence of Receivable

**Article 422.** (1) An action for the existence of a receivable shall be considered brought as from the time of submission of the application for issuing of an enforcement order, where the time limit referred to in Article 415 (1) herein has been complied with.

(2) The bringing of an action under Paragraph (1) shall not stay the immediate enforcement as admitted, except in the cases referred to in Article 420 herein.

(3) If the action is dismissed by an effective judgment, the enforcement shall terminate and sentence two of Article 245 (3) herein shall apply.

## Opposition before Intermediate Appellate Review Court

(Heading amended, SG No. 50/2008)

**Article 423.** (1) (Amended and supplemented, SG No. 50/2008) Within one month after learning of the enforcement order, the execution debtor, who has been deprived of an opportunity to contest the receivable, may lodge an opposition to the intermediate appellate review court, where:

1. the enforcement order has not been duly served upon the said execution debtor;
2. the enforcement order has not been served upon the said execution debtor in person and on the day of the service the said execution debtor did not have a habitual residence within the territory of the Republic of Bulgaria;

3. the execution debtor was unable to learn of the service in due time owing to special unforeseen circumstances;

4. the execution debtor was unable to lodge the opposition thereof owing to special unforeseen circumstances which the said execution debtor was unable to overcome.

Simultaneously with the opposition, the execution debtor may furthermore exercise the rights thereof under Article 413 (1) and Article 419 (1) herein.

(2) (Amended, SG No. 50/2008) The lodgment of an opposition to the intermediate appellate review court shall not stay the enforcement of the order. On a motion by the execution debtor, the court may stay the enforcement under the terms established by Article 282 (2) herein.

(3) (New, SG No. 50/2008) The court shall grant the opposition when the court establishes that the prerequisites covered under Paragraph (1) exist. If the opposition is granted, the enforcement of the order issued under Article 410 herein shall be stayed. Where the opposition is granted, the court shall furthermore examine the interlocutory appeals under Article 413 (1) and Article 419 (1) herein lodged with the opposition. Where the opposition is not granted because the prerequisites referred to in Items 3 and 4 of Article 411 (2) herein did not exist, the court, acting ex officio, shall invalidate the enforcement order and the writ of execution issued on the basis of the said order.

(4) (New, SG No. 50/2008) The examination of the case by the first-instance court shall proceed with instructions under Article 415 (1) herein. In this proceeding, the court shall furthermore examine the motion under Article 420 (2) herein, made with the opposition.

#### Action to Contest Receivable

**Article 424.** (1) (Amended, SG No. 50/2008) The execution debtor may contest the receivable according to an action procedure, where newly discovered circumstances or new written evidence of material relevance to the case are discovered, which could not have been known to the said execution debtor before expiry of the time limit for lodgment of the opposition or which the said execution debtor could not procure within the same time limit.

(2) The action may be brought within three months after the day on which the new circumstance became known to the execution debtor or after the day on which the execution debtor could procure the new written evidence, but not later than within one year after extinguishment of the receivable.

#### Standard Forms

**Article 425.** (1) The Minister of Justice shall issue an ordinance endorsing thereby standard forms of an enforcement order, an application for issuing of an enforcement order and the other papers in connection with the order for payment proceeding.

(2) Where the applicant has not used a standard form or has used a wrong standard form, the court shall attach the relevant standard form to the written instruction thereof for curing of the non-conformity.

# **Chapter Thirty-Eight**

## **COMMENCEMENT, STAY AND TERMINATION OF ENFORCEMENT**

### **Commencement of Enforcement**

**Article 426.** (1) The enforcement agent shall proceed with enforcement on a petition by the interested party on the basis of a presented writ of execution or another enforceable act.

(2) In the petition thereof, the execution creditor shall specify the method of enforcement. The said creditor may specify several methods simultaneously. In the course of the proceeding, the said creditor may specify other methods of enforcement as well.

(3) The conformity of the petition referred to in Paragraph (1) shall be verified under Article 129 herein.

(4) The execution creditor may request that the enforcement agent enquire into the property status of the execution debtor, search records, and require duplicate copies of documents.

#### Territorial Competence

**Article 427.** (1) The petition for enforcement shall be submitted to the enforcement agent whose area of practice covers:

1. the location of the movable or immovable things whereagainst the enforcement is levied;

2. the permanent address or the registered office of the garnishee, where the enforcement is levied against receivables of the execution debtor from the said garnishee;

3. the place of compliance with the obligations to act or not to act, where compliance with such obligations is sought;

4. the permanent or present address of the execution creditor or the execution debtor: at the choice of the execution creditor in respect of a receivable for maintenance.

(2) The execution creditor may request from the enforcement agent exercising competence over the permanent address thereof to impose a garnishment or preventive attachment on corporeal things and receivables of the execution debtor, even though the enforcement steps are subject to performance by another enforcement agent according to the rules of Paragraph (1). After imposition of the garnishment or preventive attachment, the enforcement agent shall transmit the enforcement case to the competent enforcement agent, who is to take an inventory and conduct a sale of the corporeal things.

(3) Where the enforcement is levied against pecuniary receivables of the execution debtor from a garnishee with a permanent address or registered office within another geographical jurisdiction, the enforcement case shall not be transmitted.

## Notice of Voluntary Compliance

**Article 428.** (1) The enforcement agent shall be obligated to invite the execution debtor to comply voluntarily with the obligation thereof within two weeks. Where proceeding with enforcement on the basis of an enforcement order, the enforcement agent shall invite the execution debtor by the service of the said order, and where the order has been served upon the execution debtor, a new time limit for voluntary compliance therewith shall not be allowed.

(2) The notice shall contain the name and address of the execution creditor and a warning to the execution debtor that unless the said execution debtor complies with the obligation thereof within the time limit allowed thereto, coercive enforcement will be proceeded with. The notice shall communicate the garnishments and preventive attachments imposed. A copy of the enforceable act shall be attached to the notice of voluntary compliance.

(3) Should the execution debtor die after receiving a notice of voluntary compliance but before other enforcement steps have been performed, the enforcement agent, prior to proceeding with the steps thereof, shall transmit a new notice of voluntary compliance to the heirs.

(4) Where the enforcement agent replaces one method of enforcement by another method, the said agent shall transmit to the execution debtor communications of the garnishment and preventive attachment imposed.

## Extent of Personal Applicability of Writ of Execution

**Article 429.** (1) The heirs of and singular successors to the execution creditor, as well as the surety and the solidary execution co-debtor who have paid the debt, may move for enforcement on the basis of the writ of execution issued in favour of the execution creditor. The succession or the payment by the surety or execution co-debtor, as the case may be, shall be established by written evidence.

(2) The writ of execution issued against the decedent may be enforced even against the property of the heirs of the said decedent, unless the said heirs establish that they have renounced the succession or have accepted the succession under an inventory. Where the heir has not accepted the succession, the enforcement agent shall set the time limit under Article 51 of the Succession Act, communicating the declaration of will of the heir to the competent regional judge for due recording of the said declaration.

(3) The writ of execution shall furthermore have effect against any third party who has pledged or mortgaged a corporeal thing of his or her own to secure the debt, where the execution creditor commences the enforcement against the said thing.

## Execution Debtor's Ad Hoc Representative

**Article 430.** The regional court exercising jurisdiction over the place of enforcement, acting on a motion by the execution creditor, shall appoint an ad hoc representative of the execution debtor if, upon proceeding with enforcement, the execution debtor does not have a

registered permanent or present address.

#### Enforcement Agent's Powers

**Article 431.** (1) The enforcement agent, if so required for the enforcement, may order any buildings of the execution debtor to be opened and may search the personal effects, dwelling unit and other premises of the execution debtor.

(2) (Amended, SG No. 42/2009, SG No. 100/2010, effective 1.01.2011) Government institutions, municipalities, organizations and citizens shall be obligated to render assistance to the enforcement agent. When requested to do so, the police authorities shall be obligated to render assistance to the enforcement agent if the execution of the functions thereof is obstructed.

(3) (Amended, SG No. 12/2009, effective 1.01.2010 - amended, SG No. 32/2009) The enforcement agent shall have right of access to information in the court and administrative services, including the authorities of the National Revenue Agency, the local divisions of the National Social Security Institute, of the Central Depository, of the persons keeping a register of government securities, of the control authorities under the Road Traffic Act and of other persons who keep registers of property or possess data of the property thereof. The said agent may search records and obtain information on the execution debtor, as well as request copies and abstracts of documents.

(4) (New, SG No. 100/2010, effective 1.01.2011) A requisite fee shall be due for the information referred to in Paragraph (3), necessary for the relevant enforcement proceeding, as well as for recording precautionary measures under the said proceeding. The said fee shall be paid by the execution creditor and shall be borne by the execution debtor.

(5) (Amended, SG No. 42/2009, renumbered from Paragraph (4), SG No. 100/2010, effective 1.01.2010) In the cases where the personal presence of the execution debtor is required and the execution debtor does not appear, even though the said execution debtor has received a summons to do so, the enforcement agent may order the police authorities to bring the execution debtor.

(6) (Renumbered from Paragraph (5), SG No. 100/2010, effective 1.01.2010) Where necessary, the enforcement agent may ask the authorities of the Ministry of Interior to suspend from operation a motor vehicle whereagainst enforcement is levied for a period of up to three months.

#### Stay of Enforcement

**Article 432.** The enforcement proceeding shall be stayed:

1. by the court, in the cases referred to in Article 245 (1) and (2), Article 309 (1), Item 3 of Article 397 (1), Articles 438 and 524 herein;

2. on a motion by the execution creditor;

3. in the cases referred to in Items 2 and 3 of Article 229 (1) herein, with the exception of the sale of a corporeal immovable which has already been advertised;

4. in the cases referred to in Article 282 (2) herein, as well as where the intermediate appellate review judgment appealed is reversed by the Supreme Court of Cassation;

5. (new, SG No. 42/2009, amended, SG No. 100/2010, effective 21.12.2010) in the cases referred to in Article 624 (4) herein;

6. (new, SG No. 100/2010, effective 18.06.2011) in the cases referred to in Article 627b (2) herein;

7. (renumbered from Item 5, SG No. 42/2009, renumbered from Item 6, SG No. 100/2010, effective 21.12.2010) in other cases provided for in a law.

#### Termination of Enforcement

**Article 433.** (1) The enforcement proceeding shall be terminated by decree where:

1. the execution debtor presents a receipt from the execution creditor, duly authenticated, or a receipt from the post office, or a letter from a bank showing that the amount under the writ of execution has been paid to or deposited with the execution creditor prior to the institution of the enforcement proceeding; if the execution debtor presents a receipt bearing an unauthenticated signature of the execution creditor, the said creditor, if a dispute with the debtor arises, shall be obligated to declare in writing that the receipt has not been issued thereby, or otherwise the said receipt shall be presumed genuine;

2. the execution creditor has moved for this in writing;

3. the writ of execution has been invalidated;

4. the act on the basis of which the writ of execution has been issued is vacated or the said act is pronounced forged by an effective judicial act;

5. the property cited by the execution creditor cannot be sold and other seizable property cannot be discovered;

6. the fees and costs related to the enforcement, due in advance, have not been paid;

7. an effective judgment, whereby the action under Article 439 or 440 herein is granted, is presented;

8. the execution creditor fails to move for the performance of enforcement steps in the course of two years, with the exception of the suits for maintenance obligations.

(2) In all cases covered under Paragraph (1), the enforcement agent shall lift ex officio the garnishments and preventive attachments imposed after the decree on termination enters into effect.

(3) The termination of the proceeding shall not affect the rights which third parties have acquired before that on the basis of the enforcement steps, as well as the conformity of the payment effected by the garnishee to the enforcement agent.

## Attestation of Enforcement Steps

**Article 434.** The enforcement agent shall draw up a memorandum on each step undertaken and performed thereby, stating therein the day and place of performance of the said step, the demands and statements made by the parties, the amount collected, and the costs related to the enforcement as incurred.

# Chapter Thirty-Nine REMEDIES AGAINST ENFORCEMENT

## Section I Appellate Review of Enforcement Agent's Steps

### Appealable Steps

**Article 435.** (1) The execution creditor may appeal against the refusal of the enforcement agent to perform an enforcement step sought, as well as the stay and termination of the coercive enforcement.

(2) (Supplemented, SG No. 100/2010, effective 21.12.2010) The execution debtor may appeal against the decree on a fine and the levy of the enforcement against any property which the execution debtor considers unseizable, the seizure of a movable thing or the eviction of the execution debtor from an immovable, by reason of not being duly notified of the enforcement, as well as the decree on the costs.

(3) The decree on award shall be appealable solely by a person who deposited earnest money before the last day of the sale, and by an execution creditor who entered the sale as a bidder, as well as by the execution debtor, by reason of a failure to conduct due bidding at the public sale or of the property not being awarded to the highest bidder.

(4) A third party may appeal against the steps of the enforcement agent solely where the enforcement is levied against corporeal things which, on the day of the garnishment, preventive attachment or delivery, if a movable thing is concerned, were in the possession of the said person. Any such appeal shall not be granted if it is established that the corporeal thing was owned by the execution debtor upon imposition of the garnishment or preventive attachment.

(5) A coercive seizure of possession of a corporeal immovable shall be appealable solely by a third party who was in possession of the said immovable prior to the bringing of the action whereunder the judgment is enforced. If the said third party fails to appeal within the time limit for appellate review, the said third party may bring a possessory action.

### Lodgment of Appeal

**Article 436.** (1) The appeal shall be lodged care of the enforcement agent with the district court exercising jurisdiction over the place of the enforcement within one week after

performance of the step, if the party was present at the performance of the said step or if the party was summoned, and in the rest of the cases, within one week after the day of the communication. In respect of the third parties, the time limit shall begin to run as from learning of the step.

(2) A duplicate copy of the appeal shall be served upon the other party, and where the appeal has been lodged by a third party, duplicate copies of the said appeal shall be served upon the execution debtor and upon the execution creditor on the petition whereof the enforcement case has been instituted.

(3) The party which has received a duplicate copy of the appeal may lodge written oppositions within three days. After expiry of the said time limit, the enforcement agent shall transmit the appeal together with the oppositions, if any, and a copy of the enforcement case to the district court, setting forth reasoning on the steps appealed.

(4) The provisions of Articles 260, 261 and 262 herein shall apply, *mutatis mutandis*, in respect of the appeals.

#### Examination of Appeals

**Article 437.** (1) The appeals lodged by the parties shall be examined in camera, except where witnesses or expert witnesses must be heard.

(2) The appeals lodged by third parties shall be examined in public session, with the appellant, the execution debtor and the execution creditor on the petition whereof the enforcement case has been instituted being summoned.

(3) The court shall examine the appeal on the basis of the data in the enforcement case and the evidence presented by the parties.

(4) The court shall publish the judgment together with the reasoning thereof within one month after the receipt of the appeal in the court. The judgment shall be unappealable.

#### Stay of Enforcement upon Appellate Review

**Article 438.** The lodgment of the appeal shall not stay the enforcement steps, but the court may decree a stay. In such case, the court shall immediately transmit a duplicate copy of the ruling on stay to the enforcement agent.

## **Section II**

### **Remedy according to Action Procedure**

#### **Contestation of Receivable**

**Article 439.** (1) The execution debtor may contest the enforcement through an action.

(2) The action of the execution debtor may be founded solely on facts which have occurred after conclusion of the trial in the proceeding whereunder the enforcement title has

been issued.

#### Remedy of Third Party

**Article 440.** (1) Any third party whereof a right has been affected by the enforcement may bring an action for declaration that the property whereagainst the enforcement for a pecuniary receivable is levied does not appertain to the execution debtor.

(2) Any such action shall be brought against the execution creditor and the execution debtor.

(3) The execution creditor shall be liable, under the terms established by Article 45 of the Obligations and Contracts Act, for any damages inflicted on third parties through levy of the enforcement against the property which appertains thereto.

#### Enforcement Agent's Liability for Damages

**Article 441.** (Amended, SG No. 50/2008, SG No. 100/2010, effective 21.12.2010) The private enforcement agent shall be liable, under the terms established by Article 45 of the Obligations and Contracts Act, for any damages inflicted as a result of legally non-conforming coercive enforcement. The liability for any such damages inflicted by the public enforcement agent shall be under Article 49 of the Obligations and Contracts Act.

## TITLE TWO ENFORCEMENT OF PECUNIARY RECEIVABLES

### Chapter Forty GENERAL RULES

#### Subject of Enforcement

**Article 442.** The execution creditor may levy the enforcement against any corporeal thing or receivable owned by the execution debtor.

#### Replacement of Subject and Method of Enforcement

**Article 443.** The execution debtor may propose that the enforcement be levied against another corporeal thing or receivable or be performed solely by some of the methods of enforcement demanded by the execution creditor. If the enforcement agent determines that the method of enforcement proposed by the execution debtor is in a position to satisfy the execution creditor, the enforcement agent shall levy the enforcement against the corporeal thing or receivable named by the execution debtor.

#### Unseizable Corporeal Things

**Article 444.** Enforcement may not be levied against the following corporeal things owned by any execution debtor who is a natural person:

1. corporeal things for habitual use of the execution debtor and the family thereof, specified in a list adopted by the Council of Ministers;

2. the food which the execution debtor and the family thereof need for one month and, applicable to farmers, until the next harvest, or the equivalent thereof in other agricultural produce if such food is not available;

3. the heating, cooking and lighting fuel needed for three months;

4. the machinery, tools, devices and books which the execution debtor needs in his or her personal capacity where the said debtor practises a liberal profession or which an artisan needs for the practice of the skilled craft thereof;

5. the land tracts owned by the execution debtor where the said debtor is a farmer: orchards and vineyards of an aggregate surface area not exceeding 0.5 hectares, or cropland and meadows of a surface area not exceeding 3 hectares, and the machinery and implements needed for the farming, as well as the fertilizers, the plant protection products and sowing seed: for one year;

6. the necessary two head of draught animals, one cow, five sheep or goats, ten beehives and the domestic fowl, as well as the feed needed for the sustenance thereof until the next harvest or until the animals are turned out to graze;

7. the dwelling unit owned by the execution debtor, if the said debtor and any of the family members thereof wherewith the said debtor lives together have no other dwelling unit, regardless of whether the execution debtor resides therein; if the dwelling unit exceeds the housing needs of the execution debtor and the family members thereof specified by an ordinance of the Council of Ministers, the part of the said dwelling unit in excess of the said needs shall be sold if the conditions under Article 39 (2) of the Ownership Act apply;

8. the corporeal things and receivables provided for in another law as not subject to coercive enforcement.

#### Non-applicability of Unseizability

**Article 445.** (1) Execution debtors may not avail themselves of the prohibitions covered under Article 444 herein in respect of any corporeal things which are pledged or mortgaged, where the pledgee or the mortgagee is an execution creditor.

(2) The following may not avail themselves of the prohibitions referred to in Item 5 and 7 of Article 444 herein:

1. any debtors on obligations for maintenance, for damages sustained as a result of a tort or delict, or for defalcation;

2. any debtors in respect of cases provided for by a law.

#### Unseizable Income

**Article 446.** (1) (Amended, SG No. 50/2008) If the enforcement is levied against a labour remuneration or against any other remuneration for work whatsoever, as well as against a pension to an amount exceeding the minimum wage, only the following shall be withheld:

1. if the person found against has a monthly income not exceeding BGN 300: one-fourth, if the person has no children, and one-fifth, if the person has any children maintained thereby;

2. if the person found against has a monthly income exceeding BGN 300 but not exceeding BGN 600: one-third, if the person has no children, and one-fourth, if the person has any children maintained thereby;

3. if the person found against has a monthly income exceeding BGN 600 but not exceeding BGN 1,200: one-half, if the person has no children, and one-third, if the person has any children maintained thereby;

4. if the person found against has a monthly income exceeding BGN 1,200: the excess over BGN 600, if the person has no children, and the excess over BGN 800, if the person has any children maintained thereby.

(2) (New, SG No. 50/2008) The monthly labour remuneration referred to in Paragraph (1) shall be determined by deducting the taxes and compulsory social insurance contributions due on the said remuneration.

(3) (Renumbered from Paragraph (2), SG No. 50/2008) The limitations covered under Paragraph (1) shall not apply to any maintenance obligations. In such cases, the amount for maintenance as awarded shall be withheld in whole, and the deductions covered under Paragraph (1) for the other obligations of the party found against and for maintenance obligations for a past period shall be made on the balance of all income accruing to the said debtor.

(4) (Renumbered from Paragraph (3), SG No. 50/2008) Coercive enforcement against receivables for maintenance shall be inadmissible. Coercive enforcement against student grants shall be admitted solely in respect of maintenance obligations.

#### Invalidity of Waiver of Remedy

**Article 447.** Any waiver by the execution debtor of the remedy under Articles 444 and 446 herein shall be invalid.

#### Obligation to Declare Property and Income

**Article 448.** (1) (Amended, SG No. 50/2008) If any seizable property whereof the sale would cover the costs of the enforcement is not found in the possession of the execution debtor, the said debtor shall be obligated to appear before the regional judge and to declare the entire property and all income thereof. The lack of sufficient property shall be established by memorandum.

(2) The regional judge, acting on a motion by the enforcement agent, shall schedule a

hearing for the appearance of the execution debtor and the execution creditor.

(3) If the execution debtor fails to appear, the court shall decree that the attendance of the said debtor be compelled.

(4) (Amended, SG No. 50/2008) The obligation to appear and to present a declaration and the liability for non-compliance with the said obligations shall be stated in the summons to the execution debtor.

#### Steps Simultaneous with Notice of Voluntary Compliance

**Article 449.** (1) Where the enforcement is levied against a movable or immovable thing, the notice of voluntary compliance shall furthermore specify the day whereon the inventory will be taken. The said inventory may also be taken within the time limit for voluntary compliance.

(2) Where the enforcement is levied against an immovable simultaneously with the dispatch of the notice of voluntary compliance wherein the immovable is specified, the enforcement agent shall dispatch a letter to the Recording Office for recording of a preventive attachment of the said immovable.

#### Garnishment of Movable Thing or Receivable

**Article 450.** (1) A movable thing shall be garnished by means of taking an inventory of the said thing by the enforcement agent.

(2) A movable thing or a receivable of the execution debtor may alternatively be garnished by the receipt of the communication of the inventory or the garnishment if the said communication specifies exactly the thing or the receivable whereagainst the enforcement is levied.

(3) The garnishment of the receivable of the execution debtor shall be considered imposed in respect of the garnishee as from the day on which the garnishment communication is served upon the said garnishee according to Article 507 herein.

#### Effect of Garnishment and of Preventive Attachment in Respect of Execution Debtor

**Article 451.** (1) As from the time of imposition of the garnishment, the execution debtor shall forfeit the right to dispose of the receivable or of the corporeal thing and may not, on pain of criminal liability, modify, damage or destroy the corporeal thing.

(2) The consequences under Paragraph (1) shall occur in respect of the execution debtor as from the receipt of the notice of voluntary compliance, where the enforcement is levied against a movable or immovable thing and the said thing is specified in the notice.

#### Effect of Garnishment and of Preventive Attachment in Respect of Execution Creditor

**Article 452.** (1) Any dispositions of the garnished corporeal thing or receivable performed by the execution debtor after the garnishment shall be invalid in respect of the execution creditor and the joint creditors, unless the third-party transferee can invoke Article

78 of the Ownership Act.

(2) Where the enforcement is levied against an immovable, the invalidity shall have effect solely in respect of the dispositions performed after the recording of the preventive attachment.

(3) The execution creditor and the joint creditors may demand payment from the garnishee despite the payment which the said garnishee has made to the execution debtor after the garnishment communication was served upon the said garnishee. The members of the management bodies of the garnishee shall incur solidary liability with the said garnishee.

#### Inopposability of Unrecorded Instruments

**Article 453.** The following may not be opposed to the execution creditor and to the joint creditors:

1. the transfer and creation of any rights in rem which were not recorded prior to the preventive attachment;

2. the recordable judgments on any statements of action which were not recorded prior to the preventive attachment;

3. the transfer of any receivable communicated after the garnishee received the garnishment communication;

4. the alienation of any movable things whereof the possession was not delivered to the transferee prior to the imposition of the garnishment, unless there is a document about the alienation of the said things validly pre-dating the said imposition.

#### Stay of Enforcement on Execution Debtor's Motion

**Article 454.** (1) (Amended, SG No. 50/2008) The enforcement agent shall stay the enforcement if, until the delivery of the movable thing to a retail establishment or a commodity exchange or, respectively, until the commencement of the open-outcry auction and, applicable to the public sale of an immovable, before the day preceding the day of the sale, the natural-person execution debtor deposits 30 per cent of the receivables under the writs of execution presented thereagainst and undertakes in writing to deposit to the enforcement agent 10 per cent of the said receivables monthly.

(2) If the execution debtor fails to pay any of the installments under Paragraph (1), the enforcement agent, acting on a motion by any of the execution creditors, shall proceed with the enforcement without the execution debtor being able to seek a new stay.

(3) Paragraph (1) shall not apply where a pledged or mortgaged corporeal thing or a corporeal thing incorporated into the commercial enterprise of the sole trader is being sold.

#### Proceeds of Enforcement

**Article 455.** (1) All amounts accruing under the enforcement case from the execution debtor, from the garnishee, from bidders and buyers in the sale, as well as from the retail

establishments or commodity exchanges which have conducted the sale of movable things, shall be credited to the account of the enforcement agent.

(2) Payment of the amounts due to the execution creditor and to the joint creditors shall be effected on the basis of payment orders issued by the enforcement agent, who shall note the redemption on the writ of execution.

(3) Where the execution creditor and the execution debtor have not named an account for transfer of the amounts accruing, the said amounts shall remain on the account of the enforcement agent until claimed.

## **Chapter Forty-One**

### **JOINING CREDITORS AND DISTRIBUTION OF AMOUNTS COLLECTED**

#### **Joining Creditors**

**Article 456.** (1) During any stage of the enforcement, while the distribution has not been prepared, other creditors of the same execution debtor may join the proceeding.

(2) Joining under Paragraph (1) shall be effected by a written motion whereto the creditor shall attach the writ of execution held thereby or a certificate issued by the enforcement agent to the effect that the said writ is filed with another enforcement case.

(3) The certificate shall indicate the unsatisfied balance of the receivable, including principal, interest and costs, and the day at which the said balance is determined. In such case, the distributable amount shall be transferred to the account of the enforcement agent who has issued the certificate and who shall note the redemption on the writ of execution.

#### Consequences of Joining

**Article 457.** (1) The joint execution creditor shall enjoy the same rights in the enforcement proceeding as the rights enjoyed by the original execution creditor.

(2) The enforcement steps performed prior to the joining shall benefit the joint execution creditor as well.

(3) The communications and summonses shall be addressed solely to the original execution creditor.

(4) If a third party brings an action or lodges an appeal against the enforcement steps, the original execution creditor shall be summoned as a party. The joint execution creditors may intervene in the case as co-parties. The judgment issued shall have effect in respect of the joint execution creditors as well, even if the said creditors have not intervened in the case.

#### Joining of the State

**Article 458.** (Amended, SG No. 12/2009, effective 1.01.2010 - amended, SG No.

32/2009) The State shall be considered a priori a joint execution creditor in respect of the public and other receivables due thereto by the execution debtor, whereof the amount has been communicated to the enforcement agent prior to the effecting of the distribution. To this end, the enforcement agent shall dispatch a communication to the National Revenue Agency regarding each enforcement commenced by the said agent and regarding each distribution.

#### Joining of Secured Creditor

**Article 459.** (1) Any creditor in favour of whom an injunction by means of imposition of a garnishment or preventive attachment has been granted shall be considered joint execution creditor where the enforcement is levied against the subject of the injunction. The amount appertaining to the secured creditor shall be preserved on the account of the enforcement agent and shall be delivered to the said creditor after the said creditor presents a writ of execution. The said amount shall be distributed among the rest of the execution creditors or shall be restored to the execution debtor if the injunction is dissolved.

(2) Paragraph (1) shall furthermore apply to any mortgagee and pledgee, as well as to any creditor enjoying a right of retention.

#### Distribution

**Article 460.** If the amount collected under the enforcement case is insufficient to satisfy all execution creditors, the enforcement agent shall effect a distribution, allocating first amounts for payment of the receivables which enjoy a right to preferred satisfaction. The balance shall be distributed among the other receivables on a pro rata basis.

#### Offsetting Amounts under Distribution

**Article 461.** The execution creditor who has been awarded the corporeal thing may set off such portion of the receivable thereof against the amount due for the value of the said thing as appertains to the said creditor on a pro rata basis.

#### Presentment of Distribution

**Article 462.** (1) The enforcement agent shall present the distribution to the execution debtor and to all execution creditors, who shall be summoned to this end on a day assigned by the enforcement agent.

(2) Unless an appeal is lodged within three days after the presentment of the distribution, the said distribution shall be considered final and the enforcement agent shall deliver the amounts under the distribution.

#### Judgment on Distribution

**Article 463.** (1) In case the distribution is appealed, the case, together with the appeal, shall be transmitted to the district court, which shall examine the said appeal according to the procedure established by Article 278 herein.

(2) The judgment of the district court on the distribution shall be appealable before the appellate court. The examination of the appeal shall follow the procedure established by

Article 274 herein. The judgment of the appellate court shall be unappealable.

#### Contestation of Joint Creditor's Receivable

**Article 464.** (1) Where one of the execution creditors contests the existence of the receivable of another creditor, the former must bring an action against the latter and the execution debtor. The bringing of the action shall stay the delivery of the amount allocated to the creditor holding the contested receivable. Unless such action is brought within one month after the distribution, the amount shall be delivered to the execution creditor.

(2) The action may alternatively be based on facts pre-dating the conclusion of the trial in the proceeding under which the enforcement title has been issued.

## **Chapter Forty-Two ENFORCEMENT AGAINST CORPOREAL THINGS**

### **Section I Inventory, Appraisal and Delivery for Safekeeping**

#### **Inventory of Movable Thing**

**Article 465.** The enforcement agent shall take an inventory of the corporeal thing specified by the execution creditor solely if the said thing is in the possession of the execution debtor, except where it is evident from the circumstances that the said thing appertains to another person.

#### Inventory of Growing Crops and Fruits

**Article 466.** Coercive enforcement may be levied even against growing crops and fruits, an inventory of which shall be taken not earlier than two months prior to the customary time for the harvesting thereof.

#### Inventory of Movable Thing: Content

**Article 467.** (1) The inventory must contain:

1. a reference to the writ of execution;
2. the place where the inventory is taken;
3. a detailed description of the corporeal thing;
4. the price at which the corporeal thing is to be sold at a retail establishment;
5. the oppositions by the parties, if any, and any rights to the inventoried corporeal thing declared by third parties.

(2) It must be noted in the inventory whether the corporeal things whereagainst coercive enforcement is inadmissible have been left with the execution debtor.

(3) The inventory shall furthermore specify the place and time of the sale of the corporeal thing, should the execution creditor so request. In such case, the execution debtor shall be considered notified of the sale regardless of whether the said debtor was present when the inventory was taken.

(4) The inventory shall be signed by the enforcement agent. The inventory shall not be communicated to the parties.

#### Fixing Price of Movable Thing

**Article 468.** (1) (Amended, SG No. 42/2009) The enforcement agent shall fix the price at which the movable thing is to be sold at a retail establishment. The starting bid for bidding at the open-outcry auction or for the public sale shall be 75 per cent of the value of the corporeal thing.

(2) (Amended and supplemented, SG No. 42/2009) On a motion by the party, an expert shall be appointed to determine the value of the corporeal thing. The said expert shall be appointed ex officio where determination of the value requires special knowledge in the field of science, art, crafts and other. The said expert may alternatively give the conclusion thereof orally, which shall be recorded in the memorandum.

#### Delivery to Execution Debtor for Safekeeping

**Article 469.** The inventoried movable thing may be delivered to the execution debtor for safekeeping, unless removed for sale at a retail establishment. In such case, the execution creditor may use the said thing solely if this does not diminish the value thereof.

#### Safekeeping of Inventoried Corporeal Thing

**Article 470.** (1) If the execution debtor refuses to accept the corporeal thing for safekeeping or if the enforcement agent determines that the said thing must not be left with the said debtor, the corporeal thing shall be seized by the enforcement agent and shall be given for safekeeping to the execution creditor or to a keeper appointed by the enforcement agent.

(2) The keeper shall be selected in consideration of the person thereof, as well as of the nature of the corporeal thing, and of the place where the said thing is situated or will be stored.

(3) The corporeal thing shall be delivered for safekeeping against signed acknowledgment.

#### Keeper's Obligations

**Article 471.** (1) The keeper shall be obligated to keep the corporeal thing acting as a prudent administrator and to give account for the revenue accruing from the said thing and for the expenses incurred on the safekeeping of the said thing.

(2) If the keeper fails to comply with the obligations thereof under Paragraph (1), the enforcement agent may deliver the corporeal thing for safekeeping to another person.

#### Remuneration of Expert and Keeper

**Article 472.** The enforcement agent shall fix a remuneration due to the expert and to the keeper, where a third party, which shall be deposited by the execution creditor in advance. If any costs have to be incurred as well on the removal or safekeeping of the corporeal thing, the said costs shall be deposited by the execution creditor in advance.

## Section II Sale of Movable Things

### Competition upon Levy of Another Enforcement

**Article 473.** (1) The sale of a garnished corporeal thing shall be conducted by the enforcement agent who has taken an inventory of the said thing.

(2) If another enforcement is levied against the inventoried corporeal thing, the subsequent execution creditor may approach the regional court with a motion to authorize the conduct of a sale for enforcement of the receivable of the said creditor. An authorization shall be granted if a memorandum referred to in Article 477 (3) herein is not registered at the regional court after the lapse of one month since the levy of the enforcement.

(3) The movable thing as inventoried shall be seized for enforcement on the basis of the authorization referred to in Paragraph (2).

#### Sale of Movable Thing

**Article 474.** (1) The sale of a movable thing shall be conducted through a retail establishment or a commodity exchange, at open-outcry auction, or according to the procedure applicable to the public sale of an immovable.

(2) The execution debtor may agree that the corporeal thing be sold at the price as fixed by the enforcement agent at a retail establishment of the private enforcement agent or at a retail establishment named thereby, presenting the written consent for acceptance of the said thing for sale at the retail establishment.

(3) If the corporeal thing can be sold on a commodity exchange, the execution creditor or the execution debtor may name a commodity exchange, presenting the written consent for acceptance of the said thing for sale by the exchange.

(4) The delivery of the corporeal thing shall be attested by a memorandum signed by the enforcement agent and by the manager of the commodity exchange or retail establishment. The retail establishment or the commodity exchange, as the case may be, shall receive a commission for the sale effected to the amount of 15 per cent of the selling price, which shall be withheld upon depositing of the proceeds.

(5) Any corporeal things of a value appraised in excess of BGN 5,000, any motor vehicles, any ships and aircraft shall be sold by the enforcement agent according to the procedure applicable to the public sale of an immovable as established by this Code. Any such sale shall be advertised according to the procedure established by Article 477 (3) herein. The enforcement agent shall deliver possession of the corporeal thing after payment of the price. The rules of Articles 482 and 521 herein shall apply in this proceeding.

#### Sale of Perishable Things

**Article 475.** Any corporeal things that are perishable and whose preservation requires substantial costs or special conditions shall be sold not later than one week after the inventory is taken.

#### Sale of Growing Crops and Fruits

**Article 476.** Any growing crops and fruits shall be sold by the enforcement agent according to the procedure applicable to the public sale of an immovable established by this Code. Any such sale must be conducted not earlier than one week prior to the customary time for the harvesting of the said crops and fruits.

#### Sale at Retail Establishment

**Article 477.** (1) The corporeal thing shall be removed to the retail establishment by the execution debtor.

(2) The execution debtor shall present to the enforcement agent a receipt attesting the delivery of the corporeal thing at the retail establishment.

(3) The enforcement agent shall advertise the sale of the corporeal thing by means of notices which shall be posted in the places designated for this purpose at the regional court, at the office of the enforcement agent, and at the local municipality or mayoralty. The memorandum on the posting of the said notices shall be registered at the regional court.

#### Sale on Site

**Article 478.** Where removal of the corporeal thing to a retail establishment is inconvenient in respect of the sale of the said thing, the enforcement agent shall post a notice in a conspicuous place at the retail establishment and shall afford an opportunity to those wishing to view the corporeal thing in the place where the said thing is situated. The sale shall be advertised according to the procedure established by Article 477 (3) herein.

#### Payment of Price

**Article 479.** The sale at a retail establishment shall be conducted at the price fixed. The corporeal thing shall be delivered to the buyer after payment of the price. If the corporeal thing sells at a price lower than the price fixed or is delivered to the seller prior to payment of the price, the enforcement agent shall collect the selling price from the seller.

#### New Sale

**Article 480.** (Supplemented, SG No. 42/2009) If the corporeal thing is not sold within three months after the delivery of the said thing to a retail establishment or after the sale is advertised according to the procedure established by Article 478 herein, the said thing shall be sold at open-outcry auction at a price equal to 50 per cent of the initial price referred to in Article 468 (1) herein.

#### Sale at Open-Outcry Auction

**Article 481.** (1) The enforcement agent shall conduct the sale at open-outcry auction at the assigned time in front of the building where the inventoried corporeal things are kept or in another place appointed by mutual consent of the parties. Should no consent be reached, the sale shall be conducted in a place assigned by the enforcement agent, and shall be scheduled to a date within one to three weeks after the inventory is taken.

(2) The sale shall not be scheduled and the corporeal things as inventoried shall be released if the enforcement creditor fails to deposit the costs of conduct of the said sale within one week after the inventory is taken.

(3) On the day of the sale, the enforcement agent shall draw up a memorandum, stating therein the day and the manner of advertisement and notification of the parties.

(4) The auction shall commence at the time assigned and shall end after the last thing inventoried is offered.

(5) No earnest money shall be deposited for entry in the auction.

(6) If no bidders present themselves within one hour after the assigned time, the enforcement agent shall offer the corporeal things for sale in succession in an order at his or her own discretion.

(7) Each separate corporeal thing shall be offered orally by the enforcement agent at the starting bid as fixed for the auction. The price shall be announced thrice.

(8) If any of the bidders signals that he or she accepts the price, the enforcement agent shall offer the corporeal thing at a higher price. If the higher price is accepted by any of the bidders, the enforcement agent shall offer an even higher price.

(9) If the highest price offered is not accepted even after the third announcement, the enforcement agent shall declare that the corporeal thing has been purchased by the bidder who was the first to accept the lower price announced, shall record the price in the memorandum, and shall deliver the corporeal thing to the bidder against payment in cash. If the purchaser declared by the enforcement agent fails to pay the accepted price in cash immediately, the enforcement agent shall exclude the said bidder from further bidding in the auction.

(10) If bidders do not present themselves or if the starting bid is not accepted even after the third announcement, the enforcement agent shall declare the sale uneffected, shall release the corporeal thing, and shall deliver the said thing to the execution debtor. If the execution debtor is not present, the corporeal thing shall be delivered to the keeper, and if the corporeal

thing has not been delivered for safekeeping, the said thing shall be left in the place of the sale at the disposal of the execution debtor.

#### Stability of Sale

**Article 482.** (1) Once conducted, the sale may not be appealed or contested according to an action procedure.

(2) Ownership of the corporeal thing shall pass to the purchaser of the said thing regardless of whether the said thing appertained to the execution debtor.

(3) The previous owner shall be entitled to receive the price if the said price was not paid under the distribution. If the said price was paid, the said owner shall be entitled to recover from the execution creditors and from the execution debtor what they received under the distribution.

(4) If the execution creditor acts in bad faith, the said creditor shall be liable to the owner for the damages inflicted thereon. In all cases, the costs of the enforcement shall be borne by the execution creditor.

## **Chapter Forty-Three ENFORCEMENT AGAINST IMMOVABLE THINGS**

### **Inventory of Immovable**

**Article 483.** The enforcement agent shall take an inventory of the immovable specified by the enforcement creditor after satisfying himself or herself that the said immovable was owned by the execution debtor at the day of imposition of the preventive attachment. The verification of ownership shall be performed by means of a search of the tax or notarial books or in another manner, including an examination of neighbours. Where reliable data on the ownership are not available, possession at the day of the preventive attachment shall be taken into account.

#### Inventory: Content

**Article 484.** (1) The inventory shall contain:

1. a reference to the writ of execution;
2. the place where the inventory is taken;
3. the location, the boundaries of the immovable, and any mortgages and preventive attachments imposed thereon, as well as any taxes due;
4. the starting bid for the bidding;
5. the oppositions by the parties, if any, and any rights to the corporeal thing inventories as declared by third parties.

(2) The enforcement agent shall request information on the charges from the National Revenue Agency territorial directorate and from the Recording Offices simultaneously with the motion for recording of the preventive attachment.

(3) The inventory shall furthermore specify the place and time of the sale of the corporeal thing, should the execution creditor so request. In such case, the execution debtor shall be considered notified of the sale regardless of whether the said debtor was present when the inventory was taken.

(4) The inventory shall be signed by the enforcement agent. The inventory shall not be communicated to the parties.

#### Fixing Starting Bid for Public Sale

**Article 485.** The enforcement agent shall fix the starting bid for the bidding, with Article 468 herein being applied, *mutatis mutandis*.

#### Keeping of Corporeal Immovable

**Article 486.** (1) The immovable shall be left in the possession of the execution debtor until conduct of the sale. The execution debtor must manage the immovable acting as a prudent administrator. The said debtor shall receive the immovable according to the inventory and shall be obligated to deliver the said immovable in the same condition as accepted thereby.

(2) If the execution debtor fails to manage the immovable properly or obstructs the viewing by third parties, the enforcement agent shall deliver the management to another person.

#### Advertisement of Sale

**Article 487.** (1) Upon the lapse of one week since the inventory was taken, the enforcement agent shall be obligated to draw up a notice of the sale, stating therein the owner of the immovable, a description of the immovable, whether the immovable is mortgaged and for what amount, the starting bid for the sale, and the place and the day on which the sale will commence and will end.

(2) The notice referred to in Paragraph (1) shall be posted in the places designated for this purpose at the office of the private enforcement agent, at the building of the regional court, in the municipality or mayoralty exercising competence over the location of the immovable, as well as in the immovable itself, and then at least one day prior to the day stated in the notice for commencement of the sale.

(3) On the day referred to in Paragraph (2), the enforcement agent shall draw up a memorandum, stating therein the day of advertising of the notice. The said memorandum shall be registered at the regional court.

(4) The enforcement agent shall determine the period of time during which persons who wish to purchase the immovable may view the said immovable.

#### Place of Sale

**Article 488.** (1) The sale shall be conducted at the building of the regional court. The said sale shall continue for one month and shall end on the day stated in the notice.

(2) The papers on the sale shall be kept at the office of the regional court at the disposal of any person interested in the immovable.

#### Bids

**Article 489.** (1) Earnest money for entry in the bidding, amounting to 10 per cent of the starting bid, shall be deposited in an account of the enforcement agent. The execution creditor shall not deposit earnest money if the receivable thereof exceeds the amount of the said earnest money.

(2) Each bidder shall state the price offered thereby in figures and in words and shall submit the bid thereof, together with the receipt of deposit of the earnest money, in a sealed envelope. Each bidder may make multiple bids. Each bid shall be made separately.

(3) The execution creditor shall not deposit earnest money for each bid if the receivable thereof exceeds the amount of the sum total of the requisite amounts of earnest money according to the number of the bids made.

(4) The bids shall be submitted at the office of the regional court, and any such submission shall be recorded in the incoming register.

(5) The sale shall end at the end of normal business hours on the last day.

(6) Any bids by any persons who are disqualified from entering the public sale, as well as any price offers below the starting bids, shall be invalid.

#### Persons Disqualified from Bidding

**Article 490.** (1) The execution debtor, the legal representative thereof, the officials of the office of the regional court, the employees of the enforcement agent, as well as the persons specified in Article 185 of the Obligations and Contracts Act, shall not have the right to enter the bidding.

(2) Where the immovable has been purchased by a person disqualified from bidding, the sale shall be invalid.

(3) In the case referred to in Paragraph (2), the amount deposited by the purchaser shall be retained for satisfaction of the receivables under the enforcement case, and the immovable may be offered for sale again on a motion by any of the execution creditors.

#### Non-conduct of Sale upon Payment of Debt

**Article 491.** If the execution debtor deposits everything due under the writs of execution presented thereagainst and the costs of the enforcement case before expiry of the time limit for submission of the written bids, the sale shall not be conducted.

## Declaration of Purchaser

**Article 492.** (1) At the commencement of normal business hours on the day after expiry of the time limit for submission of written bids, in the assigned place at the building of the regional court, the enforcement agent, in the presence of the bidders who have presented themselves, shall declare the bids as submitted and shall draw up a memorandum on the said declaration. The bidders and the bids shall be entered in the said memorandum in the order of opening of the envelopes. The bidder who has offered the highest price shall be considered purchaser of the immovable. If the highest price has been offered by more than one bidder, the purchaser shall be determined by the drawing of lots in the presence of the bidders who have appeared. The declaration of the purchaser shall be effected by the enforcement agent in the memorandum which shall be signed thereby.

(2) If, upon declaration of the purchaser, any of the bidders who have appeared offers orally a price higher by one amount of earnest money, the enforcement agent shall record the bid in the memorandum and, after the bidder signs the said memorandum, the enforcement agent shall ask thrice whether anybody wishes to offer a price higher by one more amount of earnest money. If such a bid is submitted, it shall be recorded in the memorandum and the bidder shall sign the said memorandum. After the bids are exhausted, the bidder who has offered the highest price shall be declared purchaser of the immovable.

(3) The purchaser shall be obligated to deposit the price offered thereby, deducting the earnest money deposited, within one week after the end of the sale.

## Next Purchaser

**Article 493.** If the price is not deposited within the time limit referred to in Article 492 (3) herein:

1. the earnest money deposited by the bidder shall serve for satisfaction of the execution creditors;

2. (amended, SG No. 100/2010, effective 21.12.2010) the enforcement agent shall declare the bidder who offered the next highest price purchaser of the immovable; if the said bidder fails to deposit the price offered thereby within one week after being declared purchaser, the enforcement agent shall declare the next bidder purchaser and shall do so until exhausting all bidders who have offered a price equal to the starting bid; any bidder, who has been declared purchaser but fails to deposit the price offered in due time, shall be liable under Item 1; after a bidder declared purchaser deposits the price, the earnest money deposited shall be returned to the bidders who have not been declared purchasers;

## New Sale

**Article 494.** (1) If bidders have not appeared or if no valid bids have been made, or if the purchaser has failed to deposit the price and the immovable has not been awarded according to the procedure established by Item 2 of Article 493 herein, the execution creditor shall have the right to move, within one week after the communication, for the conduct of a new sale.

(2) The new sale shall be conducted according to the rules applicable to the first sale. The said sale shall commence not earlier than one month after the end of the first sale at a starting

bid equal to 80 per cent of the starting bid for the first sale. If the immovable is not sold even at that sale and the fixing of a new starting bid is not moved for within one week, the immovable shall be released from enforcement and the preventive detachment shall be expunged on a motion by the enforcement agent.

#### Payment of Price by Enforcement Creditor

**Article 495.** (Amended, SG No. 100/2010, effective 21.12.2010) The execution creditor, who has been declared purchaser of an immovable, shall be obligated, within one week after the distribution, to deposit the amount required for payment of the proportionate parts of the receivables of the other execution creditors, or the amount whereby the price exceeds the receivable of the said creditor where there are no other execution creditors. If the execution creditor fails to deposit the said amount, the said execution creditor shall be liable for the damages and for the costs of the sale, and Item 2 of Article 493 and Article 494 (2) herein, as the case may be, shall apply in respect of the immovable.

#### Award Decree

**Article 496.** (1) Where the person who has been declared purchaser according to the procedure established by Articles 492 to 494 herein deposits the amount due in due time, the enforcement agent shall award the immovable thereto by a decree.

(2) As from the day of the award decree, the purchaser shall acquire all rights to the immovable which the execution debtor enjoyed. The rights to the immovable which any third parties have acquired shall be inopposable to the purchaser if the said rights are inopposable to the execution creditors.

(3) Unless the award is appealed, the validity of the sale shall be contestable solely upon breach of Article 490 herein and upon non-payment of the price. In the latter case, the purchaser may avert the granting of the action if the said purchaser deposits the amount due with interest accruing since the day when the said purchaser was declared purchaser.

#### Advertisement of New Sale

**Article 497.** If the award decree is vacated or if the sale is declared invalid under Article 496 (3) herein, the new sale shall be conducted after new advertising.

#### Delivery of Possession to Purchaser

**Article 498.** (1) Possession of the immovable shall be delivered to the purchaser by the enforcement agent on the basis of the effective award decree. The purchaser shall present certificates of fees paid on the transfer of the immovable and on recording of the award decree.

(2) The coercive seizure of possession shall be executed against any person who is in possession of the immovable. The only remedy available to such a person shall be an action for ownership.

#### Recovery upon Judicial Eviction

**Article 499.** (1) If it is established by an effective judgment that the execution debtor did not own the immovable sold, the purchaser may seek recovery of the price deposited thereby, if the said price has not yet been paid out to the execution creditors, or if the said price has been paid out, the said purchaser may seek recovery from each one of the said creditors, as well as from the execution debtor. In both cases the purchaser shall be entitled to interest and to the costs incurred on the entry thereof in the sale. The said purchaser shall furthermore be entitled to seek a refund of the fees paid on the transfer from the municipality and the State.

(2) For recovery of the amounts referred to in Paragraph (1), the regional judge exercising jurisdiction over the location of the immovable shall issue a writ of execution on the basis of the distribution and the certificates referred to in Article 498 (1) herein, if the persons whereagainst the writ is issued are impleaded in the case in which the judgment has been rendered. If the amount deposited by the purchaser has not been paid out, the said purchaser shall recover the said amount by payment order issued by the enforcement agent.

(3) Where the immovable has been awarded to an execution creditor, the said creditor shall retain the receivable thereof against the execution debtor and shall be entitled to seek, according to the procedure established by Paragraph (2), recovery of the amounts specified in Paragraph (1), excluding the costs incurred on the entry thereof in the sale.

#### Sale of Co-owned Immovable

**Article 500.** (1) Where the enforcement is levied against any co-owned immovable for a debt of any of the co-owners, an inventory shall be taken of the immovable in globo, but solely the undivided interest of the execution debtor shall be sold.

(2) Alternatively, the immovable may be sold in globo, if the rest of the co-owners agree to this in writing.

#### Sale of Mortgaged Immovable

**Article 501.** (1) Upon the sale of a mortgaged immovable which is conducted to enforce a receivable other than the receivable of the mortgagee, the enforcement agent shall dispatch to the said mortgagee a communication on the scheduling of the inventory and the sale.

(2) In the cases referred to in Articles 494 and 495 herein, the mortgagee may enter the sale on an equal footing with the rest of the creditors.

## **Chapter Forty-Four**

### **ENFORCEMENT OF CORPOREAL THINGS IN MATRIMONIAL COMMUNITY PROPERTY**

#### **Levy of Enforcement against Common Corporeal Thing**

**Article 502.** (1) Enforcement of a receivable against one of the spouses may be levied against a corporeal thing which constitutes matrimonial community property. The non-debtor spouse may name a property owned by the debtor spouse whereagainst the enforcement is to be levied. If the property named is available and the receivable can be satisfied therefrom, after

the inventory is taken, the enforcement in respect of the corporeal thing which constitutes matrimonial community property shall be stayed and may be resumed if, after realization of the property named, the receivable or part thereof remains unsatisfied.

(2) Where the spouses agree that the enforcement be levied against a corporeal thing designated thereby, which constitutes matrimonial community property, Article 443 herein shall apply.

#### Non-debtor Spouse Notified

**Article 503.** (1) Where the enforcement agent establishes that a corporeal thing whereagainst enforcement is levied constitutes matrimonial community property, the said agent shall notify the non-debtor spouse.

(2) The non-debtor spouse may appeal against the enforcement steps citing non-compliance with Article 502 herein.

(3) The non-debtor spouse may contest the receivable on the same grounds and according to the same procedure as the debtor spouse, as well as appeal against the enforcement steps on the same grounds as the debtor spouse.

(4) The non-debtor spouse may furthermore enter the bidding upon the public sale of the corporeal immovable.

#### Sale of Common Corporeal Thing

**Article 504.** (1) Where the enforcement is levied against any corporeal thing constituting matrimonial community property, after the sale of the said thing the enforcement agent shall pay out half of the proceeds to the non-debtor spouse, and shall apply Article 455 (2) and Articles 460 to 464 herein to the balance.

(2) If the enforcement is levied against an immovable, Article 500 herein shall apply.

#### Frustration of Sale and Precedence upon Award

**Article 505.** (1) (Amended, SG No. 50/2008) The non-debtor spouse may frustrate the sale if the said spouse deposits the cash equivalent of the share of the debtor spouse in the common corporeal thing in an account of the enforcement agent according to the price fixed for sale at a retail establishment or of the price of the immovable, as the case may be, prior to the delivery of the corporeal thing to a retail establishment or a commodity exchange or, respectively, prior to the commencement of the open-outcry auction and, applicable to the public sale of an immovable, before the day preceding the day of the sale.

(2) Where the non-debtor spouse enters the bidding, the said spouse shall be declared purchaser if, upon the drawing up of the memorandum under Article 492 (1) herein, the said spouse declares that he or she wishes to purchase the immovable at the highest price offered.

#### Equality of Shares

**Article 506.** In the cases referred to in Articles 504 and 505 herein, the non-debtor spouse

may not oppose to the execution creditor the entitlement of the said spouse to a larger share than the debtor spouse owing to the contribution of the non-debtor spouse to the acquisition of the corporeal thing. The execution creditor may not claim that the share of the debtor spouse is larger on the same grounds.

## **Chapter Forty-Five**

# **ENFORCEMENT AGAINST EXECUTION DEBTOR'S RECEIVABLES**

### **Garnishment of Receivable**

**Article 507.** (1) The garnishment communication shall be dispatched to the garnishee simultaneously with the dispatch of the notice of voluntary compliance to the execution debtor.

(2) The garnishment communication shall forbid the garnishee to deliver the amounts or corporeal things due therefrom to the execution debtor. The said corporeal things must be listed exactly.

(3) As from the day of receipt of the garnishment communication, the garnishee shall assume the obligations of a keeper in respect of the corporeal things or amounts due therefrom.

#### Garnishee's Duties

**Article 508.** (1) Within three days after service of the garnishment communication, the garnishee must inform the enforcement agent:

1. whether the said garnishee admits the receivable whereupon the garnishment is imposed, and whether the said garnishee is ready to pay the said receivable;
2. whether any other parties claim the same receivable;
3. whether a garnishment has been imposed on the same receivable under other writs of execution as well, and for what claims.

(2) The invitation to give these explanations shall be contained in the communication of imposition of the garnishment itself.

(3) If the garnishee does not contest the obligation thereof, the said garnishee shall deposit the amount due therefrom in the account of the enforcement agent or shall deliver the garnished corporeal things thereto.

#### Garnishment of Receivable Secured by Pledge or Mortgage

**Article 509.** (1) If the garnished receivable is secured by a pledge, the person who holds the pledged corporeal thing shall be commanded not to deliver the said thing to the execution debtor but to deliver the said thing to the enforcement agent if the garnishee admits the debt.

(2) If the garnished receivable is secured by a mortgage, the garnishment shall be noted in the relevant book at the Recording Office.

#### Award for Collection or in Lieu of Payment

**Article 510.** The garnished receivable shall be made available to the execution creditor for collection or, on a motion thereby, shall be given to the execution creditor in lieu of payment. Where there are several execution creditors under the enforcement case, the receivable shall be made available for collection to the execution creditor on whose motion the case has been instituted and, should the said creditor decline, to another execution creditor who makes such a motion.

#### Enforcement against Delivered Corporeal Things

**Article 511.** Enforcement against the corporeal things which the garnishee delivers or which the said garnishee has been ordered to deliver shall follow the procedure established by Articles 465 to 482 herein.

#### Garnishment of Labour Remuneration

**Article 512.** (1) The garnishment of a labour remuneration shall affect not only the remuneration specified in the garnishment communication but also any other remuneration received by the execution debtor in consideration of the same or other work with the same employer or at the same institution.

(2) If the execution debtor takes up employment with another employer or at another institution, the garnishment communication shall be forwarded there by the person who initially received the said communication and shall be considered dispatched by the enforcement agent. The garnishee shall notify the enforcement agent of the new place of work of the execution debtor and of the amount withheld until the change of employment.

(3) The person who pays a labour remuneration to the execution debtor notwithstanding the garnishment imposed, without withholding the amount under the garnishment, shall be liable in person to the execution creditor for the said amount solidarily with the garnishee.

(4) The garnishment communication under maintenance obligations shall be entered into the civil-service or employment work book of the execution debtor by the person who pays the remuneration. Where the execution debtor takes up employment with another employer or at another institution, the remuneration thereof shall continue to be withheld on the basis of this entry even if no other garnishment communication is received.

(5) The entry shall be expunged at the command of the enforcement agent who has imposed the garnishment.

(6) If the employment relationship or civil-service relationship of the execution debtor is terminated after the imposition of the garnishment on the labour remuneration and the said debtor fails to notify the enforcement agent of the new employment of the said debtor within one month, the enforcement agent shall impose a fine not exceeding BGN 200 on the said debtor.

## Execution Creditor's Liability upon Collection of Receivable

**Article 513.** The execution creditor who delays the collection of the receivable delivered thereto shall be liable to the execution creditor under the writ of execution for all damages which constitute a direct and immediate consequence of the said delay.

## Costs of Collection of Awarded Receivable

**Article 514.** The costs which the execution creditor incurs on collection of the receivable delivered thereto shall be left borne thereby. The said execution creditor shall be obligated to give the enforcement agent exact account of the amounts collected.

## Enforcement against Physical Securities

**Article 515.** (1) Physical securities shall be garnished by means of taking an inventory and seizure of the said securities by the enforcement agent, who shall deposit the said securities with a bank.

(2) Upon the imposition of garnishment on physical registered shares or bonds, the enforcement agent shall notify the corporation of this. The garnishment shall have effect in respect of the corporation as from the receipt of the garnishment communication. The garnishment shall extend to all property rights conferred by the security.

(3) After imposition of the garnishment, the execution creditor may move for:

1. an award of the receivable under the security for collection in lieu of payment;
2. the conduct of a public sale.

(4) Physical securities shall be sold by the enforcement agent in accordance with the rules for public sale of an immovable under this Code, separately and in blocks. The enforcement agent shall transfer each security in the due manner applicable to the said security and shall deliver the said security to the purchaser after the entry into effect of the award decree. Where the security is transferred by endorsement, the order of endorsements shall not be interrupted.

## Enforcement against Dematerialized Securities

**Article 516.** (1) Dematerialized securities shall be garnished by means of dispatch of a garnishment communication to the Central Depository, the corporation being notified simultaneously. The Central Depository shall notify immediately the relevant regulated market of the garnishment imposed.

(2) Government securities shall be garnished by means of dispatch of a garnishment communication to the person keeping a register of government securities.

(3) The garnishment shall have effect as from the time of service of the garnishment communication and shall extend to all property rights conferred by the security.

(4) The Central Depository and the person keeping a register of government securities shall

be obligated to notify the enforcement agent, within the time limit referred to in Article 508 herein, of what securities are held by the execution debtor, whether any other garnishments have been imposed and for what claims.

(5) As from the receipt of the garnishment communication, the dematerialized securities shall pass into the disposition of the enforcement agent.

(6) After imposition of the garnishment, the execution creditor may move for:

1. an award of the receivable under the security for collection in lieu of payment;
2. the conduct of a public sale.

(7) Dematerialized securities shall be sold through a bank in the manner established for the said securities. The enforcement agent shall act on his or her behalf and for the account of the execution debtor.

#### Enforcement against Participating Interest in Commercial Corporation

**Article 517.** (1) A participating interest in a commercial corporation shall be garnished by dispatch of a garnishment communication to the Registry Agency. The garnishment shall be recorded according to the procedure applicable to recording of a pledge of a participating interest in a commercial corporation and shall have effect as from the recording of the said garnishment. The Registry Agency shall notify the corporation of the garnishment as recorded.

(2) Where the enforcement is levied against a participating interest held by a general partner, the enforcement agent, after establishing compliance with the conditions under Article 96 (1) of the Commerce Act, shall serve the declaration of will of the execution creditor on dissolution of the corporation upon the corporation and upon the rest of the general partners. After the lapse of six months, the enforcement agent shall empower the execution creditor to bring an action for dissolution of the corporation before the district court exercising jurisdiction over the registered office of the said corporation. The court shall dismiss the action if it is established that the receivable of the execution creditor has been satisfied. If it determines that the action is well-founded, the court shall dissolve the corporation. The dissolution shall be recorded ex officio in the commercial register, whereafter liquidation shall be proceeded with.

(3) Where the enforcement is levied against a participating interest held by a limited partner, the enforcement agent shall serve upon the corporation the declaration of will of the execution creditor on termination of the participating interest of the execution debtor in the corporation. After the lapse of three months, the enforcement agent shall empower the execution creditor to bring an action for dissolution of the corporation before the district court exercising jurisdiction over the registered office of the said corporation. The court shall dismiss the action if it is established that the corporation has paid the execution creditor the portion of the property, determined according to Article 125 (3) of the Commerce Act, appertaining to the execution-debtor partner, or that the receivable of the execution creditor has been satisfied. If it determines that the action is well-founded, the court shall dissolve the corporation. The dissolution shall be recorded ex officio in the commercial register, whereafter liquidation shall be proceeded with.

(4) Where the enforcement is levied against all participating interests in a corporation, the action for dissolution of the said corporation may be brought after recording of the garnishment and without compliance with the requirements of Article 96 (1) of the Commerce Act, without service of a declaration of will for dissolution of the company or for termination of the participation of the execution debtors in the company. The court shall dismiss the action if it is established that the receivable of the execution creditor has been satisfied before the end of the first hearing of the case. If it determines that the action is well-founded, the court shall dissolve the corporation and this shall be recorded ex officio in the commercial register, whereafter liquidation shall be proceeded with.

Enforcement against Common Deposit

**Article 518.** Enforcement for a receivable against one of the spouses may alternatively be levied against one-half of a money deposit in matrimonial community. The other half shall remain a personal deposit of the non-debtor spouse. The provisions of Articles 503 and 506 herein shall apply, mutatis mutandis, to any such enforcement.

## **Chapter Forty-Six ENFORCEMENT AGAINST GOVERNMENT INSTITUTIONS, MUNICIPALITIES AND BUDGET-SUBSIDIZED ESTABLISHMENTS**

### **Enforcement against Government Institutions and Municipalities (Heading supplemented, SG No. 13/2010, declared unconstitutional by the Constitutional Court of the Republic of Bulgaria, regarding the words "and Municipalities" - SG No. 5/2011)**

**Article 519.** (1) (Supplemented, SG No. 13/2010, declared unconstitutional by the Constitutional Court of the Republic of Bulgaria, regarding the words "and Municipalities" - SG No. 5/2011) Enforcement of pecuniary receivables against government institutions and municipalities shall be inadmissible.

(2) (Supplemented, SG No. 13/2010, declared unconstitutional by the Constitutional Court of the Republic of Bulgaria, regarding the words "and Municipalities" - SG No. 5/2011) The pecuniary receivables against government institutions and municipalities shall be paid out of the budgetary spending authority of the said institutions provided for this purpose. To this end, the writ of execution shall be presented to the financial authority of the relevant institution. If spending authority is not available, the superior institution shall undertake the measures necessary for a provision for such authority in the next succeeding budget at the latest.

Enforcement against Budget-Subsidized Establishments

(Heading amended, SG No. 13/2010, declared unconstitutional

by the Constitutional Court of the Republic of Bulgaria, regarding erasing the words "Municipalities and" - SG No. 5/2011)

**Article 520.** (1) (Amended, SG No. 13/2010, declared unconstitutional by the Constitutional Court of the Republic of Bulgaria, regarding erasing the words "Municipalities and others" - SG No. 5/2011) Enforcement against any resources on the bank accounts of the establishments subsidized by the budget, which have accrued as a subsidy from the central government budget, shall be inadmissible.

(2) Enforcement of pecuniary receivables against any other property which is privately owned by the execution creditors referred to in Paragraph (1) shall follow the rules of this Title.

## **TITLE THREE ENFORCEMENT OF NON-PECUNIARY RECEIVABLES**

### **Chapter Forty-Seven COERCIVE SEIZURE OF CORPOREAL THINGS**

#### **Delivery of Movable Thing**

**Article 521.** (1) Any movable thing awarded which, having been claimed by the enforcement agent, was not voluntarily delivered by the execution debtor, shall be seized coercively from the said debtor and shall be delivered to the execution creditor.

(2) If the corporeal thing is not in the possession of the execution debtor or has deteriorated, the cash equivalent of the said thing shall be collected from the said debtor. It shall be proceeded in a similar way where only part of the corporeal thing is found. If the cash equivalent of the corporeal thing is not specified in the writ of execution, the said equivalent shall be determined by the enforcement agent after hearing of the parties and, where necessary, after examination of witnesses and an expert witness as well.

(3) The decree determining the cash equivalent shall be appealable under Article 436 herein. The appellate review of the decree shall not stay the collection of the cash equivalent, but the court may decree the stay. The court shall examine the appeal, sitting in public session with the execution debtor and the execution creditor being summoned. The judgment shall be appealable before the appellate court, whose judgment shall be unappealable.

Delivery of Possession

**Article 522.** (1) Possession of an immovable which has been awarded to a person shall be

delivered to the said person. The enforcement agent shall assign a day and hour for the delivery of possession and shall notify the parties. The memorandum shall be drawn up by the enforcement agent on site. If the enforcement agent does not vacate the immovable voluntarily, the said agent shall be evicted coercively.

(2) The judgments referred to in Article 349 herein shall be enforced after the appertaining portions of the value of the immovable are paid up to the other co-partitioners.

#### Coercive Seizure of Possession from Third Party

**Article 523.** (1) If the enforcement agent finds the corporeal immovable awarded in the possession of a third party and if the said agent satisfies himself or herself that the said party has acquired possession of the immovable after the institution of the case in which the judgment enforced has been issued, the said agent shall deliver possession of the immovable to the execution creditor. In the memorandum, the enforcement agent shall specify the manner in which the said agent satisfied himself or herself that the third party has acquired possession after the institution of the case.

(2) If the third party claims any rights to the awarded immovable which exclude the rights of the execution creditor, the enforcement agent shall adjourn the enforcement and shall allow the third party three days to approach the regional court with a motion for stay of the enforcement.

#### Stay of Delivery of Possession

**Article 524.** Attached to the petition for the stay, the third party must present written evidence of the right claimed thereby to the immovable. The petition shall be examined in public session with the execution creditor, the execution debtor and the third party being summoned. If the court determines that the petition is well-founded, the court shall stay the enforcement and shall allow the third party one week to bring an action before the competent court. If the third party fails to bring an action within the time limit allowed, the stay shall be vacated on a motion by the execution creditor.

#### Unsanctioned Recovery of Possession

**Article 525.** (1) Where the person evicted from possession recovers possession of the immovable in any manner whatsoever without a sanction, the enforcement agent, acting on a motion by the execution creditor, shall re-evict the said person therefrom.

(2) The person referred to in Paragraph (1) shall furthermore incur criminal liability under Article 323 (2) of the Criminal Code.

## **Chapter Forty-Eight** **PERFORMANCE OF SPECIFIC ACT**

### **Enforcement of Obligation to Perform Substitutable Act**

**Article 526.** (1) Where the execution debtor fails to perform an act which the said debtor has

been ordered to perform and which may be performed by another person, the execution creditor may seek from the enforcement agent empowerment of the said creditor to perform the act for the account of the execution debtor.

(2) The execution creditor may approach the court with a motion that the execution debtor be ordered to deposit in advance the amount necessary for performance of the act.

#### Enforcement of Obligation to Perform Non-substitutable Act and to Refrain from Acting

**Article 527.** (1) Where the act cannot be performed by another person but depends exclusively on the will of the execution debtor, the enforcement agent, acting on a motion by the execution creditor, shall compel the said debtor to perform the act, imposing thereon a fine not exceeding BGN 200. If even after that the execution creditor fails to perform the act, the enforcement agent shall impose thereon successive new fines up to the same amount.

(2) The rule under Paragraph (1) shall not apply to the obligations of factory and office workers arising from an employment relationship or civil-service relationship.

(3) Where the execution debtor acts contrary to what the said debtor is obligated to do or to suffer, the enforcement agent, acting on a motion by the execution creditor, shall impose on the said debtor a fine not exceeding BGN 400 for each breach of the said obligation.

(4) The acts of the enforcement agent for the empowerment and for the imposition of the fines shall be appealable according to the procedure established by Articles 435 to 438 herein.

#### Enforcement of Obligation to Deliver Child

**Article 528.** (1) Where the enforcement agent proceeds with the enforcement of an obligation to deliver a child, as well as of an obligation to return the child thereafter, the said agent shall invite the execution debtor to comply voluntarily at the assigned place and time. The notice of voluntary compliance must be served upon the execution debtor if practicable two weeks, but in any case not later than one week, prior to the time assigned for delivery of the child.

(2) Within three days after service of the notice, the execution debtor must notify the enforcement agent:

1. whether the said debtor is ready to deliver the child at the assigned place and time;
2. what impediments exist to the timely compliance with the obligation;
3. of the place and time at which the said debtor is ready to deliver the child.

(3) The enforcement agent shall impose a fine under Article 527 (3) herein on the execution debtor for a failure to comply with the obligation under Paragraph (2) in due time and, where necessary, shall decree that the attendance of the said debtor be compelled.

(4) The enforcement agent may approach the Social Assistance Directorate with a request for assistance to eliminate the impediments to timely compliance with the obligation and for explanation to the execution debtor and, where necessary, to the child as well, of the

advantages of voluntary compliance and the adverse consequences of non-compliance with the judgment of court. The enforcement agent may approach the Social Assistance Directorate with a request to undertake appropriate measures under Article 23 of the Child Protection Act and, where necessary, the said agent may approach the police authority with a request to take measures under Article 56 of the Ministry of Interior Act.

(5) If the execution debtor fails to comply voluntarily, the enforcement agent, acting with the assistance of the police authorities and the mayor of the municipality, borough or mayoralty, shall seize the child coercively and shall deliver the said child to the execution creditor.

#### Detention upon Obstruction of Enforcement

**Article 529.** If the execution debtor obstructs the enforcement, the police authorities shall detain the said debtor and shall notify the prosecuting magistracy immediately.

## **PART SIX NON-CONTENTIOUS PROCEEDINGS**

### **Chapter Forty-Nine GENERAL RULES**

#### **Governing Provisions**

**Article 530.** The non-contentious proceedings provided for in this Code and in other laws shall be governed by the rules of this Chapter, save insofar as any special rules are established.

#### Cognizance of Petition for Facilitation

**Article 531.** (1) The non-contentious proceeding shall commence on a written petition by the interested person.

(2) The petition shall be submitted to the regional court within whose geographical jurisdiction the permanent address of the petitioner is located. If the petitioners have different permanent addresses, the said petition shall be submitted to the court exercising jurisdiction over the permanent address of one of the said petitioners.

#### Examination of Petition in Camera

**Article 532.** The petition shall be examined in camera, unless the court determines that the correct adjudication of the case requires that the said case be examined in public session.

#### Ex Officio Verification

**Article 533.** The court shall be obligated to verify ex officio whether the conditions for issuing of the act sought exist. The court, acting on its own initiative, may take evidence and take into account any facts not cited by the petitioner.

## Personal Appearance and Declaration of Circumstances

**Article 534.** The court may decree the personal appearance of the petitioner. The court may require from the petitioner to confirm by a declaration the truthfulness of the circumstances set forth thereby.

## Use of Evidence

**Article 535.** The court may invoke testimony given before other authorities, as well as assign another court or the police authorities, or the municipalities, to take the requisite evidence.

## Stay of Proceeding

**Article 536.** (1) The non-contentious proceeding shall be stayed where:

1. there is a case regarding a legal relation which is a precondition for the issuing of the act sought or which is subject to establishment by the said act;
2. a dispute over a civil right arises on the petition for issuing of the act between the petitioner and another person, who opposes the petition; in such case, the court shall allow the petitioner one month to bring the action; the proceeding shall be terminated if the said action is not brought within the said time limit.

(2) The effective judgment on the dispute shall be binding upon authorization of the non-contentious proceeding under the terms and within the limits established by Article 298 herein.

## Contestation of Non-contentious Act

**Article 537.** (1) The judgment whereby the petition for issuing of the act sought is granted shall be unappealable.

(2) Where the act referred to in Paragraph (1) affects the rights of third parties, the dispute which has arisen therefrom, if over a civil right, shall be resolved according to an action procedure. The action shall be brought against the persons who benefit from the act. If the action is granted, the act issued shall be vacated or modified.

(3) The prosecutor may bring an action for vacation of the act issued, where the said act was rendered in violation of the law. The action shall be directed against the persons who benefit from the act.

## Appellate Review of Refusal

**Article 538.** (1) A refusal to issue the act shall be appealable within one week after service of the judgment on the party.

(2) The appeal shall be lodged through the regional court. The said appeal may alternatively be based on new facts and evidence. The examination of the appeal shall follow the procedure established by Article 278 herein.

(3) The judgment whereby the petition is denied shall be no impediment to a re-submission of a petition to the same court for the issuing of the same act.

#### Termination of Proceeding

**Article 539.** (1) The non-contentious proceeding shall be terminated where:

1. the petition for issuing of the act is withdrawn;
2. the petitioner is not found at the address named thereby.

(2) The ruling whereby the proceeding is terminated shall be appealable by an interlocutory appeal.

#### Applicability of Action Proceeding Rules

**Article 540.** In addition to the general rules of this Code, the rules of action proceeding, with the exception of Articles 207 to 266 and Articles 303 to 388 herein, shall also apply, mutatis mutandis, to non-contentious proceedings.

#### Costs

**Article 541.** The costs of non-contentious proceedings shall be for the account of the petitioner.

## **Chapter Fifty ESTABLISHMENT OF FACTS**

### **Scope of Application**

**Article 542.** (1) (Redesignated from Article 542, SG No. 19/2009) Where the law provides that a known fact of legal relevance must be certified by a duly drawn up document (such as a certificate of educational attainment, a certificate of civil status etc.), and such document has not been drawn up and cannot be drawn up or the document drawn up has been destroyed or lost beyond recovery, the person who invokes this fact as a fountain of rights may approach the regional court with a petition to establish the said fact and, where necessary, to order the execution of the relevant document.

(2) (New, SG No. 19/2009) If a civil status register has been destroyed or lost beyond recovery, the mayor of the relevant municipality may approach the regional court with a petition to establish the said fact and to order the execution of the relevant register.

#### Petition: Content

**Article 543.** The petition shall state:

1. the purpose for which the petitioner prays for the establishment of the relevant fact;

2. the reasons for which the document has not been drawn up or for which the said document cannot be drawn up, with official documents being presented for establishment of the said reasons;

3. evidence of the fact subject to establishment.

#### Examination of Petition

**Article 544.** (1) The petition shall be examined in public session, with the petitioner and the persons interested in the establishment of the fact being summoned. Apart from the said persons, the prosecutor shall be summoned as well.

(2) The following parties shall be interested:

1. the persons whereof the relations depend on the fact subject to establishment;

2. the organizations and institutions which were supposed to draw up the document or which are not in a position to recover the said document;

3. the organizations and institutions in dealing wherewith the petitioner wishes to invoke the establishment decreed by the court.

(3) If any interested person is deceased, the heirs thereof shall be summoned. The interested parties referred to in Item 3 of Paragraph (2) may alternatively be represented by the local subdivisions thereof.

(4) (New, SG No. 19/2009) In the cases referred to in Article 542 (2) herein, the court shall summon the Ministry of Regional Development and Public Works and the prosecutor. The Ministry of Regional Development and Public Works shall submit the data applicable to the relevant register, as extracted from the Unified System for Civil Registration and Administrative Services of the Population.

#### Establishment of Educational Attainment

**Article 545.** (1) Where the petitioner wishes to establish that the said petitioner has received education at a particular educational establishment, to establish this fact the court may use, in addition to the other evidence, a conclusion of expert witnesses regarding the qualifications of the petitioner.

(2) In the case referred to in Paragraph (1), the superior institution of the educational establishment referred to in Paragraph (1) shall be summoned as an interested institution referred to in Item 2 of Article 544 (2) herein.

#### Judgment: Content and Effect

**Article 546.** (1) The judgment of the court shall specify the fact established by the court and the evidence on the basis of which the said fact was established.

(2) The judgment whereby the court pronounces on the petition shall be appealable according

to the standard procedure.

(3) The judgment shall have no evidential value in respect of those interested persons, organizations or institutions covered under Article 544 herein, who or which have not been summoned to participate in the proceeding, if the said parties contest the fact.

#### Applicability of Proceeding for Removal of Errors

**Article 547.** Any errors in the documents referred to in Article 542 herein may be rectified according to the procedure established by this Chapter and with the same consequences, where a law does not provide for another procedure for rectification of the said errors.

#### Establishment of Facts which have Occurred Abroad

**Article 548.** Where any facts referred to in Article 542 herein have occurred abroad, the establishment of the said facts may be sought according to the procedure established by this Chapter solely if it is proved that the petitioner is unable to obtain the document which the said petitioner needs or an attestation in lieu of the said document from the authorities of the State within whose territory the fact has occurred. This impediment shall be proved either by means of documents issued by the competent authorities of the foreign State, or by means of a certificate issued by the Ministry of Foreign Affairs, to the effect that the authorities of the foreign State have refused to examine the petition of the interested person or that it is impossible to make such a request.

## **Chapter Fifty-One DECLARATION OF ABSENCE OR DEATH**

### **Cognizance and Content of Petition**

**Article 549.** (1) A petition for declaration of the absence or death of a particular person shall be cognizable in the regional court exercising jurisdiction over the last permanent address of the absent person, and where there is no such address, in the regional court exercising jurisdiction over the place where the person lived immediately before absenting himself or herself.

(2) The petition shall furthermore indicate the presumable heirs of the absent person and the attorney-in-fact or legal representative thereof, if any.

#### Examination of Petition

**Article 550.** (1) (Amended, SG No. 69/2008) The court, sitting in camera, shall decree the collection of information on the absent persons from the next of kin thereof, from the municipality, borough or mayoralty, from the Ministry of Interior and from any other appropriate source.

(2) The court shall dispatch an abstract of the petition for publication to the municipality, borough or mayoralty wherein the person lived immediately before absenting himself or herself. The said abstract shall be served upon the persons referred to in Article 549 (2)

herein.

(3) The court shall pronounce on the petition for declaration of the absence or death after hearing the prosecutor and the persons specified in Article 549 (2) herein, as well as the other interested parties.

#### Drawing up Certificate of Death

**Article 551.** On the basis of the judgment whereby the death of a particular person has been declared, a certificate of death shall be drawn up, citing the last permanent address of the person or the place where the said person lived immediately before absenting himself or herself.

#### Reversal of Judgment

**Article 552.** (1) On a petition by any interested party or on a motion by the prosecutor, the judgment declaring the absence or death of a particular person may be reversed or modified if it is established that the absent person is alive or that the exact date of the death thereof is other than the date declared by the court.

(2) The action under Paragraph (1) shall be brought against the party which has moved for the declaration of the absence or death, and against the persons who invoke the relevant act as a fountain of rights.

## **Chapter Fifty-Two PROCEEDING IN RESPECT OF OPENED SUCCESSION**

### **Territorial Competence**

**Article 553.** (1) The property left after the death of a person shall be sealed in the cases established by the law by the regional court exercising jurisdiction over the place of the opening of the succession or of the location of the property.

(2) The regional court may assign the municipality or the mayoralty to perform the sealing through its own authority.

(3) On a motion by the petitioner, the sealing may alternatively be assigned to the enforcement agent.

#### Authorized Persons

**Article 554.** The following may move for sealing:

1. any person who claims a right to succession;
2. the creditor who holds a writ of execution against the deceased;

3. the prosecutor and the mayor of the municipality, borough or mayoralty, where any heirs are absent.

#### Sealing

**Article 555.** A memorandum shall be drawn up on the sealing, stating therein the date, the authority which commanded the performance of the sealing, a listing of the sealed premises, safes, trunks and other such, and a brief description of the objects which are not sealed. The said memorandum shall be signed by the official and by the parties present.

#### Unsealing

**Article 556.** (1) Any party entitled to move for sealing may move for unsealing and for taking an inventory of the property.

(2) The unsealing shall be performed and the inventory shall be taken by the regional court, which may assign this according to the procedure established by Article 553 (2) and (3) herein.

#### Taking of Inventory

**Article 557.** (1) A memorandum shall be drawn up on the inventory, describing therein separately all things in the order of unsealing. An expert may be appointed for appraisal of the things.

(2) The heirs of the deceased and the creditors may be present at the taking of the inventory.

(3) The inventory may be taken even if no sealing has been performed.

#### Delivery of Corporeal Things

**Article 558.** The corporeal things inventoried shall be delivered to the heirs or to any of the said heirs against signed acknowledgment, and where there are no heirs or where the said heirs do not wish to accept the said things, the said things shall be delivered to a third party for safekeeping.

#### Notification of Inventory

**Article 559.** Where the sealing and unsealing are performed and the inventory is taken by the municipality, borough or mayoralty, the memorandum shall be transmitted to the regional judge.

## **Chapter Fifty-Three CANCELLATION OF SECURITIES**

### **Subject Matter and Prerequisites**

**Article 560.** Any person, who holds a right to a negotiable security payable to order: a

promissory note, a bill of exchange and other such, or to a negotiable instrument payable to bearer, may move for the cancellation of the said security if the said person is dispossessed of the said security against the will thereof or if the said security has been destroyed.

Petition: Content

**Article 561.** In the petition thereof, the petitioner must:

1. reproduce the security or indicate everything which is necessary for the establishment of the identity of the said security;
2. set forth the circumstances whereunder the security was lost or destroyed, as well as the circumstances wherefrom the right of the petitioner to the said security arises;
3. confirm the truthfulness of the allegations thereof by an express declaration contained in the petition.

Order Barring Payment

**Article 562.** (1) If the petition conforms to the requirements covered under Article 561 herein, the court, sitting in camera, shall issue an order which shall contain:

1. an indication of the petitioner;
2. an invitation to the holder of the security to declare the rights thereof not later than the day specified in the order for a hearing of the court for pronouncement on the cancellation, with a warning that if the said holder fails to do so, the security will be cancelled;
3. a command to the payer not to effect any payments to the bearer of the security.

(2) The order shall be posted in the place designated for this purpose at the court and shall be promulgated in the Unofficial Section of the State Gazette.

(3) A duplicate copy of the order shall be dispatched to the payer.

Scheduling of Hearing for Cancellation

**Article 563.** A hearing for cancellation of a security shall be scheduled to a date not earlier than:

1. forty-five days after the promulgation of the order referred to in Article 562 (3) herein or after the maturity of the security, if the said promulgation was effected prior to the maturity: applicable to any negotiable security payable to order;
2. one year after the maturity of the first coupon after the promulgation of the order: applicable to any negotiable security payable to bearer issued with interest coupons attached thereto;
3. one year after the maturity of the security: applicable to any negotiable securities payable to bearer issued with no interest coupons attached thereto.

### Contestation of Petition

**Article 564.** (1) The person who contests the petition for cancellation shall be obligated to state this at the latest during the court hearing and to deposit the security with the court or with a bank until resolution of the dispute.

(2) In the case referred to in Paragraph (1), the court shall stay the cancellation proceeding and shall allow the petitioner one month to present evidence that the said petitioner has brought an action for declaratory judgment on the right thereof to the security. The court shall terminate the cancellation proceeding unless evidence of the bringing of an action is presented.

### Judgment on Cancellation

**Article 565.** (1) The judgment on cancellation shall be rendered in public session with the petitioner being summoned.

(2) The judgment whereby the petition for cancellation is denied shall be appealable according to the standard procedure.

### Exercise of Rights Conferred by Security

**Article 566.** After the cancellation of the security, the petitioner shall exercise the rights conferred thereby on the basis of the judgment on cancellation. On the basis of the said judgment, the said petitioner may demand the issuing of a duplicate copy of the security.

### Security Holder's Rights

**Article 567.** The person who possesses the cancelled security, regardless of the fact that the said person has not claimed the rights thereto in due time, may seek to recover the amount under the security from the person on the petition whereof the cancellation has been decreed if the said person was not entitled to move for cancellation.

### Vacation of Order Barring Payment

**Article 568.** If the proceeding for cancellation ends without a judgment on cancellation, the order barring payment shall be vacated ex officio by the court and this shall be communicated to the payer.

## **Chapter Fifty-Four NOTARIAL PROCEEDINGS**

### **Section I General Rules**

#### **Notarial Certifications**

**Article 569.** Notarial proceedings shall be proceedings whereof the procedure applies to the effecting of:

1. legal transactions by notarial acts;
2. certification of a right of ownership to a corporeal immovable, certification of the date, content or signatures of private documents, as well as of the trueness of duplicate copies and abstracts of documents and papers;
3. notarial invitations, protests, certification of appearance or of non-appearance of persons before the notary for performance of steps therebefore;
4. acceptance and return of documents and papers delivered for safekeeping;
5. entries, notations and the deletion thereof in the cases provided for in a law;
6. searches of the notarial books, including searches of the books referred to in Article 577 (2) herein;
7. issuing of certificates of existence or non-existence of charges;
8. performance of other notarial steps provided for in a law.

#### Territorial Competence

**Article 570.** (1) (Supplemented, SG No. 50/2008) Any notarial acts on transfer of ownership or on creation of a right in rem to a corporeal immovable and on certification of a right of ownership to an immovable shall be issued by the notary within whose area of practice the immovable is located. Any entries, notations and deletions of an immovable shall be effected on an order of the recording magistrate by the Recording Office exercising competence over the location of the immovable. Any acts subject to entry, notation and deletion shall be presented in two or more identical copies.

(2) The other notarial steps, as well as the testaments, may be performed by any notary regardless of the link between the area of practice thereof and the notarial certification.

#### Commencement of Notarial Proceeding

**Article 571.** Notarial proceedings shall commence on an oral petition. The said petition shall be submitted in writing solely where an issuing of a notarial act on transfer or creation of a right in rem to an immovable, certification of a right of ownership to an immovable, and entry, notation and deletion of an entry is sought.

#### Parties to and Participants in Notarial Proceeding

**Article 572.** Parties to a notarial proceeding shall be the persons on whose behalf the performance of the notarial step is sought. Participating in a notarial proceeding shall be the persons whose personal declaration of will the notary certifies.

## Place and Time of Notarial Certifications

**Article 573.** (1) The notary cannot perform notarial steps outside the area of practice thereof.

(2) (Amended, SG No. 50/2008) Any notarial act subject to entry shall be issued solely in the notary's chambers within normal business hours.

(3) Any other notarial steps may also be performed out of the notary's chambers and outside normal business hours, where valid reasons prevent the persons participating in the certification from appearing in the notary's chambers or necessitate the immediate performance of a notarial step.

## Legal Conformity of Notarial Certifications

**Article 574.** Notarial steps may not be performed in respect of any transactions, documents or other acts which conflict with the law or with good morals.

## Notary's Recusal

**Article 575.** (1) The notary may not perform notarial steps where the notary himself or herself, the spouse thereof or the person who is a de facto cohabitee therewith, any ascendants or descendants thereof, any collateral relatives thereof up to the fourth degree of consanguinity, any affines thereof up to the first degree of affinity, as well as any person in respect of whom the notary is a tutor, curator, adoptee or adopter or a member of a foster family, is a party to the notarial proceeding or a person participating in the said proceeding.

(2) The prohibition under Paragraph (1) shall furthermore apply in the cases where the transaction or the document contains a disposition in favour of any of the persons covered under Paragraph (1).

## Null Notarial Certifications

**Article 576.** A notarial step shall be null where the notary did not have the right to perform the said step (Article 569, Article 570 (1), Article 573 (1), Articles 574 and 575 herein), as well as where Article 578 (4) (in respect of the personal appearance of the participating persons), Article 579, Items 1, 3, 4 and 6 of Article 580, Articles 582, 583 and Article 589 (2) herein were violated upon the performance of the said step.

## Appellate Review of Refusal

**Article 577.** (1) Any refusal to effect a notarial certification shall be appealable by an interlocutory appeal before the district court.

(2) Separate books shall be kept of the refusals to effect an entry, notation or deletion.

(3) Where the court reverses the refusal, the entry, notation or deletion shall be considered effected as from the time of submission of the petition for the said entry, notation or deletion.

## Section II

# Special Rules

## Notarial Act: Form

**Article 578.** (1) For the issuing of a notarial act, a draft of the act shall be prepared in two or more identical copies. The shape, kind and size of the paper whereon the said draft shall be handwritten or typed shall conform to a standard form endorsed by the Minister of Justice.

(2) All copies of the draft shall be prepared in a clean and legible form, handwritten in black or blue ink or typed.

(3) The figures in the draft shall be written in words, where the said figures concern the content of the transaction. The blank spaces shall be crossed out.

(4) The persons or the attorneys-in-fact thereof, whose declarations of will are contained in the draft, must appear in person before the notary who, before issuing the act, shall verify the identity, the full capacity to act and the representative authority of the persons who have appeared therebefore.

(5) The identity of the persons who are unknown to the notary shall be established by means of an identity document. In the same manner, the notary shall establish whether the persons who have appeared therebefore have attained the age of 18 years. If an identity document is not available, the person shall establish the identity thereof by means of two witnesses of established identity.

### Notarial Act: Issuing

**Article 579.** (1) The notary shall read the content of the act to the participating persons. If the said persons approve the content of the said act, they shall write out the name thereof and shall affix the signature thereof before the notary, or if the act is already signed, they shall write out the full name thereof and shall confirm the signatures thereof.

(2) Where any of the participating persons is unable to sign by reason of illiteracy or disability, Article 189 herein shall apply, and the act shall not be countersigned by witnesses.

(3) Where any corrections, insertions or deletions in the act have to be made, an express note of this shall be made and the said note shall be signed in the same manner as the act itself.

### Notarial Act: Content

**Article 580.** The notarial act shall contain:

1. the year, the month and the day and, where necessary, also the hour and place of issuing;
2. the name of the issuing notary;
3. (amended and supplemented, SG No. 50/2008, effective 30.05.2008) the full name, the Standard Public Registry Personal Number of the persons who participate in the proceeding, as well as the number, date and place of issue and issuing authority of the identity document

of the said persons;

4. the content of the act;

5. brief reference to the documents attesting compliance with the requirements referred to in Article 586 (1) herein;

6. signature and full name of the parties or representatives thereof written out, and signature of the notary.

#### Notarial Act: Filing

**Article 581.** After the issuing of the act and the recording thereof, one copy of the said act shall be filed in a special book, and the other copies, whereon a fee shall be charged as for duplicate copies, shall be delivered to the participating persons.

#### Oral Interpreter

**Article 582.** (Amended, SG No. 50/2008) Where any of the participating persons has no command of the Bulgarian language and the language used thereby is unfamiliar to the notary, the notary shall appoint an oral interpreter.

#### Participation of Deaf, Mute or Illiterate Person

**Article 583.** (1) Where any participating person is literate but mute, deaf or deaf-mute, the deaf person must read the document aloud and declare whether the said person agrees with the content of the said document, whereas the mute or deaf-mute person must, after the reading of the document, write in his or her own hand therein that the said person agrees with the content of the said document.

(2) Where any of the persons referred to in Paragraph (1) are illiterate, the notary shall appoint a sign-language interpreter, with the assistance of whom the content of the document shall be communicated to the deaf or deaf-mute person and the approval by the deaf or deaf-mute person of what is read shall be conveyed. The notary must satisfy himself or herself that the sign-language interpreter and the said persons understand each other.

(3) In the cases referred to in Paragraph (2), the notary shall make the relevant note in the act.

#### Incompatibility of Witnesses, Oral Interpreters and Sign-Language Interpreters

**Article 584.** The following may not act as witnesses, oral interpreters and sign-language interpreters:

1. any persons who lack full capacity to act;

2. any persons who cannot read and write in the Bulgarian language;

3. any persons who are related to the persons referred to in Article 572 herein or to the notary in any of the manners specified in Article 575 herein; the sign-language interpreter may be a relative to a person participating in the proceeding;

4. any person in whose favour is any disposition contained in the act;
5. any blind, deaf and mute persons;
6. any persons employed in the notary's office and the employees of the Recording Office.

#### Participation of Witnesses, Oral Interpreters and Sign-Language Interpreters

**Article 585.** (1) The witnesses, oral interpreters and sign-language interpreters shall promise that what they will affirm before the notary will be true, according to Article 170 herein.

(2) The persons referred to in Paragraph (1) shall sign the act.

#### Verification of Ownership

**Article 586.** (1) Upon the issuing of a notarial act whereby a right of ownership is transferred or another right in rem to a corporeal immovable is created, transferred, modified or terminated, the notary shall verify whether the grantor owns the said immovable and whether the special requirements for effecting of the transaction are fulfilled.

(2) The right of ownership shall be certified by the relevant document. Where such documents are not available to the grantor, the right of ownership shall be verified according to the procedure established by Article 587 (2) herein.

(3) In the act, the notary shall furthermore certify the performance of the verification referred to in Paragraph (1) and, to this end, shall specify the documents attesting the right of ownership and the other requirements.

(4) Where the document of ownership of the grantor is not recorded, the notarial act shall not be issued until the recording of the said documentary proof.

#### Notarial Act of Ascertainment

**Article 587.** (1) Where the owner of an immovable does not have a document on the right thereof, the said owner may obtain such a document after establishing the right thereof before a notary by means of due written evidence.

(2) If the owner does have such evidence at the disposal thereof or if the said evidence is insufficient, the notary shall perform a circumstantial verification as to acquisition of the ownership by acquisitive prescription by means of an examination of three witnesses, named by the mayor of the municipality, borough or mayoralty wherein the immovable is located or by an official designated thereby. The witnesses shall be named at a direction of the owner and must be, as far as practicable, neighbours to the immovable.

(3) On the basis of the evidence referred to in Paragraphs (1) and (2), the notary shall render a reasoned decree. If the right of ownership is acknowledged by the said decree, the notary shall issue the petitioner a notarial act of ownership of the corporeal immovable.

#### Notarial Act of Ascertainment: Content

**Article 588.** (1) A notarial act of ascertainment shall contain:

1. the essential elements referred to in Items 1, 2 and 5 of Article 580 herein and signature of the notary;
2. (supplemented, SG No. 50/2008, effective 30.05.2008) the full name or the designation and the Standard Public Registry Personal Number of the owner, the number, date and place of issue and issuing authority of the identity document;
3. exact description of the corporeal immovable, indicating the boundaries and the location thereof.

(2) Upon issuing of a notarial act of ascertainment, Article 578 (4) and (5), Articles 579, 581, 582 and 583 herein shall not apply.

#### Presentation of Private Document for Certification

**Article 589.** (1) Each person may present to the notary a private document for certification of the date of presentation of the said document before the notary or the content of the said document.

(2) (Amended, SG No. 50/2008) Upon certification of a signature affixed to a private document, the persons whereof the signatures are subject to certification must appear in person before the notary and sign the document before the said notary or confirm the previously affixed signatures. Where the document is to be used for the creation, modification or termination of rights to an immovable, the persons must write out the full name thereof and affix the signature thereof before the notary, or if the signature is already affixed, write out the full name thereof and confirm the signature. Article 578 (4) and (5), Article 579 (2) and Articles 582 to 585 herein shall apply upon certification of a signature affixed to a private document.

(3) If the private document is in any language other than Bulgarian and is non-recordable, Article 582 herein shall apply, *mutatis mutandis*.

#### Certification of Private Document Date, Content and Signatures

**Article 590.** (1) The certification of the date, content and signatures of a private document shall be effected by means of an inscription on the document. Article 580 herein shall apply in this case, save insofar as there are any special rules.

(2) In respect of the certification of the date or signatures as effected, a note shall be made in a special register of such certifications. Upon certification of the content of a document, the petitioner must present a duplicate copy of the said document. After the certification the duplicate copy, duly authenticated, shall be filed in a special book.

(3) After the certification, the private documents shall be returned to the persons who have presented the said documents.

(4) (New, SG No. 50/2008) Upon simultaneous certification of the signatures and the content

of a document, the petitioner must present two or more identical copies of the document, which shall be signed according to the procedure established by Article 589 (2) and (3) herein. After certification of the signature and the content, one copy shall be filed in a special book, and the other copies shall be delivered to the petitioner.

#### Certification of Duplicate Copy of Document

**Article 591.** (1) Upon certification of the trueness of a duplicate copy of any documents presented to the notary, the notary shall be obligated to compare the duplicate copy with the original and to specify in the certification who presented the document, who made the duplicate copy, as well as whether the duplicate copy was made from the original document or from another duplicate copy and whether they contained any crossings, insertions, corrections and other peculiarities.

(2) In the case referred to in Paragraph (1), Article 589 (1) and Article 590 herein shall apply, *mutatis mutandis*.

#### Notarial Invitation

**Article 592.** (1) For the purpose of service of a notarial invitation, the petitioner must present the invitation in three identical copies. The notary shall note on each of the said copies that the invitation has been communicated to the person whom it concerns, whereupon one of the copies of the invitation shall be delivered to the person wherefrom the invitation originates, and the other copy shall be filed in a special book at the notary.

(2) Any other communications, warnings and answers in connection with civil-law relationships shall be effected through the notary according to the procedure established by Paragraph (1).

#### Memorandum of Ascertainment

**Article 593.** (Amended, SG No. 50/2008) Upon certification of the appearance or non-appearance of persons before the notary for performance of any steps therebefore, a memorandum of ascertainment shall be drawn up. The consent or dissent of the appearing persons to the performance of the relevant steps shall be certified in the same manner. Article 580 herein shall apply to the drawing up of any such memorandum of ascertainment, save insofar as there are special rules. Any such memorandum of ascertainment shall be drawn up in two identical copies, which shall be signed by the petitioner and by the notary. One of the copies shall be filed in a special book, and the other copy, whereon a fee shall be charged as for a duplicate copy, shall be delivered to the petitioner.

#### Safekeeping of Documents and Papers

**Article 594.** (1) (Amended, SG No. 50/2008) Upon acceptance by the notary of documents and papers for safekeeping, a memorandum of acceptance shall be drawn up in two identical copies, which shall be signed by the petitioner and by the notary. One copy shall be filed in a special register, and the other copy, whereon a fee shall be charged as for a duplicate copy, shall be delivered to the petitioner.

(2) A memorandum of delivery shall be drawn up upon the return of any documents and

papers delivered for safekeeping, and the said memorandum shall be signed by the petitioner or by the applicant's heirs or an ad hoc attorney-in-fact, as the case may be. The said memorandum shall be filed in the register.

## **Chapter Fifty-Five RECORDING OF LEGAL PERSONS**

### **Scope of Application**

**Article 595.** (1) The formation, transformation, placing in liquidation and dissolution of legal persons and the other recordable circumstances shall be recorded according to the procedure established by this Chapter, where a law provides for recording in a court register.

(2) The registers shall be kept by the district courts.

#### Recordable Circumstances

**Article 596.** (1) The following shall be recorded in the registers:

1. the type, designation, registered office and address of the legal person;
2. the objects;
3. the bodies and the persons who represent the legal persons, the manner of representation, as well as the liquidators;
4. other circumstances provided for in a law.

(2) Any changes in the circumstances indicated in Paragraph (1) shall be recorded as well.

(3) The recording shall be promulgated in the State Gazette where a law so provides.

#### Recording

**Article 597.** Recording shall be effected on the basis of a judgment of the court within whose geographical jurisdiction the registered office of the legal person is located. The said judgment shall contain the recordable circumstances. The recording shall have effect solely in respect of the recordable circumstances.

#### Public Access to Registers

**Article 598.** The registers and the case records shall be accessible to the general public, and any person may request searches for a circumstance recorded in the registers or issuing of a document on any such circumstance.

#### Effect of Recording

**Article 599.** (1) Any recorded circumstance shall be presumed known to bona fide third

parties as from the day of the recording, and any circumstance which is subject to promulgation shall be presumed known to bona fide third parties as from the date of promulgation.

(2) Any bona fide third party may invoke the recording, even if the recorded circumstance does not exist.

(3) Any unrecorded circumstances shall be considered non-existent in respect of bona fide third parties.

(4) In the event of a discrepancy between a recorded and a promulgated circumstance, the third parties may invoke the promulgated circumstance unless it is established that the recorded circumstance was known to the said parties.

#### Legitimation

**Article 600.** A recording proceeding shall commence on a written motion by:

1. an empowered person;
2. a body empowered to form, transform or dissolve the legal person;
3. a liquidator.

#### Motion: Content

**Article 601.** (1) The motion shall contain:

1. the name and address of the movant;
2. the type, designation and registered office of the legal person;
3. the circumstance whereof the recording is sought.

(2) The requisite documents on the recordable circumstances, as well as specimen signatures of the persons who represent the legal person, shall be attached to the motion.

(3) Where dissolution of a legal person which has no successor is recorded, the certificate on delivery of the payrolls, issued by the local division of the National Social Security Institute, shall be attached to the motion.

#### Recording Proceeding

**Article 602.** (1) The motion for recording shall be examined in camera, unless the court deems it necessary to examine the said motion in public session or this is provided for in a law.

(2) The court shall verify the existence of the recordable circumstance and the admissibility of the recording of the said circumstance and shall render a judgment, which shall be served upon the petitioner.

Immediate Enforcement

**Article 603.** The judgment of recording shall be subject to immediate enforcement.

Expungement of Recorded Circumstance

**Article 604.** Where it is established according to an action procedure that the recording is inadmissible or null, as well as that a recorded circumstance is non-existent, the court shall expunge the recording or the relevant circumstance ex officio, acting on a motion by the prosecutor or by the interested person.

Corrections in Registers

**Article 605.** Corrections in the registers shall be effected on a motion by the bodies and persons covered under Article 600 herein or ex officio by the court according to the procedure established by Article 602 herein.

Appellate Review of Refusal

**Article 606.** Any judgment whereby a recording is refused shall be appealable by an interlocutory appeal before the appellate court.

Ordinance on Keeping and Safe Custody of Registers

**Article 607.** The Minister of Justice shall issue an ordinance on the keeping and safe custody of the registers of recordings.

**PART SEVEN**  
**(Effective 24.07.2007, SG No. 59/2007)**  
**SPECIAL RULES REGARDING PROCEEDINGS IN**  
**CIVIL CASES SUBJECT TO OPERATION**  
**OF EUROPEAN UNION LAW**

**Chapter Fifty-Six**  
**COOPERATION WITHIN THE EUROPEAN UNION IN**  
**PROCEEDINGS IN CIVIL MATTERS**

**Section I**  
**Service under Regulation (EC) No 1393/2007 of the**  
**European Parliament**  
**and of the Council of 13 November 2007 on the service in**  
**the Member**

**States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ, L 324/79 of 10 December 2007), hereinafter referred to as "Regulation (EC) No 1393/2007" (Heading amended, SG No. 42/2009)**

**Service by Diplomatic or Consular Agents**

**Article 608.** (Amended, SG No. 50/2008, SG No. 42/2009) Service under Article 13.1 of Regulation (EC) No 1393/2007, which must be effected in the Republic of Bulgaria, shall be admissible where the addressee is a national of the Member State in which the document has been issued.

Service by Postal Service in Another Member State

**Article 609.** (Amended, SG No. 42/2009) (1) Upon service under Article 14 of Regulation (EC) No 1393/2007, the service, the refusal to accept or the circumstance that the addressee was not found at the address shall be certified by an addressee's acknowledgment of receipt.

(2) The party may move for the service to be effected by means of a courier service performed by a registered person entered in the public register of operators providing non-universal postal services. In such case, the costs shall be borne by the party.

Service by Postal Service in the Republic of Bulgaria

**Article 610.** (Amended, SG No. 50/2008, SG No. 42/2009) The document subject to service in the Republic of Bulgaria must be drawn up or accompanied by a translation into the Bulgarian language or into a language which the addressee understands.

Competent Agencies under Articles 2.1 and 2.2 of Regulation (EC) No

1393/2007

(Heading amended, SG No. 42/2009)

**Article 611.** (1) (Amended, SG No. 50/2008) Upon service abroad of judicial communications and summonses, a transmitting agency shall be the court wherebefore the case is pending.

(2) (Amended, SG No. 50/2008) Upon service abroad of extrajudicial documents, a transmitting agency shall be the regional court exercising jurisdiction over the current or permanent address of the person who moved for the service or over the registered office of

the said person, and in respect of notarized documents, a transmitting agency shall alternatively be the regional court within whose geographical jurisdiction the notary practises.

(3) (Amended, SG No. 50/2008) Upon service in the Republic of Bulgaria, a receiving agency shall be the regional court within whose geographical jurisdiction the service must be effected.

(4) (Amended, SG No. 50/2008) The receiving agency shall effect the service through a court official, by post, or by a particular form requested by the party. Where there is no court institution in the nucleated settlement where the service must be effected, service may be effected care of the municipality or mayoralty.

Refusal to Accept by Reason of Document Language

**Article 612.** (Amended, SG No. 50/2008, SG No. 42/2009) The addressee shall declare the refusal thereof under Article 8.1 of Regulation (EC) No 1393/2007 to the foreign transmitting agency, where the communication has been served by post, or to the receiving agency wherethrough the said communication has been served.

Service of Document Abroad by Another Party to Dispute

**Article 613.** (Amended, SG No. 42/2009) Service under Article 15 of Regulation (EC) No 1393/2007 shall be inadmissible in the Republic of Bulgaria.

Reversal of Relief

**Article 613a.** (New, SG No. 42/2009) The interested party may submit a petition for the reversal of the relief in pursuance of Article 19.4 of Regulation (EC) No 1393/2007 to the Supreme Court of Cassation. Any such petition may be submitted within one year after rendition of the judgement.

## **Section II**

### **Taking of Evidence under Council Regulation (EC) No 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters**

### **Taking of Evidence in Member States of European Union**

**Article 614.** Where taking of evidence must be performed under Council Regulation (EC) No 1206/2001, the court may transmit a request to take evidence to the competent authority of the other Member State or, under the terms established by Article 17 of the Regulation, the court may request to take evidence directly.

## Right to Participate

**Article 615.** Within the scope of Council Regulation (EC) No 1206/2001, the Bulgarian court or an authorized member thereof may be present and participate in the taking of evidence by the court of the other Member State.

## Direct Taking of Evidence

**Article 616.** (1) Direct taking of evidence in another Member State shall be performed by members of the court or by a person authorized by the court.

(2) The parties, representatives thereof and expert witnesses may participate in this proceeding, insofar as this is permitted by Bulgarian legislation.

## Competent Authorities under Articles 2.1 and 3.3. of Council Regulation

(EC) No 1206/2001

(Heading supplemented, SG No. 50/2008)

**Article 617.** (1) The requests for taking of evidence in the Republic of Bulgaria shall be submitted to the regional court within whose geographical jurisdiction the taking is to be performed.

(2) The district court within whose geographical jurisdiction the direct taking of evidence is to be performed shall be competent to authorize direct taking of evidence in the Republic of Bulgaria.

## Language of Requests and Communications

**Article 618.** The requests from another Member State for the taking of evidence and the communications under Council Regulation (EC) No 1206/2001 must be drawn up in the Bulgarian language or must be accompanied by a translation into the Bulgarian language.

# **Chapter Fifty-Seven**

## **RECOGNITION OF AND ADMISSION TO ENFORCEMENT OF JUDGMENTS AND JUDICIAL ACTS SUBJECT TO OPERATION OF EUROPEAN UNION LAW**

### **Section I**

#### **Certificates Issued Pursuant to Bulgarian Judicial Acts (Heading amended, SG No. 100/2010, effective 21.12.2010)**

#### **Certificate of European Enforcement Order for**

## Uncontested Claims

**Article 619.** (1) (Supplemented, SG No. 50/2008) The certificate under Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims shall be issued upon a written petition by the party to the first-instance court which has examined the case or within whose geographical jurisdiction the public document has been issued.

(2) The order whereby the petition for the issuing of a certificate is granted shall be unappealable and shall not be communicated to the person against whom enforcement is sought.

(3) The order whereby the petition for the issuing of a certificate is rejected in whole or in part shall be appealable by an interlocutory appeal, a duplicate copy whereof shall not be presented for service.

(4) (Amended, SG No. 50/2008) The court may rectify or withdraw the certificate in pursuance of Article 10 of Regulation (EC) No 805/2004 of the European Parliament and of the Council.

### Issuing of Certificate on Recognition of or Admission to Enforcement of Bulgarian Judgment

**Article 620.** (1) The first-instance court which has examined the case shall, upon a written petition by the party, issue a certificate of recognition of or admission to enforcement of a Bulgarian judgment of court in another Member State, where an act of the European Union so requires.

(2) A certificate referred to in Paragraph (1) shall also be issued by the first-instance court on a written petition by the party where recognition of or admission to enforcement is to be sought in a State which is not a Member State of the European Union.

## Section II

### Proceeding for Recognition of and Admission to Enforcement of Judgments and Acts Rendered in Other Member States of the European Union (Heading supplemented, SG No. 100/2010, effective 21.12.2010)

### Direct Recognition

**Article 621.** (1) (Amended, SG No. 50/2008) A judgment of court or another act shall be respected by the authority wherebefore the said act is presented on the basis of a duplicate copy authenticated by the rendering court, and a certificate accompanying the said act, where an act of the European Union so requires.

(2) The judgment within the scope of Article 21.2 of Council Regulation (EC) No 2201/2003

concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, shall be recognized by the competent registration authorities.

#### Recognition according to Judicial Procedure

**Article 622.** (1) The interested party may approach the district court exercising jurisdiction over the permanent address of the opposing party or over the registered office thereof or, where the said party does not have a permanent address or registered office within the territory of the Republic of Bulgaria, over the permanent address or registered office of the interested party, with a motion for recognition of the judgment according to the procedure established by Article 623 herein. Where the interested party, either, does not have a permanent address or registered office within the territory of the Republic of Bulgaria, the Sofia City Court shall be approached with the motion.

(2) (Supplemented, SG No. 50/2008) The judgment shall be respected and recognized on the basis of a duplicate copy authenticated by the rendering court, and a certificate of enforceability of the said judgment, where an act of the European Union so requires.

(3) The order of recognition shall have the relevance of a judgment rendered in an action procedure.

(4) Where the outcome of the case depends in whole or in part on the recognition of a foreign judgment rendered in a Member State of the European Union, the court wherebefore the case is pending shall be competent regarding the recognition.

#### Admission to Enforcement

**Article 623.** (1) A petition for admission to enforcement of a judgment of court or another act rendered in another Member State of the European Union shall be submitted to the district court exercising jurisdiction over the permanent address of the person against whom enforcement is sought, over the registered office thereof, or over the place of enforcement. A duplicate copy of the petition shall not be presented for service on the person against whom enforcement is sought.

(2) The court shall examine the petition in camera. The court shall verify the conditions for admission to enforcement solely on the basis of the copy of the judgment of court, the certificate and the translation thereof into the Bulgarian language.

(3) (Amended, SG No. 100/2010, effective 21.12.2010) In the order whereby the petition is granted, the court shall set the applicable time for appealing under Article 43, paragraph 5 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Anticipatory enforcement of the order whereby the petition is granted shall be inadmissible.

(4) In the order whereby the petition is granted, the court shall also pronounce on the interim and precautionary measures sought.

(5) (New, SG No. 50/2008, effective 1.03.2008) The order on the admission shall have the relevance of a judgment rendered in an action procedure.

(6) (Renumbered from Paragraph (5) and amended, SG No. 50/2008, effective 1.03.2008) The order shall be subject to intermediate appellate review before the Sofia Appellate Court. The judgment of the Sofia Appellate Court shall be subject to cassation appellate review before the Supreme Court of Cassation.

Enforcement without Express Proceeding

(Heading amended, SG No. 50/2008)

**Article 624.** (1) (Redesignated from Article 624 and supplemented, SG No. 50/2008) A petition for the issuing of a writ of execution pursuant to a European Enforcement Order for an uncontested claim or for a judgment in a European small claim proceeding shall be submitted to the district court exercising jurisdiction over the permanent address of the person against whom enforcement is sought, over the registered office thereof, or over the place of enforcement.

(2) (New, SG No. 50/2008, supplemented, SG No. 42/2009) The order shall be appealable according to the procedure established by Article 623 (6) herein. The time limit for the intermediate appellate review shall begin to run, in respect of the applicant, as from the service of the order, and in respect of the respondent, as from the service of the notice of voluntary compliance.

(3) (New, SG No. 42/2009) An appellate review of the order whereby the petition was granted shall not stay the enforcement.

(4) (New, SG No. 42/2009) A stay or limitation of enforcement within the meaning given by Article 23 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ, L 199/1 of 31 July 2007) shall be decreed by the court wherebefore the case is pending, and where an order has entered into effect, any such stay or limitation shall be decreed by the first-instance court.

## **Chapter Fifty-Eight**

### **ENFORCEMENT PURSUANT TO REGULATION (EC) No 1896/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE**

#### **Authority Competent to Issue European Order**

**Article 625.** (1) (Amended, SG No. 50/2008) A petition for issuing of a European Order for Payment shall be submitted to the district court exercising jurisdiction over the permanent address of the debtor, over the registered office thereof, or over the place of enforcement.

(2) Where the possibility of examination of the case according to an action procedure is not

ruled out, the respondent may make a recusal for territorial cognizance at the latest by the statement of opposition lodged thereby.

#### Transmittal of Case

**Article 626.** Where the statement of opposition has been lodged in due time, the court shall instruct the applicant who has not ruled out the possibility of examination of the case according to an action procedure to deposit the remainder of the stamp duty due in an account of the generically and territorially competent court. The court shall transmit ex officio the case records to the generically and territorially competent court.

#### Enforcement Pursuant to European Order

**Article 627.** (1) (Amended, SG No. 50/2008) The petition for the issuing of a writ of execution pursuant to a European Order for Payment, issued by another Member State, shall be submitted to the district court exercising jurisdiction over the permanent address of the debtor, over the registered office thereof, or over the place of enforcement.

(2) (Amended, SG No. 50/2008, supplemented, SG No. 42/2009) The order shall be appealable according to the procedure established by Article 623 (6) herein. The time limit for intermediate appellate review shall begin to run, in respect of the applicant, as from the service of the order, and in respect of the respondent, as from the service of the notice of voluntary compliance.

**Chapter Fifty-Eight A**  
**(New, SG No. 100/2010, effective 18.06.2010)**  
**RECOGNITION AND ENFORCEMENT OF**  
**JUDGMENTS PURSUANT TO COUNCIL**  
**REGULATION (EC) No 4/2009 OF 18 DECEMBER 2008**  
**ON JURISDICTION, APPLICABLE LAW,**  
**RECOGNITION AND ENFORCEMENT OF**  
**DECISIONS AND COOPERATION IN MATTERS**  
**RELATING TO MAINTENANCE OBLIGATIONS,**  
**HEREINAFTER REFERRED TO AS "REGULATION**  
**(EC) No. 4/2009"**  
**Reversal of Judgment Rendered in Member State Bound**  
**by 2007 Hague Protocol**

**Article 627a.** (New, SG No. 100/2010, effective 18.06.2010) The interested party may submit a petition to the Supreme Court of Cassation for reversal of the judgment pursuant to Article 19, paragraph 1 of Regulation (EC) No 4/2009.

#### Enforcement of Judgment Rendered in Member State Bound by 2007 Hague Protocol

**Article 627b.** (New, SG No. 100/2010, effective 18.06.2010) (1) The petition for the issuing of a writ of execution pursuant to the documents covered under Article 20 of Regulation (EC) No 4/2009 shall be submitted to the district court exercising jurisdiction over the permanent address of the execution debtor or over the place of enforcement.

(2) Refusal or suspension of enforcement, within the meaning given by Article 21 of Regulation (EC) No 4/2009, shall be decreed by the district court.

Admission to Enforcement of Judgments Rendered in Member State Not Bound by 2007 Hague Protocol

**Article 627c.** (New, SG No. 100/2010, effective 18.06.2010) (1) The petition for admission to enforcement of a judgment or of another act rendered in a Member State of the European Union which is not bound by the 2007 Hague Protocol shall be submitted to the district court exercising jurisdiction over the permanent address of the execution debtor or over the place of enforcement. A duplicate copy of the petition for service upon the execution debtor shall not be presented.

(2) The court shall examine the petition referred to in Paragraph (1) in camera.

(3) In the order whereby the petition is granted the court shall set the applicable time for appealing under Article 32, paragraph 5 of Regulation (EC) No 4/2009. Anticipatory enforcement of the order whereby the petition is granted shall be inadmissible.

(4) In the order whereby the petition is granted, the court shall also pronounce on the interim and precautionary measures sought.

(5) The order on the admission shall have the relevance of a judgment rendered in an action procedure.

(6) The order shall be subject to intermediate appellate review before the Sofia Appellate Court under the terms and according to the procedure established by Article 32 of Regulation (EC) No 4/2009. The judgment of the Sofia Appellate Court shall be subject to cassation appellate review before the Supreme Court of Cassation.

## **Chapter Fifty-Nine**

### **REFERRAL OF QUESTIONS FOR PRELIMINARY RULINGS**

#### **National Court Competence**

**Article 628.** Where the interpretation of a provision of European Union law or the interpretation and validity of an act of the institutions of the European Union is relevant to the correct adjudication of the case, the Bulgarian court shall request the Court of Justice of the European Communities to give a ruling thereon.

Referral of Question

**Article 629.** (1) The question shall be referred by the court wherebefore the case is pending, either ex officio or on a motion by the party.

(2) The court whereof the judgment is appealable, may not grant the motion of the party for referral of a question for a preliminary ruling on interpretation of a provision or act. Any ruling denying such a motion shall be unappealable.

(3) The court whereof the judgment is unappealable shall always refer a question for a preliminary ruling, except where the answer to the question arises clearly and unambiguously from a previous judgment of the Court of Justice of the European Communities or the meaning and import of the provision are so clear that they give no rise to any doubt whatsoever.

(4) The court shall always refer a question where the validity of an act referred to in Article 628 herein is at issue.

(5) Where the interpretation of Title IV "Visas, asylum, immigration and other policies related to free movement of persons" of the Treaty Establishing the European Community or the interpretation and validity of any acts adopted by virtue of the said Title of the Treaty is relevant to the correct adjudication of the case, solely the court whereof the judgment is unappealable may refer a question under Article 628 herein.

#### Content of Request

**Article 630.** (1) The request to the Court of Justice of the European Communities shall contain a description of the facts of the case, the applicable national law, an exact reference to the provision or act whereof the interpretation or validity is subject to the request, the reasons for which the court believes that the preliminary ruling requested is relevant to the correct adjudication of the case, as well a formulation of the specific question referred for a preliminary ruling.

(2) At its discretion, the court may also transmit a duplicate copy of the case.

#### Stay and Resumption of Proceeding before National Court

**Article 631.** (1) Upon referral of the question, the court shall stay the proceeding in the case. Any such ruling shall be unappealable.

(2) The proceeding in the case shall be resumed after the pronouncement by the Court of Justice of the European Communities.

#### Precautionary and Interim Measures

**Article 632.** The court, acting on a motion by the parties, may decree appropriate precautionary and interim measures while the proceeding in the case is stayed.

#### Effect of Judgment on Request for Preliminary Ruling

**Article 633.** The judgment given by the Court of Justice of the European Communities shall be binding upon all courts and institutions in the Republic of Bulgaria.

## **TRANSITIONAL AND FINAL PROVISIONS**

§ 1. (1) Any first-instance cases, instituted on statements of action received at the regional and district court prior to the entry into force of this Code, shall be completed at the same courts, regardless of the change of cognizance.

(2) Any cases on petitions to secure a future action, instituted prior to the entry into force of this Code, shall be examined at the same courts, regardless of the change of cognizance.

§ 2. (1) (Supplemented, SG No. 50/2008) Any first-instance cases, instituted on statements of action received prior to the entry into force of this Code, shall be examined according to the hitherto effective procedure for examination of cases by the court of first instance and of intermediate appellate review instance.

(2) Any intermediate appellate review cases, instituted on appeals received prior to the entry into force of this Code, shall be examined according to the hitherto effective procedure for examination of cases by the court of intermediate appellate review instance.

(3) Any cassation cases, instituted on cassation appeals received prior to the entry into force of this Code, shall be examined according to the hitherto effective procedure for examination of cases by the court of cassation instance.

(4) (New, SG No. 50/2008) Any proceedings under petitions to secure actions, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(5) (Effective 24.07.2007, SG No. 59/2007, renumbered from Paragraph (4), SG No. 50/2008) Any cassation appeals against intermediate appellate review judgments of the district courts on actions for remedy against wrongful dismissal under Items 1 to 3 of Article 344 (1) of the Labour Code and on actions for labour remuneration and compensation under an employment relationship with a cost of action above the amount referred to in Littera (a) of Article 218a (1) of the Code of Civil Procedure as superseded, lodged prior to the entry into force of this Code, shall be examined by the relevant appellate court according to the hitherto effective cassation procedure. Any cases instituted at the Supreme Court of Cassation, which have not been scheduled for examination, as well as any cases scheduled for examination after the 30th day of June 2008, shall be transmitted to the relevant appellate court, which shall examine the said cases according to the hitherto effective cassation procedure.

(6) (New, SG No. 50/2008) Any proceedings under petitions for recovery of possession according to an administrative procedure, submitted in pursuance of Article 126g of the Code of Civil Procedure as superseded prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(7) (Renumbered from Paragraph (5), SG No. 50/2008) Any public sales, advertised prior to the entry into force of this Code, shall be completed according to the hitherto effective procedure.

(8) (New, SG No. 50/2008) Any non-contentious proceedings, instituted under petitions

received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(9) (New, SG No. 50/2008) Any proceedings instituted under petitions to issue a writ of execution, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded. This procedure shall furthermore apply to the examination of any petitions to stay the enforcement under Article 250 of the Code of Civil Procedure as superseded, where the writ of execution has been issued under a petition submitted prior to the 1st day of March 2008, as well as of any petitions to stay the enforcement of intermediate appellate review judgments according to the procedure established by Article 218b (3) to (6) of the Code of Civil Procedure as superseded.

(10) (New, SG No. 50/2008) Any proceedings instituted under appeals against the steps of the public or private enforcement agent and against the refusal of the state or private enforcement agent to perform an enforcement step sought, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(11) (New, SG No. 50/2008) Any proceedings in cassation cases, instituted under interlocutory appeals, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded for examination of the cases by the court of cassation instance.

(12) (New, SG No. 50/2008) Any cases instituted under petitions for a reversal of an effective judgment, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(13) (New, SG No. 50/2008) Any cases instituted under appeals against the rulings or orders of the President of or a judge from the Supreme Court of Cassation on a return of cassation appeals and under petitions to reverse effective judgments or rulings by a three-judge panel of the Supreme Court of Cassation, received prior to the 1st day of March 2008, shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

(14) (New, SG No. 50/2008) In all cases which are not expressly specified, the proceedings instituted under petitions received prior to the 1st day of March 2008 shall be examined according to the procedure established by the Code of Civil Procedure as superseded.

**§ 3.** (Effective 24.07.2007, in respect of the repeal of Chapter Thirty-Two A 'Special Rules for the Recognition and Admission for Enforcement of Decisions of Foreign Courts and of Other Foreign Bodies' with Articles 307a to 307e and Part Seven 'Proceedings Concerning Return of a Child or Exercise of the Right of Access' with Articles 502 to 507) The Code of Civil Procedure (promulgated in the Transactions of the Presidium of the National Assembly No. 12/1952; amended in No. 92/1952, No. 89/1953, No. 90/1955, No. 90/1956, No. 90/1958, Nos. 50 and 90/1961; corrected in No. 99/1961; amended in the State Gazette No. 1/1963, No. 23/1968, No. 27/1973, No. 89/1976, No. 36/1979, No. 28/1983, No. 41/1985, No. 27/1986, No. 55/1987, No. 60/1988, Nos. 31 and 38/1989, No. 31/1990, No. 62/1991, No. 55/1992, Nos. 61 and 93/1993, No. 87/1995, Nos. 12, 26, 37, 44 and 104/1996, Nos. 43, 55 and 124/1997, Nos. 21, 59, 70 and 73/1998, Nos. 64 and 103/1999, Nos. 36, 85 and

92/2000, No. 25/2001, Nos. 105 and 113/2002, Nos. 58 and 84/2003, Nos. 28 and 36/2004, Nos. 38, 42, 43, 79, 86, 99 and 105/2005, Nos. 17, 33, 34, 36, 37, 48, 51 and 64/2006) is hereby superseded.

**§ 4.** (1) The statutory instruments of secondary legislation, issued in pursuance of the Code of Civil Procedure as superseded, shall apply insofar as they do not conflict with this Code.

(2) (Effective 24.07.2007, SG No. 59/2007, amended, SG No. 50/2008) The Council of Ministers and the Minister of Justice shall issue the instruments referred to in Article 55, Article 73 (3), Article 425 and Item 7 of Article 444 herein within six months after the promulgation of this Code in the State Gazette.

**§ 5.** The Administrative Procedure Code (promulgated in the State Gazette No. 30/2006) shall be amended as follows:

1. In Article 182 (2), the words "shall incur liability according to Article 65 (1) of the Code of Civil Procedure" shall be replaced by "shall incur, regardless of the outcome of the case, the costs of the new hearing, of the taking of new evidence or of the re-taking of previously taken evidence, the costs incurred by the other party and of the attorney-in-fact thereof on appearance in the case, as well as shall pay an additional stamp duty to the amount of one-third of the initially paid stamp duty but not less than BGN 100."

2. In Article 189 (4), the words "shall incur liability under Article 65 (1) of the Code of Civil Procedure" shall be replaced by "shall incur, regardless of the outcome of the case, the costs of the new hearing, of the taking of new evidence or of the re-taking of previously taken evidence, the costs incurred by the other party and of the attorney-in-fact thereof on appearance in the case, as well as shall pay an additional stamp duty to the amount of one-third of the initially paid stamp duty but not less than BGN 100."

**§ 6.** The Tax and Social-Insurance Procedure Code (promulgated in the State Gazette No. 105/2005, amended in Nos. 30, 33, 34, 59, 63, 73, 82, 86, 95 and 105/2006, No. 46/2007) shall be amended as follows:

1. In Article 56 (1), the words "Article 114" shall be replaced by "Article 176".

2. In Article 181, Paragraph (2) shall be amended to read as follows:

"(2) The person who complied with the obligation may proceed with coercive enforcement according to the procedure established by the Code of Civil Procedure on the basis of the act ascertaining the public receivable and the certificate issued under Paragraph (1) in the cases referred to in Item 1 of Article 180 (1) herein, as well as where the person who complied with the obligation has acceded, as co-execution debtor, to the public obligation with a validly dated express written consent of the obligated person."

3. In Article 206 (1), the words "Articles 345, 346 and 347, Article 354 (1), Articles 391, 392, 395, 396 and 397" shall be replaced by "Articles 451, 452 and 453, Article 459 (1), Articles 508, 509, 512, 513 and 514".

**§ 7.** The Private International Law Code (promulgated in the State Gazette No. 42/2005) shall be amended as follows:

1. In Article 12 (1), the words "Article 83" shall be replaced by "Article 109".
2. In Article 14, the words "Article 84" shall be replaced by "Article 110".
3. In Article 19 (1), the words "Littera (d) of Article 80 (1)" shall be replaced by "Item 5 of Article 104".
4. In Article 21 (2), the words "Article 104" shall be replaced by "Article 211".
5. In sentence two of Article 23 (1), the words "not later than before the end of the first hearing of the case" shall be replaced by "within the time limit for an answer to the statement of action".
6. In Article 24, the words "before the end of the first hearing of the case" shall be replaced by "within the time limit for an answer to the statement of action".
7. In Article 30 (2), the words "Article 133" shall be replaced by "Article 164".

**§ 8.** The Labour Code (promulgated in the State Gazette Nos. 26 and 27/1986; amended in No. 6/1988, Nos. 21, 30 and 94/1990, Nos. 27, 32 and 104/1991, Nos. 23, 26, 88 and 100/1992; modified by Constitutional Court Judgment No. 12/1995, promulgated in No. 69/1995; amended in No. 87/1995, Nos. 2, 12 and 28/1996, No. 124/1997, No. 22/1998; modified by Constitutional Court Judgment No. 11/1998, promulgated in No. 52/1998; amended in Nos. 56, 83, 108 and 133/1998, Nos. 51, 67 and 110/1999, No. 25/2001, Nos. 1, 105 and 120/2002, Nos. 18, 86 and 95/2003, No. 52/2004, Nos. 19, 27, 46, 76, 83 and 105/2005, and Nos. 24, 30, 48, 57, 68, 75, 102 and 105/2006, Nos. 40 and 46/2007) shall be amended as follows:

1. In Article 210 (5), the words "a writ of execution shall be issued on the basis of the order of the employer or the authority under sentence two of Paragraph (1) according to the procedure established by the Code of Civil Procedure" shall be replaced by "the employer shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure, regardless of the amount of the claim".
2. In Item 11 of Article 349 (2), the words "Article 395 (4)" shall be replaced by "Article 512 (4)".

**§ 9.** The Copyright and Neighbouring Rights Act (promulgated in the State Gazette No. 56/1993; amended in No. 63/1994, No. 10/1998, No. 28/2000, No. 77/2002, Nos. 28, 43, 74, 99 and 105/2005, Nos. 29, 30 and 73/2006) shall be amended as follows:

1. In Article 95a (2), the words "Article 15 (3)" shall be replaced by "Article 26 (4)".
2. In Article 96a (2), the words "Articles 308 to 322" shall be replaced by "Articles 389 to 403", and the words "Article 317" shall be replaced by "Article 398".

**§ 10.** The Bar Act (promulgated in the State Gazette No. 55/2004; amended in Nos. 43 and 79/2005, Nos. 10, 39 and 105/2006) shall be amended as follows:

1. Article 37 shall be amended to read as follows:

"Article 37. In respect of their claims arising from unrecovered remuneration and expenses, attorneys-at-law shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Civil Procedure Code regardless of the amount of the said claims."

2. In Article 62 (6), the words "Chapter Fifty-Two" shall be replaced by "Chapter Fifty-Five `Recording of Natural Persons'".

3. In Article 143, Paragraph (2) shall be amended to read as follows:

"(2) In the event outstanding expenses are not paid by the attorney-at-law sanctioned within one month of entry into force of the decision, the coercive enforcement of the decision in the part regarding the expenses shall be admitted on a motion by the Bar Council or by the Disciplinary Tribunal according to the procedure established by Article 418 of the Code of Civil Procedure. The attorney-at-law being shall be inscribed in the list of attorneys-at-law at fault with the college fund."

4. Article 145 shall be amended to read as follows:

"Article 145. The coercive enforcement of the decision whereby a disciplinary sanction of fine has been imposed shall be admitted on a motion by the Bar College according to the procedure established by Article 418 of the Code of Civil Procedure."

§ 11. The Administrative Violations and Sanctions Act (promulgated in the State Gazette No. 92/1969; amended and supplemented in No. 54/1978, No. 28/1982, Nos. 28 and 101/1983, No. 89/1986, No. 24/1987, No. 94/1990, No. 105/1991, No. 59/1992, No. 102/1995, Nos. 12 and 110/1996, Nos. 11, 15, 59, 85 and 89/1998, Nos. 51, 67 and 114/1999, No. 92/2000, Nos. 25, 61 and 101/2002, No. 96/2004, Nos. 39 and 79/2005, Nos. 30, 33, 69 and 108/2006) shall be amended as follows:

1. Article 78 shall be amended to read as follows:

"Article 78. Where damages have been awarded, the coercive enforcement of the penalty decree shall be admitted on a motion by the person who is entitled to damages according to the procedure established by Article 418 of the Code of Civil Procedure."

2. In Article 83f (1), the words "Article 97 (4)" shall be replaced by "Article 124 (5)".

§ 12. The Bank Bankruptcy Act (promulgated in the State Gazette No. 92/2002; amended in No. 67/2003, No. 36/2004, Nos. 31 and 105/2005, Nos. 30, 34 and 59/2006) shall be amended as follows:

1. Article 16 shall be amended to read as follows:

"Appellate Review of Judgments

**Article 16.** (1) The judgments referred to in Article 13 (1) and in Article 14 herein shall be subject to intermediate appellate review and cassation appellate review according to the standard procedure. The time limit for intermediate appellate review shall be seven days. The

right of appeal shall vest in the conservators of the bank and the Central Bank, and the right to protest shall vest in the prosecutor.

(2) An appellate review of a judgment under Article 13 (1) shall not stay the enforcement thereof.

(3) The intermediate appellate review court shall institute the case on the day of receipt of the appeal or on the next working day at the latest and shall examine the said appeal, rendering judgment within one month after institution of the case.

(4) Upon reversal of the judgment on the initiation of bankruptcy proceedings, all consequences arising from the effect of the said judgment shall be deleted, reckoned from the effective date of the judgment on reversal, and the powers of the bankruptcy bodies shall be terminated.

(5) The judgment whereby a judgment referred to in Article 13 (1) or in Article 14 herein is reversed shall be recorded in the Commercial Register."

2. In Article 39:

(a) in Paragraph (4), the words "Chapter Nineteen" shall be replaced by "Chapter Twenty-One `Appellate Review of Rulings";

(b) in Paragraph (5), the words "Article 218j" shall be replaced by "Chapter Twenty-One `Appellate Review of Rulings".

3. In Article 47 (1), the words "cassation appellate review according to the procedure established by Articles 218b to 218j of" shall be replaced by "appellate review according to the standard procedure established by".

4. In Article 57, Paragraph (5) shall be amended to read as follows:

"(5) When the credit is not repaid on maturity, the trustee in bankruptcy shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account."

5. In Article 76:

(a) in Paragraph (1), the words "Article 372 (3)" shall be replaced by "Article 482 (3)";

(b) in Paragraph (2), the words "Article 387" shall be replaced by "Article 499".

6. In Article 89, the words "Articles 332 to 335" shall be replaced by "Articles 435 to 438".

7. In Article 99 (4), the words "Articles 214 to 217" shall be replaced by "Chapter Twenty-One `Appellate Review of Rulings".

**§ 13.** In the Bulgarian National Bank Act (promulgated in the State Gazette No. 46/1997; amended in Nos. 49 and 153/1998, Nos. 20 and 54/1999, No. 109/2001, No. 45/2002, Nos.

10 and 39/2005, Nos. 37, 59 and 108/2006), in Article 53, Paragraph (2) shall be amended to read as follows:

"(2) The Bulgarian National Bank shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Civil Procedure Code on the basis of an abstract of the books of accounts of the said Bank, whereby the defaulted receivables thereof, including any interest due, are ascertained."

**§ 14.** In the Religious Denominations Act (promulgated in the State Gazette No. 120/2002; amended in No. 33/2006), in Article 15 (1), the words "Chapter Forty-Six" shall be replaced by "Chapter Forty-Nine `General Rules'".

**§ 15.** The Water Act (promulgated in the State Gazette No. 67/1999; amended in No. 81/2000, Nos. 34, 41 and 108/2001, Nos. 47, 74 and 91/2002, Nos. 42, 69, 84 and 107/2003, Nos. 6 and 70/2004, Nos. 18, 77 and 94/2005, Nos. 29, 30, 36, 65, 66, 105 and 108/2006) shall be amended as follows:

1. In Article 202 (4), the words "Article 31" shall be replaced by "Article 26 (4)".

2. In Article 203, the words "with the amounts due being collected according to the procedure established by Littera (j) of Article 237 of the Code of Civil Procedure proceeding from an abstract of the bills" shall be replaced by "with the provider of the service having the option to move for the issuance of an execution order under Article 410 (1) of the Civil Procedure Code regardless of the amount of the obligation".

**§ 16.** In the Act Restoring Ownership of Forests and Forest Stock Land Tracts (promulgated in the State Gazette No. 110/1997; amended in Nos. 33, 59 and 133/1998, No. 49/1999, Nos. 26 and 36/2001, Nos. 45, 63 and 99/2002, No. 16/2003, No. 30/2006, Nos. 13 and 24/2007), in Article 15 (4) and (5), the words "Article 18 (2) and Litterae (a) and (c) of Article 20 (1)" shall be replaced by "Article 30 (3) and Article 32 (1) and (3)".

**§ 17.** In the Civil Registration Act (promulgated in the State Gazette No. 67/1999; amended in Nos. 28 and 37/2001, No. 54/2002, No. 63/2003, Nos. 70 and 96/2004, No. 30/2006, No. 48/2007), in Article 19 (2), the words "the summary proceedings under" shall be replaced by "Chapter Fifteen `Ascertainment of Facts' of".

**§ 18.** In the Value Added Tax Act (promulgated in the State Gazette No. 63/2006; amended in Nos. 86, 105 and 108/2006; modified by Constitutional Court Judgment No. 7/2007, promulgated in No. 37/2007; amended in No. 41/2007), Article 131 shall be amended as follows:

1. In Paragraph (3), the words "and by the Code of Civil Procedure" shall be deleted.

2. In Paragraph (4), the words "or, respectively, according to the procedure established by Article 382 (1) or (3) and Article 371 (1) or (4) of the Code of Civil Procedure" shall be deleted.

**§ 19.** In the State Property Act (promulgated in the State Gazette No. 44/1996; amended in No. 104/1996, Nos. 55, 61 and 117/1997, Nos. 93 and 124/1998, No. 67/1999, Nos. 9, 12, 26 and 57/2000, No. 1/2001, modified by Constitutional Court Judgment No. 7/2001,

promulgated in No. 38/2001; amended in No. 45/2002, No. 63/2003, Nos. 24 and 93/2004, No. 32/2005, Nos. 17, 30, 36, 64 and 105/2006, No. 41/2007), in Article 38 (5), the words "Article 41 (5) and the time limit referred to in Article 157 (1)" shall be replaced by "Article 56 (3) and the time limit referred to in Article 199".

**§ 20.** The Public Financial Inspection Act (promulgated in the State Gazette No. 33/2006; amended in No. 59/2006) shall be amended as follows:

1. In Article 22:

(a) there shall be inserted a new Paragraph (5) to read as follows:

"(5) The findings of fact in the deficit deed shall be considered true until proved otherwise.";

(b) the existing Paragraph (5) shall be renumbered to become Paragraph (6).

2. In Article 27, Paragraph (4) shall be amended to read as follows:

"(4) On the basis of the deficit deed, an immediate enforcement order shall be issued according to the procedure established by Article 418 of the Civil Procedure Code."

**§ 21.** In the Civil Servants Act (promulgated in the State Gazette No. 67/1999; amended in No. 1/2000, Nos. 25, 99 and 110/2001, No. 45/2002, No. 95/2003, No. 70/2004, No. 19/2005, Nos. 24, 30 and 102/2006), in Item 10 of Article 112 (1), the words "Article 395 (4)" shall be replaced by "Article 512 (4)".

**§ 22.** The Energy Act (promulgated in the State Gazette No. 107/2003; amended in No. 18/2004, Nos. 18 and 95/2005, Nos. 30, 65 and 74/2006, No. 49/2007) shall be amended as follows:

1. Article 107 shall be amended to read as follows:

"Article 107. The public provider, the electricity system operator, the public suppliers, the suppliers of last resort, the transmission company and the distribution companies shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure for the receivables thereof for electricity provided or transmitted, as well as for the services rendered thereby under this Act, regardless of the amount of the said receivables."

2. Article 154 shall be amended to read as follows:

"Article 154. In respect of the liabilities of any customers, who are defaulting payers, and of the association referred to in Article 151 (1) herein to the heat transmission company, an enforcement order may be issued under Article 410 (1) of the Code of Civil Procedure, regardless of the amount of the said liabilities. An equalizing bill for the respective year for which the liability applies must have been prepared in respect of the liabilities of any customers with application of a share distribution system, who are defaulting payers."

3. In Article 184, the words "may collect the receivables thereof for natural gas from defaulting payers according to the procedure established by Littera (j) of Article 237 the

Code of Civil Procedure on the basis of abstracts of the bills" shall be replaced by "shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure for the receivables thereof for supply of natural gas regardless of the amount of the said receivables".

**§ 23.** The Obligations and Contracts Act (promulgated in the State Gazette No. 275/1950; corrected in Transactions of the Presidium of the National Assembly No. 2/1951; amended in No. 69/1951, No. 92/1952; State Gazette No. 85/1963, No. 27/1973, No. 16/1977, No. 28/1982, No. 30/1990, Nos. 12 and 56/1993, Nos. 83 and 104/1996, Nos. 83 and 103/1999, No. 34/2000, No. 19/2003, Nos. 42 and 43/2005, No. 36/2006) shall be amended and supplemented as follows:

1. In Article 37, the words "with notarized signature" shall be replaced by "with notarial certification of the signature and the contents, performed simultaneously".

2. Article 160 shall be amended to read as follows:

"Article 160. Where a secured claim is monetary or liquidated damages in cash have been agreed for it, if the pledge is created by a contract in writing or is provided by operation of law for securing claims which arise from a contract in writing, the creditor shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure."

3. Article 165 shall be amended to read as follows:

"Article 165. A creditor who has a pledge on a claim shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure under the terms and according to the procedure established by Article 160 herein and shall be satisfied preferentially according to the procedure for reversal of the enforcement of a claim."

4. In Article 173, Paragraph (3) shall be amended to read as follows:

"(3) If a claim is for a specific amount of money, or if liquidated damages in cash have been agreed for it, the creditor shall have the option to move, on the basis of the act on recording of the mortgage, for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure."

**§ 24.** (Effective 24.07.2007, SG No. 59/2007) The Child Protection Act (promulgated in the State Gazette No. 48/2000; amended in Nos. 75 and 120/2002, Nos. 36 and 63/2003, Nos. 70 and 115/2004, Nos. 28, 94 and 103/2005, Nos. 30, 38 and 82/2006) shall be amended as follows:

1. In Article 4 (1), there shall be added a new Item 12 to read as follows:

"12. taking of measures of a provisional character for the protection of a child in the cases and under the terms established by Article 12 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for Protection of Children, done at The Hague on the 19th day of October 1996 (ratified by law, promulgated in the State Gazette No. 9/2006) (Convention promulgated in

the State Gazette No. 15/2007), hereinafter referred to as "the Convention of 1996".

2. In Article 21, there shall be added a new Paragraph (3) to read as follows:

"(3) In pursuance of Article 35, paragraph 2 of the Convention of 1996, the Social Assistance Directorate, exercising competence over the permanent address of the parent who has approached the relevant competent authority with a request to obtain or to maintain access to the child who does not habitually reside in the Republic of Bulgaria, shall gather information or evidence and shall make a finding on the suitability of that parent to exercise the rights of access, as well as on the conditions under which access is to be exercised."

3. There shall be inserted a new Chapter Three A with Articles 22a to 22g and a new Chapter Three B with Articles 22h to 22m, to read as follows:

#### Chapter Three A

#### "PROCEEDINGS CONCERNING RETURN OF A CHILD OR EXERCISE OF RIGHTS OF ACCESS

**Article 22a.** (1) A petition for the return of a child or for the exercise of rights of access under the Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on the 25th day of October 1980 (ratified by law, promulgated in the State Gazette No. 20 of 2003) (Convention promulgated in the State Gazette No. 82/2003), hereinafter referred to as "the Hague Convention", shall be examined by the Sofia City Court in public session with the participation of:

1. the Ministry of Justice or the applicant;
2. the interested parties;
3. a prosecutor.

(2) The Social Assistance Directorate with the municipality wherein the child has its present address shall submit an opinion in the proceeding under Paragraph (1). The court shall hear the child in accordance with Article 15 herein.

(3) The Ministry of Justice shall represent the applicant, where the petition has been lodged care of the said Ministry. The said Ministry may appoint a representative to act on its behalf.

**Article 22b.** The court, acting on a motion as submitted or ex officio, may rule on a suitable provisional measure for the protection of the child for the purpose of avoiding any further dangers to the child or detriment to the parties.

**Article 22c.** (1) The court shall render judgment within one month after submission of the petition.

(2) In the proceeding under Article 22a (1), the court shall not examine the question of exercise of the rights of custody on the merits.

**Article 22d.** (1) The judgment of the Sofia City Court shall be appealable by the persons

covered under Article 22a (1) before the Sofia Appellate Court.

(2) Within one month after lodgment of any such appeal, the court shall render judgment which shall be final.

**Article 22e.** In this proceeding, the court may take evidence of its own motion, as well as assist the parties in exercising their procedural rights.

**Article 22f.** Where a foreign court applies Article 15 of the Hague Convention, the Bulgarian authority competent to determine that the removal or retention of a child was wrongful shall be the court which has examined or is examining the questions regarding the rights of custody, or the Ministry of Justice, where the said questions have not been a subject matter of a court proceeding.

**Article 22g.** (1) The rules of this Chapter shall furthermore apply, *mutatis mutandis*, in respect of the Convention of 1996 concerning parental responsibility and measures for the protection of children.

(2) In the cases and under the terms of Articles 8, 9 and 13 of the Convention of 1996, the competent court first seised, if it considers that this is in the child's best interests, may decline jurisdiction in favour of a foreign court second seised or accept to examine the case and render judgment, where the foreign court first seised has declined jurisdiction in favour of the said competent court.

(3) In the cases referred to in Paragraph (2), the judgment rendered by the foreign court shall be recognizable and enforceable according to the procedure established by Chapter Three B.

#### Chapter Three B

#### SPECIAL RULES FOR RECOGNITION AND ADMISSION TO ENFORCEMENT OF DECISIONS OF FOREIGN COURTS AND OF OTHER FOREIGN AUTHORITIES CONCERNING CUSTODY AND MEASURES FOR THE PROTECTION OF CHILDREN

**Article 22h.** (1) A petition for recognition and admission to enforcement of a decision of a foreign court or another foreign authority concerning the exercise of rights of custody and restoration of the exercise of rights of custody upon improper removal of a child, based on the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980, done at Luxembourg on the 20th day of May 1980 (ratified by law, promulgated in the State Gazette No. 21/2003) (Convention promulgated in the State Gazette No. 104/2003), hereinafter referred to as "Luxembourg Convention", shall be examined by the Sofia in public session with the participation of:

1. the Ministry of Justice;
2. the parties to the foreign decision;
3. a prosecutor.

(2) Paragraph (1) shall not apply where the applicant has seised the court directly.

(3) The Social Assistance Directorate with the municipality wherein the child has its present address shall submit an opinion in the proceeding under Paragraph (1). The court shall hear the child in accordance with Article 15 herein.

(4) The court, acting on a motion as submitted or ex officio, may rule on a suitable provisional measure for the protection of the child for the purpose of avoiding any further dangers to the child or detriment to the parties.

**Article 22i.** (1) The court shall suspend the proceeding under Article 22g (1) herein where:

1. the decision is subject to appeal;

2. a proceeding on the merits of the dispute, which has commenced before the proceeding in the State of origin of the decision whereof the recognition and/or admission to enforcement is applied for, is pending before a Bulgarian court;

3. another decision concerning the exercise of the rights of custody is the subject of a proceeding for recognition and/or admission to enforcement of the said decision.

(2) In the cases referred to in Item 2 of Paragraph (1), the court shall immediately notify the relevant court, which shall be obligated to pronounce within one month after notification.

**Article 22j.** (1) The court shall render judgment within one month after submission of the petition.

(2) The judgment of the court shall be appealable before the Sofia Appellate Court.

(3) The Sofia Appellate Court shall render judgment within the time limit referred to in Paragraph (1). The said judgment shall be final.

**Article 22k.** (1) Recognition and enforcement of a decision on exercise of the rights of custody, rendered after the removal of the child, may be applied for according to the procedure established by this Chapter, if the said removal has been declared improper by the said decision.

(2) A recognition and enforcement of the decision of another State party to the Luxembourg Convention shall be refused in the cases covered by Articles 8 and 9, where the grounds provided under Article 10, paragraph 1 of the Convention exist.

(3) A recognition and enforcement of the decision shall be admitted solely in so far as the said decision is enforceable in the State of origin of the said decision.

**Article 22l.** Save in so far there are no special rules concerning this proceeding, the standard action proceeding rules in the Code of Civil Procedure shall apply.

**Article 22m.** The rules of this Chapter shall furthermore apply, mutatis mutandis, in respect of the Convention of 1996 concerning the recognition and enforcement of decisions of foreign courts and of other foreign authorities."

4. In Article 25, there shall be added a new Item 5 to read as follows:

"5. in the cases covered under Article 11 of the Convention of 1996."

**§ 25.** The Consumer Protection Act (promulgated in the State Gazette No. 99/2005; amended in Nos. 30, 51, 53, 59, 105 and 108/2006, Nos. 31 and 41/2007) shall be amended and supplemented as follows:

1. In Article 186 (1), there shall be added the following sentence two: "Any such action shall be examined according to the procedure established by Chapter Thirty-Three 'Proceedings in Class Actions' of the Code of Civil Procedure."

2. Article 186b shall be repealed.

3. In Article 188, Paragraphs (2) and (3) shall be repealed.

4. In Article 189:

(a) Paragraphs (2) and (3) shall be repealed;

(b) Paragraph (5) shall be repealed.

5. Article 190a shall be repealed.

**§ 26.** The Protection Against Discrimination Act (promulgated in the State Gazette No. 86/2003; amended in No. 70/2004, No. 105/2005, Nos. 30 and 68/2006) shall be amended as follows:

1. In Article 61:

(a) in Paragraph (2), the words "Article 105 (3)" shall be replaced by "Article 136";

(b) in Paragraph (3), the words "Chapter Three" shall be replaced by "Articles 22 to 24".

2. In Article 71 (3), the words "Article 174" shall be replaced by "Article 218".

**§ 27.** In the Health Insurance Act (promulgated in the State Gazette No. 70/1998; amended in Nos. 93 and 153/1998, Nos. 62, 65, 67, 69, 110 and 113/1999, Nos. 1, 31 and 64/2000, No. 41/2001, Nos. 1, 54, 74, 107, 112, 119 and 120/2002, Nos. 8, 50, 107 and 114/2003, Nos. 28, 38, 49, 70, 85 and 111/2004, Nos. 39, 45, 76, 99, 102, 103 and 105/2005, Nos. 17, 18, 30, 33, 34, 59, 95 and 105/2006, No. 11/2007, modified by Constitutional Court Judgment No. 3/2007, promulgated in No. 26/2007; amended in Nos. 31 and 46/2007), in Article 111, Paragraph (2) shall be amended to read as follows:

"(2) In respect of the amount due under Paragraph (1), the Regional Health Insurance Fund shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said Fund."

**§ 28.** In the Mortgage Bonds Act (promulgated in the State Gazette No. 83/2000; amended in

No. 59/2006), in Article 22 (2), the words "Articles 375 to 389" shall be replaced by "Articles 486 to 501".

**§ 29.** The Cadastre and Property Register Act (promulgated in the State Gazette No. 34/2000; amended in Nos. 45 and 99/2002, No. 36/2004, Nos. 39 and 105/2005, Nos. 29 and 30/2006) shall be amended as follows:

1. In Article 87, the words "Chapter Forty-Six" shall be replaced by "Chapter Forty-Nine `General Rules'".

2. In Article 88, the words "Article 431 (2) and (3)" shall be replaced by "Article 537 (2) and (3)".

3. In Article 89, the words "Article 192 (2)" shall be replaced by "Article 247".

**§ 30.** In the Chambers of Architects and Engineers in Project Development Design Act (promulgated in the State Gazette No. 20/2003; amended in No. 65/2003, No. 77/2005, Nos. 30 and 79/2006), in Article 30, the words "to obtain writs of execution under the provisions of Chapter Twenty-Three of the Code of Civil Procedure" shall be replaced by "to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said receivables.

**§ 31.** In the Concessions Act (promulgated in the State Gazette No. 36/2006; amended in Nos. 53, 65 and 105/2006, No. 41/2007), in Article 89 (2), the words "Article 41 (5)" shall be replaced by "Article 56 (3)".

**§ 32.** In the Credit Institutions Act (promulgated in the State Gazette No. 58/2006; amended in No. 105/2006), in Article 60 (2), the words "shall be entitled to obtain a writ of execution according to a statement of account for the whole amount due" shall be replaced by "shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account thereof."

**§ 33.** In the Marks and Geographical Indications Act (promulgated in the State Gazette No. 81/1999; corrected in No. 82/1999; amended in Nos. 28, 43, 94 and 105/2005, Nos. 30, 73 and 96/2006), Article 76g shall be amended as follows:

1. The heading shall be amended to read as follows: "Interim Measures".

2. In Paragraph (1), in the text before Item 1, the words "the person in regard of whom the injunction is requested" shall be replaced by "the respondent party".

3. In Paragraph (2), the word "injunctions" shall be replaced by "interim measures", the words "Articles 308 to 322" shall be replaced by "Articles 389 to 403", and the words "Article 317" shall be replaced by "Article 398".

4. In Paragraph (3), the word "injunction" shall be replaced by "interim measure".

5. In Paragraph (4), in sentence one, the word "injunctions" shall be replaced by "interim measures", the words "state or private law enforcement" shall be replaced by "enforcement",

and the words "admission of the injunction" shall be replaced by "imposition of the measure", and in sentence two, the word "injunction" shall be replaced by "interim measure".

6. In Paragraph (5), the word "injunctions" shall be replaced by "interim measures".

7. In Paragraph (6), the word "injunction" shall be replaced by "interim measure".

**§ 34.** The International Commercial Arbitration Act (promulgated in the State Gazette No. 60/1988; amended in No. 93/1993, No. 59/1998, No. 38/2001, No. 46/2002; modified by Constitutional Court Judgment No. 9/2002, promulgated in No. 102/2002) shall be amended as follows:

1. In sentence one of Article 8 (1), the words "at the first court meeting" shall be replaced by "within the time limit for an answer to the statement of action".

2. In Article 16 (1), the words "Articles 126b and 126c" shall be replaced by "Article 71".

3. In Article 48 (3), the words "Articles 54 and 55" shall be replaced by "Article 71".

4. In Article 51, Paragraph (3) shall be amended to read as follows:

"(3) The actions for recognition and admission to enforcement of foreign arbitration awards and of the settlements reached before foreign arbitration courts on arbitration cases shall be brought, unless otherwise provided for in an international treaty whereto the Republic of Bulgaria is a party, before the Sofia City Court, and Articles 118 to 122 of the Private International Law Code shall apply, mutatis mutandis, to the consideration of any such actions, with the exception of the right of the execution debtor to raise a defence of extinguishment of the claim."

**§ 35.** In the Customs Act (promulgated in the State Gazette No. 15/1998; amended in Nos. 89 and 153/1998, Nos. 30 and 83/1999, No. 63/2000, No. 110/2001, No. 76/2002, Nos. 37 and 95/2003, No. 38/2004, Nos. 45, 86, 91 and 105/2005, Nos. 30 and 105/2006) shall be amended as follows:

1. In Item 9 of Article 14 (1), the words "Article 64 (5)" shall be replaced by "Article 78 (6) and (8)".

2. In Article 211j (1), the words "Article 231" shall be replaced by "Article 303".

**§ 36.** In the Succession Act (promulgated in the State Gazette No. 22/1949; corrected in No. 41/1949; amended in No. 275/1950, No. 41/1985, No. 60/1992, modified by Constitutional Court Judgment No. 4/1996, promulgated in No. 21/1996; amended in No. 104/1996, No. 117/1997, No. 96/1999, No. 34/2000), in Article 24 (2), the words "Article 474 (1) and (2)" shall be replaced by "Article 578 (1) and (2)".

**§ 37.** The Notaries and Notarial Practice Act (promulgated in the State Gazette No. 104/1996; amended in Nos. 117, 118 and 123/1997, No. 24/1998, No. 69/1999, No. 18/2003, Nos. 29 and 36/2004, Nos. 19 and 43/2005, Nos. 30, 39 and 41/2006) shall be amended as follows:

1. In Article 50, the words "Articles 41 to 52" shall be replaced by "Articles 37 to 58".

2. Article 61 shall be amended to read as follows:

"Coercive Enforcement

**Article 61.** In respect of the sums due, the Notary Chamber of Bulgaria shall have the option, acting on a resolution of the General Meeting, to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said sums."

3. In Article 89, Paragraph (3) shall be amended to read as follows:

"(3) In respect of any unpaid notarial fees, the notary shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said fees."

**§ 38.** In the Indemnification of Nationalized Property Owners Act (promulgated in the State Gazette No. 107/1997; modified by Constitutional Court Judgment No. 4/1998, promulgated in No. 30/1998; amended in Nos. 45, 88 and 135/1998, No. 12/1999, No. 9/2000; corrected in No. 10/2000; amended in No. 99/2000, No. 25/2001, Nos. 28, 45, 47/2002, No. 112/2003, No. 101/2004, No. 24/2006), in Article 6, Paragraph (12) shall be repealed.

**§ 39.** In the Public Procurement Act (promulgated in the State Gazette No. 28/2004; amended in No. 53/2004, Nos. 31, 34 and 105/2005, Nos. 18, 33, 37 and 79/2006), in Article 122b (2), the words "Article 41 (5)" shall be replaced by "Article 56 (3)".

**§ 40.** In the Municipal Property Act (promulgated in the State Gazette No. 44/1996; amended in No. 104/1996, No. 55/1997, Nos. 22 and 93/1998, Nos. 23, 56, 64, 67, 69 and 96/1999, No. 26/2000, No. 34/2001, No. 120/2002, No. 101/2004, Nos. 29, 30 and 36/2006), in Article 27 (3), the words "Article 41 (5) and the time limit referred to in Article 157 (1)" shall be replaced by "Article 56 (3) and the time limit referred to in Article 199".

**§ 41.** The Registered Pledges Act (promulgated in the State Gazette No. 100/1996; amended in No. 86/1997, No. 42/1999, Nos. 19 and 58/2003, Nos. 34 and 43/2005, Nos. 30 and 34/2006) shall be amended as follows:

1. In Article 35:

(a) Paragraph (1) shall be amended to read as follows:

"(1) Where the pledgor does not duly cooperate for the foreclosure on the pledged property or for its conservation, the pledgee, proceeding from an abstract from the registry of a recorded security interest and a recording of commencement of foreclosure, shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure. The delivery of the pledged property shall follow the procedure established by Article 521 of the Civil Procedure Code.";

(b) in Paragraph (2), the words "the public or private enforcement" shall be replaced by "the enforcement".

2. Article 36 shall be amended to read as follows:

"Challenge of Rights

**Article 36.** In the foreclosure proceeding, the pledgor may challenge the debt or the security interest according to the procedure established by Article 439 of the Code of Civil Procedure."

3. In Article 37 (4), the words "Article 372" shall be replaced by "Article 482".

4. In Article 40 (2), the words "Article 372" shall be replaced by "Article 482".

5. In Article 41 (2), the words "Article 217" shall be replaced by "Article 278".

6. In Article 42, the words "Article 369" shall be replaced by "Article 464".

**§ 42.** The Republic of Bulgaria Defence and Armed Forces Act (promulgated in the State Gazette No. 112/1995; amended in No. 67/1996, No. 122/1997, Nos. 70, 93, 152 and 153/1998, Nos. 12, 67 and 69/1999, Nos. 49 and 64/2000, No. 25/2001, Nos. 1, 40, 45 and 119/2002, Nos. 50, 86, 95 and 112/2003, Nos. 93 and 111/2004, Nos. 27, 38, 76, 88, 102 and 105/2005, Nos. 30, 36, 56, 82, 91 and 102/2006, No. 11, 41 and 46/2007) shall be amended as follows:

1. In Article 300, Paragraph (3) shall be amended to read as follows:

"(3) In respect of the costs referred to in Paragraphs (1) and (2), the relevant competent authority, designated by the Minister of Defence, shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said authority."

2. In Article 300a, Paragraph (2) shall be amended to read as follows:

"(2) In respect of the costs referred to in Paragraph (1), the relevant competent authority, designated by the Minister of Defence, shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said authority."

**§ 43.** In the Criminal Assets Forfeiture Act (promulgated in the State Gazette No. 19/2005; amended in Nos. 86 and 105/2005, Nos. 33 and 75/2006), in Article 28 (5), the words "Article 87 (4)" shall be replaced by "Article 124 (5)".

**§ 44.** In the Patents and Utility Models Registration Act (promulgated in the State Gazette No. 27/1993; amended in No. 83/1996, No. 11/1998, No. 81/1999, Nos. 45 and 66/2002, No. 17/2003, Nos. 30 and 64/2006, No. 31/2007), in Article 67 (4), sentence two shall be amended to read as follows: "Non-payment of this fee may not serve as grounds to suspend procedures, but the receiving office shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said

office."

**§ 45.** In the Agricultural Producers Support Act (promulgated in the State Gazette No. 58/1998; amended in Nos. 79 and 153/1998, Nos. 12, 26, 86 and 113/1999, No. 24/2000, Nos. 34 and 41/2001, Nos. 46 and 96/2002, No. 18/2004, Nos. 14 and 105/2005, Nos. 18, 30, 34, 59, 96 and 108/2006, No. 13/2007), in Article 27, Paragraph (2) shall be amended to read as follows:

"(2) In respect of the receivables thereof from natural and legal persons, the Fund shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said Fund. Any such receivables shall be collected by the State Receivables Collection Agency."

**§ 46.** The Political Parties Act (promulgated in the State Gazette No. 28/2005; amended in No. 102/2005, Nos. 17 and 73/2006) shall be amended as follows:

1. In Article 18, Paragraph (1) shall be amended to read as follows:

"(1) Any judgment on the petition for registration shall be appealable or protestable before the Supreme Court of Cassation within seven days after learning of the said judgment regardless of the prerequisites for cassation appealability covered under Article 280 (1) of the Code of Civil Procedure."

2. In Article 41:

(a) Paragraph (1) shall be amended to read as follows:

"(1) The Sofia City Court judgment referred to in Article 40 herein shall be appealable before the Supreme Court of Cassation regardless of the prerequisites for cassation appealability covered under Article 280 (1) of the Code of Civil Procedure.";

(b) in Paragraph (2), the words "Article 231" shall be replaced by "Article 303".

**§ 47.** In the Privatization and Post-privatization Control Act (promulgated in the State Gazette No. 28/2002; amended in No. 78/2002, Nos. 20 and 31/2003; modified by Constitutional Court Judgment No. 5/2003, promulgated in No. 39/2003; amended in Nos. 46 and 84/2003, Nos. 55 and 115/2004, Nos. 28, 39, 88, 94, 103 and 105/2005, Nos. 36, 53, 72 and 105/2006), § 11b of the Supplementary Provisions shall be amended to read as follows:

"§ 11b. In respect of the installments of the price under contracts for privatization, the Post-privatisation Control Agency and the authorities referred to in Article 4 (2) herein shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Civil Procedure Code on the basis of an abstract of the books of account of the said Agency."

**§ 48.** The Industrial Designs Act (promulgated in the State Gazette No. 81/1999; amended in No. 17/2003, Nos. 43 and 105/2005, Nos. 30 and 73/2006) shall be amended as follows:

1. In Article 57g:

(a) the heading shall be amended to read as follows: "Interim Measures".

(b) in Paragraph (1), in the text before Item 1, the words "the person in respect to whom a security measure is requested" shall be replaced by "the respondent party".

(c) in Paragraph (2), the words "security measures" shall be replaced by "interim measures", the words "Articles 308 to 322" shall be replaced by "Articles 389 to 403", and the words "Article 317" shall be replaced by "Article 398".

(d) In Paragraph (3), the words "security measure" shall be replaced by "interim measure".

(e) in Paragraph (4), in sentence one, the word "security measures" shall be replaced by "interim measures", the words "a public or private law enforcement" shall be replaced by "an enforcement", and the words "admission of the security interest" shall be replaced by "imposition of the measure", and in sentence two, the words "security measure" shall be replaced by "interim measure".

(f) in Paragraph (5), the words "security measures" shall be replaced by "interim measures".

(g) in Paragraph (6), the words "security measure" shall be replaced by "interim measure".

## 2. In Article 60a:

(a) the heading shall be amended to read as follows: "Interim Measures";

(b) in Paragraph (1), in the text before Item 1, the word "injunctions" shall be replaced by "measures";

(c) Paragraph (2) shall be amended to read as follows:

"(2) The admission, imposition and lifting of interim measures shall follow the procedure established by Articles 389 to 403 of the Code of Civil Procedure, with the exception of sentence one of Article 398 (2), save insofar as this Act provides for otherwise."

(d) in Paragraph (3), the word "injunction" shall be replaced by "interim measure";

(e) in Paragraph (4), the word "injunctions" shall be replaced by "interim measures", the words "executive judge" shall be replaced by "enforcement agent", and the words "admission of the security interest" shall be replaced by "imposition of the measure";

(f) in Paragraph (5), the word "injunctions" shall be replaced by "interim measures";

(g) in Paragraph (6), in sentence one, the word "injunctions" shall be replaced by "interim measures" and the words "executive judge" shall be replaced by "enforcement agent", and in sentence two, the word "injunction" shall be replaced by "interim measure";

(h) in Paragraph (7), the word "injunction" shall be replaced by "interim measure", and the words "the said security interest" shall be replaced by "imposition of the said measure".

**§ 49.** In the Roads Act (promulgated in the State Gazette No. 26/2000; amended in No. 88/2000, No. 111/2001, Nos. 47 and 118/2002, Nos. 9 and 112/2003, Nos. 6 and 14/2004, Nos. 88 and 105/2005, Nos. 30, 36, 64, 102, 105 and 108/2006), in Article 57, Paragraph (2) shall be amended to read as follows:

"(2) In the event of failure to comply with the provision contained in Paragraph (1), the authority managing the road shall repair the consequences of the violation at the expense of the offender. In respect of the receivable thereof from the offender, the administration shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure on the basis of an abstract of the books of account of the said administration."

**§ 50.** In the Irrigation Associations Act (promulgated in the State Gazette No. 34/2001; amended in No. 108/2001, No. 30/2006), Article 54 shall be amended to read as follows:

"Article 54. In respect of the receivables thereof, the associations shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said receivables."

**§ 51.** In the Ownership Act (promulgated in Transactions of the Presidium of the National Assembly No. 92/1951; amended in No. 12/1958, No. 90/1960, Official Gazette No. 99/1963, Nos. 26 and 27/1973, Nos. 54 and 87/1974, No. 55/1978, No. 36/1979, No. 19/1985, Nos. 14 and 91/1988, No. 38/1989, No. 31/1990, No. 77/1991, No. 33/1996, No. 100/1997, No. 90/1999, Nos. 34 and 59/2000, No. 32/2005, No. 46/2006, No. 24/2007), in Article 46, Paragraph (2) shall be amended to read as follows:

"(2) On the basis of an effective resolution of the general meeting under Article 45, the manager or the chairman of the managing council shall have the option to move for the issuance of an enforcement order according to the procedure established by Article 410 (1) of the Code of Civil Procedure."

**§ 52.** In the Agricultural Land Ownership and Use Act (promulgated in the State Gazette No. 17/1991; corrected in No. 20/1991; amended in No. 74/1991, Nos. 18, 28, 46 and 105/1992, No. 48/1993; modified by Constitutional Court Judgment No. 12/1993, promulgated in No. 64/1993; amended in No. 83/1993, No. 80/1994, Nos. 45 and 57/1995; modified by Constitutional Court Judgments Nos. 7 and 8/1995, promulgated in No. 59/1995; amended in No. 79/1996; modified by Constitutional Court Judgments No. 20/1996, promulgated in No. 103/1996; amended in No. 104/1996, Nos. 62, 87, 98 and 123/1997, Nos. 59, 88 and 133/1998, No. 68/1999, Nos. 34 and 106/2000, Nos. 28, 47 and 99/2002, No. 16/2003, No. 36/2004, Nos. 17 and 30/2006, Nos. 13 and 24/2007), in Item 1 of Article 19 (8), the words "Article 483" shall be replaced by "Article 587".

**§ 53.** In the Social Assistance Act (promulgated in the State Gazette No. 56/1998; amended in Nos. 45 and 120/2002, Nos. 18, 30 and 105/2006), in Article 14b, Paragraph (2) shall be amended to read as follows:

"(2) The coercive enforcement of the order referred to in Article 14a (3) herein shall be admitted on a motion by the Social Assistance Directorate according to the procedure established by Article 418 of the Code of Civil Procedure."

**§ 54.** In the State Receivables Collection Act (promulgated in the State Gazette No. 26/1996; amended in No. 104/1996, No. 51/1997, No. 59/1998, No. 103/1999; modified by Constitutional Court Judgment No. 2/2000, promulgated in No. 29/2000; amended in No. 63/2000, No. 111/2001, Nos. 28 and 46/2002, No. 105/2005, No. 105/2006), in Article 87, Paragraph (2) shall be amended to read as follows:

"(2) The receivables covered under Paragraph (1), with the exception of the receivables referred to in Item 5, shall be ascertained by an act of ascertainment of a private state receivable, which shall be issued by the Executive Director of the Agency. On the basis of the act of ascertainment of a private state receivable, the Agency shall have the option to move for the issuance of an immediate enforcement order according to the procedure established by Article 418 of the Code of Civil Procedure."

**§ 55.** In the Judicial System Act (promulgated in the State Gazette No. 59/1994; modified by Constitutional Court Judgment No. 8/1994, promulgated in No. 78/1994; modified by Constitutional Court Judgment No. 9/1994, promulgated in No. 87/1994; modified by Constitutional Court Judgment No. 17/1995, promulgated in No. 93/1995; amended in No. 64/1996; modified by Constitutional Court Judgment No. 19/1996, promulgated in No. 96/1996; amended in Nos. 104 and 110/1996, Nos. 58, 122 and 124/1997, Nos. 11 and 133/1998; modified by Constitutional Court Judgment No. 1/1999, promulgated in No. 6/1999; amended in Nos. 34, 38 and 84/2000, No. 25/2001, No. 74/2002; modified by Constitutional Court Judgment No. 11/2002, promulgated in No. 110/2002; modified by Constitutional Court Judgment No. 13/2002, promulgated in No. 118/2002; amended in Nos. 61 and 112/2003, Nos. 29, 36 and 70/2004; modified by Constitutional Court Judgment No. 4/2004, promulgated in No. 93/2004; modified by Constitutional Court Judgment No. 4/2005, promulgated in No. 37/2005; amended in Nos. 43 and 86/2005, No. 17/2006; modified by Constitutional Court Judgment No. 1/2006, promulgated in No. 23/2006; amended in Nos. 30 and 39/2006), in Article 175 (2), Article 176 (3), Article 181 (4) and Article 182, the words "Articles 41 to 52" shall be replaced by "Articles 37 to 58".

**§ 56.** In the Commercial Register Act (promulgated in the State Gazette No. 34/2006; amended in Nos. 80 and 105/2006), in sentence one of Article 25 (4), the words "Chapter Twenty A" shall be replaced by "Chapter Twenty One `Appellate Review of Rulings'".

**§ 57.** The Private Enforcement Agents Act (promulgated in the State Gazette No. 43/2005; amended in No. 39/2006, No. 31/2007) shall be amended as follows:

1. Article 15 shall be repealed.

2. In Article 16:

(a) Paragraph (1) shall be repealed;

(b) the existing Paragraph (2) shall be renumbered to become Paragraph (1);

(c) the existing Paragraph (3) shall be renumbered to become Paragraph (2), and the figure "2" therein shall be replaced by "under Article 431 (3) of the Code of Civil Procedure".

3. In Article 18:

(a) in Paragraph (4), in sentence one the words "Article 414" shall be replaced by "Article 521", and in sentence two, the words "Articles 357 and 358" shall be replaced by "Articles 462 and 463";

(b) Paragraph (5) shall be amended to read as follows:

"(5) Acting on a court order, a private enforcement agent may serve notices and summonses in civil cases."

4. In Article 19 (3), the words "Article 12" shall be replaced by "Article 22".

5. In Article 43, the words "Articles 41 to 52" shall be replaced by "Articles 37 to 58".

6. Article 54 shall be amended to read as follows:

"Coercive Enforcement

**Article 54.** In respect of the sums due under an effective decision of the General Meeting, the Chamber shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said sums."

7. In Article 71 (5), the words "Articles 165 to 170" shall be replaced by "Articles 207 to 209".

8. In Article 79, Paragraph (3) shall be amended to read as follows:

"(3) In respect of any fees and costs outstanding and not paid, the private enforcement agent shall have the option to move for the issuance of an enforcement order under Article 410 (1) of the Code of Civil Procedure regardless of the amount of the said fees and costs."

**§ 58.** The Commerce Act (promulgated in the State Gazette No. 48/1991; amended in No. 25/1992, Nos. 61 and No. 103/1993, No. 63/1994, No. 63/1995, Nos. 42, No. 59, 83, 86 and 104/1996, Nos. 58, 100 and 124/1997, Nos. 52 and No. 70/1998, Nos. 33, 42, 64, 81, 90, 103 and 114/1999, No. 84/2000, Nos. 28, 61 and 96/2002, Nos. 19, 31 and 58/2003, Nos. 31, 39, 42, 43, 66, 103 and 105/2005, Nos. 38, 59 and 105/2006) shall be amended and supplemented as follows:

1. (Amended, SG No. 50/2008) In Article 70 (6), the words "Article 498" shall be replaced by "Article 604".

2. In Article 74, there shall be added a new Paragraph (4) to read as follows:

"(4) The action shall be examined according to the procedure established by Chapter Thirty-Three 'Proceedings in Class Actions' of the Code of Civil Procedure, where the contested resolution has been passed by the general meeting of a joint-stock company with issued bearer shares or by an investment company of the open-end type. Exclusion from participation shall not be granted in this case."

3. In Article 232 (4), the words "Article 488a" shall be replaced by "Article 583".

4. In Article 263n (5), the words "Twelve A `Summary Proceedings' of the Code of Civil Procedure, and Article 126e shall not apply" shall be replaced by "Thirty-Two `Proceedings in Commercial Disputes' of the Code of Civil Procedure".

5. In Article 264k (5), the words "Twelve A `Summary Proceedings' of the Code of Civil Procedure, and Article 126e shall not apply" shall be replaced by "Thirty-Two `Proceedings in Commercial Disputes' of the Code of Civil Procedure".

6. In Article 581 (1), the words "Article 456" shall be replaced by "Article 560".

7. In Article 613a:

(a) in Paragraph (1), the words "before the Supreme Court of Cassation following the rules set out in Chapter Nineteen A of" shall be replaced by "according to the standard procedure established by";

(b) in Paragraph (3), the words "Chapters Eighteen and Nineteen" shall be replaced by "Chapter Twenty `Intermediate Appellate Review'".

8. Article 708 shall be amended to read as follows:

"Collection of Transformed Claim

**Article 708.** On the basis of the plan as endorsed by the court, the creditor shall have the option to move for the issuance of an order under Article 410 (1) of the Code of Civil Procedure for enforcement of the transformed claim regardless of the amount of the said claim."

§ 59. In the Family Code (promulgated in the State Gazette No. 41/1985; amended in No. 11/1992; corrected in No. 15/1992; amended in Nos. 63 and 84/2003, No. 42/2005, No. 30/2006), Article 79 shall be amended and supplemented as follows:

1. The existing text shall be redesignated to become Paragraph (1).

2. There shall be added a new Paragraph (2) to read as follows:

"(2) The actions for support and for an increase of support shall be examined according to the procedure established by Chapter Twenty-Five `Summary Proceedings' of the Code of Civil Procedure."

§ 60. (Effective 24.07.2007, SG No. 59/2007) Within three months after the promulgation of this Code in the State Gazette, the Council of Ministers shall lay before the National Assembly drafts of acts to amend and supplement the law whose provisions must be brought into conformity with this Code.

§ 61. This Code shall enter into force on the 1st day of March 2008, with the exception of:

1. Part Seven `Special Rules Regarding Proceedings in Civil Cases Subject to Operation of European Union Law';

2. § 2 (4);

3. § 3 in respect of the repeal of Chapter Thirty-Two A 'Special Rules for the Recognition and Admission for Enforcement of Decisions of Foreign Courts and of Other Foreign Bodies' with Articles 307a to 307e and Part Seven 'Proceedings Concerning Return of a Child or Exercise of the Right of Access' with Articles 502 to 507;

4. § 4 (2);

5. § 24;

6. § 60,

which shall enter into force three days after the promulgation of this Code in the State Gazette.

Act to Amend and Supplement the Code of Civil Procedure

(SG No. 50/2008, effective 1.03.2008)

#### TRANSITIONAL AND FINAL PROVISIONS

§ 43. The rules of procedure referred to in Article 342 (1) of the Judicial System Act shall regulate, inter alia, the registers referred to in sentence two of Article 235 (5) and Article 489 (4) of the Code of Civil Procedure.

.....

§ 47. (Effective 30.05.2008) The proceedings terminated under § 2 of the Transitional and Final Provisions herein shall be resumed ex officio by the court.

§ 48. This Act shall enter into force as from the 1st day of March 2008, with the exception of § 23, 25, 45, 46 and 47, which shall enter into force as from the date of promulgation of this Act in the State Gazette.

Act to Amend and Supplement the Code of Civil Procedure

(SG No. 42/2009)

#### TRANSITIONAL AND FINAL PROVISIONS

§ 26. Any cases under Article 390 (1) and under Article 411 (1) of the Code of Civil Procedure, instituted prior to the entry into force of this Act, shall be completed by the same court, regardless of the change of cognizance.

§ 27. Any cases in respect of actions for exercise of parental rights where the parents have differences in the cases referred to in Item 9 of Article 76 of the Bulgarian Identity Documents Act, instituted prior to the entry into force of this Act, shall be completed according to the hitherto effective procedure.

.....  
Act to Amend and Supplement the Code of Civil Procedure

(SG No. 100/2010, effective 21.12.2010)

TRANSITIONAL AND FINAL PROVISIONS

.....  
§ 25. The pending proceedings shall be examined according to the hitherto effective procedure.

§ 26. This Act shall enter into force as from the day of promulgation thereof in the State Gazette with the exception of § 12 herein, which shall enter into force as from the 1st day of January 2011, and Item 2 of § 13 and

§ 21 herein, which shall enter into force as from the 18th day of June 2011.



Promulgated, State Gazette No. 42/17.05.2005, amended, SG No. 59/20.07.2007, effective 1.03.2008, SG No. 47/23.06.2009, effective 1.10.2009, SG No. 100/21.12.2010, effective 21.12.2010

Text in Bulgarian: Кодекс на международното частно право

## **Part One BASIC PROVISIONS**

### **Chapter One SCOPE OF CODE**

Subject Matter

**Article 1.** (1) The provisions of this Code shall govern:

1. the international jurisdiction of the Bulgarian courts, of other authorities, and proceedings in international civil matters;
2. the law applicable to relationships at private law with an international element;
3. the recognition and enforcement of foreign judgments and other authentic instruments in the Republic of Bulgaria.

(2) Within the meaning given by this Code, "relationship at private law with an international element" shall be a relationship involving two or more States.

Closest Connection Principle

**Article 2.** (1) Relationships at private law with an international element shall be governed by the law of the State with which the said relationships are most closely connected. The provisions contained in the Code regarding the determination of the applicable law express this principle.

(2) If the applicable law cannot be determined on the basis of the provisions of Part Three herein, the law of the State with which the relationship has the closest connection by virtue of other criteria shall apply.

Relations with International Treaties, International

Instruments and Other Laws

**Article 3.** (1) The provisions of this Code shall not affect the regulation of relationships at private law with an international element as established in an international treaty, in another international instrument in force for the Republic of Bulgaria, or in another law.

(2) Upon application of an international treaty or of another international instrument, regard shall be had to the international character of the provisions thereof, to the qualification established in the said provisions, and to the need to achieve uniformity in the interpretation and application of the said provisions.

**Part Two**  
**INTERNATIONAL JURISDICTION OF BULGARIAN**  
**COURTS AND**  
**OTHER AUTHORITIES.**  
**PROCEEDINGS IN INTERNATIONAL CIVIL**  
**MATTERS**

**Chapter Two**  
**JURISDICTION OF BULGARIAN COURTS AND**  
**OTHER AUTHORITIES**

General Jurisdiction

**Article 4.** (1) The Bulgarian courts and other authorities shall have international jurisdiction where:

1. the defendant has a habitual residence, statutory seat or principal place of business in the Republic of Bulgaria;
2. the claimant or applicant is a Bulgarian national or is a legal person registered in the Republic of Bulgaria.

(2) Actions against a legal person, where the dispute has arisen out of direct relationships with a branch of the said person, may be brought before the Bulgarian courts if the branch is registered in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Personal Rights

**Article 5.** Apart from pursuant to Article 4 herein, the Bulgarian court and other authorities shall furthermore have jurisdiction:

1. over matters relating to a change or protection of a name, where the person is a Bulgarian national or is habitually resident in the Republic of Bulgaria;
2. over matters relating to limitation or deprivation of Bulgarian nationals of the capacity to enter into legal relationships;
3. to establish and terminate guardianship or curatorship, where the person placed under guardianship or curatorship is a Bulgarian national or is habitually resident in the Republic of Bulgaria;

4. to declare the absence unheard from or death of a person who is a Bulgarian national or who has a known habitual residence in the Republic of Bulgaria.

#### Celebration of Marriage

**Article 6.** (1) Marriage in the Republic of Bulgaria shall be celebrated by a civil-status registrar if one of the future spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) Marriage between foreign nationals may be celebrated in the Republic of Bulgaria by a consular official or a diplomatic agent of the State of origin of the said foreign nationals, if this is permissible under the law of the said State.

(3) Bulgarian nationals abroad may enter into marriage before a competent authority of the foreign State if this is permissible under the law of the said State.

(4) Marriage between Bulgarian nationals abroad may be celebrated by a Bulgarian consular official or diplomatic agent if this is permissible under the law of the receiving State.

(5) Marriage between a Bulgarian national and a foreign national may be celebrated abroad by a Bulgarian consular official or diplomatic agent if this is permissible under the law of the receiving State and the national law of the foreign national.

#### Jurisdiction in Matrimonial Matters

**Article 7.** Matrimonial matters shall be cognizable in the Bulgarian courts if one of the spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Interspousal Relationships

##### in Personam and in Rem

**Article 8.** Under the terms established by Article 7 herein, the Bulgarian courts shall furthermore have jurisdiction over matters relating to relationships in personam and in rem between spouses.

#### Jurisdiction in Matters Relating to Establishment of Parenthood

**Article 9.** (1) The Bulgarian courts and other authorities shall have jurisdiction over proceedings for establishment and contesting of parenthood except pursuant to Article 4 herein and where the child or the parent, who is a party, is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) Under the terms established by Paragraph (1), this jurisdiction shall furthermore apply to matters relating to relationships in personam and in rem between parents and children.

#### Jurisdiction in Matters Relating to Adoption

**Article 10.** (1) The Bulgarian courts and other authorities shall have jurisdiction over matters

relating to admission of adoption, annulment or revocation of adoption, except in the cases covered under Article 4 herein and where the adopter, the adoptee or one of the parents of the adoptee is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) The Bulgarian courts shall have jurisdiction over matters relating to relationships in rem between adopter and adoptee, where the adopter or adoptee is a Bulgarian national or is habitually resident in the Republic of Bulgaria, as well as in the cases covered under Article 4 herein.

#### Jurisdiction in Matters Relating to Maintenance

**Article 11.** The Bulgarian courts shall have jurisdiction over actions on maintenance save in the cases under Article 4 (1) herein and where the maintenance creditor is habitually resident in the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Rights in Rem

**Article 12.** (1) (Amended, SG No. 59/2007) The matters under Article 109 of the Code of Civil Procedure relating to immovable property situated in the Republic of Bulgaria, the matters relating to enforcement or to security which such property constitutes, as well as the matters relating to transfer or establishment of rights in rem in such property, shall be exclusively cognizable in the Bulgarian courts and other authorities.

(2) The Bulgarian courts shall have jurisdiction over actions on rights in rem in movable property, save in the cases covered under Article 4 herein and where the property is situated in the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Intellectual Property Rights

**Article 13.** (1) The Bulgarian courts shall have jurisdiction over actions on copyrights and neighbouring rights, where protection is sought within the territory of the Republic of Bulgaria.

(2) The Bulgarian courts shall have exclusive jurisdiction over actions on items of industrial property, where the patent has been issued or the registration has been effected in the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Succession

**Article 14.** (Amended, SG No. 59/2007) The Bulgarian courts and other authorities shall have jurisdiction over actions under Article 110 of the Code of Civil Procedure and other proceedings relating to succession to the estates of deceased persons, where the deceased at the time of his or her death was habitually resident in the Republic of Bulgaria, or was then a Bulgarian national, as well as where part of the estate thereof is situated in the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Rights Arising out of

#### Contractual Relationships

**Article 15.** The Bulgarian courts shall have jurisdiction over actions on contractual relationships, save in the cases covered under Article 4 herein and where the place of performance of the obligation is within the Republic of Bulgaria or where the defendant has a principal place of business within the Republic of Bulgaria.

#### Jurisdiction in Matters Relating to Consumer Rights

**Article 16.** (1) The Bulgarian courts shall have jurisdiction over actions brought by a consumer save in the cases covered under Article 4 herein and where the said consumer is habitually resident in the Republic of Bulgaria and the conditions under Article 95 (2) herein are in place.

(2) An agreement on choice of court shall be admissible solely if entered into after the dispute has arisen.

#### Jurisdiction in Labour Disputes

**Article 17.** (1) Matters relating to labour disputes shall be cognizable in the Bulgarian courts, where the factory or office worker habitually carries out his or her work in the Republic of Bulgaria, as well as in the cases covered under Article 4 herein.

(2) An agreement on choice of court shall be admissible solely if entered into after the dispute has arisen.

#### Jurisdiction in Matters Relating to Tortious or

#### Delictual Rights

**Article 18.** (1) The Bulgarian courts shall have jurisdiction over actions on damage sustained as a result of a tort or delict save in the cases covered under Article 4 herein and where the harmful act was committed in the Republic of Bulgaria or where the damage or part thereof occurred in the Republic of Bulgaria.

(2) The jurisdiction referred to in Paragraph (1) shall furthermore apply to direct actions taken by the party who has suffered the damage against the insurer of the person claimed to be liable.

#### Exclusive Jurisdiction in Matters Relating to the Legal Status of

#### Legal Persons Registered in the Republic of Bulgaria

**Article 19.** (1) (Amended, SG No. 59/2007) The Bulgarian courts shall have exclusive jurisdiction over actions under Item 5 of Article 104 of the Code of Civil Procedure, where the legal person is registered in the Republic of Bulgaria.

(2) Paragraph (1) shall apply to actions which have as their object the nullity or the dissolution of a corporation or another legal person, or the revocation of acts of bodies thereof, protection of membership, as well as challenge of the transformation of a commercial corporation and pecuniary balancing upon transformation, where the corporation or the other legal person is registered in the Republic of Bulgaria.

## Jurisdiction in Actions Brought against a Number of Defendants

**Article 20.** The Bulgarian courts shall have jurisdiction over actions brought against a number of defendants if the grounds for jurisdiction exist in respect of one of the said defendants.

## Jurisdiction by Reason of Related Actions

**Article 21.** (1) Where the Bulgarian courts have jurisdiction over one of the actions brought by the claimant, the said courts shall furthermore have jurisdiction over the rest of the actions if the connection between the cases necessitates that they be heard and determined together.

(2) (Amended, SG No. 59/2007) Where the Bulgarian courts have international jurisdiction over the original claim, the said courts shall also have jurisdiction over the counter-claim under the terms established by Article 211 of the Code of Civil Procedure .

## Exclusive Jurisdiction

**Article 22.** The international jurisdiction of the Bulgarian courts and other authorities shall be exclusive solely where so expressly provided for.

## Submission of Action to Foreign Court

**Article 23.** (1) (Amended, SG No. 59/2007) Where an action is brought to assert a proprietary right and the dispute does not fall within the exclusive jurisdiction of the Bulgarian courts, any such action may be submitted to a foreign court by an agreement in writing between the parties. Where the Bulgarian court has been seised while such an agreement is in place, the defendant must raise his or her objection to the exercise of such jurisdiction within the time limit for response to the statement of action and before the court has taken a stand on the merits of the dispute. Sentence one shall not apply to actions on maintenance.

(2) Under the terms established by sentence one of Paragraph (1), a case cognizable in a foreign court may be submitted to the Bulgarian courts. This shall not apply to actions on maintenance.

(3) Save insofar as otherwise provided for by the agreement, it shall be presumed to confer on the Bulgarian or foreign courts exclusive jurisdiction over the dispute for the subject matter whereof the said agreement has been entered into.

## Tacit Establishment of Jurisdiction by Bulgarian Court

**Article 24.** (Amended, SG No. 59/2007) Where the jurisdiction of the Bulgarian courts may be stipulated by an agreement under Article 23 (1) herein, the said jurisdiction may be established even without any such agreement if the defendant accepts the said jurisdiction expressly or tacitly through acts on the merits of the dispute within the time limit for response to the statement of action.

## Jurisdiction upon Securing a Claim

**Article 25.** The Bulgarian courts shall furthermore have jurisdiction to secure a claim for the examination whereof they do not have international jurisdiction, if the subject matter of the conservatory attachment is situated in the Republic of Bulgaria and the judgment of the foreign court is entitled to recognition and enforcement in the Republic of Bulgaria.

#### Jurisdiction to Coerce Enforcement

**Article 26.** The Bulgarian enforcement authorities shall have exclusive jurisdiction to take action for coercive enforcement where the obligation which is the subject to such action must be performed by a person habitually resident in the Republic of Bulgaria or where the subject matter of this action is situated in the Republic of Bulgaria.

#### Jurisdiction upon Change of Circumstances

**Article 27.** (1) Where the grounds for international jurisdiction existed when the case was instituted, the said jurisdiction shall be retained even if the said grounds lapse while the proceedings are in progress.

(2) If the international jurisdiction did not exist when the case was instituted, the said jurisdiction shall be conferred if the grounds for it arise while the proceedings are in progress.

#### Verification Proprio Motu

**Article 28.** The court shall of its own motion verify international jurisdiction. The determination of the existence of absence of such jurisdiction shall be subject to intermediate and cassation appeal.

## **Chapter Three PROCEEDINGS**

#### Applicable Law

**Article 29.** The Bulgarian courts and other authorities shall hear and determine cases pursuant to Bulgarian law.

#### Rules of Evidence

**Article 30.** (1) The apportionment of the burden of proof shall be determined by the substantive law which governs the consequences of the fact requiring proof.

(2) (Amended, SG No. 59/2007) If the law applicable to the merits of the case admits testimony regarding the circumstances under Article 164 of the Code of Civil Procedure, this type of evidence shall be admissible if the fact materialized within the territory of the State whereof the law is applicable.

(3) The securing of evidence which is situated in the Republic of Bulgaria shall be effected by the Bulgarian courts even if they do not have jurisdiction over the case for the determination of which the said evidence is required. The opposite party shall be notified of

the day of the securing, unless it brooks no delay.

#### Evaluation of Foreign Procedural Acts

**Article 31.** The Bulgarian courts and other authorities shall evaluate the validity of foreign procedural acts and authentic instruments in conformity with the law of the State where the said acts were performed or the said instruments issued.

#### Summoning and Service of Documents

**Article 32.** (1) The summoning, as well as the service of notices and documents abroad, shall be effected through the Bulgarian diplomatic agents or consular officials and the competent foreign authorities. The Bulgarian authorities shall approach the said agents, officers and authorities through the Ministry of Justice according to a procedure established by the Minister of Justice.

(2) Assistance from the Bulgarian diplomatic agents and consular officials shall be sought solely for acts in respect of Bulgarian nationals.

#### Legal Address

**Article 33.** (1) A party with a known address abroad shall be summonsed at the said address, with the writ of summons indicating that the said party may name a legal address in the Republic of Bulgaria.

(2) The obligation referred to in Paragraph (1) shall furthermore apply to the legitimate representative, guardian and authorized representative of a person in the Republic of Bulgaria, should they leave the country.

(3) Upon non-performance of the obligation referred to in Paragraphs (1) and (2), the subsequent writs of summons shall be filed with the case records and shall be presumed served. The party shall be notified of these consequences upon the first summoning.

#### Summoning through Representative

**Article 34.** Where a party has a known address abroad, the said party may be summonsed through a representative thereof in the Republic of Bulgaria, if the said representative has concluded on behalf of the said party the transaction in connection with which the proceedings have been instituted.

#### Summoning through Publication

**Article 35.** (1) Where a party has a known address abroad and an attempt at summoning at the said address has failed, the said party shall be summonsed by means of a publication in the Unofficial Section of the State Gazette, effected at least one month prior to the date of the hearing.

(2) If, notwithstanding the publication, the party does not appear at the hearing, the court shall appoint a representative of the said party.

## Judicial Cooperation

**Article 36.** (1) The Bulgarian authorities shall be obliged to render judicial cooperation at the request of the foreign authorities, except where compliance with any such request is contrary to Bulgarian public policy.

(2) The requested cooperation shall be provided in accordance with Bulgarian law. At the request of the foreign authority, the said cooperation may be provided in accordance with the foreign law provided this is compatible with Bulgarian law.

(3) Where the Bulgarian authorities seek judicial cooperation abroad, the said authorities may request that the act be performed pursuant to Bulgarian law.

## Decline of Jurisdiction over Lawsuit Pending

### Elsewhere (Lis Pendens)

**Article 37.** The Bulgarian court shall of its own motion stay any proceedings brought before it if other proceedings based on the same facts, involving the same cause of action and between the same parties, were brought earlier before a foreign court and the latter proceedings are expected to be concluded within a reasonable time by a final judgment which is entitled to recognition and enforcement in the Republic of Bulgaria.

## Jurisdiction over Pre-conditioning Legal Relationship

**Article 38.** (1) The Bulgarian court shall take a stand on legal relationships on which the outcome of the dispute depends, even where it does not have jurisdiction over the cases for such relationships.

(2) Where a lawsuit is pending abroad on the pre-conditioning legal relationship, the Bulgarian court may stay the proceedings brought before it if there is reason to expect that the foreign judgment will be recognized in the Republic of Bulgaria.

# Part Three APPLICABLE LAW

## Chapter Four COMMON PROVISIONS

### Qualification

**Article 39.** (1) Where determination of the applicable law depends on the qualification of the essential elements or of the relationships, the said qualification shall be performed according to Bulgarian law.

(2) Where a specific legal institution or legal concept are unknown to Bulgarian law and cannot be defined through interpretation pursuant to Bulgarian law, the foreign law which governs the said institution or concept must be taken into consideration for the qualification

thereof.

(3) Upon performance of qualification, account must be taken of the international element in the relationships which are being settled and of the specifics of private international law.

#### Referral

**Article 40.** (1) Within the meaning given by this Code, the "law of a State" shall denote the legal standards of the said State, including the conflict of laws rules thereof, save as otherwise provided for in this Code or in another statute.

(2) Remission to Bulgarian law and transmission to the law of a third State shall be inadmissible regarding:

1. the legal status of legal persons and of bodies unincorporate;
2. the formal requirements for legal transactions;
3. the choice of applicable law;
4. maintenance;
5. contractual relationships;
6. non-contractual relationships.

(3) In the cases covered under Paragraph (1), where referral is admitted, Bulgarian substantive law or, respectively, the substantive law of the third State, shall apply.

#### Applicable Law of State with Several Legal Systems

**Article 41.** (1) Where the State whereof the law has been determined as applicable by this Code has several territorial units with separate legal systems, the law of that State shall determine which of the said systems shall apply.

(2) Where a State has several territorial units each having its own legal regulation of contractual and non-contractual relationships, each territorial unit shall be treated as a separate State upon determination of the applicable law under Chapters Ten and Eleven herein.

(3) Where the State whereof the law has been determined as applicable by this Code comprises several legal systems applicable to different categories of persons, the law of that State shall determine which of the said systems shall apply.

(4) Where the law of the State referred to in Paragraphs (1) and (3) does not lay down criteria for determination of the applicable legal system, the legal system with which the relationship has the closest connection shall apply.

#### Change of Determination Criterion

**Article 42.** No subsequent change of circumstances on the basis of which the applicable law has been determined shall be retroactive.

#### Establishment of Content of Foreign Law

**Article 43.** (1) The court or another authority applying the law shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions.

(2) The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or another authority applying the law.

(3) Upon choice of applicable law, the court or another authority applying the law may order the parties to assist in the establishment of the content of the said law.

#### Interpretation and Application of Foreign Law

**Article 44.** (1) The foreign law shall be interpreted and applied as it is interpreted and applied in the State which created the said law.

(2) Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal.

#### Public Policy

**Article 45.** (1) A provision of a foreign law determined as applicable by this Code shall not apply only if the consequences of such application are manifestly incompatible with Bulgarian public policy.

(2) Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law.

(3) Where an incompatibility referred to in Paragraph (2) is established, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

#### Special Mandatory Rules

**Article 46.** (1) The provisions of this Code shall not affect the application of the mandatory rules of Bulgarian law which, considering their subject matter and purpose, must be applied notwithstanding the referral to a foreign law.

(2) The court may have regard to the mandatory rules of another State with which the relationship has a close connection if the said rules, according to the law of the State that created them, must be applied notwithstanding what law has been determined as applicable by a conflict of laws rule of this Code. To decide whether to have regard of such special mandatory rules, the court must have regard to the nature of the said rules and the subject

matter thereof, as well as to the consequences of the application or non-application thereof.

Reciprocity

**Article 47.** (1) The application of a foreign law shall be independent of any requirement of reciprocity.

(2) In case a statutory instrument requires reciprocity, the existence of such reciprocity shall be presumed until the contrary is established.

## **Chapter Five LEGAL STATUS OF SUBJECTS**

### **Section I Legal Status of Natural Persons**

Common Provisions

**Article 48.** (1) Within the meaning given by this Code, the national law of a person (*lex patriae*) shall be the law of the State of the nationality of the said person.

(2) The national law of a person holding dual or multiple nationality, of which one is Bulgarian nationality, shall be Bulgarian law.

(3) The national law of a person who is a national of two or more foreign States shall be the law of the State of habitual residence of the said person. Where the person does not have a habitual residence in any State whereof the said person is a national, the law of the State with which the said person has the closest connection shall apply.

(4) Within the meaning given by this Code, the national law of a stateless person shall be the law of the State of habitual residence of the said person.

(5) Within the meaning given by this Code, the national law of a person with a recognized refugee status and of an asylee shall be the law of the State of habitual residence of the said person.

(6) Where in the cases referred to in Paragraphs (3), (4) and (5) the person does not have a habitual residence or such cannot be established, the law of the State with which the said person has the closest connection shall apply.

(7) Within the meaning given by this Code, "habitual residence of a natural person" shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement. For determination of this place, special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections.

Capacity to Have Rights and Duties

**Article 49.** (1) The capacity of a person to have rights and duties shall be governed by the national law thereof.

(2) Foreign nationals and stateless persons shall have in the Republic of Bulgaria the same rights as Bulgarian nationals, save as otherwise provided for by statute.

#### Capacity to Enter into Legal Relationships

**Article 50.** (1) The capacity of a person to enter into legal relationships shall be governed by the national law thereof. Where the law applicable to a specific relationship establishes special conditions regarding the capacity to have rights and duties, the said law shall apply.

(2) Where the contract is entered into between persons who are present within the territory of the same State, the person who is capable of having rights and duties under the law of that State may not invoke the incapacity thereof under the law of another State, except where the opposite party was aware of the said incapacity or was unaware of the said incapacity through negligence at the time of conclusion of the contract.

(3) The provision of Paragraph (2) shall not apply to any transactions in family and succession relationships, as well as to any transactions regarding rights in rem in immovable property situated in a State other than the State of the place of conclusion of the transaction.

#### Acquired Capacity to Have Rights and Duties and to Enter into

#### Legal Relationships

**Article 51.** The capacity to have rights and duties and to enter into legal relationships, which is acquired pursuant to national law, shall not be affected by a change of nationality.

#### Capacity to Carry Out Activities of Commercial Nature

**Article 52.** The capacity of a person to carry out activities of a commercial nature without incorporation of a legal person shall be determined by the law of the State where the person is registered as a merchant. Where registration is not required, the law of the State where the person has a principal place of business shall apply.

#### Name

**Article 53.** (1) The name of a person and the change of the said name shall be governed by the national law of the person.

(2) The effect of the change of nationality on the name shall be determined by the law of the State whose nationality the person has acquired. Where any such person is stateless, the effect of the change of his or her habitual residence on the name shall be determined by the law of the State in which the said person establishes his or her new habitual residence.

(3) The protection of the name shall be governed by the law which is applicable according to the provisions of Chapter Eleven herein.

(4) The name and the change thereof may be governed by Bulgarian law, should this be requested by a person who is habitually resident in the Republic of Bulgaria.

#### Limitation and Deprivation of Capacity to Enter into

#### Legal Relationships

**Article 54.** (1) The terms and consequences of limitation or deprivation of the capacity of a person to enter into legal relationships shall be governed by the national law of the said person. Where a person is habitually resident within the territory of the Republic of Bulgaria, the court may apply Bulgarian law.

(2) The law applied according to Paragraph (1) shall furthermore govern the terms for revocation of the limitation or deprivation of the capacity to enter into legal relationships.

#### Declaration of Absence Unheard from and Death

**Article 55.** (1) The terms and consequences of declaration of an absence unheard from and of death shall be governed by the law of State whose nationality the person held when last heard from. Where any such person is stateless, the terms and consequences of declaration of an absence unheard from and of death shall be governed by the law of State where the said person was last habitually resident.

(2) The provisional measures for conservation of the property of a person situated within the territory of the Republic of Bulgaria shall be governed by Bulgarian law.

(3) Any person, who was habitually resident in the Republic of Bulgaria, may be declared absent unheard from or dead under Bulgarian law, should this be requested by a justifiably interested party.

## **Section II**

### **Legal Status of Legal Persons, Unincorporated Entities and the State**

#### Legal Persons

**Article 56.** (1) Legal persons shall be governed by the law of the State where the said persons are registered.

(2) Where no registration is required for incorporation of the legal person, or where the legal person is registered in several States, the applicable law shall be the law of the State in which the statutory seat thereof is situated.

(3) If in the cases under Paragraph (2) the situs of the statutory seat is different from the situs of the actual place of management of the legal person, the law of the State where the actual place of management thereof is situated shall apply.

(4) The branch of a legal person shall be governed by the law of the State in which the said branch is registered.

## Bodies Unincorporate

**Article 57.** Associations or organizations which are not legal persons shall be governed by the law of the State in which the said entities are registered or instituted.

## Scope of Applicable Law

**Article 58.** The law applicable to the persons covered under Articles 56 and 57 herein shall govern:

1. the establishment, the legal nature, and the form of legal organization thereof;
2. the name or the corporate designation;
3. the legal personality and the system of management;
4. the composition, competence and functioning of the bodies;
5. the representation;
6. the acquisition and loss of membership, as well as the rights and duties thereto incidental;
7. the liability for obligations;
8. the consequences of violations of the law or of the basic instrument;
9. the transformation and dissolution.

## Transfer of Central Administration and Transformation

**Article 59.** The transfer of the central administration to another State and the transformation of legal persons with central administration in different States shall take effect solely if carried out in accordance with the law of the said States.

## Participation of State in Relationships at Private Law with

### International Element

**Article 60.** The provisions of this Code shall furthermore apply to the relationships at private law with an international element, whereto a State is a party, save as where otherwise established by statute.

# **Chapter Six**

## **LEGAL TRANSACTIONS, AGENCY AND EXTINCTIVE PRESCRIPTION**

### Formal Requirements for Legal Transactions

**Article 61.** The formal requirements for legal transactions shall be governed by the law applicable to the transaction. Compliance with the formal requirements as established by the law of the State where performance of the transaction is to be made shall, however, suffice.

Relationships between Principal and Third Party in

Voluntary Agency

**Article 62.** (1) In the relationships between the principal and the third party, the existence and the extent of the authority of the agent, as well as the effects of the agent's actual or purported exercise of the authority thereof, shall be governed by the law of the State in which the agent had his or her principal place of business at the time of performance of the relevant acts.

(2) Notwithstanding the provision of Paragraph (1), the law of the State in which the agent has acted shall apply if:

1. the principal place of business of the principal or the habitual residence thereof is situated in that State, and the agent has acted in the name of the principal, or
2. the principal place of business of the third party or the habitual residence thereof is situated in that State, or
3. the agent has acted at an exchange or auction, or
4. the agent has no principal place of business.

(3) The agent or the third party may choose in writing the law governing the matters covered under paragraph (1). The choice of applicable law must be expressly accepted by the other party and must not prejudice the interests of the agent.

Extinctive Prescription

**Article 63.** The law governing the relevant relationship shall apply to extinctive prescription.

## **Chapter Seven**

# **RIGHTS IN REM AND INTELLECTUAL PROPERTY RIGHTS**

## **Section I**

### **Rights in Rem**

Common Provisions

**Article 64.** (1) Possession, ownership and other rights in rem in movable and immovable property shall be governed by the law of the State in which the property is situated (*lex loci rei sitae*).

(2) The evaluation as to whether a corporeal object is movable or immovable, as well as the type of the rights in rem, shall be determined by the law specified in Paragraph (1).

#### Acquisition and Termination of Rights in Rem

**Article 65.** (1) The acquisition and termination of proprietary and possessory rights shall be governed by the law of the State in which the corporeal object is situated during performance of the act or occurrence of the circumstance justifying the acquisition or termination.

(2) The acquisition of ownership and other rights in rem on the grounds of acquisitive prescription shall be governed by the law of the State in which the corporeal object was situated at the time of lapse of the period of acquisitive prescription. The time of possession in another State shall be assimilated to the said period.

#### Acquired Rights

**Article 66.** Upon change of the place in which the corporeal object is situated, the rights acquired pursuant to the law of the State in which the corporeal object was situated may not be exercised to the prejudice of the law of the State in which the said object is newly situated.

#### Corporeal Objects in Transit

**Article 67.** (1) The acquisition and termination of rights in rem in corporeal objects in transit shall be governed by the law of the State of destination of the said objects.

(2) The rights in rem in corporeal objects for personal use carried by a passenger shall be governed by the law of the State where the passenger is habitually resident.

#### Means of Transport

**Article 68.** The acquisition, transfer and termination of rights in rem in means of transport shall be governed by:

1. the law of the flag of the ship;
2. the law of the State where the aircraft is registered;
3. the law of the State where the person operating the railway rolling stock and land motor vehicles has its place of business.

#### Recording

**Article 69.** The recording of legal transactions for the acquisition, transfer and extinguishment of rights in rem shall be governed by the law of the State in which the corporeal object was situated at the time of performance of the transaction.

#### Cultural Property

**Article 70.** Where a given corporeal object belonging to the cultural heritage of a specific State has been wrongfully removed from the territory of the said State, the request of the said

State for return of the said object shall be governed by the law of the said State, except where the said State has opted for application of the law of the State in which the object is situated at the time of making the request for return.

## **Section II**

### **Intellectual Property Rights**

#### Common Provisions

**Article 71.** (1) The arising, content, transfer and termination of copyright and of rights neighbouring on copyright shall be governed by the law of the State for which the protection of the said rights is sought (*lex loci protectionis*).

(2) The arising, content, transfer and termination of industrial property rights shall be governed by the law of the State in which the patent has been issued or the registration has been effected or, respectively, in which an application for a patent or for registration has been filed.

#### Rights in Intellectual Property Items Prepared within the Scope of

##### Employment

**Article 72.** The law governing the contract of employment shall furthermore apply to the relationships between the employer and the author, the holder of intellectual property rights in respect of intellectual property items prepared within the scope of employment.

##### Law Applicable to Agreements

**Article 73.** The agreements transferring rights or granting consent to the use of intellectual property rights shall be governed by the law applicable according to Chapter Ten herein.

## **Section III**

### **Scope of Law Applicable to Rights in Rem and to Intellectual Property Rights**

#### Scope of Applicable Law

**Article 74.** The applicable law, determined according to the provisions of Sections I and II of this Chapter, shall govern:

1. the existence, type, content and scope of the rights;
2. the holders of the rights;
3. the transferability of the rights;

4. the methods of creation, modification, transfer and extinguishment of the rights;
5. the need of recording and the enforceability of the rights against third parties.

## **Chapter Eight**

### **FAMILY RELATIONSHIPS**

#### Formal Requirements for Marriage

**Article 75.** (1) The formal requirements for marriages shall be governed by the law of the State of celebration.

(2) The formal requirements for marriages celebrated by a duly empowered diplomatic agent or consular official shall be governed by the law of the sending State.

(3) The validity of a marriage celebrated abroad shall be recognized in the Republic of Bulgaria if the formal requirements established in the law applicable under Paragraphs (1) and (2) have been satisfied.

#### Substantive Requirements for Entry into Marriage

**Article 76.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) The substantive requirements for entry into marriage shall be governed for each of the future spouses by the law of the State of which the person was a national at the time of celebration of the marriage. In respect of a Bulgarian national who enters into marriage abroad, the authorization referred to in Article 6 (2) of the Family Code may be granted by the Bulgarian diplomatic agent or consular official.

(2) Where one of the future spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria, the marriage shall be celebrated by a Bulgarian civil-status registrar and if the applicable foreign internal law establishes any impediment to the entry into marriage which, under Bulgarian law, is incompatible with the freedom to enter into marriage, the said impediment shall be disregarded.

#### Establishment of Absence of Impediments

**Article 77.** A foreign national or a stateless person must certify to the Bulgarian civil-status registrar that:

1. the national law of the said person recognizes the validity of a marriage celebrated by a foreign competent authority;
2. there are no impediments to entry into the said marriage under the national law of the said person.

#### Marriage Annulment

**Article 78.** Marriage annulment shall be governed by the law which was applicable to the substantive requirements for entry into the marriage.

## Interspousal Relationships in Personam and in Rem

**Article 79.** (1) The relationships in personam between spouses shall be governed by the common national law thereof.

(2) The relationships in personam between spouses holding different nationalities shall be governed by the law of the State in which they have a common habitual residence or, in the absence of such habitual residence, by the law of the State with which both spouses are most closely connected.

(3) The relationships in rem between spouses shall be governed by the law applicable to the relationships in personam therebetween.

(4) Spouses may select an applicable law to govern the relationships in rem therebetween if this is admissible under the law determined in Paragraphs (1) and (2).

### Agreement on Choice of Applicable Law

**Article 80.** (1) The choice of applicable law under Article 79 (4) herein must be evidenced in writing, dated and signed by the spouses.

(2) The entry into and the validity of the agreement on choice shall be governed by the selected law.

(3) The choice may be made before or after entry into the marriage. The spouses may change or revoke the choice of applicable law. Where the choice has been made after entry into the marriage, the said choice shall take effect as from the time of entry into the marriage unless otherwise agreed between the parties.

### Enforceability of Choice of Applicable Law

**Article 81.** If the relationships in rem between spouses are governed by a selected foreign law, they shall be enforceable against third parties solely if the said parties were aware of the application of the said law or were unaware through negligence. Enforceability shall apply to rights in rem in immovable property solely if the requirements for recording, established by the law of the State in which the property is situated, have been satisfied.

### Divorce

**Article 82.** (1) A divorce between spouses possessing the same foreign nationality shall be governed by the law of the State whose nationals the said spouses were upon submission of the application for divorce.

(2) A divorce between spouses possessing different nationalities shall be governed by the law of the State in which the said spouses have a common habitual residence at the time of submission of the application for divorce. Where the spouses have no common habitual residence, Bulgarian law shall apply.

(3) If the applicable foreign law does not admit the divorce and at the time of submission of

the application for divorce one of the spouses was a Bulgarian national or was habitually resident in the Republic of Bulgaria, Bulgarian law shall apply.

#### Establishment of Parenthood

**Article 83.** (1) Establishment of parenthood shall be governed by the law of the State whose nationality the child acquired at the time of birth.

(2) Notwithstanding the application of Paragraph (1), the following law may be applied should this be more favourable to the child:

1. the law of the State of which the child is a national or in which the child is habitually resident at the time of establishment of parenthood, or

2. the law applicable to the relationships in personam between the parents at the time of birth.

(3) Referral to the law of a third State shall be admissible where the said law admits establishment of the parenthood of the child.

(4) Affiliation shall be effective if it conforms to the national law of the affiator or to the national law of the child at the time of affiliation, or by the law of the State in which the child has a habitual residence at the time of affiliation.

(5) The formal requirements for affiliation shall be governed by the law of the State where the affiliation has been effected, or by the law applicable according to Paragraph (4).

#### Adoption

**Article 84.** (1) The conditions for adoption shall be governed by the law of the State of which the adopter (or adopters) and the adoptee are nationals at the time of submission of the application for adoption.

(2) Should the said persons hold different nationalities, the national law of each of the persons shall apply.

(3) (Amended, SG No. 47/2009, effective 1.10.2009) The consent of the Minister of Justice shall be required where the adopted child is habitually resident in the Republic of Bulgaria, unless the adoptive parent is habitually resident in the Republic of Bulgaria. The terms and procedure for the grant of consent to adoption shall be established by an ordinance of the Minister of Justice.

(4) (Amended, SG No. 47/2009, effective 1.10.2009) Where the adoptee is a Bulgarian national, the adopter, whether habitually resident in another State, must satisfy the conditions for adoption under the law of that State as well.

(5) The effect of adoption shall be governed by the common national law of adopter and adoptee. If adopter and adoptee hold different nationalities, the law of the State in which they have a common habitual residence shall apply.

(6) Annulment of adoption shall be governed by the law which was applicable to the

conditions for the adoption according to Paragraphs (1), (2) and (4).

(7) The grounds for revocation of adoption, apart from annulment under Paragraph (6), shall be governed by the law applicable to the act of adoption according to Paragraph (5).

(8) Upon revocation of adoption, regard must be had to the best interests of the adoptee who has not attained full legal age.

#### Relationships between Parents and Children

**Article 85.** (1) The relationships between parents and children shall be governed by the law of the State in which they have a common habitual residence.

(2) If parents and child have no common habitual residence, the relationships therebetween shall be governed by the law of the State in which the child has a habitual residence or by the national law thereof, should this be more favourable to the child.

#### Guardianship and Curatorship

**Article 86.** (1) The institution and termination of guardianship and curatorship shall be governed by the law of the State in which the person who is placed under guardianship or curatorship has a habitual residence.

(2) The relationships between the person placed under guardianship or curatorship and the guardian or curator shall be governed by the law which applied according to Paragraph (1).

(3) The obligation to accept guardianship or curatorship shall be governed by the national law of the person designated as guardian or curator.

(4) Provisional or urgent protection measures may be taken under Bulgarian law where the person or any movable or immovable property thereof is situated within the territory of the Republic of Bulgaria.

#### Maintenance

**Article 87.** (1) Maintenance obligations shall be governed by the law of the State in which the maintenance creditor has a habitual residence, save as where the national law thereof is more favourable to the said creditor. In such case, the national law of the maintenance creditor shall apply.

(2) Where the maintenance creditor and the maintenance debtor are nationals of the same State and the maintenance debtor is habitually resident in that State, the common national law of the two persons shall apply.

(3) Where the law applicable under Paragraphs (1) and (2) does not admit the award of maintenance, Bulgarian law shall apply.

(4) Where maintenance obligations between former spouses arise by reason of annulment of a marriage or by reason of divorce, the applicable law shall be the law which applied according to Article 78 or Article 82 herein, as the case may be.

## Scope of Law Applicable to Maintenance

**Article 88.** (1) The law applicable to maintenance shall determine:

1. whether maintenance may be claimed, to what amount and by whom;
2. who can claim maintenance and within what time limits;
3. whether and under what terms the maintenance may be modified;
4. the grounds for extinguishment of the right to maintenance;
5. the obligation of the maintenance debtor to reimburse the authority which paid the maintenance instead of the said debtor.

(2) Upon determination of the amount of maintenance, account must be taken of the financial capabilities of the maintenance debtor and of the actual needs of the maintenance creditor, even where the applicable foreign law provides for otherwise.

## **Chapter Nine** **SUCCESSION RELATIONSHIPS**

### Succession by Operation of Law

**Article 89.** (1) Succession to movable property shall be governed by the law of the State in which the antecessor had a habitual residence upon death.

(2) Succession to immovable property shall be governed by the law of the State in which the said property is situated.

(3) The antecessor may designate the law of the State of which the said antecessor was a national at the time of the designation to govern the succession to the whole of the estate thereof.

(4) The conditions for material validity of the act of designation of applicable law and the revocation of the said designation shall be governed by the law designated. The designation of applicable law and the revocation of the said designation must be expressed in a statement made in accordance with the formal requirements for testamentary dispositions.

(5) The choice of applicable law must not affect the reserved share of the heirs determined under the law applicable according to Paragraphs (1) and (2).

### Testamentary Succession

**Article 90.** (1) The capacity of a person to dispose of the property thereof by means of a will (making and revocation) shall be governed by the law applicable according to Article 89 herein.

(2) A will shall be formally valid if it conforms to the law of the State:

1. in which it was made, or
2. of which the testator was a national at the time of making the will or upon death, or
3. in which the testator was habitually resident at the time of making the will or upon death, or
4. in which the immovable property subject to the will is situated.

(3) Paragraph (2) shall furthermore apply to the form of revocation of the testamentary disposition.

#### Scope of Applicable Law

**Article 91.** The law applicable to succession shall govern:

1. the time and place of opening of the succession;
2. the range and precedence of the heirs, devisees and legatees;
3. the respective shares of the heirs, devisees and legatees;
4. the capacity to inherit;
5. the assumption of the obligations of the deceased and the apportionment of the said obligations among the heirs, devisees and legatees;
6. the acceptance and renunciation of succession;
7. the time limits for acceptance of the succession;
8. the disposable part of the estate;
9. the conditions for material validity of the will.

#### Vacant Succession

**Article 92.** Where under the law applicable there is no heir, devisee or legatee under a disposition of property upon death and no natural person is an heir by operation of law, the assets of the estate situated within the territory of the Republic of Bulgaria shall be appropriated by the Bulgarian State or by the municipality.

## **Chapter Ten**

### **CONTRACTUAL RELATIONSHIPS**

#### Choice of Applicable Law

**Article 93.** (1) Contracts shall be governed by the law chosen by the parties. Any such choice must be expressed or clearly demonstrated by the terms of the contract or by the circumstances whereunder the contractual relationship evolves.

(2) Unless otherwise agreed, the parties shall be presumed to have accepted as applicable the usage of which the parties are or ought to have been aware and which is widely known in international trade or commerce, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce involved.

(3) By their choice, the parties can select a law applicable to the whole or a part only of the contract.

(4) The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed the said contract. Any variation by the parties of the law to be applied, made after the conclusion of the contract, shall not prejudice the formal validity of the contract according to Article 98 herein or adversely affect the rights of third parties.

(5) Where all the elements of a contract at the time of choice are connected with one State only, the choice of a foreign law must not prejudice the application of the mandatory rules of the said State which cannot be derogated from by contract.

(6) The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 97 and 98 herein.

#### Applicable Law in the Absence of Choice

**Article 94.** (1) To the extent that the parties have not chosen an applicable law, the law of the State with which the contract is most closely connected shall apply. If any part of the contract can be separated from the other clauses thereof and should the said part have a closer relation to another State, the law of the latter may apply as an exception.

(2) It shall be presumed that the contract is most closely connected with the State in which the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his or her habitual residence or central administration.

(3) If the contract is entered into in the course of the trade or profession of the party referred to in Paragraph (2), it shall be presumed that the contract is most closely connected with the State within whose territory the main place of business is situated. If the place where the performance is effected differs from the main place of business of the party, it shall be presumed that that the contract is most closely connected with the State within whose territory, as of the moment of the contract conclusion, the place of business wherethrough the performance is to be effected is situated.

(4) The provisions of Paragraphs (2) and (3) shall not apply if the performance which is characteristic of the contract cannot be determined.

(5) Where the subject matter of the contract is a right in immovable property, it shall be presumed that the contract is most closely connected with the State in which the said immovable property is situated.

(6) The provisions of Paragraphs (2) and (3) shall not apply to a contract for the carriage of goods. It shall be presumed that a contract for the carriage of goods is most closely connected with the State within whose territory the principal place of business of the carrier is situated at the time of conclusion of the contract, subject to the condition that:

1. the place of loading, or
2. the place of discharge, or
3. the principal place of business of the consignor

is also situated in that State.

(7) The provision of Paragraph (6) shall furthermore apply to single voyage charter parties or to other contracts whereof the main purpose is the carriage of goods.

(8) The provisions of Paragraphs (2), (3), (5), (6) and (7) shall not apply if it appears from the circumstances as a whole that the contract is more closely connected with another State. In such case, the law of that other State shall apply.

#### Law Applicable to Consumer Contracts

**Article 95.** (1) Within the meaning given by this Code, "consumer contract" shall be a contract under which one of the parties is a person who acquires goods, uses services, or is granted credit for the needs thereof or for the needs of the family thereof rather than for sale, production or practice of a trade.

(2) A consumer contract shall be governed by a law chosen by the parties. A choice of applicable law must not deprive the consumer of the protection afforded thereto by the mandatory rules of the State in which the said consumer is habitually resident where:

1. the conclusion of the contract in that State was preceded by a specific invitation addressed to the consumer or by advertising, and the consumer had taken in that State all the steps required for the conclusion of the contract, or
2. the other party or an agent of the said party received the consumer's order in that State, or
3. the contract is for the sale of goods and, for the purpose of inducing the consumer to buy goods, the seller arranged the consumer's journey to another State where the consumer gave his or her order.

(3) Where the parties have not chosen an applicable law, the contracts entered into in the circumstances described in Paragraph (2) shall be governed by the law of the State in which the consumer is habitually resident.

(4) The provisions of Paragraphs (2) and (3) shall not apply to contracts of carriage and to contracts for the supply of services where the services are to be supplied to the consumer exclusively in a State other than that in which the consumer is habitually resident. Any such contracts shall be governed according to Articles 93 and 94 herein.

(5) The contracts which, for an inclusive price, provide for a combination of travel and accommodation, shall be governed by the law determined as applicable under Paragraphs (2) and (3).

#### Law Applicable to Individual Employment Contracts

**Article 96.** (1) An employment contract shall be governed by the law chosen by the parties. A choice of applicable law must not deprive the factory or office worker of the protection afforded thereto by the mandatory rules of the law which would be applicable in the absence of choice of applicable law.

(2) In the absence of choice of applicable law, a contract of employment shall be governed by the law of the State in which the factory or office worker habitually carries out his or her work, even if he or she is temporarily employed in another State.

(3) Where the factory or office worker does not habitually carry out his or her work in any one State, the law of the State in which the employer is habitually resident or in which the employer's principal place of business is situated shall apply.

(4) If, in the cases covered under Paragraphs (2) and (3), it appears from the circumstances as a whole that the contract is more closely connected with another State, the law of that other State shall apply.

#### Conclusion and Material Validity of Contracts

**Article 97.** (1) The conclusion and material validity of a contract, or of any separate provision of a contract, shall be governed by the law of the State which, according to this Chapter, would be applicable if the contract or provision were valid.

(2) To establish that he or she did not consent, each party may invoke the law of the State in which the said party is habitually resident 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 specified in Paragraph (1).

#### Formal Requirements for Contracts

**Article 98.** (1) A contract shall be formally valid if it satisfies the formal requirements established by the law applicable to the contract according to the provisions of this Chapter or by the law of the State in which the contract is concluded.

(2) A contract concluded at a time when the parties are present in different States shall be formally valid if it satisfies the formal requirements established by the law applicable to the contract according to the provisions of this Chapter or by the law of one of those States.

(3) Where a contract is concluded by an agent, account must be taken of the law of the State within whose territory the agent is present upon application of Paragraphs (1) and (2).

(4) A consumer contract concluded in the circumstances described in Article 95 (2) herein shall be formally valid if it satisfies the formal requirements established by the law of the

State in which the consumer is habitually resident.

(5) A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements established by the law which, by virtue of the provisions of this Chapter, governs or would govern the contract, or by the law of the State where the act was done.

(6) A contract whereof the subject matter is a right in rem in immovable property shall be subject to the mandatory formal requirements established by the law of the State in which the immovable property is situated, to the extent that by the law of the State the said requirements are imposed irrespective of the State where the contract is concluded and irrespective of the law governing the contract.

#### Subrogation

**Article 99.** (1) Where a third party has a duty to satisfy a creditor or has satisfied a creditor, the law which governs the third party's duty to satisfy the creditor shall determine whether and to what extent the said third party is entitled to exercise against the debtor in full or to a limited extent the rights which the satisfied creditor had against the debtor under the law governing their relationship.

(2) Paragraph (1) shall furthermore apply in the cases where several persons are subject to the same duty and one of the said persons has satisfied the creditor.

#### Assignment of Claim

**Article 100.** (1) The relationship between an assignor and an assignee of a claim shall be governed by the law which, according to the provisions of this Chapter, applies to the contract of assignment.

(2) The law governing the claim assigned shall determine the assignability of the said claim, the relationship between assignee and debtor, the conditions whereunder the assignment can be invoked against the debtor, and the discharging effect of payment by the debtor.

#### Burden of Proof

**Article 101.** (1) The law governing the contract according to the provisions of this Chapter shall furthermore apply in connection with the proving of the contract, to the extent that the said law contains rules which raise presumptions of law or other provisions regarding the burden or proof.

(2) A contract or a unilateral act intended to have legal effect may be proved by any mode of proof admissible under the law of the State of the court seised (*lex fori*) or under the law referred to in Article 98 herein, according to which the said contract or act is formally valid.

#### Scope of Applicable Law

**Article 102.** (1) The law applicable to the contract, as determined by the provisions of this Chapter, shall govern:

1. the interpretation of the contract;
2. the performance of the obligations;
3. the consequences of full or partial non-performance of obligations;
4. the assessment of damages;
5. the grounds for extinguishment of the obligations;
6. the consequences of nullity of the contract;
7. the extinctive prescription;
8. the termination of rights consequent to the lapse of a specified period.

(2) In relation to the manner of performance and the steps that the creditor may take in the event of non-performance, the court shall have full or partial regard to the law of the State in which performance of the contract takes place (*lex loci solutionis*).

#### Interpretation and Application of the Provisions of this Chapter

**Article 103.** In the interpretation and application of the provisions of this Chapter, regard must be had to:

1. the circumstance that the said provisions are aligned with the Convention on the Law Applicable to Contractual Obligations of 19 June 1980, concluded in Rome by the Member States of the European Community, and
2. the need to achieve uniformity in the manner in which the rules of the said Convention are interpreted and applied in the States for which it is in force.

#### Inapplicability of the Provisions of this Chapter

**Article 104.** The provisions of this Chapter shall not apply to any obligations arising under a bill of exchange, a promissory note and a cheque.

## **Chapter Eleven** **NON-CONTRACTUAL RELATIONSHIPS**

### **Section I** **Tort or Delict**

#### Common Provisions

**Article 105.** (1) The obligations arising out of a tort or delict shall be governed by the law of the State within whose territory the direct damage arises or is likely to arise (*lex loci delicti commissi*).

(2) Where the author of the tort or delict and the person sustaining damage both have their habitual residence or a place of business in the same State at the time when the damage occurs, the law of that State shall apply.

(3) Notwithstanding the provisions of Paragraphs (1) and (2), if it appears from the circumstances as a whole that the tort or delict is manifestly more closely connected with another State, the law of that other State shall apply. A manifestly closer connection may be based on a pre-existing relationship between the parties, such as a contract that is closely connected with the tort or delict in question.

#### Product Liability

**Article 106.** (1) Where the damage is caused or there is a risk of damage being caused by a defective product, the obligation for compensation shall be governed by the law of the State in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was introduced into the market of that State without the consent of the said person. In such case, the applicable law shall be the law of the State of the habitual residence or the place of business of the person claimed to be liable.

(2) Paragraph (1) shall not affect the application of the provisions of Article 105 (2) and (3) herein.

#### Unfair Competition and Restriction of Competition

**Article 107.** (1) The obligations arising out of an act of unfair competition and of restriction of competition shall be governed by the law of the State within whose territory the interests of competitors in the relationships therebetween or the collective interests of consumers are or are likely to be directly and substantially affected.

(2) Where an act of unfair competition affects exclusively the interests of a specific competitor, the provisions of Article 105 (2) and (3) herein shall apply.

#### Violation of Rights Relating to the Personality

**Article 108.** (1) The obligations arising out of a violation of rights relating to the personality by the mass communication media, and in particular print publications, radio, television or other means of dissemination of information, shall be governed, at the election of the person sustaining damage, by:

1. the law of the State in which the said person is habitually resident, or
2. the law of the State within whose territory the damage occurred, or
3. the law of the State of the habitual residence or the place of business of the person claimed to be liable.

(2) In the cases referred to in Items 1 and 2 of Paragraph (1), the person claimed to be liable must have reasonably foreseen that the damage would occur within the territory of the relevant State.

(3) The right of reply upon violation of rights relating to the personality by the mass communication media shall be governed by the law of the State in which the place of publication or transmission of the broadcast is situated.

(4) The provision of Paragraph (1) shall furthermore apply to obligations arising from violation of rights related to protection of personal data.

#### Violation of the Environment

**Article 109.** The obligations arising out of a violation of the environment shall be governed by the law of the State within whose territory the damage arises or is likely to arise, unless the person sustaining damage prefers to base the claim thereof on the law of the State in which the harmful act was committed.

#### Infringement of Intellectual Property Rights

**Article 110.** The obligations arising from an infringement of copyrights, of rights neighbouring on copyright, and on industrial property rights, shall be governed by the law of the State for which protection of the right is sought (*lex loci protectionis*).

## **Section II**

### **Unjust Enrichment. Agency without Authority**

#### Unjust Enrichment

**Article 111.** (1) The obligations arising out of unjust enrichment shall be governed by the law of the State in which the enrichment takes place.

(2) Where the unjust enrichment takes place in connection with another relationship between the parties, such as a contract that is closely connected with the unjust enrichment in question, the law governing that other relationship shall apply.

(3) Where at the time of the unjust enrichment taking place the parties had their habitual residence or place of business in the same State, the law of that State shall apply.

(4) If it appears from the circumstances as a whole that the unjust enrichment is manifestly more closely connected with another State, the law of that other State shall apply.

#### Agency without Authority

**Article 112.** (1) The obligations arising out of agency without authority shall be governed by the law of the State of habitual residence or place of business of the party concerned at the time of assuming the agency.

(2) Where the agency has been assumed in connection with another relationship between the parties, such as a contract that is closely connected with the agency without authority in question, the law governing that other relationship shall apply.

(3) Where the obligation arising out of agency without authority is connected to protection of a natural person or of a specific property, the applicable law shall be the law of the State in which the person was present or the property was situated at the time of agency without authority.

(4) If it appears from the circumstances as a whole that the agency without authority is manifestly more closely connected with another State, the law of that other State shall apply.

## **Section III**

### **Common Provisions on Non-Contractual Relationships**

#### Choice of Applicable Law

**Article 113.** (1) After an obligation arising out of a non-contractual relationship regulated in Section I and II comes into existence, the parties may submit the said obligation to a law of their choice. The choice of applicable law must be expressed or clearly demonstrated by the circumstances of the case and may not affect the rights of third parties.

(2) Where at the time when the obligation comes into existence all the elements of the non-contractual relationship are connected to a State other than the State whose law has been chosen, the choice must be without prejudice to the application of the mandatory rules of that State, which cannot be derogated from by contract.

(3) The provisions of Paragraphs (1) and (2) shall not apply to the obligations regulated in Article 111 herein.

(4) The provisions of Articles 97 and 98 herein shall apply, *mutatis mutandis*, to the existence and material validity of the agreement on choice of applicable law.

#### Scope of Law Applicable to Non-Contractual Relationships

**Article 114.** (1) The law applicable to obligations arising out of a non-contractual relationship shall govern:

1. the conditions and extent of liability, including the determination of persons who are liable for acts performed thereby;
2. the grounds for exemption from liability, as well as any limitation of liability and any division of liability;
3. the measures which the court has power to take so as to ensure to prevention, termination of compensation of injury or damage;
4. the kinds of injury or damage for which compensation may be due;
5. the assessment of the damage or injury, in so far as prescribed by legal standards;
6. the assignability of a right to compensation;

7. the persons entitled to compensation for injury or damage sustained personally;
8. liability for injury caused by another person;
9. the manners in which an obligation may be extinguished, the extinctive prescription and the termination of rights consequent to the lapse of a specified period.
10. the proving of the obligations, to the extent that the applicable law contains rules which raise presumptions of law or other provisions regarding the burden of proof.

(2) The applicable law shall not govern the liability of the State and of bodies governed by public law, as well as of the authorities and representatives thereof, for acts performed thereby in the course of exercise of the powers thereof.

#### Taking Account of Rules of Safety and Conduct

**Article 115.** Whatever may be the applicable law, in determining liability, regard must be had to the rules of safety and conduct which were in force at the place and time of commission of the harmful act.

#### Direct Action against the Insurer

**Article 116.** The right of persons who have suffered injury or damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the obligation arising out of the relevant non-contractual relationship, unless the person who has suffered injury or damage prefers to base the claims thereof on the law applicable to the insurance contract.

## **Part Four**

### **RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND OTHER AUTHENTIC ACTS**

#### **Chapter Twelve**

### **CONDITIONS OF AND PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND OTHER AUTHENTIC ACTS**

#### Conditions of Recognition and Enforcement

**Article 117.** The judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

1. the foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court

seised was the only ground for the foreign jurisdiction over disputes in rem;

2. the defendant was served a copy of the statement of action, the parties were duly summonsed, and fundamental principles of Bulgarian law, related to the defence of the said parties, have not been prejudiced;

3. if no effective judgment has been given by a Bulgarian court based on the same facts, involving the same cause of action and between the same parties;

4. if no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought and the enforcement is applied for has been rendered;

5. the recognition or enforcement is not contrary to Bulgarian public policy.

#### Jurisdiction upon Recognition

**Article 118.** (1) A foreign judgment shall be recognized by the authority whereto the said judgment is presented.

(2) Should the conditions of recognition of the foreign judgment be raised as the issue in a dispute, an action for ascertainment may be brought before the Sofia City Court.

#### Jurisdiction upon Enforcement

**Article 119.** (1) An action for enforcement of a foreign judgment shall be brought before the Sofia City Court.

(2) A true copy of the judgment, authenticated by the rendering court, and a certificate issued by the same court, to the effect that the said judgment has taken effect, shall be attached to the statement of action. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria.

(3) Paragraph (2) shall furthermore apply in the cases referred to in Article 118 herein.

#### Verification of Conditions of Recognition and Enforcement

**Article 120.** (1) The court shall of its own motion verify the conditions covered under Article 117 herein.

(2) The defendant in the proceedings for recognition and enforcement of the foreign judgement may not invoke violations under Item 2 of Article 117 herein, which the said defendant could have raised before the foreign court.

#### Scope of Verification and Defence of Debtor

**Article 121.** (1) The court shall not examine the merits of the dispute decided by the foreign court.

(2) The debtor may raise the defence of extinguishment of the obligation on the basis of circumstances that have occurred after the foreign judgment took effect.

(3) The debtor may not raise the defence of extinguishment of the obligation on the basis of the circumstances referred to in Paragraph (2) after the judgment admitting enforcement has taken effect.

#### Recognition and Enforcement of Court Settlements

**Article 122.** The provisions of Article 117 to 121 herein shall furthermore apply to court settlements, if the said settlements enjoy equal status as judgments of court in the State in which the said settlements are reached.

#### Enforceability of Foreign Authentic Instruments

**Article 123.** The conditions covered under Articles 117 to 121 herein shall furthermore apply to the issue of a declaration of enforceability in the Republic of Bulgaria for a foreign authentic instrument which certifies a claim enforceable in the State in which the instrument was issued.

#### Recognition of Effects of Foreign Writs of

#### Enforcement and Protection

**Article 124.** The civil effects of foreign writs of enforcement and protection shall be respected in the Republic of Bulgaria in connection with the presentment thereof, if the said writs were issued by a body which has international jurisdiction under Bulgarian law and if they are not contrary to Bulgarian public policy.

## FINAL PROVISIONS

§ 1. In the Consumer Protection and Rules of Trade Act (promulgated in the State Gazette No. 30 of 1999; amended in Nos. 17 and 19 of 2003), Article 37a shall be repealed.

§ 2. In the Obligations and Contracts Act (promulgated in the State Gazette No. 275 of 1950; corrected in Transactions of the Presidium of the National Assembly No. 2 of 1951; amended in No. 69 of 1951, No. 92 of 1952; State Gazette No. 85 of 1963, No. 27 of 1973, No. 16 of 1977, No. 28 of 1982, No. 30 of 1990; Nos. 12 and 56 of 1993, Nos. 83 and 104 of 1996, Nos. 83 and 103 of 1999, Nos. 34 and 19 of 2003), Articles 437 to 449 inclusive shall be repealed.

§ 3. In the Commerce Act (promulgated in the State Gazette No. 48 of 1991; amended in No. 25 of 1992, Nos. 61 and 103 of 1993, No. 63 of 1994, No. 63 of 1995, Nos. 42, 59, 83, 86 and 104 of 1996, Nos. 58, 100 and 124 of 1997, Nos. 52 and 70 of 1998, Nos. 33, 42, 64, 81, 90, 103 and 114 of 1999, No. 84 of 2000, Nos. 28, 61 and 96 of 2002, Nos. 19, 31 and 58 of 2003, No. 31 of 2005), Articles 281 and 282 shall be repealed.

§ 4. In the Code of Civil Procedure (promulgated in Transactions of the Presidium of the National Assembly No. 12 of 1952; amended in No. 92 of 1952, No. 89 of 1953, No. 90 of 1955, No. 90 of 1956, No. 90 of 1958, Nos. 50 and 90 of 1961, corrected in No. 99 of 1961;

amended in the State Gazette No. 1 of 1963, No. 23 of 1968, No. 27 of 1973, No. 89 of 1976, No. 36 of 1979, No. 28 of 1983, No. 41 of 1985, No. 27 of 1986, No. 55 of 1987, No. 60 of 1988, Nos. 31 and 38 of 1989, No. 31 of 1990, No. 62 of 1991, No. 55 of 1992, Nos. 61 and 93 of 1993, No. 87 of 1995, Nos. 12 and 26 of 1996, Nos. 37, 44 and 104 of 1996, Nos. 43, 55 and 124 of 1997, Nos. 59, 70 and 73 of 1998, Nos. 64 and 103 of 1999, Nos. 36, 85 and 92 of 2000, No. 25 of 2001, Nos. 105 and 113 of 2002, Nos. 58 and 84 of 2003, Nos. 28 and 36 of 2004), Article 7, Article 9 (3) and (4), Article 132 and Chapter Thirty-Two shall be repealed.

**§ 5.** The Family Code (promulgated in the State Gazette No. 41 of 1985; amended in No. 11 of 1992; corrected in No. 15 of 1992; amended in Nos. 63 and 84 of 2003) shall be amended as follows:

1. Article 129 to 135 and 137 to 143 inclusive shall be repealed.

2. In Article 136 :

(a) Paragraph (1) shall be repealed;

(b) Paragraph (2) shall be amended to read as follows:

"(2) A Bulgarian national who has attained the age of one year may be adopted by a foreigner who has presented an authorization to adopt a child according to his or her national law. By way of exception, considering the state of health of the child or where other important circumstances exist, any such child may be adopted even before attaining the age of one year, if this is in the child's best interests.";

(c) Paragraphs (3), (4), (5), (7), (8) and (9) shall be repealed.

**§ 6.** The Not-for-Profit Legal Entities Act (promulgated in the State Gazette No. 81 of 2000; amended in Nos. 41 and 98 of 2001, Nos. 25 and 120 of 2002) shall be amended as follows:

1. The heading of Chapter Four shall be amended to read as follows: "Branches of Foreign Not-for-Profit Legal Entities".

2. Article 51 shall be repealed.

3. In Article 52 :

(a) the heading shall be amended to read as follows: "Incorporation of a Branch";

(b) Paragraph (1) shall be repealed.

**§ 7.** In the Merchant Shipping Code (promulgated in the State Gazette Nos. 55 and 56 of 1970; corrected in No. 58 of 1970; amended and supplemented in No. 55 of 1975, No. 10 of 1987, No. 30 of 1990, No. 85 of 1998, No. 12 of 2000, No. 41 of 2001, No. 113 of 2002, No. 55 of 2004), Articles 21, 24 and 26 shall be repealed.

This Code was passed by the 39th National Assembly on the 4th day of May 2005 and the Official Seal of the National Assembly has been affixed thereto.



Promulgated, State Gazette No. 110/17.12.2004, amended and supplemented, SG No. 86/24.10.2006, supplemented, SG No. 9/28.01.2011, amended and supplemented, SG No. 27/1.04.2011

Text in Bulgarian: Чл. 1 до чл. 10

## Chapter One GENERAL DISPOSITIONS Scope of Application

**Article 1.** This Act regulates the relationships associated with mediation as an alternative method of resolution of legal and non-legal disputes.

### Notion of Mediation

**Article 2.** Mediation is a voluntary and confidential procedure for out-of-court resolution of disputes, whereby a third party mediator assists the disputants in reaching a settlement.

### Subject of Mediation

**Article 3.** (1) (Supplemented, SG No. 27/2011) Subject of mediation may be civil, commercial, labour, family and administrative disputes related to consumer rights, and other disputes between natural and/or legal persons, including when they are cross-border disputes.

(2) Mediation shall furthermore be conducted in the cases provided for in the Criminal Procedure Code.

(3) Mediation shall not be conducted if a law or another statutory instrument provides for another procedure for conclusion of an agreement.

### Organization of Mediation

**Article 4.** Mediation shall be implemented by natural persons. Such persons may associate for the purpose of implementing of the activity. No persons performing functions of administration of justice in the judiciary system may carry out mediation activities.

## Chapter Two PRINCIPLES OF MEDIATION Voluntary Recourse and Equal Treatment

**Article 5.** The parties shall have equal opportunities to participate in a mediation process. They shall participate in the process of their own free will and may withdraw at any

time.

#### Neutrality and Impartiality

**Article 6.** (1) A mediator shall not display partiality and shall not impose a resolution of the dispute.

(2) Within a mediation process, all questions shall be resolved by mutual agreement between the parties.

#### Confidentiality

**Article 7.** (1) (Previous Article 7, SG No. 27/2011) Discussions in connection with the dispute shall be confidential. The participants in a mediation process shall be bound by the obligation to respect the confidentiality of all circumstances, facts and documents as have come to the knowledge thereof in the course of the process.

(2) (New, SG No. 27/2011) Mediators may not be interrogated as witnesses regarding circumstances which have been confided to them by mediation participants and which are relevant to the resolution of the dispute that is the subject of the mediation, unless having received the explicit consent of the confiding party.

(3) (New, SG No. 27/2011) An exception to mediation confidentiality is allowed where:

1. this is necessary for the purposes of criminal proceedings or in relation to the protection of public order;

2. this is required in order to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

3. disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

## **Chapter Three**

### **LEGAL STATUS OF MEDIATOR**

#### **General Eligibility Requirements**

**Article 8.** (Amended, SG No. 86/2006) A mediator may be only a legally capable person who meets the following requirements:

1. has not been convicted for criminal offenses at public law;

2. has successfully undergone a course for mediators

3. has not been deprived of the right to exercise a profession or conduct an activity;

4. (Supplemented, SG No. 9/2011) has a permit for long-term or permanent residence in the Republic of Bulgaria, in the event the person is a foreign national;

5. has been entered in the Uniform Register of Mediators with the Minister of Justice

(2) (Effective as from the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union) The requirement under paragraph 1, item 4 does not apply to nationals of member-states of the European Union, the other states from the European Economic Area and Switzerland.

(3) The Minister of Justice shall issue a certificate to the mediator ascertaining his/her entering in the Uniform Register of Mediators.

(4) The Minister of Justice shall approve by issuing an order the organizations which deliver training to mediators. The terms and conditions for their approval, as well as the requirements for mediation training are to be defined in an ordinance of the Minister of Justice.

(5) In the event a person, applying for mediator and an organization, applying to deliver training for mediators, do not meet the statutory requirements, the Minister of Justice shall issue an order to refuse, respectively approve, their entering in the Uniform Register of Mediators. The order may be appealed before the Supreme Administrative Court following the procedure of the Administrative Procedure Code.

#### Uniform Register of Mediators

**Article 8a.** (New, SG No. 86/2006) (1) The Minister of Justice creates and maintains the Uniform Register of Mediators

(2) The following is entered in the Uniform Register of Mediators:

1. name, personal identification number (personal number of a foreign national), citizenship, education, profession, additional specialization in the field of mediation, the organization which has trained the mediator, foreign language skills, address and telephone for contacts and number of the mediator;

2. deletion and striking off the mediator;

3. the organization where the mediator was trained

4. changes in the circumstances under Article 8, paragraph 1, item 1, 3 and 4.

(3) The Uniform Register of Mediators is public.

(4) A person entered in the Uniform Register of Mediators shall declare in writing to the Minister of Justice any changes in the circumstances, subject to entering in the Register, within 14 days after they occur.

(5) When a requirement of Article 8, paragraph 1, item 1, 3 and 4 is no longer met, the Minister of Justice issues an order for deletion of the mediator in the Uniform Register of Mediators. The order may be appealed before the Supreme Administrative Court following the procedure of the Administrative Procedure Code.

(6) The procedure for entering in, striking off and deletion from the Uniform Register of Mediators is determined by the ordinance as per Article 8, paragraph 4.

(7) The information under paragraph 2, item 1 concerning the personal identification number (personal number of a foreign national) shall be submitted under the terms and conditions provided for by the Personal Data Protection Act.

#### Fees

**Article 8b.** (New, SG No. 86/2006) The Ministry of Justice shall charge a fee for entering in the Uniform Register of Mediators and for approval of organizations which train mediators, to an amount set with a tariff, adopted by the Council of Ministers.

#### Rules of Mediator Conduct

**Article 9.** (1) (Supplemented, SG No. 86/2006) A mediator shall act in good faith in compliance with the law, good morals, and the procedural and ethical rules of mediator conduct. These rules shall be determined in the ordinance under Article 8, paragraph 4

(2) A mediator shall accept to conduct the procedure solely if able to guarantee his or her own independence, impartiality and neutrality.

#### Mediator's Obligations and Liability

**Article 10.** (1) A mediator may not give legal advice.

(2) During the process, a mediator shall be obligated to comply with the opinion of each of the disputants.

(3) A mediator shall withdraw from the process upon occurrence of any circumstances as would cast doubt on the independence, impartiality and neutrality thereof.

(4) A mediator may not communicate to the other participants in the process any circumstances concerning solely one of the disputants without the consent of the said disputant.

(5) A mediator shall not be liable if the parties fail to reach a settlement.

(6) A mediator shall not be liable for non-performance of the agreement.

## **Chapter Four**

# **MEDIATION PROCESS**

## **Initiation of Process**

**Article 11.** (1) A mediation process shall commence on the initiative of the disputants, with each of the said disputants having the right to propose resolution of the dispute through mediation.

(2) (New, SG No. 27/2011) The beginning of a mediation process shall be the date on

which the parties have reached an explicit agreement to commence such a process, and when no explicit agreement is available the beginning of the mediation process shall be the date of the first meeting of all participants with the mediator.

(3) (Renumbered from Paragraph 2, SG No. 27/2011) A proposal for resolution of the dispute through mediation may furthermore be made by the court or another competent authority whereto the dispute has been referred for settlement.

(4) (Renumbered from Paragraph 3, SG No. 27/2011) The consent of the parties to resolution of a possible future dispute therebetween through mediation may furthermore be stipulated as a clause of a contract.

Effect of the mediation process beginning on the limitation period

**Article 11a.** (New, SG No. 27/2011) No limitation period shall run while the mediation process is ongoing.

Participants

**Article 12.** (1) A mediation process shall be implemented by one or more mediators selected by the parties.

(2) (Supplemented, SG No. 86/2006) The disputants shall participate in the process personally or through a representative. Authorization shall be made in writing.

(3) Lawyers, as well as well as other specialists, may likewise participate in a mediation process.

Mediator's Steps

**Article 13.** (1) Prior to conduct of the process, the mediator shall inform the parties of the essence of mediation and of the consequences thereof and shall require the written or oral consent of the said parties to participation.

(2) (Amended, SG No. 27/2011) The mediator shall be obligated to indicate all circumstances as my give rise to reasonable doubt in the parties as to the impartiality and neutrality of the mediator, including the cases when the mediator is a person:

1. who is a spouse or a relative in a direct line to an unlimited degree and collaterally up to and including the fourth degree, or to the third degree of affinity, of any of the parties or their representatives;

2. who lives in de facto marital cohabitation with any party to the dispute that is the subject of the mediation;

3. who has been a representative or an agent of any party to the dispute that is the subject of the mediation;

4. in respect of whom there are other circumstances that cause reasonable doubt as to the mediator's impartiality.

(3) (New, SG No. 27/2011) A mediator shall sign a statement of impartiality for each process which has been assigned to him/her and shall present it to the parties to the dispute. The statement of impartiality shall contain, inter alia, a reference to the circumstances under Paragraph 2.

(4) (Renumbered from Paragraph 3, SG No. 27/2011) In the course of the process, the essence of the dispute shall be clarified, the mutually acceptable options of solutions shall be specified, and the possible framework of an agreement shall be outlined.

(5) (Renumbered from Paragraph 4, SG No. 27/2011) Upon performance of the said steps, the mediator may schedule separate meetings with each of the parties, with due respect for the equal rights thereof to participation in the process.

#### Grounds for Suspension of Process

**Article 14.** (1) Mediation shall be suspended:

1. by common agreement between the parties, or at the request of one of the parties;
2. upon the death of the mediator;
3. in the cases provided for in Article 10 (3) herein.

(2) (Supplemented, SG No. 86/2006) If mediation is conducted while a proceeding is pending, the parties shall forthwith inform the competent authority of the suspension of the mediation process.

#### Grounds for Termination of Process

**Article 15.** (1) A mediation process shall be terminated:

1. upon reaching a settlement;
2. by mutual agreement between the parties;
3. upon withdrawal of one of the parties;
4. upon the death of a disputant;
5. upon dissolution of a disputant if a legal person.

6. (new, SG No. 27/2011) upon expiration of 6 months from the beginning of the process.

(2) The agreement of the parties to the termination of the dispute must be expressed clearly and unequivocally.

(3) Upon termination of a mediation process, a pending proceeding that has been suspended shall be resumed in accordance with the provisions of the law.

## **Chapter Five**

# **AGREEMENT**

## **Form and Content**

**Article 16.** (1) (Previous Article 16, supplemented, SG No. 27/2011) The form and content of the agreement shall be determined by the parties. The form may be oral, written, or written with a notarization of the parties' signatures. A written agreement shall state the place and date whereat the said agreement was reached, the names of the parties and the addresses thereof, the points of agreement, the name of the mediator, and the date under Article 11(2) and shall bear the signatures of the parties.

(2) (New, SG No. 27/2011) The parties may include a liability clause in the agreement governing any cases of defaulting on the obligations laid down therein.

### Effect of Agreement

**Article 17.** (1) The agreement shall be binding solely on the disputants and may not be held adverse to any persons who did not participate in the process.

(2) (Amended, SG No. 86/2006) The agreement shall be binding on the parties solely in respect of the points of agreement therebetween.

(3) (New, SG No. 86/2006) Null shall be an agreement which contradicts or evades the law, as well as an agreement which is in conflict with the morals.

### Making an agreement enforceable

**Article 18.** (New, SG No. 27/2011) (1) Any agreement concerning a legal dispute within the meaning of Article 1 of this Act reached in a mediation process shall have the effect of a court settlement and shall be subject to approval by regional courts in Bulgaria.

(2) The competent court shall approve the agreement, once acknowledged by the parties, if it does not contradict the law or the principles of morality. The court shall hear the opinion of the prosecutor, if the latter is involved as a party to the process.

## **ADDITIONAL PROVISION**

(New, SG No. 27/2011)

**§ 1.** (New, SG No. 27/2011) Within the meaning of this Act, a "cross-border dispute" shall be:

1. One in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen; or

(b) an invitation is made to the parties by a court to which the case has been referred to the effect that they are to use mediation for resolving the dispute.

2. One in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1.

For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

## **TRANSITIONAL AND FINAL PROVISIONS**

§ 1a. (Renumbered from § 1, SG No. 27/2011) Within six months after the entry of this Act into force, the Minister of Justice shall adopt mediator training standards, Procedural and Ethical Rules of Mediator Conduct, and shall establish and maintain a Uniform Register of Mediators.

§ 2. The implementation of this Act shall be entrusted to the Minister of Justice.

This Act was passed by the 39th National Assembly on the second day of December in the year two thousand and four, and the Official Seal of the National Assembly has been affixed thereto.

TRANSITIONAL AND FINAL PROVISIONS to the Amendment and Supplement Act to the Mediation Act

(SG No. 86/2006)

§ 7. The persons who have been entered in the Uniform Register of Mediators have to ascertain with the due documents before the Ministry of Justice, within 6 months of the coming of this act into effect, that they meet the requirements of Article 8, paragraph 1, item 1, 3 and 4. The same term applies for filing of applications for entering in the Register of Mediators of persons who meet the requirements of Article 8, paragraph 1, item 1 - 4 and who have been trained as mediators in the country or abroad prior to the entering of this act in effect.

§ 8. The Minister of Justice shall issue the ordinance under Article 8, paragraph 4 within three months after the entering of this act in effect.

§ 9. The Council of Ministers shall adopt the tariff under Article 8b within three months after the entering of this act in effect.

§ 10. Paragraph 1 concerning Article 8, paragraph 2 shall enter into effect as of the date of accession of the Republic of Bulgaria to the European Union.

ADDITIONAL PROVISION to the Amendment and Supplement Act to the Mediation Act

(SG No. 27/2011)

§ 11. This Act transposes the requirements laid down in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136/3, 24.5.2008)



Promulgated, State Gazette No. 79/4.10.2005, effective 1.01.2006, amended, SG No. 105/29.12.2005, effective 1.01.2006, SG No. 17/24.02.2006, effective 1.05.2006, SG No. 30/11.04.2006, effective 12.07.2006, amended and supplemented, SG No 42/5.06.2009, SG No. 32/27.04.2010, effective 28.05.2010, amended, SG No. 97/10.12.2010, effective 10.12.2010, supplemented, SG No. 99/17.12.2010, effective 1.01.2011, amended, SG No. 9/28.01.2011, supplemented, SG No. 82/21.10.2011, effective 1.01.2012, amended, SG No. 99/16.12.2011, effective 1.01.2012

Text in Bulgarian: Закон за правната помощ

## Chapter One GENERAL DISPOSITIONS

**Article 1.** This Act shall regulate legal aid in criminal, civil and administrative matters before courts of all instances.

**Article 2.** Legal aid under this Act shall be provided by lawyers and shall be financed by the State.

**Article 3.** The purpose of this Act is to guarantee persons equal access to justice by means of ensuring and grating effective legal aid.

**Article 4.** The resources for legal aid shall be provided by the executive budget.

**Article 5.** Legal aid shall be granted to natural persons on the grounds specified in this Act and in other laws.

## Chapter Two LEGAL AID AUTHORITIES

**Article 6.** (1) The Minister of Justice shall elaborate, coordinate and conduct the state policy in the sphere of legal aid.

(2) Legal aid shall be organized by the National Legal Aid Office (NLAO) and the Bar Councils.

(3) The National Legal Aid Office shall be an independent state body, a public-financed legal person and a second-level spending unit with the Minister of Justice, with a head office in Sofia.

(4) The National Legal Aid Office shall have a separate budget, which shall be prepared, implemented, balanced off and reported by the said Office. The revenue and expenditure sides of the NLAO budget shall be prepared according to the classification of revenues and expenditures of the state budget.

**Article 7.** (1) The National Legal Aid Office shall be assisted by an administration.

(2) The work organization of the NLAO, the structure, composition and functions of the separate units of the administration thereof, shall be determined by Rules which shall be adopted by the Council of Ministers.

**Article 8.** The National Legal Aid Office shall perform the following functions:

1. provide general and methodological guidance of the activity concerning the grant of legal aid;

2. prepare a draft of a legal aid budget;

3. dispose of the resources on the legal aid budget;

4. organize the keeping of the National Legal Aid Register;

5. pay for the legal aid granted;

6. exercise control over the grant of legal aid;

7. prepare bills and other statutory instruments in the sphere of legal aid, which shall be laid before the Council of Ministers by the Chairperson of the NLAO;

8. analyze the information required for proper planning and management of the legal aid system;

9. popularize the legal aid system;

10. adopt a decision on reimbursement of the costs incurred in the cases under Article 27 (3) herein;

11. endorse the standard forms under this Act;

12. pursue international legal cooperation in the sphere of legal aid.

**Article 9.** (1) The National Legal Aid Office shall be a body which considers and decides the matters within the competence thereof at meetings.

(2) The decisions of the NLAO shall be adopted by a simple majority of the total number of members of the said Office.

**Article 10.** (1) the National Legal Aid Office shall be governed by a Chairperson.

(2) In the activity thereof, the Chairperson shall be assisted by a Deputy Chairperson.

**Article 11.** (1) The National Legal Aid Office shall consist of five members: a Chairperson, a Deputy Chairperson, and three members.

(2) The Chairperson and the Deputy Chairperson of the NLAO shall be appointed and

removed from office by an order of the Prime Minister on the basis of a Council of Ministers decision. The motion to the Council of Ministers shall be made by the Minister of Justice.

(3) The remaining three members of the NLAO shall be elected by the Supreme Bar Council.

**Article 12.** The members of the NLAO shall be appointed or elected, as the case may be, for a term of office of three years. The said members may be re-appointed or re-elected for the same term of office.

**Article 13.** Eligibility for membership of the NLAO shall be limited to Bulgarian citizens who:

1. have graduated in Law from a higher educational establishment and possess a licensed competence to practise law;

2. have practised law for at least five years;

3. have not been sentenced to deprivation of liberty for premeditated offence at public law, regardless of whether they have been rehabilitated;

4. (amended, SG No 42/2009) does not hold an office or pursue activities referred to in Article 19 (6) of the Administration Act.

**Article 14.** (1) A member of the NLAO shall vacate office prior to the expiry of the term of office thereof:

1. upon resignation;

2. upon gross or systematic violation of this Act;

3. when sentenced by an effective sentence to deprivation of liberty for a premeditated offence at public law;

4. (new, SG No. 42/2009, amended, SG No. 97/2010, effective 10.12.2010) when conflict of interest has been ascertained by an effective act under the Conflict of Interest Prevention and Ascertainment Act;

5. (renumbered from Item 4, SG No. 42/2009) when unable to discharge the duties thereof for a period longer than six months;

6. (renumbered from Item 5, SG No. 42/2009) upon interdiction;

7. (renumbered from Item 6, SG No. 42/2009) upon death.

(2) In the cases covered under Paragraph (1), the Prime Minister or the Chairperson of the Supreme Bar Council shall make a motion for a pre-term termination of the term of office.

(3) The Council of Ministers or the Supreme Bar Council shall pronounce on the

removal and, respectively, on the designation of a new member within one month.

(4) The new member of the NLAO shall serve the remainder of the term of office of the removed member.

**Article 15.** (1) The Chairperson and the Deputy Chairperson shall perform the activity thereof under an employment relationship and may not occupy another position under an employment or civil-service relationship.

(2) The remunerations of the Chairperson and of the Deputy Chairperson shall be fixed as follows:

1. of the Chairperson: three average monthly wages of the persons hired under an employment relationship and under a civil-service relationship in the public sector, conforming to data of the National Statistical Institute;

2. of the Deputy Chairperson: 90 per cent of the remuneration of the Chairperson, referred to in Item 1.

**Article 16.** (Supplemented, SG No. 99/2010, effective 1.01.2011, amended, SG No. 99/2011, effective 1.01.2012) The members of the NLAO shall receive a remuneration for attendance of a meeting in the amount of BGN 120.

**Article 17.** The Chairperson of the NLAO shall perform the following functions:

1. organize and direct the activity of the NLAO in accordance with this Act, the Rules referred to in Article 7 (2) herein and the decisions adopted by the NLAO;

2. be responsible for the exercise of the powers of the NLAO;

3. represent the NLAO in dealings with third parties;

4. appoint and dismiss the civil servants and conclude and terminate the contracts of employment with the employees under employment relationships of the NLAO administration;

5. lay before the Council of Ministers the instruments referred to in Item 7 of Article 8 herein;

6. submit an annual report on the activity of the NLAO to the Council of Ministers, the Supreme Bar Council and the Supreme Judicial Council;

7. conduct inspections on the implementation of this Act, whether personally or through persons authorized thereby;

8. issue orders within the powers vested therein.

**Article 18.** The Bar Councils shall organize the grant of legal aid within the respective geographical jurisdiction and, to this end:

1. shall prepare an opinion on the applications of the lawyers of the Bar Association for entry into the National Legal Aid Register;

2. shall compile and maintain a list of lawyers on duty;

3. according to Article 25 (4) and (5) herein, shall designate a lawyer of the Bar Association, entered in the National Legal Aid Register, for implementation of the legal aid, making sure that the professional experience and qualifications of the said lawyer are suitable for the type, the factual and legal complexity of the case, other appointments according to the procedure established by this Act, and the caseload of the said lawyer;

4. exercise control as to the grant of legal aid by lawyers of the Bar Association;

5. authenticate the timesheets of the lawyers who have granted legal aid, and prepare a motion for payment of a fee within the limits established by the ordinance referred to in Article 37 herein.

**Article 19.** The Bar Councils shall receive a remuneration from the NLAO budget for the activity performed concerning the administration of legal aid.

**Article 20.** (1) (Amended, SG No 32/2010, effective 28.05.2010) The National Legal Aid Office shall interact with the Supreme Bar Council, with the Bar Councils, with the judicial authorities and the Ministry of the Interior and the Ministry of Defence and with the Ministry of Justice in connection with the granting of legal aid.

(2) (Amended, SG No 32/2010, effective 28.05.2010) In the exercise of the powers thereof, the NLAO may require oral and written information related to the grant of legal aid from the lawyers, from the Bar Associations, from the judicial authorities and the Ministry of the Interior and the Ministry of Defence and from the social assistance authorities, which shall be obligated to provide any information required forthwith and at no charge.

(3) (Amended, SG No. 105/2005) In the exercise of the powers thereof under this Act, the authority referred to in Article 25 (1) herein may require information from the NLAO, the Bar Councils, the revenue authorities, the National Social Security Institute authorities and the social assistance authorities, the Labour Office Directorates and other State and municipal bodies, which shall be obligated to provide the information requested.

## **Chapter Three**

### **TYPE AND SCOPE OF LEGAL AID**

**Article 21.** Legal aid shall be of the following types:

1. pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings or to bringing a case before a court;

2. preparation of documents for bringing a case before a court;

3. representation in court by legal counsel;

4. (supplemented, SG No. 82/2011, effective 1.01.2012) representation upon detention under Article 70 (1) of the Ministry of Interior Act and under Article 16a of the Customs Act.

**Article 22.** (1) Legal aid under Items 1 and 2 of Article 21 herein shall be granted to the persons who satisfy the eligibility requirements for monthly social assistance benefits according to the procedure established by the Regulations for Application of the Social Assistance Act, and to persons placed in specialized institutions for provision of social services.

(2) Legal aid under Items 1 and 2 of Article 21 herein shall furthermore be granted to a foster family or to a family of friends and relatives wherewith a child is placed according to the procedure established by the Child Protection Act .

(3) The circumstances under Paragraphs (1) and (2) shall be certified by the order of the Director of the Social Assistance Directorate or by the judgment of court on placement of the child, as the case may be. In case the person has not exercised the entitlement thereof to a monthly social benefit according to the procedure established by the Regulations for Application of the Social Assistance Act, the said person shall submit to the NLAO a certificate issued by the Director of the Social Assistance Directorate to the effect that the said person satisfies the eligibility requirements for monthly social assistance benefits.

**Article 23.** (1) (Supplemented, SG No 32/2010, effective 28.05.2010) The legal aid system referred to in Item 3 of Article 21 herein shall cover the cases in which defence or representation by reserve defence counsel is mandatory as provided by virtue of statute.

(2) (Amended, SG No 32/2010, effective 28.05.2010) The legal aid system shall furthermore cover the cases in which a an accused, a defendant, or a party to a criminal, civil or administrative case is unable to pay for the assistance of a lawyer, wishes to have such assistance, and the interests of justice require this.

(3) (Amended, SG No 32/2010, effective 28.05.2010) In criminal matters, the assessment that the the accused or the defendant is unable to pay for the assistance of a lawyer shall be made by the authority who directs the procedural acts, on the basis of the property status of the person as established in the specific case.

(4) In civil and administrative matters, legal aid shall be granted in the cases where, on the basis of evidence presented by the relevant competent authorities, the court determines that the party is unable to pay for the assistance of a lawyer. To arrive at such determination, the court shall take into consideration:

1. the income accruing to the person or the family;
2. the property status, as certified by a declaration;
3. the family situation;
4. the health status;
5. the employment status;

6. the age and

7. other circumstances ascertained.

**Article 24.** Legal aid under Items 1, 2 and 3 of Article 21 herein shall not be granted:

1. where the granting of legal aid is not justified in terms of the benefit that such aid would confer on the applicant for legal aid;

2. where the claim is manifestly unfounded, unjustified, or inadmissible;

3. (amended, SG No. 105/2005) in the cases of commercial matters and tax matters under the Tax and Social Insurance Procedure Code .

## **Chapter Four**

### **ACCESS TO LEGAL AID SYSTEM**

**Article 25.** (1) In the cases referred to in Items 3 and 4 of Article 21 herein, the decision to grant legal aid shall be made by the authority directing the procedural acts, at the request of the person concerned or by virtue of the law. A refusal to grant legal aid shall be reasoned.

(2) In the cases referred to in Items 1 and 2 of Article 21 herein, the decision to grant legal aid shall be made by the Chairperson of the NLAO within 14 days after submission of the order, the judgment of court or the certificate referred to in Article 22 (3) herein. A refusal shall be appealable according to the procedure established by the Administrative Procedure Code .

(3) The instrument on granting of legal aid shall be issued in a written form and shall state:

1. title of the instrument;

2. designation of the authority who issues the instrument;

3. factual and legal basis for issuance of the instrument;

4. the person whereto legal aid is granted;

5. the type of legal aid and, in the cases referred to in Item 3 of Article 21 herein, the case in the matter of which the said aid is granted;

6. the means by which an appeal against the instrument can be lodged;

7. date of issuance, position and signature of the person who issued the instrument.

(4) The instrument on granting of legal aid shall be transmitted forthwith to the relevant Bar Council for designation of a lawyer entered in the National Legal Aid Register.

(5) If practicable, the Bar Council shall designate a lawyer named by the person whereto

legal aid is granted.

**Article 26.** (1) The Bar Council shall notify the authority referred to in Article 25 (1) or (2) herein of the designated lawyer.

(2) The authority referred to in Article 25 (1) or (2) herein shall appoint the designated lawyer as mandatory, defence counsel or special procedural representative for courts of all instances, unless an objection to this has been raised.

(3) The appointed lawyer may delegate the authority to another lawyer entered in the National Legal Aid Register.

(4) In exceptional cases, where qualified assistance of a lawyer in a particular case cannot be provided, the Bar Council may designate a lawyer from another geographical jurisdiction with the consent of the said lawyer.

(5) The appointed mandatory, defence counsel or special procedural representative may be replaced at the request of the authority referred to in Article 25 (1) or (2) herein according to the procedure of the appointment thereof.

**Article 27.** (1) The person whereto legal aid has been granted shall be obligated to notify forthwith the authority referred to in Article 25 (1) or (2) herein of any intervening change in the circumstances which render the said person eligible for the granting of the aid.

(2) The authority who made the decision to grant legal aid may terminate the said aid as from the time of occurrence of the change. A transcript of the instrument shall be transmitted forthwith to the NLAO.

(3) (Amended, SG No. 105/2005) In case the person fails to notify promptly the change in circumstances referred to in Paragraph (1), on the basis of a decision under Item 10 of Article 8 herein the said person shall reimburse the NLAO for any costs incurred as from the time of the said change. The receivable shall be collected according to the procedure established by the Tax and Social Insurance Procedure Code .

## **Chapter Five**

### **LAWYERS ON DUTY**

**Article 28.** (1) (Amended, SG No 32/2010, effective 28.05.2010) In urgent cases on cases of coercive procedural measures and questioning before a judge in the pre-trial proceedings, the Secretary of the Bar Council shall designate a lawyer on duty, unless the accused has not retained his or her own defence counsel.

(2) (Supplemented, SG No. 82/2011, effective 1.01.2012) A lawyer on duty shall furthermore be designated according to the procedure established by Paragraph (1) for a detainee in the cases under Article 70 (1) of the Ministry of Interior Act and under Article 16a of the Customs Act, where the said detainee is unable to retain a lawyer of his or her own.

**Article 29.** (1) A lawyer on duty shall be designated from amongst the lawyers entered

in the National Legal Aid Register who have granted consent to be included in the list of lawyers on duty.

(2) The consent referred to in Paragraph (1) may not be effective for a period shorter than one month and shall express the readiness of the lawyer to be designated a lawyer on duty at any time of the day or night.

(3) The Bar Council shall maintain a list of lawyers on duty.

**Article 30.** (1) A request to designate a lawyer on duty in the cases referred to in Article 28 (1) herein shall be made by the authority directing the procedural acts to the Bar Council in writing or by telephone not later than three hours before the time appointed for the relevant proceeding.

(2) Immediately after the detention, the authority referred to in Article 25 (1) herein shall explain to the detainee the right to assistance of a lawyer on duty and shall notify the Bar Council of the need to appoint a defence counsel. The lawyer selected from the list shall proceed forthwith with fulfilment of the obligations thereof concerning the legal aid.

(3) The obligations referred to in Paragraph (2) shall be fulfilled by means of serving the detainee, upon signed acknowledgment of service, with a copy of a form stating the right thereof to assistance of a retained lawyer or a lawyer on duty as from the time of detention.

(4) The lawyer on duty shall continue to provide the legal aid in all phases of the trial.

## **Chapter Six**

### **NATIONAL LEGAL AID REGISTER**

**Article 31.** The National Legal Aid Office shall keep a National Legal Aid Register for the lawyers designated to provide legal aid by geographical jurisdiction of the relevant district courts.

**Article 32.** (1) The Register shall be open to public inspection. The Register shall be compiled on a paper-based and an electronic data medium and shall be posted on the Internet.

(2) The National Legal Aid Office shall provide the Bar Councils with information on the lawyers entered in the Register referred to in Article 31 herein.

**Article 33.** (1) Any lawyer wishing to be entered into the National Legal Aid Register shall submit an application to the NLAO care of the relevant Bar Council.

(2) The application referred to in Paragraph (1) shall be completed in a standard form endorsed by the NLAO.

(3) The Bar Council shall prepare an opinion on the application received and shall forward the said application to the NLAO.

(4) The lawyer shall be entered into the National Legal Aid Register by decision of the NLAO.

(5) The National Legal Aid Office shall issue a reasoned refusal to enter a lawyer into the Register or shall strike a lawyer entered therein in the cases of:

1. imposition of a disciplinary sanction;
2. bringing a charge of an offence at public law;

3. ascertained violation under this Act or poor quality of the legal aid provided, as ascertained by the Bar Council or the NLAO.

(6) Striking shall be imposed by the NLAO for a period of one year or, when repeated, for a period of three years.

(7) Any refusal of entry by the NLAO, as well as any striking of a lawyer from the National Legal Aid Register, shall be appealable according to the procedure established by the Administrative Procedure Code .

(8) Striking shall be announced on the Internet site of the NLAO.

**Article 34.** (1) The National Legal Aid Register shall be updated for the next succeeding calendar year not later than at the end of September of the last preceding calendar year.

(2) In exceptional cases, the National Legal Aid Register may also be modified during the course of the year according to the procedure established for entry.

**Article 35.** (1) The National Legal Aid Office may conduct inspections as to the legal aid provided under Article 21 herein. The said Office may require information from the competent authority directing the proceeding to certify the scope and type of the legal aid provided.

(2) The mandator, the client or the authorities referred to in Article 25 (1) herein may refer breaches committed by lawyers providing legal aid to the NLAO for consideration.

(3) The findings of the inspections may be grounds for striking of the lawyer from the National Legal Aid Register.

**Article 36.** (1) The Bar Council shall compile and keep, on a paper-based and on an electronic data medium, a list of the lawyers appointed to provide legal aid, and this list shall be periodically transmitted to the NLAO. The Bar Council shall notify the NLAO of each change in the appointment.

(2) The list shall be compiled in a standard form endorsed by the NLAO and shall be posted on the Internet site of the NLAO.

## **Chapter Seven**

### **PAYMENT FOR LEGAL AID**

**Article 37.** (1) Payment for legal aid shall depend on the type and amount of work

performed and shall be determined by an ordinance of the Council of Ministers on a motion by the NLAO.

(2) Without prejudice to other sanctions, the lawyer shall not be paid a fee for any legal aid provided in bad faith or incompetently in a particular case.

**Article 38.** (1) The type and amount of the work done shall be certified by a timesheet of the lawyer, completed in a standard form endorsed by the NLAO.

(2) The Bar Council shall verify and authenticate the timesheet of the lawyer who has provided legal aid and shall propose an amount of the fee depending on the type, amount and quality of the legal aid provided within the limits established by the ordinance referred to in Article 37 herein.

(3) The appointed lawyer shall furthermore be reimbursed for the essential expenses for the defence, incurred for visit to the places for deprivation of liberty or detention facilities in another nucleated settlement.

**Article 39.** Payment for the legal aid provided shall be effected by the NLAO by means of bank transfer on the basis of the timesheet referred to in Article 38 herein.

**Article 40.** The lawyer who provides legal aid shall not have the right to receive any fee and resources covering expenses from the mandator or from the client thereof.

## **Chapter Eight**

### **SPECIFICS OF GRANTING LEGAL AID IN CROSS-BORDER DISPUTES**

(Effective as from the date of entry into force of the

Treaty concerning the Accession of the Republic of Bulgaria to

the European Union)

**Article 41.** (1) The provisions of this Chapter shall apply to the granting of legal aid in cross-border disputes in civil and commercial matters before courts of all instances. The said provisions shall not apply to criminal and administrative matters.

(2) "Cross-border dispute", within the meaning given by Paragraph (1), shall be a dispute where the party applying for legal aid is a citizen of a Member State of the European Union or a person residing lawfully in a Member State of the European Union, and where the dispute is settled by a competent authority in another Member State of the European Union.

(3) The provisions of this Act shall apply to the granting of legal aid in cross-border disputes, save insofar as otherwise specifically provided for in this Chapter.

**Article 42.** (1) The citizens of the European Union or the persons residing lawfully in a Member State of the European Union shall be granted legal aid if the property status of the said persons does not exceed the social threshold established in Article 22 (1) herein.

(2) Where the property status of the persons referred to in Paragraph (1) exceeds the social threshold established in Article 22 (1) herein but the said persons are unable to pay for the costs of the case, the NLAO shall determine whether the applicant can pay the said costs. The said determination shall take into account the circumstances covered under Article 23 (4) herein, as well as the differential between the minimum cost of living required in the Member State and in Bulgaria.

**Article 43.** (1) The Ministry of Justice shall be the authority of the Republic of Bulgaria which shall be competent to receive applications for legal aid in cross-border disputes from the competent authorities of Member States of the European Union.

(2) The Ministry of Justice shall be the authority of the Republic of Bulgaria which shall be competent to transmit applications for legal aid in cross-border disputes to the competent authorities of Member States of the European Union.

**Article 44.** (1) The applicant shall have the right to submit an application for legal aid either to the competent authority of the Member State of the European Union in which the said applicant is domiciled or habitually resident, or directly to the Ministry of Justice of the Republic of Bulgaria, should the case is to be tried by a court in the Republic of Bulgaria or should the judgment of court must be enforced in the Republic of Bulgaria.

(2) The legal aid application and the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid, as submitted to the Ministry of Justice, shall be translated into the Bulgarian language or into another official language of the institutions of the European Community, which the Republic of Bulgaria has specified as acceptable to the European Commission. Legalization of the said documents shall not be required.

(3) Upon receipt of an application for legal aid from a competent authority of another Member State of the European Union, the Ministry of Justice of the Republic of Bulgaria shall verify whether the application is accompanied by all the supporting documents required and whether a translation of the documents has been provided. If the documents are responsive to these requirements, the application shall be forthwith transmitted to the NLAO for adoption of a decision.

(4) In case the application is not responsive to the requirements of this Article, the said application shall be returned to the competent transmitting authority of the foreign Member State of the European Union for curing of the non-conformities as detected.

(5) The National Legal Aid Office shall transmit the decision thereof on the application for legal aid to the Ministry of Justice, which shall forward the said decision to the competent authority of the other Member State of the European Union for service on the applicant.

(6) Any refusal by the NLAO to grant legal aid shall be reasoned and shall be appealable according to the procedure established by the Administrative Procedure Code.

**Article 45.** (1) (Amended, SG No. 9/2011) Should the case be tried by the court of another Member State of the European Union, or should the judgment of court is to be enforced in another Member State of the European Union, any applicant who is a Bulgarian

citizen residing within the territory of the Republic of Bulgaria, a foreign citizen or a stateless person who has been permitted continuous, long-term or permanent residence in the Republic of Bulgaria, or a person who has been recognized a refugee status or who has been afforded a right of asylum within the territory of the Republic of Bulgaria, may submit the application thereof together with the documents proving that the said applicant is responsive to the eligibility requirements for granting of legal aid, directly to the competent authority of the respective Member State of the European Union, or care of the Ministry of Justice of the Republic of Bulgaria.

(2) The documents referred to in Paragraph (1) shall be translated into the official language or into one of the official languages of the other Member State of the European Union, or into another official language of the institutions of the European Community, which the said Member State has specified as acceptable to the European Commission.

(3) The Ministry of Justice of the Republic of Bulgaria shall have the right to refuse to transmit the application in case the said application is not responsive to the requirements of this Chapter. In such case, the Ministry of Justice of the Republic of Bulgaria shall notify the applicant of the reasons for the refusal.

(4) The Ministry of Justice of the Republic of Bulgaria shall be obligated to inform the applicant of the documents required for acceptance of the application for legal aid in the other Member State of the European Union and shall arrange a translation of the application and of the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid.

(5) The Ministry of Justice of the Republic of Bulgaria shall be obligated to transmit the application together with the documents accompanying the said application to the competent authority of the other Member State of the European Union within 15 days after the day of translation of the application and of the documents.

(6) Should the competent authority of the other Member State of the European Union reject the application for legal aid, the applicant shall repay the costs of translation of the application and of the documents borne by the Ministry of Justice of the Republic of Bulgaria.

**Article 46.** The applications referred to in Articles 44 and 45 herein shall be submitted in standard forms established by the European Commission.

**Article 47.** The Ministry of Justice of the Republic of Bulgaria shall provide the European Commission with the following information:

1. the names and addresses of the competent receiving and transmitting authority;
2. the means by which applications are received;
3. the languages that may be used for the completion of the applications.

**Article 48.** The applicant who has received legal aid in another Member State of the European Union, where the case was tried, shall have the right to legal aid under this Act in case the Republic of Bulgaria is asked to recognize or admit enforcement of a judgment of

court rendered in the matter of the relevant case.

**Article 49.** (1) The legal aid granted to the persons referred to in Article 42 herein shall furthermore cover the following costs related to the cross-border nature of the dispute:

1. relating to interpretation;
2. relating to translation of documents required by the court or by another competent authority;
3. travel costs, where the physical presence of witnesses in the court hearing is mandatorily required.

(2) The legal aid granted to the persons referred to in Article 45 (1) herein shall cover the following costs:

1. relating to legal aid under Item 1 of Article 21 herein, which has been granted in the Republic of Bulgaria until the time when the application for legal aid was received in another Member State of the European Union where the case is tried or where the judgment of court must be enforced;
2. relating to the translation of the application for legal aid and of the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid.

## **SUPPLEMENTARY PROVISIONS**

§ 1. "Systematic violation," within the meaning given by this Act, shall be the commission of three or more violations.

§ 2. Legal aid in civil matters shall furthermore include legal aid in a subsequent enforcement proceeding, which has commenced within one year after the entry into effect of the judgment of court, unless there is a change in the circumstances that existed during the consideration of the application for legal aid.

## **TRANSITIONAL AND FINAL PROVISIONS**

§ 3. Any pending cases in which an assigned counsel or a special procedural representative has been appointed, shall be tried under the hitherto effective terms and procedure.

§ 4. The Council of Ministers shall provide the property and the financial resources necessary for commencement of the work of the NLAO.

§ 5. In the Code of Civil Procedure (promulgated in the State Gazette No. 12/1952; amended in No. 92/1952, No. 89/1953, No. 90/1955, No. 90/1956, No. 90/1958, Nos. 50 and 90/1961, corrected in No. 99/1961; amended in the State Gazette No. 1/1963, No. 23/1968, No. 27/1973, No. 89/1976, No. 36/1979, No. 28/1983, No. 41/1985, No. 27/1986, No. 55/1987, No. 60/1988, Nos. 31 and 38/1989, No. 31/1990, No. 62/1991, No. 55/1992, Nos. 61 and 93/1993, No. 87/1995, Nos. 12, 26, 37, 44 and 104/1996, Nos. 43, 55 and 124/1997,

Nos. 59, 70 and 73/1998, Nos. 64 and 103/1999, Nos. 36, 85 and 92/2000, No. 25/2001, Nos. 105 and 113/2002, Nos. 58 and 84/2003 and Nos. 28 and 36/2004; supplemented, No. 38/2005; amended, Nos. 42 and 43/2005), in Article 64 there shall be added the following new Paragraph (6):

"(6) If the claim of a recipient of legal aid is granted, the due fees and applicable costs shall be awarded in favour of the National Legal Aid Office commensurate to the portion of the action granted. In the cases of a judgment adverse to the recipient of legal aid, the said recipient shall owe costs commensurate to the portion of the action rejected."

**§ 6.** The Bar Act (promulgated in the State Gazette No. 55 of 2004; amended in No. 43 of 2005) shall be amended as follows:

1. Article 44 shall be amended to read as follows:

"Article 44. (1) A lawyer, who has been entered in the National Legal Aid Register, shall be obligated to provide legal aid according to the procedure established by the Legal Aid Act, where the said lawyer has been designated for this.

(2) The lawyer shall be obligated to conduct the case assigned thereto, in the matter of which he or she provides legal aid according to the procedure established by the Legal Aid Act, exercising the same care as if he were retained by the client."

2. In Article 89, Item 15 shall be amended to read as follows:

"15. participate in the arrangement of legal aid according to the procedure established by the Legal Aid Act;"

3. In Item 6 of Article 132 , the words "assigned defence or special procedural representation" shall be replaced by "legal aid".

**§ 7.** In the Tax Procedure Code (promulgated in the State Gazette No. 103/1999; modified by Constitutional Court Judgment No. 2/2000, promulgated in No. 29/2000; amended in No. 63/2000, No. 109/2001, Nos. 45 and 112/2002, Nos. 42, 112 and 114/2003, Nos. 36, 38, 53 and 89/2004, Nos. 19, 39 and 43/2005), in Article 13 (2) there shall be added the following new Item 5:

"5. for the costs of legal aid under the Legal Aid Act, incurred after the lapse of the grounds for the granting of such aid."

**§ 8.** This Act shall enter into force on the 1st day of January 2006, with the exception of Chapter Eight, which shall enter into force as from the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union.

**§ 9.** The implementation of this Act shall be entrusted to the National Legal Aid Office.

The Act was passed by the 40th National Assembly on the 21st day of September 2005 and the Official Seal of the National Assembly has been affixed thereto.

**TRANSITIONAL AND FINAL PROVISIONS**

of the Administrative Procedure Code

(SG, No. 30/2006, effective 12.07.2006)

.....

§ 106. Everywhere in the Legal Aid Act (Promulgated, State Gazette No. 79/2005, amended, SG No. 105/2005, SG No. 17/2006) the words "the Administrative Procedure Act" shall be replaced by "the Administrative Procedure Code".

**National section**

# **CYPRUS**

**Dr. George A. Serghides**

**LL.B. (Athens), Ph.D. in Law (Exon, U.K.), Ph.D. in Law (Athens), Ph.D. in Law (Salonica)**

**President of the Family Court of Nicosia-Kyrenia, Cyprus**

**Adjunct Law Professor at the University of Cyprus**

**Editor and Main Author of Studia Juris Cyprii**

**International Hague Network Judge**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### Current sources:

##### For divorce:

Article 111 para. 2A & B(a),(b) and (c) and para. 3 of the Constitution as amended by Law 95/1989. See also Articles 22 and 87.1(c) of the Constitution.

Article 225 of the Charter of the Most Holy Church of Cyprus (i.e. the Greek Orthodox Church of Cyprus) of 1979.

The Attempt for Reconciliation and Spiritual Dissolution of the Marriage Law of 1990 (Law 22/1990) as amended by Law 54(I)/1995).

Section 87 (on attempt for reconciliation) and Section 88 (on spiritual reconciliation) of the Charter of the Most Holy Church of Cyprus of 2010.

Section 14 of the Family Courts Law of 1990 (Law 23/1990) as amended by Laws 46(I)/1999 and 69(I)/2009.

Exhibit A (to Section 11) to the Family Courts (Religious Groups) Law of 1994 (Law 87(I)/1994) as amended by Law 70(I)/2009.

Section 27 of the Marriage Law of 2003 (Law 104(I)/2003) as amended by Law 66(1)/2009.

Sections 3 and 4(b), (c) & (d) of the Application of the Marriage Law of 2003 to Members of the Turkish Community (Temporary Provisions) Law of 2003 (Law 120(I)/2003) and formerly Section 26 of the Turkish Family (Marriage and Divorce) Law, of 1951, Cap. 339.

Sections 2 and 29 paras (1), (2), (3) and (4) of the Courts of Justice Law of 1960 (Law 14/1960), as amended.

##### For Legal Separation:

No substantive law provisions dealing with legal separation. In the past, however, there were provisions dealing with legal separation of the members of the Catholic Church and the Maronite Church (under their own respective ecclesiastical laws) as well as of members of the Turkish Moslem Community of Cyprus (see sections 28-30 of the Turkish Family (Marriage and Divorce) Law, 1951, Cap. 339).

##### For the annulment of marriage:

Article 111 para. 1, para. 2A and para. 3 of the Constitution as amended by Law 95/1989. See also Articles 22 and 87.1(c) of the Constitution.

Articles 83-86, 89-90 of the Charter of the Most Holy Church of Cyprus of 2010.

Section 13-26 of the Marriage Law of 2003 (Law 104(I)/2003).

Sections 3 and 4(a), (b), (c) and (d) of the Application of the Marriage Law of 2003 to Members of the Turkish Community (Temporary Provisions) Law of 2003 (Law

120(I)/2003 and formerly Section 26 of the Turkish Family (Marriage and Divorce) Law, of 1951, Cap. 339.

There are no reform proposals pending for divorce, legal separation and annulment of marriage.

### Divorce

#### Jurisdiction *ratione personae*

*(interpersonal (or internal) conflict of laws rules of jurisdiction)*

Regarding divorce petitions, depending on the case, *ratione personae*, the competent Courts in Cyprus are the following:

- (a) The Family Courts (3 in number),
- (b) The Family Court of the Latin religious group,
- (c) The Family Court of the Maronite religious group,
- (d) The Family Court of the Armenian religious group,
- (e) The Presidents of the District Courts.

The Family Courts deal *ratione persone* with any divorce case, except where the case comes within the jurisdiction of any other Court mentioned above (under paras. (b)-(e)).

A Family Court of a religious group mentioned above in paras (b), (c), and (d) has jurisdiction, (i) when both parties are Cypriot citizens and members of the same or different religious groups and their marriage took place in the rites of the religious group to which both or either belongs, or (ii) when both parties are Cypriot citizens and members of the same religious group and performed a civil marriage. The celebration of the marriage in Cyprus and not abroad, is not a prerequisite for the jurisdiction of a Family Court of a religious group.

A President of the District Court has jurisdiction to dissolve the marriage of members of the Turkish Community (i.e. Cypriot citizens Muslims) which took place in Cyprus. If their marriage took place abroad, the competent court to dissolve is a Family Court (see *Holubova v. Mehmet Ali*, (2003) 1 CLR 643).

Unlike any other matrimonial petition, in a divorce petition the Family Court is composed of 3 Judges. Appeals from the judgments of the Family Courts of first instance go to the Family Court of second instance, which is composed of 3 Judges of the Supreme Court. The Family Courts are very specialised Courts.

#### Substantive Provisions

In practice, all of the above Courts apply two grounds of divorce:

- (a) The irretrievable breakdown of the marriage due to a reason attributable to the respondent or both spouses. This ground applies free from any fault requirement and without examining the degree or extent of the responsibility of each spouse to the breakdown of the marriage. Even incompatibility of characters of the spouses and their inability for mutual understanding and loving could be reasons to substantiate such a ground of divorce.

- (b) The irretrievable breakdown of the marriage due to a separation of the spouses lasting for 4 years, no matter whether during this period attempts were made by the spouses to reconcile, which attempts, must not last for a period of more than 6 months. The 4 years separation creates an irrebuttable presumption that the marriage of the parties has irretrievably broken down and that the marriage is dead. So, the 4 years separation is the only prerequisite for this ground of divorce and it is not legitimate for the Court to examine any other factor, such as which spouse has caused the separation or was at fault.

The above two grounds, which are based on the idea of the breakdown of the marriage and not on the idea of the guilt of the parties, are the only grounds applied in practice. However, there are many other available grounds for divorce which the Family Courts and the Family Courts of Religious groups may apply. These grounds have ecclesiastical or religious origin and most of them are based on matrimonial fault, such as adultery and desertion for 2 years without cause. The fact that these fault grounds became obsolete in practice during the last 10 or even more years, shows that the Cypriot society is ready to abandon for good the divorce which is based on matrimonial fault and all its defences, such as collusion, aiming toward a more civilised divorce. Under Section 27(4) of the Marriage Law, 2003, the respondent's change of sex has been made a new ground of divorce, but so far it has never applied in practice.

It is interesting that the most recent Demographic Report of 2009 ([www.mof.gov.cy/mof/cystat/statistics.nsf/All/6C25304C](http://www.mof.gov.cy/mof/cystat/statistics.nsf/All/6C25304C) search for "demographic report of 2009") issued by the Republic of Cyprus, Statistical Service, states the following about divorces (page 18 par. 2.5):

"The total number of divorces in 2009 was 1.738 and the crude divorce rate was calculated at 2,2 per thousand population. The total divorce rate, which shows the proportion of marriages that are expected to end up in divorce, rose to 275 per thousand marriages in 2009, from 42 per thousand in 1980.

'Irretrievable breakdown of the marriage and 'irretrievable breakdown of the marriage due to 5 or 4 years separation' were the grounds for divorce accounting for 86,8% and 13,2% of the cases respectively."

#### Procedure

The procedure before the Family Courts and the Family Courts of Religious Groups is the same. The procedure begins with the filing of an application. The application embodies the remedies sought, the legal basis and the facts of the application, without being supported by an affidavit. Defence must be filed within 15 days of the service of the application, which may include a counter-action. If there is a counter-action, then there may be a defence to it. The hearing of the case is the same as in all common law countries. The applicant brings first all his or her witnesses and then the defendant his or her own. Each witness is examined and may be cross-examined and re-examined. Under a relatively new provision, Section 25, of the Evidence Law, Cap. 9 as amended by Law 32(I)/2004, which applies to all civil cases, the deposition of a witness may be conducted in whole or in part by a written declaration adopted orally on oath during examination in chief. An appeal against the decision of the Court must be filed within 42 days from the day following the delivery of judgment. For the procedure applied by the Family Courts there is a specific regulation, the Family Courts Procedural Regulation of 1990 (PR 2/1990) as amended which is adopted and applied by the Family Courts of the

Religious Groups by virtue of the Family Courts (Religious Groups) Procedural Regulation of 1995 (PR 4/1995). Regulation 9(1) of the PR 2/1990 provides that unless other provision is made in the PR for the procedure concerning the dissolution of the marriage, the Cyprus Matrimonial Causes Rules (1950) apply. The Matrimonial Causes Rules were enacted when Cyprus was a British colony and are applicable today by the Presidents of the District Courts, when they have jurisdiction over divorce cases of members of the Turkish Community who were married in Cyprus.

### Validity of marriage

#### Jurisdiction *ratione personae*

Save where a President of a District Court has jurisdiction as above in relation to members of the Turkish Moslem Community, in all other cases, including the marriage of members of religious groups, the competent Court as regards annulment of marriage is the Family Court.

#### Substantive Provisions

##### Formal validity of marriage

In Cyprus a marriage may be take place either through a civil or religious ceremony as provided by Article 111.5 of the Constitution and the Marriage Law, 2003.

##### Essential Validity of Marriage (Capacity to marry)

As provided by Article 111 of the Cyprus Constitution, the essential validity of a religious marriage between Cypriot citizens who are members of the Greek Orthodox Church or members of the religious groups of Maronites, Armenians or Roman Catholics is governed by their ecclesiastical law. As far as the marriage of members of the Greek Orthodox Church is concerned, a new Charter of this Church passed in 2010 (entry into force 1/11/2010), which regulates the matter through Articles 84-86.

Under the Marriage Law 2003 there are three types of defective marriages: non-existent, void and voidable.

A marriage is deemed to be non-existent if there is no difference of gender or if the marriage was not carried out by a competent person or if the marriage is a fictitious (sham) one (Sections 3 § 1 & 19). Non-existent marriages are regarded as never having taken place, and can be so treated without recourse to court judgment annulling them. In the case of such marriages, the power of the court is limited to the making of a declaratory judgment as to the status of the parties and the non-existence of their marriage. In all other cases, the law dealing with the essential validity of marriage is the Marriage Law 2003 (Law 104(I)/2003).

Void marriages are regarded as subsisting marriages until a judgment annulling them has been pronounced by the court. Under Section 17(2) of the Marriage Law, 2003, a marriage will be void if it takes place: (a) before the dissolution or annulment of a previous marriage, (b) between persons related to each other by blood, in direct line or collaterally up to the fifth degree, (c) between persons related to each other by affinity in direct line or collaterally up to the third degree, (d) between an adopting parent and an adoptive child or any descendant of them, (e) between a child born out of wedlock and its father who has recognised it as its child or any of their blood relatives.

Voidable marriages, like void ones, have a legal effect until they are annulled by the Court. Under Section 14 of the Marriage Law 2003 a marriage is void if either party did not freely consent to the marriage. Lack of free consent is considered to exist if the person consented to marriage under mistake as to the identity of the other contracting party or under duress. Under the same Section, a marriage is voidable if either party is mentally ill or is under the age to consent. Under Sections 14 and 15, there is an impediment for persons to marry if either of them is under the age of eighteen, unless both of them have reached the age of sixteen and there are serious reasons justifying the exception and these persons who wish to enter into a marriage have the written consent of their parents or the leave of the Court in case there is no person having parental control over them. Under Section 16, a voidable marriage may be curable under certain circumstances.

The Marriage Law 2003 does not consider as an impediment to marriage any difference of age between the parties. It does not consider as an impediment if either party in the past had celebrated a number of other marriages which ceased to exist. However, under Article 83.4 of the Charter of the Most Holy Church of Cyprus (i.e. the Greek Orthodox Church), 2010, it is an impediment to a marriage if one party is twenty five years or more older than the other. By virtue of Article 84.1(c) of the same Charter, it is an impediment to marriage if either party had celebrated in the past three marriages, which ceased to exist.

#### Procedure

Same as divorce. See above.

*Note:* In Cyprus, unlike other European Countries, there are interpersonal (internal) conflict of laws rules of jurisdiction and applicable law in regard to some family matters. In the past, and specifically before the abolition of the ecclesiastical courts and the establishment of the Family Court (1990), these conflict of laws rules were even more complicated than today. (See for these conflict of laws rules in the past in George A. Serghides, *Internal and External Conflict of Laws in Regard to Family Relations in Cyprus*, (in English), Nicosia, 1988, (vol. 1 of the *Studia Juris Cyprii*, G. A. Serghides, ed.) and in George A. Serghides, *The Formation of the Grounds for Divorce Under Cyprus Law, with a Comparative Study of Greek and English Law*, Nicosia, 2007 (in Greek), (vols 5 & 6 of the *Studia Juris Cyprii*, *op.cit.*))

**2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

In Cyprus, the competent court is the court which has jurisdiction both under the Cyprus internal and external conflict of laws rules of jurisdiction. See for the internal or interpersonal conflict of laws rules of jurisdiction, the answer to question A. 1 above. The relevant connecting factors under the Cyprus external conflict of laws (i.e. private international law) rules, required for the jurisdiction of each Court, are the following:

For Family Courts, 3 months of residence in Cyprus of either party (spouse), most probably before the filing of the divorce petition, though not specifically stated. (See Section 11(2)(e) & (3) of the Family Courts Law of 1990 (Law 23/1990) as amended.)

For Family Courts of the religious groups no such residence factor is required (see Section 9 of the Family Courts (Religious Group) Law of 1994 (Law 87(I)/1994)). The important connecting factor is the membership of a religious group and the Cypriot citizenship.

For the Presidents of the District Courts, 15 days residence of either party (spouse) before the commencement of the Court's proceedings is required. See Section 4(d) of the Application of the Marriage Law of 2003 to Members of the Turkish Community (Temporary Provisions) Law of 2003 (Law 120(I)/2003) and Section 29(4) of the Courts of Justice Law of 1960, (Law 14/1960), as amended. This required short period of 15 days residence in Cyprus applies only if the marriage of the parties was celebrated in Cyprus, formerly under the Marriage Law Cap. 279 and, by analogy, now, under the Marriage Law 2003, which has repealed and substituted the former Act.

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

Cyprus became a member of the European Union on the 1/5/2004. (See Article 2 of the **European Parliament legislative resolution on the application by the Republic of Cyprus to become a member of the European Union (AA-AFNS 1-6 — C5-0117/2003 — 2003/0901B(AVC), Official Journal of European Union, L236 vol. 46, 23/9/2003. See also Article 3 of the Treaty of Accession of 16/4/2003).**

By Cyprus' entry into the European Union, all the EC Regulations become part of the Cyprus domestic legislation having superior force to any other domestic law. In Cyprus, EC Regulations are directly applicable instruments, needing no implementing legislation.

In 2006, by Article 2 of the Fifth Amendment of the Constitution Law of 2006 (Law 127(I)/2006), a new Article was added in the Cyprus Constitution giving supremacy of the European Union Law over the Constitution of the Republic of Cyprus. This new Article 1A provides as follows:

"No provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their

institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty on European Union, from having legal effect in the Republic.”

Besides Article 6 of the same Law (i.e. Law 127(I)/2006) reads:

“6. Article 179 of the Constitution is hereby amended as follows:

(a) By deletion in paragraph 1 thereof of the word “This” and the substitution therefore of the sentence “Subject to the provisions of Article 1A, this”; and

(b) by addition in paragraph 2 thereof, immediately after the words “this Constitution” (sixth line), of the sentence “or any obligation imposed on the Republic as a result of its participation as a member state of the European Union.”

The original text of Article 179 of the Constitution was as follows:

“1. This Constitution shall be the supreme law of the Republic.

2. No law or decision of the House of Representatives or any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution.”

Note. The Fifth Amendment of the Constitution Law of 2006 is available on internet in English (see [www.olc.gov.cy](http://www.olc.gov.cy)).

Apart from the above national general provisions, there are no specific provisions put in place for the application of Regulation Brussels IIbis. However, the general provisions are quite satisfactory as they cover every EC Regulation.

The relevant Cyprus domestic law (i.e. Law 216/1990 see below) and regulations are quite consistent with Regulation Brussels IIbis.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Not yet.

In cross-border divorce cases, as regards jurisdiction, the Cyprus courts apply the rules mentioned in the answer to question A. 2 above, and as regards the law applicable, they always apply the *lex fori*, which is the relevant principle of the English private international law. It is to be noted that the rules of the English private international law are applied in Cyprus as part of the imported common law, by virtue of Section 29.1(c) of the Courts of Justice Law of 1960 (Law 14/1960), as amended, unless there is a contrary provision in a bilateral agreement concluded between the Republic of Cyprus and another State. See list of such bilateral instruments in “Horizontal issues” 3.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Under Cyprus Law, the spouses do not have such a choice, as the *lex fori*, always applies.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No. See also answer to question A. 5.

**B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The maintenance of spouses either before or after divorce is regulated by Part II of the Spouses' Property Relations (Regulation) Law of 1991 (Law 232/1991), as amended, which is a Law quite separate from the Law dealing with the maintenance of children by their parents and the obligation of the children who reach the age of majority to maintain their parents in certain cases. The latter matters are regulated by the provisions of the Parents and Children Relations Law 1990 (Law 216/1990), as amended (Part II, Sections 33 *et seq.*), the examination of which is outside the scope of this questionnaire.

By Law 232/1991 each spouse is encouraged to become financially independent as soon as possible after the divorce. However a right to maintenance survives the divorce where the former spouse is destitute.

The Spouses' Property Relations (Regulation) Law of 1991 (Law 232/1991), as amended.

List of the most basic Articles:

Section 2 "spouse" means the relationship established between a man and a woman as a consequence of a marriage recognised by the State.

Section 3 and Section 4 deal with maintenance obligations between spouses before divorce. Section 3 provides that depending on their strengths (i.e. abilities), the spouses have reciprocal maintenance obligations.

Section 5 states that provided that one of the former spouses cannot ensure her or his maintenance from his or her income or property, she or he is entitled to seek maintenance from the other former spouse, if one of the following conditions is met:

- (a) The applicant spouse is of such age or health condition that prevents her or him from starting or continuing to exercise an appropriate profession (employment) in order to support herself or himself.
- (b) The applicant has the care or custody of a minor child or an adult child or other person dependant on her or him, who because of physical or mental disability is unable to care for himself or herself and for this reason the applicant is prevented from exercising an appropriate profession.
- (c) The applicant does not find a steady and appropriate employment, or needs some professional training, although in these two cases the right to maintenance cannot last for more than 3 years after the divorce.

(d) In any other case where an award of maintenance is required for equity reasons.

Section 6 provides that the court may limit or exclude maintenance if the marriage has only lasted a short time, if the claimant has a serious fault with regard to divorce, or if he or she has willingly caused his or her destitution.

Section 7.1 provides that in determining the amount of maintenance, the court must pay attention to the needs of the claimant, including all that is needed for his or her living as well as to the resources of the defendant.

Section 8 provides that the court has power to grant in appropriate cases periodical orders of maintenance.

Section 9.1 provides that maintenance is paid in advance every month.

Section 11 provides that maintenance terminates automatically if the spouse receiving maintenance, remarries, cohabits or dies.

Section 12 provides that amounts payable by virtue of a maintenance order may also be enforced as a pecuniary penalty (fine) according to the provisions of the Criminal Procedure law, Cap. 155, as amended.

There are no reform proposals pending.

The procedure is the same as for divorce and the same Regulations apply. See answer to Question A. 1.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

By virtue of Section 12 of the Law 232/1991, the maintenance claims may be enforced as a penalty (fine). Under Section 124A of the Criminal Procedure Law, Cap. 155, as amended by Law 21(l)/2012, the claimant may file an affidavit for the issue of a warrant of imprisonment against the person who failed to provide her or him with maintenance as provided by a Court's order. The Court invites in writing the person affected to appear before it at a specified date, not later than 15 days from the filing of the claimant's affidavit, for him or her to give reasons why he or she failed to comply with the maintenance order. Furthermore, in its invitation to the affected person, the Court informs him or her that in case he or she does not appear before it, a warrant of imprisonment may be issued. In case the affected person does not appear before the Court or he or she appears but he or she does not give sufficient reasons, the Court issues a warrant of imprisonment commanding the competent Police Officer to take the defendant and convey him or her to prison and there to deliver him or her to the Officer in charge thereof together with the warrant to be imprisoned for a specified period of time mentioned in the warrant, unless the sum due is paid sooner (earlier). The length of imprisonment depends on the amount due but it does not exceed one year each time.

The claimant may also use the procedure of contempt of court order which is a *quasi* criminal procedure.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Ministry of Justice and Public Order.

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

No.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The current source of law on matrimonial property is the Pecuniary Relations of Spouses (Regulation) Law of 1991 (Law 232/1991) as amended.

Section 13 of Law 232/1991 guarantees the autonomy of assets of each spouse, by stipulating that, subject to the provisions of Part III, marriage does not entail any change in the independence of the spouses in regard to their assets.

Unlike the Law of Greece where the parties may choose the system of community property (Article 1403 of the Greek Civil Code), under the Cyprus Law 232/1991 the only exception to the principle of the independence of the spouses in regard to their assets is the one provided in Section 14(1) of Law 232/1991.

Section 14 para. 1 of the same Law provides that if the marriage has been dissolved or annulled or the parties are separated and the assets of one spouse have increased, the other spouse, to the extent that he or she in any way whatsoever contributed to this increase, shall be entitled to demand the restitution of that part of the increase arising from his or her own contribution.

According to Section 2 of Law 232/1991, the term "property" means movable and immovable property which was acquired before the marriage with the prospect of marriage or acquired at any time after the marriage by either spouse.

Under the same Article "spouse" means the relationship created between a man and woman as a result of marriage recognised by the state and "contribution" means any form of contribution of spouses in the creation or acquisition of property, including the care of the home and family members.

Section 14 para. 2 provides that it is presumed that the said contribution (provided in the para. 1) amounts to one-third (1/3) of the increase of the property, unless a greater or lesser contribution can be established.

Section 14 para. 3 provides that the increase in the assets of the spouses does not include whatever they may have acquired by gift, inheritance or bequest or by alienation of the assets derived thereof.

Section 14A deals with the disclosure of assets and examination by the Court.

Section 14B deals with criminal offences committed by spouses who provide false, inaccurate or incomplete disclosure of assets.

Section 14C makes provision for additional powers of the Court.

Section 14D makes provision for annulment of fraudulent transfer of property.

Section 14E deals with orders for transfer of property.

Section 14F exempts a transfer of property between former spouses from fees and charges.

Section 15 places for the filing of a petition a time bar of 3 years after dissolution or annulment of the marriage for filing the envisaged claim in Section 14.

Section 16 deals with donations made between the spouses. In deciding a claim under Section 14, the Court takes into account for the determination of the amount to which the plaintiff is entitled, any value of the assets that the defendant donated to the plaintiff during the marriage.

Section 17(i) provides that the Court may (at its discretion) not award the plaintiff any amount under Section 14 or may reduce the amount to which the plaintiff would have been entitled under that Section, if (a) the plaintiff has been convicted of murder or manslaughter of the other spouse, (b) the plaintiff has been convicted of murder or manslaughter of a child of the other spouse, (c) the plaintiff has been convicted of intentionally causing serious bodily harm to the other spouse or a child of that spouse, (d) the plaintiff left without reasonable cause or failed to maintain the other spouse, (e) the plaintiff has behaved in an extremely violent and immoral manner towards the other spouse.

Section 17(ii) provides that for the purposes of this Article, the Court takes account of the respondent's behaviour towards the plaintiff.

There are conflicting judgements as to whether the principles of equity and trust apply along the provisions of Law 232/1991 in regard to pecuniary disputes between the spouses. The modern trend is that they do apply. However, this trend, is, according to my humble view, contrary to the Law. As we know, statutory law prevails equity and the provisions of Article 232/1991 leave no room for the application of the principles of equity. (In favour of the view that the Law 232/1991 leaves no room for the application of the principles of equity, see *Orphanidi v. Orphanidi*, (1998) 1 Cyprus Law Reports (CLR) 179, 184-188, *Christophorou v. Christophorou*, (1998) 1 CLR 1551, 1562 and *Papaioannou v. Papaioannou & Kolaridou v. Kolaridi* (2000) 1 CLR 656, 666, 676-677. For the opposite view which is the recent trend, see, inter alia, *Loginos v. Loginou* (2000) 1 CLR 1347, *Michael v. Giagou* (2001) 1 CLR 1643 and *Philippou v. Philippou* (2003) 1 CLR 1343.)

There are no reform proposals pending.

The procedure is the same as for divorce, since the same regulations apply. See answer to question A. 1.

## 2. Which conflict of laws rules apply in matrimonial property disputes?

### As to jurisdiction

According to Section 11(e) of the Family Courts Law of 1990 (Law 23/1990), as amended by Law 26(I)/1998, the Family Courts have jurisdiction if either party is residing in Cyprus for a continuous period of 3 months before the filing of the petition. However, according to the proviso added to Section 11(e) of the basic Law (Law 23/1990) by the Amendment Law 63(I)/2006, when there is property (obviously referring to property placed in Cyprus), within the meaning of Section 2 of Law 232/1991 (see answer to question C. 1), the residence in Cyprus requirement does not apply.

### As to applicable law

The *lex fori* always applies.

## 3. Which are the property consequences of registered partnerships?

There is no Law dealing with registered partnerships. However in regard to any kind of relations, the rules of equity and trust apply. See *Pentaftkas v. Pentaftka*, (1991) 1 CLR 547.

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive has not yet been transposed into domestic law. However, there is a bill pending in Parliament aiming at transposing the European Directive 2008/52 into the Cyprus domestic law, including not only cross-border civil and commercial disputes, but also internal or domestic civil and commercial disputes. It is hoped that the bill will very soon be passed into law.

There is also an older bill on mediation in family matters still pending in Parliament.

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The Legal Aid Law of 2002 (Law 165(I)/2002), as amended by Laws 22(I)/2005, 77(I)/2005, 43(I)/2006, 132(I)/2009, 172(I)/2011, 8(I)/2012, 9(I)/2012, 10(I)/2012, and the Legal Aid Procedural Regulation (No. 1) of 2003 are compatible with the Directive, as they cover any legal service in relation to any civil and criminal procedure, specifically including legal aid in family cases (Section 6 of Law 165(I)/2002). The basic Law (i.e. 165(I)/2002) was amended by Law 22(I)/2005 to insert provisions to transpose the EC Directive into Law. So the basic Law is modified to include in Section 2 a definition of what is "Directive No 2003/8/EC", and to add the following new Sections: Section 6A defining what is legal aid in cross-border disputes, Section 7A dealing with the prerequisites of granting legal aid in a cross-border dispute, Section 7B dealing with the competent Authority in Cyprus to

transmit legal aid applications as well as with the procedure of such transmission, and lastly Section 13(2)(e) dealing with the form for the transmission of legal aid applications, which the Supreme Court of Cyprus, by regulation, must enact. Under Section 7B the Cyprus competent Authority for the transmission of legal aid applications is the Ministry of Justice and Public Order.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

(*Note: "RL" means Cyprus Ratifying Law by which any bilateral or international instrument becomes by virtue of Article 169.3 of the Cyprus Constitution part of the domestic law, having superior force over any other domestic law except the Constitution).*

Article 163.3 of the Constitution provides that "Subject to the provisions of ..... (3) treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto."

#### I. MULTILATERAL INSTRUMENTS

##### A. INTERNATIONAL INSTRUMENTS

###### Hague Conventions

Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and Supplementary Protocol (1971) (RL 11/1976).

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1965) (RL 40/1982).

Hague Convention on the Recognition of Divorces and Legal Separations (1970) (RL 63/1982).

Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970) (RL 67/1982).

Hague Convention on Civil Aspects of International Child Abduction (1980) (RL 11(III)/1994).

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) (RL 26(III)/1994).

Hague Convention on Jurisdiction, Recognition, Enforcement and in Respect of Parental Responsibility and the Protection of Children (1996) (RL 24(III)/2004).

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

###### UN Conventions

UN Convention on the Recovery Abroad of Maintenance (1956) (RL 50/1978).

UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964) (RL 16(III)/2002).

International Covenant on Civil and Political Rights (1966) (RL 14/1969).

Optional Protocol to the International Covenant on Civil and Political Rights (1966) (RL 17(III)/1992).

Convention on the Elimination of All Forms of Discrimination against Women (1979) (RL 78/1985).

UN Convention on the Rights of the Child (1989) (RL 243/1990, RL 5(III)/2000).

## B. REGIONAL INSTRUMENTS

### European Conventions

European Convention on Information on Foreign Law (1968) (RL 5/1969).

Additional Protocol to the European Convention on Information on Foreign Law (1978) (RL 22/1979).

European Convention on the Status of Children Born out of Wedlock (1975) (RL 50/1979).

European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (1980) (RL 36/1986).

European Convention on the Exercise of Children's Rights (1996) (RL 23(III)/2005).

### European Council Regulations

Since Cyprus is a member of European Community all the EC Regulations also apply in Cyprus. See e.g.:

Council Regulation (EC) no. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility.

Council Regulation (EC) no. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations.

### Directives of the European Parliament and of the Council of the European Union

Since Cyprus is a member of European Community all such directives also apply in Cyprus. See e.g.

Directive No. 2003/8/EC (on legal aid in cross-boarder disputes).

Directive No. 2008/52/EC (on mediation in cross-border civil and commercial matters).

## C. SIGNED BY CYPRUS BUT NOT YET RATIFIED

Convention on Contact Concerning Children (2003).

Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (2007).

European Agreement on the Transmission of Applications for Legal Aid (1977).

Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (2001).

## II. BILATERAL INSTRUMENTS

Cyprus has entered into bilateral conventions for legal co-operation or assistance in regard to civil matters, including, of course, family matters, with the following countries: (The table which follows is in chronological order based on the year of ratification)

Czechoslovakia (RL 68/1982).

Hungary (RL 7/1983).

Greece (RL 55/1984).

Bulgaria (RL 18/1984).

Syria (RL 160/1986).

Georgia (RL 172/1986).

Belarus (RL 172/1986).

Russian Federation (RL 172/1986).

Montenegro (RL 179/1986).

Egypt (RL 32(III)/1992).

China (RL19(III)/1995).

Poland (RL 10(III)/1997).

Libya (RL 32(III)/2005).

Ukraine (RL 8(III)/2005).

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

Yes, but only in Greek. This is [www.cylaw.com](http://www.cylaw.com) available without subscription and [www.leginety.com](http://www.leginety.com) available only on subscription, where you can search for the Cyprus case law and legislation.

For statistical information on marriages and divorces, there is an available database which is [www.mof.gov.cy](http://www.mof.gov.cy) search for "demographic report of 2009" (also available in English).

European Judicial Network in Civil and Commercial Matters:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_cyp\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_cyp_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_cyp\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_cyp_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_cyp\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_cyp_en.htm)

European Judicial Atlas in Civil and Commercial Matters:

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

In Cyprus, foreign law is considered and proved as a matter of fact by an expert witness in that law. See, *inter alia*, *Royal Bank of Scotland v. Geodrill Co. Ltd and other*, (1993) 1 Cyprus Law Reports (CLR) pp. 753 *et seq.* However, when the Family Courts apply the Hague Convention on Civil Aspects of International Child Abduction (1980) ratified in Cyprus by Law 11(III)/1994, they are bound to follow the provisions of Article 14 which provide that the judicial or administrative authorities of the requested State may take notice directly of the foreign law without recourse to the specific procedures for the proof of that law. Cyprus participates in the judicial network established under the Hague Convention 1980 by having since the 19<sup>th</sup> of May 2000 an International Hague Network Judge, Dr. G. A. Serghides, with the duty, *inter alia*, of exchanging information on domestic law with Liaison Judges of other countries.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

No case law on Council Regulation (EC) 2201/2003, but one very important case on Council Regulation 1347/2000:

Decision of the Family Court of Second Instance, *Giorgos Michalias v. Chrisina A Ioannou-Michalia*, dated 14/7/2009 (2009) 1B CLR 899, by which a preliminary ruling was referred to the European Court.

Divorce proceedings commenced by the husband, on the 2/4/2003, before the Family Court of Nicosia, Cyprus, after the entry into force of the Council Regulation 1347/2000 but before Cyprus became a Member State (i.e. before 1/5/2004). Divorce proceedings begun by the wife after 1/5/2004 before the courts of another Member State (United Kingdom) which was a Member State throughout the relevant period. Both spouses were Cypriot nationals, but had their permanent residence in the United Kingdom. The question was whether Regulation (EC) No 1347/2000 of 29 May 2000 applies in the case.

Court (Seventh Chamber) Case C-312/09 held that Council Regulation (EC) No 1347/2000 of 29 May 2000 was not applicable in the case, since it is not applicable to divorce proceedings brought before the courts of a State before the latter became a Member State of the European Union. It is to be noted that, as the Family Court of Nicosia held, the Council Regulation 2201/2003 could not be applied in the case before it, since by virtue of its Article 64, this Regulation does not apply to legal proceedings instituted before the date of its coming into operation, thus before the 1/8/2004.

There are some unreported decisions of the Family Courts in undefended cases regarding declarations of enforceability of foreign decisions.

### Maintenance Regulation

No national jurisprudence. However there are some unreported decisions of the Family Courts in undefended cases regarding enforceability of foreign decisions.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

Soteris Liasides, *Recognition, Registration and Enforcement of Foreign Decisions*, Nicosia, 2009 (in Greek), p. 201, relevant pages 260-278.

#### Regulation Rome III: Cross-border divorce - applicable law

None.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

Soteris Liasides “European Regulations which deal with Significant Aspects of Family Law” (in Greek) in Sotiris Liasides, *ed.*, *Family Law Review*, 2011, year 2<sup>nd</sup> issue 4<sup>th</sup>, p. 4, relevant pages 26-30.

#### Matrimonial property regimes and property consequences of registered partnerships

G.A. Serghides, ed., *Pecuniary Relations of Spouses and Cohabitants (Literature and First Instance Judgments) & Miscellaneous Legal Topics*, vol. 9 of *Studia Juris Cyprii* (G. A. Serghides, ed.), Nicosia, 2010, containing legal articles and judgments on property relations of spouses with contributions of Professor Th. Papazissi and others.

**National section**

**CZECH REPUBLIC**

**Zuzana Fišerová**

**Director General, Czech Ministry of Justice**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

“Divorce” is an institute of Czech material Family Law and therefore regulated primarily by Act No. 94/1963 Coll., on the Family. Based on proposal by one of the spouses, the court decides on divorce. During the proceedings, the court establishes whether or not the grounds for a divorce exist, i.e. whether or not the marriage has broken down and what the causes were. The marriage is automatically considered as broken down, if the marriage has lasted at least one year, the spouses have been separated for at least six months and the second spouse supports the divorce proposal. Prior to granting a divorce to the parents of children who are minors, the court will regulate the rights and responsibilities of the spouses concerning their children for the time after the divorce. The institute of legal separation does not exist in the Czech Republic.

##### I. current sources of law

a) substantive law: Act No. 94/1963 Coll., on the Family

- divorce: §§ 23 – 29

- annulment and non existence of marriage: §§ 11-17a

- legal separation: no provisions

b) procedural law: Act No. 99/1963 Coll., Civil procedure code

c) conflict of laws rules, international jurisdiction: Act No. 97/1963 Coll., on International private and procedural law; bilateral international agreements

##### II. future sources of law

On the 3<sup>rd</sup> of February 2012 a new Czech civil code was adopted. This new piece of legislation will entry into force on the 1<sup>st</sup> of January 2014 and replace the current Civil code as well as the Act on Family. There will be no substantive changes in comparison with the current state.

#### 2. In case no court of a member state has jurisdiction according to Regulation Brussels II bis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

In case no court of a member state has jurisdiction according to Regulation Brussels II bis (Article 7 of the Regulation), the court competent for hearing a cross-border divorce case is designated according to the provisions of Act No. 97/1963 Coll., on International private and procedural law (see below § 38) or a bilateral international agreement if such an agreement has been concluded between the Czech Republic and the respective foreign State.

##### § 38

*(1) As for matrimonial matters (proceedings on cancellation of the matrimony by divorce, on invalidity of the matrimony and on determination of its existence or non-existence), jurisdiction of Czech courts shall be given if at least one of the spouses is a Czech citizen.*

*(2) If none of the spouses is Czech citizen, the jurisdiction of Czech courts shall be given if*

*a) at least one of the spouses has its residence in the Czech Republic and if the decision may be recognised in domestic states of both participants; or if*

*b) at least one of the spouses has had its residence in the Czech Republic for a longer period of time; or if*

*c) the spouses live in the Czech Republic, as far as such invalidity of the matrimony is concerned that is to be proclaimed under Czech law even without any application.*

The court territorially and functionally competent for hearing a divorce or for the declaration of the annulment of a marriage is the District Court having the jurisdiction for the district in which the couple had its last place of cohabitation in the Czech Republic, provided at least one of the spouses lives in the district. If this is not the case, the proposal is submitted to the District Court in the district where the second spouse lives. If the second spouse does not live within the territory of the Czech Republic, the proposal is submitted to the District Court in the district where the submitting spouse lives (§ 88a of the Act No. 99/1963 Coll., Civil procedure code).

**3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels II bis?**

Regulation Brussels II bis is a directly applicable act which does not need any implementing legislation.

(Ministry of Interior in collaboration with Ministry of Justice prepared an instruction designated for Registry offices (=national bodies administrating births, deaths, civil status) interpreting rules on recognition of judgements on divorce under the Regulation Brussels II bis and international agreements.)

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

No, the Czech Republic is not participating in the enhanced cooperation implemented by Regulation Rome III.

Some bilateral international agreements concluded between the Czech Republic and other States contain conflict of law rules for divorce. If such an agreement is applicable in the case in question these must be observed (e.g. with Russian Federation, Ukraine, Hungary, Poland, Romania, Bulgaria, etc.)

If it is not the case, conflict of law rules contained in the § 22 of Act No. 97/1963 Coll., on International private and procedural law, are applicable.

§ 22

*(1) Cancellation of a matrimony by divorce shall be governed by the law of the State whose citizens the spouses are at the moment of commencement of proceedings. Should the spouses be citizens of different States, the cancellation of matrimony by divorce shall be governed by Czech law.*

(2) If the law applicable under paragraph 1 does not allow divorce at all or allows it only upon extraordinarily difficult terms, the Czech law shall apply if the spouses or at least one of them has been living in the Czech Republic for a longer period of time.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No, the Czech Republic is not participating in the enhanced cooperation implemented by Regulation Rome III.

There is no choice of law provision for the divorce under the current Czech legislation.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

See answer to question A. 5.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

"Maintenance obligation" is an institute of Czech material Family Law and therefore regulated primarily by Act No. 94/1963 Coll., on the Family.

Parents have a maintenance obligation towards their children, and ascendants and descendants have a reciprocal maintenance obligation. In principle spouses have right to have the same standard of living. Divorced spouses who are unable to provide for themselves may claim maintenance from their former spouses. Courts do not grant maintenance where it would be *contra bonos mores*.

Where the father of a child is not married to its mother, he has an obligation to contribute an appropriate amount towards the mother's upkeep for a period of two years, including costs associated with pregnancy and childbirth. A person caring for a child is entitled to maintenance from the parent or parents, just as a divorced parent is entitled to maintenance for a child from the other parent.

### I. current sources of law

a) substantive law: Family law act (§§92-94, §§96-103)

b) procedural law: Civil procedure code

c) conflict of laws rules, international jurisdiction: Act No. 97/1963 Coll., on International private and procedural law; bilateral international agreements

### II. future sources of law

On the 3<sup>rd</sup> of February 2012 a new Czech civil code was adopted. This new piece of legislation will entry into force on the 1<sup>st</sup> of January 2014 and replace the current

Civil code as well as the Act on Family. There will be no substantive changes in comparison with the current state.

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

### I. Judicial decision on maintenance obligations

District courts rule in first instance on maintenance claims. Applicants initiate proceedings at the district court competent for the place where they, or the person they are looking after and for whom they are claiming maintenance, are permanently resident.

The law does not require an applicant to be represented. Only a natural person who cannot act independently before a court has to be represented by a legal representative (either a court-appointed guardian or, in the case of a minor, a parent). The applicant may, however, choose to mandate a person of their choice, e.g. a lawyer, to represent them in court.

A court may on petition set a maintenance allowance at a level covering a child's basic needs, its maintenance and standard of living. When imposing an obligation to pay maintenance and amending or revoking that obligation, a court will normally take account of the substantiated needs of the beneficiary, the debtor's capacities, possibilities and assets and the child's right to share its parents' standard of living. When calculating the parents' maintenance obligation, a court will take account of which parent is caring for the child and to what extent. Where the parents live together, account will also be taken of the parents' upkeep of the common home.

Where there is a change in circumstances, the court may, even without petition, amend agreements and court decisions concerning the maintenance of minors; otherwise it will act on petition. Where a maintenance allowance is reduced or revoked, maintenance already paid out will not be refunded.

Maintenance must be paid in regular instalments either directly to the beneficiary or to the person caring for the beneficiary. In addition to child maintenance, a court may in certain cases order the deposit of a lump sum for maintenance to mature in the future. It will also take appropriate steps to ensure that the maintenance laid down is paid in regular monthly instalments.

### II. General rules on enforcement decision in the Czech republic

Where a debtor does not voluntarily comply with the court decision, the beneficiary may petition for the judicial execution of the decision, which may involve attachment of earnings, compulsory debits, the forced sale of property, the sale of a business or the creation of a judicial lien against real property.

In the Czech Republic a creditor can choose whether to obtain satisfaction of his claim by means of judicial enforcement of a decision (i.e. by a judicial enforcement agent) according to the Code of Civil Procedure, or by means of execution by the judicial executor (private legal professional) under Act No. 120/2001 on Judicial Executors and Action in Execution (Execution Act). The judicial executor also acts in

accordance with the Code of Civil Procedure, especially as regards the provisions governing individual methods of enforcing decisions.

A creditor does not need to be represented by a lawyer when lodging a motion for enforcement of a decision.

Enforcement can generally be ordered only if the decision designates the entitled party and the obligated party, defines the extent and content of the obligation for fulfilment of which the motion for enforcement was lodged, and specifies the time limits for fulfilment of the obligation.

### III. Role of the Czech Central authority under the Maintenance Regulation

The Central authority - Office for International Legal Protection of Children – can play an important and facilitating role in the enforcement of due maintenance. Applicants residing in the Czech Republic and willing to enforce the maintenance abroad are invited to contact the Office. On the other hand in cases where applicants residing abroad are willing to enforce their maintenance in the Czech Republic, they are supposed to approach first the Central authority of their respective country.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

Office for International Legal Protection of Children

Silingrovo namesti 3/4

602 00 Brno

Czech Republic

<http://www.umpod.cz/en/>

### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

There is an instruction of the Ministry of Justice No. 59/2010-MOC-J regulating international cooperation of courts in civil and commercial matters. The instruction is a supportive act giving Czech courts and other relevant entities procedural guidance in cross-border civil cases (including maintenance claims).

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

#### I. current sources of law

a) substantive law: **Act No. 40/1964 Coll., the Civil Code (mainly §§ 143 – 151)**

b) procedural law: Act No. 99/1963 Coll., Civil procedure code

c) conflict of laws rules, international jurisdiction: Act No. 97/1963 Coll., on International private and procedural law; bilateral international agreements

## II. future sources of law

On the 3<sup>rd</sup> of February 2012 a new Czech civil code was adopted. This new piece of legislation will entry into force on the 1<sup>st</sup> of January 2014 and replace the current Civil code (as well as the Act on Family). There will be no substantive changes in comparison with the current state.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

Some bilateral international agreements concluded between the Czech Republic and other States contain conflict of law rules (as well as rules on jurisdiction/competence) for divorce and related property rights. If such an agreement is applicable in the case in question these must be observed (e.g. with Russian Federation, Ukraine, Hungary, Poland, Romania, Bulgaria, etc.)

If it is not the case, conflict of law rules contained in the § 21 (§ 37 for jurisdiction) of Act No. 97/1963 Coll., on International private and procedural law, are applicable.

### § 21

*(1) Personal and property relationships of spouses shall be governed by the law of the state whose citizens they are. Should they be citizens of different states, the relationships shall be governed by Czech law.*

*(2) Contractual regulation of property relationships of spouses shall be considered according to the law that was applicable to the property relationships of spouses at the moment when the regulation was made.*

### § 37

#### *Jurisdiction in property matters*

*(1) Jurisdiction of Czech courts in property matters shall be given if their competence is given under Czech provisions.*

*(2) Jurisdiction of Czech courts in property matters may be also based on a written agreement of the parties. In this way, however, the instance competence of Czech courts must not be changed.*

*(3) As for property disputes, a Czech legal entity may also agree in written to the competence of a foreign court.*

## **3. Which are the property consequences of registered partnerships?**

None.

Act No. 115/2006 Coll., on registered partnership, does not provide for the property consequences of registered partnerships, although it provides for maintenance obligations between registered partners.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive has been transposed into the Czech national legislation with one year delay which was caused by several amendments during the legislative procedure. The Act No. 202/2012 Coll., on Mediation, was finally adopted on the 2nd May 2012 and will enter into force on the 1st September 2012.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Directive was transposed into the Act No. 629/2004, on access to legal aid in cross-border disputes in the EU. The Act (or the Directive) is being regularly invoked in family cross-border cases (maintenance obligations, divorce, parental responsibility, etc.) by Czech and foreign applicants for legal aid.

The new Regulation on maintenance sets up new rules on legal aid for maintenance claims. Unfortunately, we still do not have sufficient experience to be able to draw a clear conclusion about the compatibility of both instruments.

There are other international instruments on free legal aid that might be invoked in cross-border cases (especially) where a non-EU member state is concerned:

- [European Agreement on the Transmission of Applications for Legal Aid](#)
- [Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid](#)
- [bilateral agreements](#)

### **3. Is your country a contracting party to any bilateral or international instruments on Family Law?**

#### **1) Multilateral international conventions:**

Hague conference on private international law:

- Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Convention of 13 January 2000 on the International Protection of Adults (*deposition of ratification instruments by Czech Republic expected in April 2012*)
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

Council of Europe:

- [European Convention on the Adoption of Children](#)
- [European Convention on the Legal Status of Children born out of Wedlock](#)
- [European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children](#)
- [European Convention on the Exercise of Children's Rights](#)
- [Convention on Contact concerning Children](#)
- [European Agreement on the Transmission of Applications for Legal Aid](#)
- [Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid](#)

Other

- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956

**II) Czech Republic has bilateral international agreements including judicial cooperation in civil matters with the following states:**

*Afghanistan, Albania, Algeria, Australia, Bahamas, Belgium, Belarus, Bosnia and Herzegovina, Bulgaria, Montenegro, China, Fiji, France, Gambia, Georgia, Croatia, Italy, Yemen, Republic of South Africa, Canada, Kenya, PDR of Korea, Kosovo, Cuba, Cyprus, Kyrgyzstan, Lesotho, Hungary, FYROM, Moldova, Mongolia, Nauru, Germany (declaration of reciprocity – recognition of judgements), New Zealand, Poland, Portugal, Austria, Romania, Russian federation, Greece, Slovakia, Slovenia, USA (declaration of reciprocity – recognition of judgements on maintenance obligations for minor children), Serbia, Syria, Spain, Switzerland, Tunisia, Turkey, Ukraine, Uzbekistan, United Kingdom, Vietnam.*

It has to be noted that some of the agreements have broad scope including jurisdiction and conflict of laws rules, some includes simple rules on recognition and enforcement of judgements and the rest is limited to the judicial cooperation *stricto sensu* – service of documents, taking of evidence, and validity of authentic acts. Some of the agreements have not been applicable for years although they remain in force.

**4. Are there any databases or online tools providing information on Family Law matters available in your country?**

### **European Judicial Network in Civil and Commercial Matters**

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_cze\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_cze_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_cze\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_cze_en.htm)

- Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_cze\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_cze_en.htm)

### **European Judicial Atlas in Civil and Commercial Matters**

- Parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

### **Office for International Legal Protection of Children**

<http://www.umpod.cz/en/>

### **Ministry of Labour and Social Affairs**

<http://www.mpsv.cz/en/>

### **Ministry of Justice**

<http://portal.justice.cz/Justice2/Uvod/uvod.aspx>

### **Ministry of Foreign Affairs**

<http://www.mzv.cz/jnp/cz/index.html>

## **5. Please provide information on accessing and applying foreign Family Law in your country.**

The Czech law respects the principle *“lura novit curia”* even when foreign law is applicable. It means that the parties are not obliged to submit the content of the respective foreign law to the court; it is the task of judicial authorities. The § 53 of Act No. 97/1963 Coll., on International private and procedural law, stipulates that in order to find out the content of foreign law, the court shall take all necessary measures. If the content of the foreign law is not known to the court by other means, it may also ask the Ministry of Justice for information for this purpose. Should doubts occur in the course of hearing court may ask the Ministry of Justice for a statement.

The Ministry of Justice (being the last resort for judicial authorities in finding the content of foreign applicable law) disposes of several sources of information. In addition to an extensive collection of foreign acts and several compilations there is a possibility to explore diplomatic and consular channels or to seek information on the basis of international instruments of the Council of Europe ([European Convention on Information on Foreign Law](#) and Additional Protocol to the European Convention on Information on Foreign Law). Competent authorities of the contracting parties to the above mentioned instruments are entitled to ask the Ministry of Justice of the Czech Republic for the information on Czech law.

Nevertheless, the most efficient and more and more broadly used tool is the European judicial network in civil and commercial matters ("EJN"). The EJN is a network of contact points and other members of all member states of the EU who communicate among themselves in order to overcome obstacles in cross-border civil cases (including missing information on foreign applicable law). The Czech Republic has appointed 4 contact points; all of them being employees of the Ministry of Justice. Every Czech civil judge has direct access to Czech contact points and is invited to ask them for cooperation.

The EJN provides also for useful general information on applicable law and judicial procedures in all member states of the European Union. Some basic information can be found on the official website: [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm)

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels II bis in matters of cross-border divorce

- jurisdiction (precedence of the Regulation Brussels II bis over national rules): Decision No. 15C 397/2007 of the District Court in Cheb approved by the decision No. 56Co 547/2007 of the Regional Court in Pilsen (as appellate court)
- jurisdiction (relation between the Regulation Brussels II bis and bilateral international agreement applicable between the Czech Republic and successor States of former Yugoslavia): Decision No. 73Co 688/2009 of the Regional Court in Ústí nad Labem (as appellate court) approving Decision No. 17C 69/2009 of the District Court in Děčín
- jurisdiction, Lis pendens (Article 19 of the Regulation Brussels II bis): Decision No. 73Co 485/2008 of the Regional Court in Ústí nad Labem (as appellate court) approving Decision No. 5C 157/2006 of the District court in Jablonec nad Nisou

### Maintenance Regulation

Unfortunately, we still do not dispose of representative jurisprudence based on the new Maintenance Regulation. That is why we can mention only older cases based on the Brussels I Regulation which governed cross-border maintenance claims before the specialised act entered into force.

- enforcement of judgement (relation between the Brussels I Regulation and bilateral agreement between Czech republic and Slovak Republic, transitional provisions in Article 66 of the Regulation): Decision No. 20Cdo 710/2006 of the Supreme Court abolishing previous decisions
- jurisdiction (exclusive jurisdiction under Article 22/5 of the Brussels I Regulation for the proceedings concerned with the enforcement of judgements on maintenance obligation): Decision No. 35 Co 272/2007 of the Regional Court in Ústí nad Labem (as appellate court) abolishing Decision No. 43 E 932/2006 of the District Court in Liberec
- scope of rules on enforcement in Brussels I Regulation, definition of "civil matter": Decision No. 73 Co 478/2009 of the Regional Court in Ústí nad Labem (as appellate court) approving Decision No. 18 Ro 2259/2008 of the District Court in Liberec

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels II bis: Cross-border divorce – jurisdiction and recognition

- Francová Marie, Dvořáková Závodská Jana: Rozvody, rozchody a zánik partnerství (2.), ASPI, Praha 2010
- Holub Milan, Nová Hana, Ptáček Lubomír, Sladká Hyklová Jana: Zákon o rodině s komentářem, judikaturou a předpisy souvisícími, 2011
- Hrušáková Milana: Zákon o rodině. Zákon o registrovaném partnerství. Komentář (4.), C.H.Beck, Praha 2009
- Kučera, Z.: Mezinárodní právo soukromé (7.), Doplněk, Brno 2009
- Pauknerová, M.: Evropské mezinárodní právo soukromé, 1. vydání, Praha: C.H.Beck 2008.
- Plecítý Vladimír, Skřejpek Michal, Salač Josef, Šíma Alexander: Základy rodinného práva, Nakladatelství Aleš Čeněk 2008
- Radvanová Senta, Zuklínová Michaela: Kurs občanského práva. Instituty rodinného práva I. InSTITUTE rodinného práva, C. H. Beck
- Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách), Masarykova univerzita Brno, 2006
- Simon, P.: Evropské mezinárodní právo procesní, Komentář k nařízení Brusel II bis, in Drápal, L., Bureš, J. a kol., Občanský soudní řád II., Komentář, 1. vydání, Praha: C.H.Beck 2009
- Švestka J., Dvořák J. a kol.: Občanské právo hmotné, 5. vydání, Praha 2009

#### Regulation Rome III: Cross-border divorce - applicable law

The Regulation Rome III is not applicable in the Czech Republic. We did not find any relevant national bibliography on the subject matter.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- Francová Marie, Dvořáková Závodská Jana: Rozvody, rozchody a zánik partnerství (2.), ASPI, Praha 2010
- Holub Milan, Nová Hana, Ptáček Lubomír, Sladká Hyklová Jana: Zákon o rodině s komentářem, judikaturou a předpisy souvisícími, 2011
- Hrušáková Milana: Zákon o rodině. Zákon o registrovaném partnerství. Komentář (4.), C.H.Beck, Praha 2009
- Ková řevá Dvořáková řevá Dvořáková Rodina a výživ
- Kučera, Z.: Mezinárodní právo soukromé (7.), Doplněk, Brno 2009
- Pauknerová, M.: Evropské mezinárodní právo soukromé, 1. vydání, Praha: C.H.Beck 2008.
- Plecítý Vladimír, Skřejpek Michal, Salač Josef, Šíma Alexander: Základy rodinného práva, Nakladatelství Aleš Čeněk 2008

- Radvanová Senta, Zuklínová Michaela: Kurs občanského práva. Instituty rodinného práva I. InSTITUTE rodinného práva, C. H. Beck
- Rozehnalová, N., Týč, V.: Evropský justiční prostor (v civilních otázkách), Masarykova univerzita Brno, 2006
- Simon, P.: Evropské mezinárodní právo procesní, Komentář k nařízení Brusel I, in Drápal, L., Bureš, J. a kol., Občanský soudní řád II., Komentář, 1. vydání, Praha: C.H.Beck 2009
- Švestka J., Dvořák J. a kol.: Občanské právo hmotné, 5. vydání, Praha 2009

#### **Matrimonial property regimes and property consequences of registered partnerships**

- Dvořák Jan, Spáčil Jiří: Společné jmění manželů v teorii a v judikatuře (3.), ASPI, Praha 2011
- Holub Milan, Bičovský Jaroslav, Pokorný Milan: Společné jmění manželů (2.), Linde, Praha 2009
- Hrušáková Milana: Zákon o rodině. Zákon o registrovaném partnerství. Komentář (4.), C.H.Beck, Praha 2009
- Kučera, Z.: Mezinárodní právo soukromé (7.), Doplněk, Brno 2009
- Pauknerová, M.: Evropské mezinárodní právo soukromé, 1. vydání, Praha: C.H.Beck 2008
- Plecítý Vladimír, Skřejpek Michal, Salač Josef, Šíma Alexander: Základy rodinného práva, Nakladatelství Aleš Čeněk 2008
- Radvanová Senta, Zuklínová Michaela: Kurs občanského práva. Instituty rodinného práva I. InSTITUTE rodinného práva, C. H. Beck
- Simon, P.: Evropské mezinárodní právo procesní, Komentář k nařízení Brusel I, in Drápal, L., Bureš, J. a kol., Občanský soudní řád II., Komentář, 1. vydání, Praha: C.H.Beck 2009
- Šarman Jan, Šupáková Hana: Přehled judikatury ve věcech majetkových vztahů mezi manžely (2.), ASPI, Praha 2010
- Švestka J., Dvořák J. a kol.: Občanské právo hmotné, 5. vydání, Praha 2009

**National section**

# **ESTONIA**

**Liis Arrak**

**Counsellor of the Civil Chamber, Supreme Court of the Republic of  
Estonia**

**Lecturer of Family Law, University of Tartu, Estonia**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### Divorce

Estonian Family Law recognises the consensual divorce of spouses and divorce on request of one spouse. Upon agreement of the spouses on the basis of a joint written petition the divorce may be granted by vital statistics office or by notary public. A divorce may be granted by the vital statistics office or by notary public only if both spouses reside in Estonia. If the spouses disagree about the divorce or the circumstances relating to the divorce or if a vital statistics office or notary public is not competent to grant divorce a marriage may be divorced by a court judgement on the basis of an action of one spouse against the other spouse.

##### Annulment and non-existence of marriage

Marriage may be annulled or declared void only by court.

According to Estonian law the marriage is void (non-existent) if persons of the same sex are married; if contraction of the marriage has been confirmed by a person who does not have the competence of a registry official of a vital statistics office, or if even only one party has not expressed his or her will to contract marriage.

A court may annul a marriage by an action if a requirement for marrying age or active legal capacity has been violated upon the contraction of the marriage; if the prohibition on marriage has been violated upon the contraction of the marriage; if the formal requirements have been violated upon the contraction of the marriage; if at the time of contraction of the marriage, at least one spouse had a temporary mental disorder or was incapable to exercise his or her will for any other reason; if the marriage was contracted by fraud, threat or violence, including by concealing the state of health or other personal details of a spouse, where such details are relevant to the contraction of the marriage; if it was not the intention of one or neither of the parties to perform the obligations arising from the marital status, but the marriage was contracted with other intentions, in particular with an aim to obtain a residence permit of Estonia (ostensible marriage).

##### Legal separation

Estonian law recognises separation of spouses as a factual situation, where spouses do not live together and at least one of the spouses do not want to continue or restore matrimonial cohabitation. The court may establish the existence of separation in order to recall the legal consequences of separation, including divorce.

Substantive provisions of divorce and annulment of marriage as well as legal separation are currently consisted in the Family Law Act (FLA)<sup>2</sup> as follows:

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<sup>2</sup> Family Law Act (Perekonnaseadus). Passed 18.11.2009 (RT I 2009, 60, 395), entered into force 1.07.2010. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/127062012012> The latest translation into English (7.07.2012) is available:

- divorce: FLA §§ 63–67,
- annulment and non-existence of marriage: FLA §§ 9–14,
- legal separation: FLA §§ 16 (3), 22, 23.

Procedural provisions concerning divorce and annulment of marriage are consisted in the Vital Statistics Registration Act (VSRA)<sup>3</sup>, the Notaries Act (NA)<sup>4</sup> and the Code of Civil Procedure (CCP)<sup>5</sup> as follows:

- divorce: VSRA (especially §§ 44–49), NA (especially §§ 29–30), CCP (there have been foreseen no specific procedure for divorce, only some specific rules concerning jurisdiction (CCP § 102), division of procedural expenses (CCP § 164), representation (CCP § 222), burden of proof and submission of evidence (CCP § 230–231), personal presence of parties in court session (CCP § 346), suspension of proceedings for divorce (CCP § 357), content of statement of claim (CCP § 363), regulation of the relationship for the time of the proceedings (CCP § 378), judgement by default (CCP § 407, 413), admittance of claim (CCP § 440), immediate execution (CCP § 467)),
- annulment and non-existence of marriage: CCP (similar to previous),
- legal separation: CCP (similar to previous).

Reform proposals: the Ministry of Justice has proposed to give the notaries the right to grant divorce also if the spouses agree but the place of habitual residence of one or both spouses is not in Estonia. The proposal has not reached the Parliament yet.

## **2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

According to § 70 (2) of the Code of Civil Procedure (CCP)<sup>6</sup> a matter falls under the jurisdiction of an Estonian court if an Estonian court can adjudicate the matter

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<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXXX33K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=perekonnaseadus>

<sup>3</sup> Vital Statistics Registration Act (Perekonnaseisutoimingute seadus). Passed 6.05.2009 (RT I 2009, 27, 164), entered into force 1.07.2010. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/128122010020> Translation into English is not available.

<sup>4</sup> Notaries Act (Notariaadiseadus). Passed 6.12.2000 (RT I 2000, 104, 684), entered into force 1.02.2002. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/130122010008> The latest translation into English (2010) is available: <http://notar.ee/15844>

<sup>5</sup> Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtumenetlus>

according to competence and pursuant to the provisions concerning jurisdiction or based on an agreement on jurisdiction, unless otherwise provided by law or an international agreement. According to CCP § 70 (4) the rules of CCP will apply only if the question of jurisdiction has not been regulated in Regulation of Brussels IIbis.

According to CCP § 102 (2) an Estonian court is competent to adjudicate a matrimonial matter (divorce, annulment of marriage, establishment of existence or absence of marriage and other claims arising from the marital relationship) if:

1. at least one of the spouses is a citizen of the Republic of Estonia or was a citizen at the time of contracting the marriage,
2. the residences of both spouses are in Estonia,
3. the residence of one spouse is in Estonia, except where the decision to be made would clearly not be recognised by the country of nationality of either spouse.

Estonia has concluded international agreements with Lithuania and Latvia (1993)<sup>7</sup>, Russian Federation (1993)<sup>8</sup>, Ukraine (1995)<sup>9</sup> and Poland (1999)<sup>10</sup>, which regulate the jurisdiction as well as applicable law in family matters (as far as the Regulation of Brussels IIbis do not regulate these questions).

### **3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

There are no further instruments or procedures enacted in Estonian law in order to apply the Regulation of Brussels IIbis (it has to be implemented directly).

### **4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Estonian Parliament has discussed the enhanced cooperation in May 2012 and there have been expressed willingness to participate, but the final decision is still not made. Thus, at the moment Estonia is not participating in the enhanced cooperation implemented by Regulation Rome III.

At current time the rules of conflict of laws in cross-border divorce cases are to be found in the Private International Law Act (PILA)<sup>11</sup>. According to PILA §§ 57 and 60

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<sup>6</sup> Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtumenetlus>

<sup>7</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13099214>

<sup>8</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13141764>

<sup>9</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13119066>

<sup>10</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/79090>

<sup>11</sup> Private International Law Act (Rahvusvahelise eraõiguse seadus). Passed 27.03.2002 (RT I 2002, 35, 217), entered into force 1.07.2002. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/13242136> The latest translation into English (2012) is

the applicable law in divorce cases shall be determined by the law of the state where the common residence of the spouses is situated at the time of commencement of the divorce procedure. If the spouses reside in different states but have the same citizenship, the applicable law shall be determined by the law of the state the citizens of which the spouses are. If the spouses reside in different states and have different citizenship, the applicable law shall be determined on the basis of the law of the state of their last common residence if one of the spouses still resides in such state. If the law governing the divorce cannot be determined pursuant to the mentioned rules, the law of the state with which the spouses are otherwise most closely connected applies. If a divorce is not permissible pursuant to the applicable law or is permissible only under extremely strict conditions, Estonian law applies instead if one of the spouses resides in Estonia or has Estonian citizenship or resided in Estonia or had Estonian citizenship at the time of contraction of the marriage.

Estonia has also concluded international agreements with Lithuania and Latvia (1993), Russian Federation (1993), Ukraine (1995) and Poland (1999), which consist of rules of applicable law in divorce cases.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

As Estonia is not participating in the enhanced cooperation, there have been enacted no specific rules in order to apply the Rome III Regulation. In national law there is stipulated no possibility for spouses to determine the applicable law in the case of divorce.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No (see answer to question A. 5).

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Maintenance obligations of divorced spouses are regulated in the Family Law Act (FLA)<sup>12</sup>. Compared to maintenance obligations of spouses during the marriage the

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available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30075K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=rahvusvahelise+era%F5iguse>

<sup>12</sup> Family Law Act (Perekonnaseadus). Passed 18.11.2009 (RT I 2009, 60, 395), entered into force 1.07.2010. The updated text of the law in original language is available:

<https://www.riigiteataja.ee/akt/127062012012> The latest translation into English (7.07.2012) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXXX33K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=perekonnaseadus>

maintenance obligations after divorce are rather limited. A divorced spouse may request provision of maintenance from the other divorced spouse if, after divorce, a divorced spouse is unable to maintain himself or herself due to caring for the common children of the spouses (until the child attains three years of age) or due to his or her age or state of health and the need for assistance arising from age or state of health existed at the time of the divorce or at the time when the right to receive maintenance from the other divorced spouse on another basis provided by law terminated.

Substantive provisions concerning post-marital maintenance obligation are consisted in FLA §§ 72-79.

Procedural provisions: special rules concerning maintenance obligation after divorce are included in FLA §§ 75, 77; general rules concerning court proceedings in maintenance cases are consolidated in Code of Civil Procedure (CCP)<sup>13</sup>. There has been foreseen no specific procedure for spousal maintenance cases, only some specific rules concerning maintenance for the time of the proceedings (CCP § 378) and immediate execution (CCP § 468).

Reform proposals: The Ministry of Justice has proposed to strengthen the position of the former spouse and to stipulate that the former spouse has prior to other relatives the right to get maintenance, i.e. to determine more clearly the order of entitled persons. The proposal has not reached the Parliament yet.

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement procedure is regulated in the Code of Enforcement Procedure (CEP)<sup>14</sup>. Maintenance obligations of former spouses may be specified in a maintenance contract by spouses or by judgement or by preliminary ruling of the court. Both, court judgements and rulings which have entered into force or are subject to immediate enforcement in civil matters and notarised agreements concerning claims for support according to which a debtor has consented to be subject to immediate compulsory enforcement may be enforced under the rules of CEP.

In order to enforce either the contract or the judgement the claimant shall file the application for enforcement. The enforcement notice shall be delivered to the debtor and the debtor shall be given term for voluntary compliance with the enforcement instrument. If the debtor does not fulfil the maintenance claim in

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<sup>13</sup> Code of Civil Procedure (Tsviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsviilkohtumenetlus>

<sup>14</sup> Code of Enforcement Procedure (Täitemenetluse seadustik). Passed 20.04.2005 (RT I 2005, 27, 198),

entry into force 1.01.2006. The updated text of the law in original language is available:

<https://www.riigiteataja.ee/akt/113062012002> The latest translation into English (2012) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80003K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%E4itemenetluse>

time, the claim shall be fulfilled from the property of the debtor according to general rules of CEP.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

According to the decree of the Minister of Justice concerning the application of the Maintenance Regulation<sup>15</sup> the Central Authority is Ministry of Justice. For more information see: <http://www.just.ee> or contact [central.authority@just.ee](mailto:central.authority@just.ee)

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

At the moment there have been enacted no instruments in order to apply the Maintenance Regulation.

## C. Matrimonial property regimes in Europe

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Matrimonial property system

Matrimonial property law is regulated in the Family Law Act (FLA)<sup>16</sup>. Estonian law recognises default as well as contractual matrimonial property regimes, although the law strongly recommends spouses to choose the matrimonial property regime while concluding marriage, i.e. to enter into a marital property contract. Therefore, Estonian law recognises usual marital property contract, which shall be entered into notarised form, and simple choice of matrimonial property regimes (community of acquests, deferred community and separation of property) at the time of conclusion of marriage, which shall not be entered into in notarised form, but needs to be noted only in marriage application.

Matrimonial property regimes

- a. *community of acquests (jointness of property)* - the objects and other proprietary rights of the spouses acquired during the property regime shall transfer into the joint ownership of the spouses (joint property), except the objects and other proprietary rights, which are according to law separate property of spouses. Spouses have to exercise jointly the rights and perform

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<sup>15</sup> Decree of Minister of Justice concerning application of Maintenance Regulation (Ülalpidamiskohustuste määruse rakendamise määrus), passed 9.06.2011 (RT I, 14.06.2011, 6), entered into force 17.06.2011. The text of decree in original language is available: <https://www.riigiteataja.ee/akt/114062011006> No translation in English available.

<sup>16</sup> Family Law Act (Perekonnaseadus). Passed 18.11.2009 (RT I 2009, 60, 395), entered into force 1.07.2010. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/127062012012> The latest translation into English (7.07.2012) is available:

[http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXXX33K3&keel=en&pg=1&pt\\_yp=RT&tyyp=X&query=perekonnaseadus](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXXXX33K3&keel=en&pg=1&pt_yp=RT&tyyp=X&query=perekonnaseadus)

the obligations relating to joint property. After termination of property regime the spouses shall divide joint property between themselves into equal parts pursuant to the provisions concerning the termination of common ownership unless otherwise agreed.

b. *deferred community (set-off of assets increment)* - the proprietary relationship of set-off of assets increment does not affect the ownership of the proprietary rights acquired by a spouse before entry into force of or during the proprietary relationship. The share added to the property of each spouse during a proprietary relationship (acquired assets) shall be set off between the spouses in equal shares.

c. *separation of property (separateness of property)* - in proprietary relations spouses shall be deemed to be persons not married to each other.

Substantive provisions concerning matrimonial property regimes are included in FLA as follows:

- general provisions concerning choice of matrimonial property regime and marital property contract: FLA §§ 24, 59–62,
- jointness of property: FLA §§ 25–39,
- set-off of assets increment: FLA §§40–56,
- separateness of property: FLA §§ 57–58.

Procedural provisions concerning choice of regime and conclusion of matrimonial property contract are included in the Vital Statistics Registration Act<sup>17</sup> (esp. VSRA § 37, 42) and Marital Property Register Act (MPRA)<sup>18</sup>. Procedural provisions concerning court proceedings in cases which arise from matrimonial property regime are included in the Code of Civil Procedure<sup>19</sup>. There is no specific procedure foreseen for matrimonial property cases, only some specific rules (similar to divorce cases).

Reform proposals: The Ministry of Justice has made several proposals in order to clarify the current regulation and give more protection to the more vulnerable spouse. The proposals have not reached the Parliament yet.

## 2. Which conflict of laws rules apply in matrimonial property disputes?

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<sup>17</sup> Vital Statistics Registration Act (Perekonnaseisutoimingute seadus). Passed 6.05.2009 (RT I 2009, 27, 164), entered into force 1.07.2010. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/128122010020> Translation into English is not available.

<sup>18</sup> Marital Property Register Act (Abieluvararegistri seadus), passed on 9.11.1995 (RT I 1995, 87, 1540), entered into force 1.09.1996. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/13335177> The translation into English is not available.

<sup>19</sup> Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtumenetlus>

Conflict of laws rules in matrimonial property cases can be found in Private International Law Act (PILA)<sup>20</sup>.

According to IPLA § 58 the proprietary rights of the spouses shall be governed by the law chosen by the spouses. Regardless of the provisions of subsection 11 (2) of this Act, the spouses may choose the law of the state of residence or the state of citizenship of one of the spouses as the law governing their proprietary rights. The fact of the choice of governing law shall be notarised. If the governing law is not chosen in Estonia, the choice of law is formally valid if the formal requirements prescribed for marital property contracts by the chosen law are complied with. If the spouses have not chosen the governing law, the proprietary rights of the spouses shall be governed by the law applicable to the general legal consequences of the marriage at the time of contraction of the marriage, i.e. by the law of the state where the common residence of the spouses is situated or if the spouses reside in different states but have the same citizenship by the law of the state the citizens of which the spouses are, or if the spouses reside in different states and have different citizenship by the law of the state of their last common residence if one of the spouses still resides in such state, or by the law of the state with which the spouses are otherwise most closely connected.

Estonia has also concluded international agreements with Lithuania and Latvia (1993), Russian Federation (1993), Ukraine (1995) and Poland (1999), which consist of rules of applicable law in matrimonial property matters.

### **3. Which are the property consequences of registered partnerships?**

Under the Estonian law registered partnership is still not directly regulated, but at the moment the Ministry of Justice is drafting the gender neutral draft law for registered partnership. Currently, the courts are applying civil law rules in order to solve the proprietary disputes between partners, esp. Law of Obligations Act (LOA)<sup>21</sup> §§ 580–609, which regulate a contract of partnership.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

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<sup>20</sup> Private International Law Act (Rahvusvahelise eraõiguse seadus). Passed 27.03.2002 (RT I 2002, 35, 217), entered into force 1.07.2002. The updated text of the law in original language is available: <https://www.riigiteataja.ee/akt/13242136> The latest translation into English (2012) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30075K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=rahvusvahelise+era%F5iguse>

<sup>21</sup> Law of Obligations Act (Võlaõigusseadus), passed 26.09.2001 (RT I 2001, 81, 487), entered into force 1.07.2002. The updated text of law in original language is available:

<https://www.riigiteataja.ee/akt/108072011021> The latest translation (2011) into English is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K4&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igus>

In national law there have been enacted rules which enable to solve disputes at arbitral tribunals (agreement of arbitral tribunal, formation and competence of arbitral tribunal, procedure etc. (Code of Civil Procedure (CCP)<sup>22</sup> §§ 712–758)).

There has also been enacted the Conciliation Act (CA)<sup>23</sup> which governs conciliation proceedings in civil matters, including the legal consequences of conciliation proceedings conducted in accordance with the procedure prescribed in this Act. For the purposes of this Act, conciliation proceedings means a voluntary process in the course of which an impartial third party facilitates communication between parties to conciliation proceedings with the purpose of assisting them in finding a solution to their dispute. A conciliator may, on the basis of the facts of conciliation and the progress of conciliation proceedings, propose to the parties his or her own solutions to the dispute.

## **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Grant by State of Procedural Assistance for Bearing Procedural Expenses, including legal aid for persons who have habitual residence in another European member state is regulated in the Code of Civil Procedure (CCP)<sup>24</sup> §§ 180–193.

There has also been enacted the State Legal Aid Act<sup>25</sup>. Under this Act, state legal aid is granted to natural or legal persons in connection with proceedings in an Estonian court or administrative body or otherwise in the protection of their rights, if deciding thereon is within the competence of an Estonian court.

## **3. Is your country a contracting party to any bilateral or international instruments on family law?**

Estonia is a contracting party to bilateral agreements with the following states:

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<sup>22</sup> Code of Civil Procedure (Tsviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsviilkohtumenetlus>

<sup>23</sup> Conciliation Act (Lepitusseadus), passed 18.11.2009 (RT I 2009, 59, 385), entered into force 1.01.2010. The updated text of the law in original language is available:

<https://www.riigiteataja.ee/akt/13240243> Translation into English is available: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=2012X06&keel=en&pg=1&ptyyp=RT&tyyp=X&query=lepitus>

<sup>24</sup> Code of Civil Procedure (Tsviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsviilkohtumenetlus>

<sup>25</sup> State Legal Aid Act (Riigi õigusabi seadus), passed 28.06.2004 (RT I 2004, 56, 403), entered into force 1.03.2005. The updated text of the law in original language is available:

<https://www.riigiteataja.ee/akt/128122011016> Translation into English is available: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30066K5&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%F5igusabi>

- Lithuania and Latvia (1993)<sup>26</sup>,
- Russian Federation (1993)<sup>27</sup>,
- Ukraine (1995)<sup>28</sup>,
- Poland (1999)<sup>29</sup>.

Estonia is a contracting party to the following international instruments on family law:

United Nations:

- Convention on the Recovery Abroad of Maintenance (UN 1956),
- Convention on the Rights of the Child (UN 1989),
- Convention on the Rights of Persons with Disabilities and Optional Protocol (UN 2006).

Hague Conference on Private International Law:

- Convention on the Recognition of Divorces and Legal Separations (Hague Conference 1970),
- Convention on the Law Applicable to Maintenance Obligations (Hague Conference 1973),
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Hague Conference 1973),
- Convention on the Civil Aspects of International Child Abduction (Hague Conference 1980),
- Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Conference 1993),
- Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (Hague Conference 1996),
- Convention on the International Protection of Adults (Hague Conference 2000).

Council of Europe:

- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children (ETS 105) (Council of Europe 1980).

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

Judgements and rulings of courts:

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<sup>26</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13099214>

<sup>27</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13141764>

<sup>28</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/13119066>

<sup>29</sup> Available in Estonian: <https://www.riigiteataja.ee/akt/79090>

- Judgements and rulings of courts of first and second instance in family law cases (as far as the cases are published and the publication is not against the right to privacy of parties): [http://www.riigiteataja.ee/kohtuteave/maa\\_ringkonna\\_kohtulahendid/t\\_siviilKohtumenetlus.html](http://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/t_siviilKohtumenetlus.html)
- Judgements and rulings of the Supreme Court of Estonia: <http://www.riigikohus.ee>

National legislation: <http://www.riigiteataja.ee>

Database of foreign agreements: <http://vlepingud.vm.ee/en/>

Ministry of Justice: <http://www.just.ee>

European Judicial Atlas in Civil and Commercial Matters:

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

## 5. Please provide information on accessing and applying foreign family law in your country.

According to § 438 of the Code of Civil Procedure (CCP)<sup>30</sup> the court shall upon making a judgement decide which legislation applies in the matter. According to CCP § 234 proof of law in force outside of the Republic of Estonia, international law or customary law must be given only in so far as the court is not acquainted with such law. The court may also use other sources of information and perform other acts to ascertain the law. Upon ascertaining foreign law, the court shall be guided by the Private International Law Act.

According to IPLA § 4 the content of foreign law to be applied shall be ascertained by the court conducting the procedure. For such purpose, the court conducting the procedure has the right to request the assistance of the parties. The parties have the right to submit documents to the court for ascertainment of the content of foreign law. The court is not required to act pursuant to the documents submitted by the parties. Courts have the right to request assistance from the Ministry of Justice or the Ministry of Foreign Affairs of the Republic of Estonia and to use experts. If the content of foreign law cannot be ascertained within a reasonable period of time despite all efforts, Estonian law applies.

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<sup>30</sup> Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). Passed 20.04.2005 (RT I 2005, 26, 197), entered into force 1.01.2006. The updated text of law in original language is available: <https://www.riigiteataja.ee/akt/104072012019> The translation into English (no later amendments included) is available: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtumenetlus>

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

#### Jurisdiction:

- 7.09.2007 judgement of the district court in Tartu (as appellate court) in civil matter no 2-06-8524,
- 25.02.2009 judgement of the district court in Tallinn (as appellate court) in civil matter no 2-08-18248,
- 19.06.2012 judgement of the district court in Tallinn (as appellate court) in civil matter no 2-12-15057.

In these judgements the court of appeal decided whether Estonian court has or has not jurisdiction to divorce the marriage under the circumstances brought before the court. Unfortunately all these judgements have not been published.

### Maintenance Regulation

No judgements found.

### **III. NATIONAL BIBLIOGRAPHY**

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

- Torga, M. Characterisation in Estonian Private International Law – a Proper Tool for Achieving Justice between the Parties? *Juridica International* 2011, pp 84-93;

#### **Regulation Rome III: Cross-border divorce - applicable law**

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#### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

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#### **Matrimonial property regimes and property consequences of registered partnerships**

- Hallik (Arrak), L. Regulation of Proprietary Relations between Spouses in the New Family Law Act: Toward Better Regulation by Means of Private Autonomy? *Juridica International* 2010, pp 161-166;

**National section**

**ENGLAND**

**and**

**WALES**

The duty of the national court “is to make the foreign order happen and there is only such discretion as fulfilment of that duty requires”  
(*per* Holman J in *Re S (Brussels II: Recognition of the Best Interests of the Child (n. 2))* [2003] EWHC 2974)

**Dr Eugenia Caracciolo di Torella**  
**School of Law, University of Leicester**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

In England and Wales the relevant substantive legal provisions can be found in the Matrimonial Causes Act 1973 (MCA 73) (<http://www.legislation.gov.uk/ukpga/1973/18>) and in the Civil Partnership Act 2004 (CPA 2004) (<http://www.legislation.gov.uk/ukpga/2004/33/contents>): s. 1 MCA 73 (divorce) or s. 44(1) CPA 2004 (dissolution of Civil Partnership); ss. 11 and 12 MCA 73 and s. 49 CPA 2004 (nullity); s. 17 MCA 73 (judicial separation).

S. 1(1) MCA 73 establishes that divorce can be granted only in case of “irretrievable breakdown of the relationship” which can be shown through any of the following five facts: adultery, behaviour, desertion, separation with or without consent (s. 1(2) (a) (b) (c) and (d) MCA 73).

The provisions concerning the procedural rules can be found in:

- Family Procedure Rules 2010 (SI 2010/2955) (<http://www.legislation.gov.uk/uksi/2010/2955/made>) as amended by the Family Procedure Amendment Rules 2012 (<http://www.legislation.gov.uk/uksi/2012/679/contents/made>)
- Matrimonial and Family Proceedings Act 1984 (<http://www.legislation.gov.uk/ukpga/1984/42/contents>)

Proposals for reform on divorce were attempted with the Family Law Act 1996 (FLA 96) which aimed to introduce a no-fault model of divorce. However, the relevant part (*ie.* Part II FLA 1996 Divorce and Separation) did not enter into force, due to difficulties revealed in a pilot study, and was shelved in 2000.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulation 2005, SI 2005/265, ([http://www.legislation.gov.uk/uksi/2005/265/pdfs/uksi\\_20050265\\_en.pdf](http://www.legislation.gov.uk/uksi/2005/265/pdfs/uksi_20050265_en.pdf)) implements the Brussels IIbis Regulation.

This instrument replaces and amends the domestic “traditional” jurisdictional rules which were included in the Domiciles and Matrimonial Proceedings Act 1973 (DMP Act 73).

S 5(2) DMP Act 73 states that an English Court shall have jurisdiction to entertain proceeding for divorce or judicial separation if (a) the court has jurisdiction under the Brussels II Regulation or (b) no court of a Member States has jurisdiction under the Brussels II Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun. See:

*Part II*

*JURISDICTION IN MATRIMONIAL PROCEEDINGS (ENGLAND AND WALES)*

*s. 5. Jurisdiction of High Court and county courts.*

*(1) Subsections (2) to (5) below shall have effect, subject to section 6(3) and (4) of this Act, with respect to the jurisdiction of the court to entertain—*

*(a) proceedings for divorce, judicial separation or nullity of marriage; and*

*(b) proceedings for death to be presumed and a marriage to be dissolved in pursuance of section 19 of the Matrimonial Causes Act 1973*

*(1A) In this Part of this Act—*

*“the Council Regulation” means Council Regulation [\(EC\) No. 1347/2000](#) of 29th May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses;*

*“Contracting State” means—*

*(a) one of the original parties to the Council Regulation, that is to say Belgium, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom, and*

*(b) a party which has subsequently adopted the Council Regulation; and*

*(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if)—*

*(a) the court has jurisdiction under the Council Regulation; or*

*(b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun.*

*(3) The court shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if)—*

*(a) the court has jurisdiction under the Council Regulation; or*

*(b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage—*

*(i) is domiciled in England and Wales on the date when the proceedings are begun; or*

*(ii) died before that date and either was at death domiciled in England and Wales or had been habitually resident in England and Wales throughout the period of one year ending with the date of death.*

*3A) Subsections (2) and (3) above do not give the court jurisdiction to entertain proceedings in contravention of Article 7 of the Council Regulation.*

**3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?**

European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulation 2005, SI 2005/265, ([http://www.legislation.gov.uk/uksi/2005/265/pdfs/uksi\\_20050265\\_en.pdf](http://www.legislation.gov.uk/uksi/2005/265/pdfs/uksi_20050265_en.pdf)) implements the Brussels IIbis Regulation.

This instrument replaces and amends the domestic “traditional” jurisdictional rules which were included in the Domiciles and Matrimonial Proceedings Act 1973 (DMP Act 73).

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

At the time of writing, the UK has decided to opt out the proposed Rome III Regulation (COM (2006) 399 final) amending Regulation (EC) No 2201/2003 (Brussels IIbis) with regard to jurisdiction and introducing rules concerning applicable law in matrimonial matters. The House of Lords European Union Committee considered the draft Regulation in a report which undoubtedly had a very substantial impact on the decision taken by the UK government ([www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27202.htm](http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/272/27202.htm)).

A strong argument in favour of the UK opt out was on the grounds that it would cause legal uncertainty and practical problems in all cases having a foreign element heard in England and Wales, and those having an English element heard in another Member State. In particular, the UK desired to continue applying the *lex fori* in its own courts rather than allowing couples to choose the applicable law.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No, England and Wales are not participating in the enhanced cooperation implemented by Regulation Rome III.

**6. Are there any formal requirements applicable to the spouses’ agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

See answer to question A.5.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

In England and Wales, whilst the law does not, generally, interfere with the properties of the parties whilst married,<sup>31</sup> once a couple experience marital

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<sup>31</sup> In English law, “formalizing a relationship has no automatic impact on the parties property rights”; see J. Masson, R. Bailey-Harris, R. Probert, *Principles of Family Law*, 2008 Sweet & Maxwell, at p. 115.

R. Bailey-Harris, R. Probert, *Principles of Family Law*, 2008 Sweet & Maxwell, at p. 115.

breakdown (*inter alia*, through divorce) the law can intervene in order to guarantee that the interests of the parties involved are safeguarded. Following divorce, English law, distinguishes between *financial support for children* and *financial support for ex-spouses*.

In the first case: “[p]arents, whether they live together or not, have a clear moral as well as legal responsibility to maintain their children. Relationship ends. Responsibilities do not.” (Department for Work and Pension, *A Fresh Start: Child Support Redesign – the government Response to Sir David Henshaw*, 2006)

For this purpose, the relevant legislation is the Child Maintenance and Others Payment Act 2008 (replacing the Child Support Act 1991), and to a lesser extent the Children Act 1989. The Child Maintenance and Enforcement Commission is entrusted with collecting money from non-resident parents.

Furthermore, following divorce, according to s. 25 Matrimonial Causes Act 1973, the court has the power to make orders especially designed to benefit children. See:

*s.25: Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 and 24A.*

*(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.*

As for the relationship between ex-spouses, there is *in practice*,<sup>32</sup> no formal distinction between “maintenance of spouses” and “division of properties” after divorce.

Both situations are commonly referred as “ancillary relief”, “financial relief” or “property adjustment orders” and the current source of law is to be found in Part II of the Matrimonial Causes Act 1973. According to it, the Court has wide discretionary powers to make orders in relation to the redistribution of the income and capital of the parties. The legislation empowers the Court to consider whether it is feasible to achieve a clean-break between the parties and provides a checklist of considerations to take into consideration when issuing financial relief. See:

*s. 25 (3) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A above in relation to a child of the family, the court shall in particular have regard to the following matters—*

*(a) the financial needs of the child;*

*(b) the income, earning capacity (if any), property and other financial resources of the child;*

*(c) any physical or mental disability of the child;*

*(d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;*

*(e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (d) of subsection (2) above.*

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<sup>32</sup> Author’s emphasis.

*s. 25 (4) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A above against a party to a marriage in favour of a child of the family who is not the child of that party, the court shall also have regard—*

*(a) to whether that party assumed any responsibility for the child's maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;*

*(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;*

*(c) to the liability of any other person to maintain the child*

Once considered the above, the Court can choose between a specific set of orders which are contained in the Matrimonial Causes Act 1973: *maintenance pending suits, periodical payment (both secured and non), distribution of properties and pension orders*. The Courts will follow the principles of "needs, compensation and equal sharing" (as articulated in the case of *Miller v Miller* and *McFarlane v McFarlane* [2006] UKHL 24).

The parties are encouraged to make their own financial arrangements after the divorce but, traditionally, agreements entered between the parties before the marriage were given little weight. The situation has gradually changed - and is now very likely to be fundamentally altered - following a string of high profile cases, in particular *Radmacher v Granatino* [2010] UKSC 42. In this case it was held that "the Court should give effect to an ante nuptial agreement that is freely entered by each party with a full appreciation of its implication unless the circumstances prevailing it would not be fair to hold the parties to their agreement" (at. p. 75, quoting *MacLeod v MacLeod (Isle of Man)* [2008] UKPC 64). Following the decision in *Radmacher*, at the time of writing, the Law Commission is examining the matter. The aim of the Law Commission is not to conduct a full-scale review, but rather to bring clarity and predictability to an area of law which is particularly complicated. A final report is expected in 2013 (see: <http://lawcommission.justice.gov.uk/news/the-future-for-prenuptial-agreements-11011.htm>).

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

In case of divorce, solicitors and the courts will use the relevant substantive law which is contained in the Matrimonial causes Act 1973 (<http://www.legislation.gov.uk/ukpga/1973/18> see question B.1).

Procedural rules are contained in the Family Procedure Rules 2010 (SI 2010/2955) (<http://www.legislation.gov.uk/uksi/2010/2955/made>) as amended by the Family Procedure Amendment Rules 2012 (<http://www.legislation.gov.uk/uksi/2012/679/contents/made>).

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

In England and Wales the Central Authority designated to facilitate the application of the Maintenance Regulation is the Lord Chancellor who delegates this duty to the

Reciprocal Enforcement of Maintenance Orders (REMO) Unit at the Office of the Official Solicitor and Public Trustee. REMO is the process by which maintenance orders made by UK courts, on behalf of UK residents, can be registered and enforced by courts or other authorities in other countries against people resident there.

Official Solicitor and Public Trustee  
81 Chancery Lane  
London  
WC2A 1DD

#### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

The Maintenance Obligations Regulations came into effect on 18 June 2011 and were directly effective as a matter of European law. It was implemented with

The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 No. 1484 (<http://www.legislation.gov.uk/ukxi/2011/1484/regulation/2/made>)

### **C. Matrimonial property regimes in Europe**

#### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

There is *no*, strictly speaking, a Matrimonial Property Regime in England.<sup>33</sup> Although, apparently, spouses and civil partners in England are subjected to a division of properties regimes, this can change if the relationship breaks down (see section B of this Report). Should this happen, the Court, using the Matrimonial Causes Act 1973, has ample powers to redistribute the properties.

In England and Wales, there is not a proposal to amend the current set up of the domestic matrimonial property regime. However, there is a Commission Law Paper looking into pre-nuptial agreements (see section B of this report). This could, *de facto*, affect matrimonial property regimes.

#### **2. Which conflict of law rules apply in matrimonial property disputes?**

Irrespective of the law governing the matrimonial property regime and irrespective of the domiciles of the parties, *an English court applies only English Law* to all matters of financial provisions and property distribution on divorce, legal separation or annulment, to financial relief after a foreign divorce and, finally, to applications for family provisions on the death of one of the spouses. In these cases the court have ample discretion. As a consequence, the importance of conflict of law rules in this area has considerably diminished (see Clarkson, 2011, Chapter 9 and R. George, 2012, both in the bibliography of this report).

#### **3. Which are the property consequences of registered partnership?**

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<sup>33</sup> Please note author's emphasis: not everybody would agree with such a blunt statement!!!

According to the Civil Partnership Act 2004, as far as properties are concerned, civil partners are in the same position as married couples. In a more general context, in *Secretary of State for Work and Pension v M* [2006] 1 FCR 467, Baroness Hale held that civil (registered) partnerships “have virtually identical legal consequences as marriage.”

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

EU Directive 2008/52 EC was (partially) implemented by the Civil Procedure (Amendments) Rule 2011 (<http://www.legislation.gov.uk/uksi/2011/88/contents/made>) and by the Cross-Border Mediation (EU Directive) Regulations 2011 (<http://www.legislation.gov.uk/uksi/2011/1133/made>).

Both of these pieces of legislation apply only to the mediation of cross-border disputes, not purely domestic ones. The Government, however, is now considering extending the national legislation to govern domestic mediations.

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Directive No 2003/8/EC is transposed into England and Wales with the following measures:

The Community Legal Service (Financial) (Amendment)

Regulations 2004 (SI 2004/2889), 9 November 2004

(<http://www.legislation.gov.uk/uksi/2004/2899/contents/made>)

The Community Legal Service (Funding) (Amendment No 2)

Order 2004 (SI 2004/2900), 30th November 2004

(<http://www.legislation.gov.uk/uksi/2004/2900/contents/made>)

Community Legal Service (Funding) Order 2007 (SI 2007/2441),

17th August 2007

(<http://www.legislation.gov.uk/uksi/2007/2441/contents/made>)

### 3. Is your country a contracting party to any bilateral or international instruments on family law?

England and Wales are a contracting party to several international agreements in family law. Amongst the most important see:

- a. The 1980 Hague Convention on the Civil Aspects on International Child Abduction

This Convention seeks to protect children from the harmful effects of parental abduction across international boundaries or the loss of contact with the so called "left-behind" parent. It establishes a procedure for bringing about the prompt return of a child wrongfully removed to or retained in another country which is a party to the Convention, or for securing access rights. Within the European Union, the Convention is supplemented by Council Regulation (EC) No 2201/2003 (commonly referred to as Brussels II A or Brussels IIbis).

- b. The 1980 European Custody Convention
- c. The 1996 Hague Convention on the International Protection of Children
- d. The 2007 Hague Convention on Maintenance

#### 4. Are there any databases or online tools providing information on family law matters available in your country?

- *Family Law Newswatch* (<http://www.familylaw.co.uk/>) is a (free) source of useful information and weekly updates in family law (case law, legislation and policy initiative/debates) at both domestic, international and EU level.
- Council of Europe:  
[www.coe.int](http://www.coe.int)
- European Judicial Network:  
<http://ec.europa.eu/civiljustice>
  - Information on divorce:  
[http://ec.europa.eu/civiljustice/divorce/divorce\\_eng\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_eng_en.htm)
  - Information on maintenance obligations:  
[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_eng\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_eng_en.htm)
  - Information on parental responsibility  
[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_eng\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_eng_en.htm)
- European Judicial Atlas in Civil and Commercial Matters
  - Matrimonial matters and matters of parental responsibility  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)
  - Maintenance obligations  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)
- International Court of Justice – The Hague:  
[www.icj-cij.org](http://www.icj-cij.org)
- Hague Conference on Private International Law:  
[www.hcch.net](http://www.hcch.net)
- International Child Abduction Database:  
[www.incadat.com](http://www.incadat.com)

- Reunite International Child Abduction Centre:  
[www.reunite.org](http://www.reunite.org)
- UN Convention on the Rights of the Child:  
[www.unicef.org/crc](http://www.unicef.org/crc)
- Conflict of Laws. Net – News and Views in Private International Law: <http://conflictoflaws.net>

**5. Please provide information on accessing and applying foreign family law your country.**

Foreign law is not automatically enforceable in England. There is, however, the Office of the Head of International Family Justice for England and Wales that is a centre of expertise and a help desk for general enquiries in the field of international family law for the judiciary and practitioners in this jurisdiction and overseas. It supports cross border judicial collaboration and enhances the expertise necessary for handling the large number of cases relating to aspects of private international law (<http://www.judiciary.gov.uk/publications-and-reports/reports/family/international-family-justice-report-2011-2012>)

There are however some instances, where foreign law has been taken into consideration in the context of domestic family law:

1. Being England a multicultural society, there have been instances where the domestic court, in deciding a case has taken into account the different backgrounds of the parties involved (see *R. v Derriviere* [1969] 53 CAR 637 and *A v T (Ancillary Relief: Cultural Factors)* [2004] 1 FLR 977).

However, in *R. v Derriviere* the Court of Appeal held that “[o]nce in this country, this country’s law must apply ...”.

2. In some cases foreign case law / legislation will have persuasive value. The most remarkable example in English Family Law is the concept of the best interest of the child that has been developed by case law, in particular the New Zealander case of *Walker v Walker and Harrison*, [1981] NZ Recent Law 257 (see question 4 in this section).

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

There are several cases involving Regulation Brussels IIbis in matters of cross-border divorce: the following are intended as an example

- ***Marinos v Marinos* [2007] EWHC 2047 (Fam).**

Judgment in proceedings under Brussels II (Revised) concerning whether the wife was habitually resident in the UK and could therefore issue a petition for divorce in the English courts. Munby J concluded that she was habitually resident.

The judgment addresses three points of law: i) what is the Community law concept of habitual residence; ii) can a person have two places of habitual residence under the Regulation and iii) is there a difference under the Regulation of the terms "habitual residence" and "reside". In reaching his conclusion that the wife did have habitual residence in the UK, Munby J reviews the facts, legislation and the relevant case law relating to these questions.

- ***Traversa v Freddi* [2011] EWCA Civ 81.**

In this case both parties were Italian and they divorced in Italy. It concerns the husband's appeal against refusal of leave to pursue an application under the Matrimonial and Family Proceedings Act 1984. Appeal successful.

### The Maintenance Regulation / Maintenance / Redistribution of foreign properties following marital breakdown

As the Maintenance Regulation has only recently become effective in the UK (June 2011), there is no relevant case law yet. There are however cases involving property disputes with a foreign element.

- ***Moore v Moore* [2007] ILPr 36.**

This case concerns the appeal by a husband, in a so called "big money case", against an order allowing the wife to apply for orders for financial relief pursuant to the MCA 73 and Part III of the Matrimonial and Family Proceedings Act 1984. The appeal was dismissed.

The issue at stake was whether the claims should go ahead in the English or Spanish courts, even though it was agreed that English law would be applied irrespective of the forum. Thorpe LJ noted the "lamentable and grotesque waste of family resources" that may have been caused by the husband's hope that the Spanish courts were more likely to decide in his favour.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

**Máire Ní Shúilleabháin**, *Cross-Border Divorce Law: Brussels IIbis*, Oxford University Press, 2010.

**Máire Ní Shúilleabháin**, "Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective", 2010, *International and Comparative Law Quarterly*, 1021 - 1053 (this is a very good historical – and critical – overview of how the legislation has evolved)

**C. Clarkson, J. Hill**, *The Conflict of Laws*, Oxford University Press, 2011 (in particular, Chapter 8 *Matrimonial Causes*, and Chapter 9, *Property*)

(53) *International and Comparative Law Quarterly*, pp. 503-518.

**J. Miles**, "England and Wales", in *Marital Agreement and Private Autonomy - in Comparative Perspective*, J. Scherpe (ed.), 2012, Hart publishing, pp. 89-121

**M. Harper, B. Frankle**, "An English Practitioner's View on Pre-Nuptial, Post-Nuptial and Separation Agreement", in *Marital Agreement and Private Autonomy - in Comparative Perspective*, J. Scherpe (ed.), 2012, Hart Publishing, pp. 122-143

**E. Cooke**, "The Law Commission's Consultation on Marital Property Agreements", in *Marital Agreement and Private Autonomy - in Comparative Perspective*, J. Scherpe (ed.), 2012, Hart publishing, pp. 144-157

**K. Boele-Woelki**, "For Better or for Worse: the Europeanization of International Family Law" *Yearbook of Private International Law*, Vol. 12 (2010)

#### Regulation Rome III: Cross-border divorce - applicable law

**T. Henderson**, "From Brussels to Rome: the Necessity of Resolving Divorce Law Conflicts Across the European Union" *Wisconsin International Law Journal* (2010), 28(4) pp. 769-794 (not UK journal but very informative)

**J.J. Kuipers**, "The Law Applicable to Divorce as Test Ground for Enhanced Cooperation" (2012), 18(2) pp. 201-221

**C. Clarkson, J. Hill**, *The Conflict of Laws*, Oxford University Press, 2011 (in particular, Chapters 8 and 9)

**A. Fiorini**, "Rome III – Choice of Law in Divorce: is the Europeanization of Family Law going too far?" *International Journal of Law Policy and the Family* 22 (2008) 178-205

**K. Boele-Woelki**, "For Better or for Worse: the Europeanization of International Family Law" *Yearbook of Private International Law*, Volume 12 (2010)

**House of Lords**, European Union Committee, 52nd Report of Session 2005-06, "Rome III- Choice of Law in Divorce"  
([www.publications.parliament.uk/pa/ld200506/ldselect/ldcom/272/27202.htm](http://www.publications.parliament.uk/pa/ld200506/ldselect/ldcom/272/27202.htm))

### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

**G. Smith**, "The Recognition and Enforcement of Maintenance Orders with the European Union: The EU Maintenance Regulation" (2011), *International Family Law*, pp.187-195

**D. Eames**, "The New EU Maintenance Regulation: a Different Outcome in *Radmacher v Granatino*?" 2011, *Family Law*, 389-393

**M Hellner**, 'The Maintenance Regulation: A Critical Assessment of the Commission's proposal' in *European Challenges in Contemporary Family Law*, K. Boele-Woelki, T. Sverdrup (eds.) Intersentia, 2008, p. 347

**P. Bremner**, "The EU Maintenance Regulation: a Qualified Success for European Family Law" 2010, Vol. 2 *King's Student Law Review*, pp. 5-25

**A. Heenan**, "**Scuppering Schofield? the impact of the EU Maintenance Regulation on claims for pension sharing**" 2012 *Family Law*, pp. 191-195

### **Matrimonial property regimes and property consequences of registered partnerships**

**C. Clarkson, E. Cooke**, "Matrimonial Property; Harmony in Europe?" (2007), 37(920) *Family Law* pp. 1-4

**E. Cooke**, "The Law Commission's Consultation on Marital Property Agreements" (2011), *Family Law* pp. 145-151

**A. Heenan**, "Pondering Property Rights: The European Commission Proposals on Property Regimes for International Couples" (2011), *International Family Law* pp. 211-214

**National section**

# **FINLAND**

**Markku Helin**

**Professor of Private Law at the University of Turku**

**Outi Kemppainen**

**Legislative Counsellor at the Ministry of Justice**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Since 1988 the Finnish law does not provide for marriage annulment and legal separation. The only way of dissolving the marital bond is divorce.

The source of law for divorce is the Marriage Act ("Avioliittolaki", "Äktenskapslagen" 234/1929) sections 25 – 32.

[Link to the Act: [www.finlex.fi/fi/laki/ajantasa/1929/19290234](http://www.finlex.fi/fi/laki/ajantasa/1929/19290234)]

Provisions concerning the proper forum are to be found in the Code of judicial procedure ("Oikeudenkäymiskaari", "Rättegångsbalken") Chapter 10 section 11. [<http://www.finlex.fi/fi/laki/ajantasa/1734/17340004000>]

Unofficial English translation of the Marriage Act can be found at the address [www.finlex.fi/fi/laki/kaannokset/1929/en19290234.pdf](http://www.finlex.fi/fi/laki/kaannokset/1929/en19290234.pdf) and of the Code of judicial procedure (later called Procedural Code) on the page [www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf](http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf)

There are no reform proposals at the moment.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

National provisions on international jurisdiction of Finnish courts can be found in section 119 of the Marriage Act. It provides two grounds of jurisdiction. According to the first one the Finnish courts have jurisdiction, if either spouse is domiciled in Finland. The notion "domicile" in Finnish law is quite near to "habitual residence". According to the doctrine, there is, however a slight difference between them, because the intention to stay in a certain state (animus remanendi) has somewhat more relevance when establishing the domicile than in the context of habitual residence.

The other ground of jurisdiction is a kind of forum necessitatis. The Finnish courts may exercise jurisdiction, if the petitioner who has a close link to Finland, cannot institute divorce proceedings in the foreign state, where either spouse is domiciled or this would cause unreasonable inconvenience to him or her. When deciding, whether it is justified to exercise jurisdiction in such a situation, the court shall take into account all the circumstances of the case.

In addition to these grounds there are some specific grounds of jurisdiction for cases, where a public prosecutor brings an action for divorce. This may happen in cases, where the marriage (by mistake) has been concluded in spite of an absolute impediment to marriage.

#### 3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

Yes. There is an Act on implementation of the Regulation Brussels IIbis which contains additional provisions needed for the application of the Regulation e.g.

determination of the competent authorities at national level and nomination of the central authority.

(“Laki tuomioistuimen toimivallasta sekä tuomioiden tunnustamisesta ja täytäntöönpanosta avioliittoa ja vanhempainvastuuta koskevista asioista annetun neuvoston asetuksen soveltamisesta”, “Lag om tillämpning av rådets förordning om domstols behörighet och om erkännande och verkställighet av domar i äktenskapsmål och mål om föräldraansvar” 1153/2004) [[www.finlex.fi/fi/laki/ajantasa/2004/20041153](http://www.finlex.fi/fi/laki/ajantasa/2004/20041153)].

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

No. The applicable law to divorce is always lex fori i.e. the Finnish law. See the Marriage Act section 120.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

See answer A. 5.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The rules are to be found in the Marriage Act, sections 48 – 51. Granting spousal maintenance after divorce is in practice rare and maintenance is normally established only for a transitory period, after which the spouse is required to support herself (himself). There are no reform proposals or reform plans. If the spouses agree on maintenance, they may submit the agreement to the social welfare board for confirmation. The agreement that is confirmed is enforceable like a final court order. If the spouses cannot agree, the case is heard by the court following the procedures provided by the Procedural Code for civil law disputes. The provisions of the right forum are to be found in Chapter 10 sections 1 and 9 of the Procedural Code.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement procedure is regulated in the Code of Enforcement ("*Ulosottoakaari*", "*Utsökningsbalken*" 705/2007).  
[\[www.finlex.fi/fi/laki/ajantasa/2007/20070705\]](http://www.finlex.fi/fi/laki/ajantasa/2007/20070705)

The creditor shall send the application for enforcement to the bailiff. If the bailiff that has received the application is not the one having competence in the case, he shall ex officio send the application to the competent one. Bailiffs in Finland are civil servants.

The ground for enforcement i.e. the court order or a decision that according to law is equivalent to a court order, shall be attached to the application. After having heard the debtor, the bailiff takes a decision on enforcement. The bailiff has several options to carry out the enforcement such as wage withholding, tax refund withholding and selling the property of the debtor.

In case the debtor has also other debts that shall be taken into account in the enforcement, the maintenance creditor is in a privileged position compared with most other creditors not having a security for their claim.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

The Central Authority is the Ministry of Justice.

**4. Are there any other national legal instruments /procedures put in place for the application of the Maintenance Regulation?**

Yes. There is an Act on the implementation on the Maintenance Regulation and an Act concerning the central authority in matters relating to cross border maintenance.

("Laki elatusvelvoitteita koskevan neuvoston asetuksen soveltamisesta", "Lag om tillämpning av rådets förordning om underhållsskyldighet" 1077/2010) [\[www.finlex.fi/fi/laki/ajantasa/2010/20101077\]](http://www.finlex.fi/fi/laki/ajantasa/2010/20101077); ("Laki Suomen keskusviranomaisesta eräissä elatusapua koskevissa kansainvälisissä asioissa, "Lag om centralmyndighet i Finland i vissa internationella ärenden som gäller underhållsbidrag" 1076/2010) [\[www.finlex.fi/fi/laki/alkup/2010/20101076?search%5Btype%5D=pika&search%5Bpika%5D=1076%2F2010\]](http://www.finlex.fi/fi/laki/alkup/2010/20101076?search%5Btype%5D=pika&search%5Bpika%5D=1076%2F2010)

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The substantive provisions on Finnish matrimonial property law can be found in the Marriage Act sec. 32 – 107 a. If a dispute arises, the case is heard by the courts following the procedures for civil law litigations in the Procedural Code. The matrimonial property regime is based on deferred community of property. During the marriage there is the separation of property. Each spouse may during the marriage freely dispose of the property owned by him or her with some exceptions concerning family home and household goods. When the marriage is dissolved the property of the spouses will however be distributed equally. The spouses may modify the distribution by making a marriage settlement. The result of the distribution may also be adjusted by a court decision, if the distribution under the circumstances of the case would lead to an unreasonable result or to unjustified enrichment of the other spouse.

There are no proposals to reform at the moment.

### **2. Which conflict of laws rules apply in matrimonial property disputes?**

The national choice-of-law provisions concerning matrimonial property regimes are in sections 129 – 138 of the Marriage Act. Another set of choice-of-law provisions is in the Nordic Convention of 6 February 1931 comprising international private law provisions on marriage, adoption and guardianship. The provisions of the Convention regarding applicable law to matrimonial property are applied, if the spouses at the time of their wedding were and still are citizens of a Nordic State and in the context of their wedding settled down in a Nordic State. The Convention ceases to apply, if the spouses later become habitually resident in a state that is not a Contracting State.

According to the Finnish national provisions the starting point is the application of the law of the state, where both spouses got domicile immediately after entering the marriage. The applicable law may change, if the spouses move their domicile to another state. As a rule, however, the change occurs only after they have lived in their new state of domicile for a period of five years. The change covers all of their assets, also the assets they had acquired before the change took place.

The spouses have an opportunity to designate the applicable law among different options available under the law by making an agreement in writing. The designated law covers all the assets belonging to spouses and it may change only if the spouses make a new designation.

The provisions of the Nordic Convention are in essence similar to the national rules, but there are numerous differences in details.

### **3. Which are the property consequences of registered partnerships?**

The property consequences of registered partnerships are identical with those of marriage.

The choice-of-law rules concerning matrimonial property regimes are in principle applicable also to registered partnerships. The application of the Nordic Convention is, however, excluded. A problem occurs, if the State the law of which is applicable

to the property regime of the registered partnership does not recognise registered partnerships in their legislation and accordingly does not have any law concerning property regimes of registered partners. It has been proposed in the doctrine that in such a case the matrimonial property regime of the state in question should be applied to registered partners.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

Directive No 2008/52/EC is transposed into Finnish law by the Act on mediation in civil matters and confirmation of settlements in general courts ("Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisissä tuomioistuimissa", "Lag om medling i tvistemål och stadfästelse av förlikning i allmänna domstolar" No 394/2011)

[[www.finlex.fi/fi/laki/ajantasa/2011/20110394](http://www.finlex.fi/fi/laki/ajantasa/2011/20110394);

Translation into English:

[www.finlex.fi/fi/laki/kaannokset/2011/en20110394.pdf](http://www.finlex.fi/fi/laki/kaannokset/2011/en20110394.pdf)]

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive No 2003/8/EC is transposed into Finnish law by amendments of the Legal Aid Act ("Oikeusapulaki" "Rättshjälpslag" 5.4.2002/257)

[[www.finlex.fi/fi/laki/ajantasa/2002/20020257](http://www.finlex.fi/fi/laki/ajantasa/2002/20020257).

Translation into English:

[www.finlex.fi/fi/laki/kaannokset/2002/en20020257.pdf](http://www.finlex.fi/fi/laki/kaannokset/2002/en20020257.pdf)]

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

Finland is a party to quite many Conventions or other international instruments on family law. The following list contains most of them, but it is not exhaustive:

- The UN Convention of 1980 of the rights of the child
- The European Convention of 1996 on the exercise of children's rights
- The European Convention of 2008 on the adoption of children
- The Nordic Convention of 1931 comprising international private law provisions on marriage, adoption and guardianship.
- The Nordic Convention of 1962 on recovery of maintenance
- The New York Convention of 1956 on international recovery of maintenance

- Convention fait à la Haye 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers des enfants
- The Hague Convention of 1970 on recognition of divorces and legal separations
- The Hague Convention of 1973 on the recognition and enforcement of decisions relating to maintenance obligations
- The Hague Convention of 1980 on the civil aspects of international child abduction
- The European Convention of 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children
- The Hague Convention of 1993 on protection of children and co-operation in respect of intercountry adoption
- The Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children
- The Hague Convention of 2000 on the international protection of adults
- Agreement of 2007 between the Government of Finland and the Government of the United States of America for the enforcement of maintenance (support) obligations.

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

Finlex ([www.finlex.fi](http://www.finlex.fi)) is a public data bank that contains Finnish legislation, secondary legislation, case-law, government bills and international treaties. The use of the database is free of charge.

In addition, there are commercial databases that contain judicial information e.g. Suomen Laki ([www.suomenlaki.com](http://www.suomenlaki.com)) and Edilex ([www.edilex.fi](http://www.edilex.fi)).

The European Judicial Network in Civil and Commercial Matters provides accessible information on Finnish family law on its website:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_fin\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_fin_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_fin\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fin_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_fin\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_fin_en.htm)

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

In family matters the court is responsible for obtaining information on the contents of foreign law. However, since there are not always efficient ways for the court to find out the content of the foreign law the parties often present evidence on the same. If no information can be obtained, Finnish law shall apply.

Judicial authorities may submit requests on information on foreign law through applicable international conventions. Finland is party to the European Convention on Information on Foreign Law. The European Judicial Network in civil and commercial matters provides also a useful tool in obtaining information from other Member States of the European Union.

A precedent of the Supreme Court of Finland concerning application of a foreign law in a case relating to spousal maintenance is KKO:2011:97.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

Helsingin hovioikeus 24.2.2012 No 539 Dno S 11/2364 (Jurisdiction of a Finnish court in a divorce case. The Finnish court had jurisdiction under Brussels IIbis, because both of the parties were Finnish nationals.)

Helsingin hovioikeus 8.6.2011 No 1760, Dno S 11/406 (Jurisdiction of a Finnish court in a divorce case. No court of a Member State had jurisdiction under Articles 3, 4 and 5 of Brussels IIbis. The question was, whether the Finnish court had jurisdiction under section 119 of the Marriage Act.)

### Maintenance Regulation

Helsingin hovioikeus 20.4.2012 No 1060, Dno S 11/3192 (Recognition of a decision concerning child maintenance. The debtor claimed that it was manifestly contrary to Finnish public order to enforce a Dutch maintenance order as far as it regards the period after the child had attained the age of 18 years. The appeal of the debtor was rejected.)

[Note: The list is not exhaustive.]

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- *Helin, Markku*. The Impact and Application of the Brussels IIbis Regulation in Finland, pp. 91-102 in Katharina Boele-Woelki and Christina González Beilfuss (eds.): Brussels IIbis: Its Impact and Application in the Member States. Intersentia 2007
- *Mikkola, Tuulikki*. Kansainvälinen avioliitto- ja jäämistöoikeus. WSLT 2009
- *Vallinen, Maarit – Helin, Markku*. Avioliiton purkaminen Suomen kansainvälisen yksityisoikeuden mukaan – tilanne Bryssel II –asetuksen ja pohjoismaisen avioliittokonvention voimaantultua. Lakimies 2001 pp. 638-658

#### Regulation Rome III: Cross-border divorce - applicable law

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#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

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#### Matrimonial property regimes and property consequences of registered partnerships

- *Helin, Markku*. Pohjoismaisen avioliittokonvention uudet määräykset. Lakimies 2008 pp. 1043-1057
- *Helin, Markku*. Ulkomaisen avioliiton ja rekisteröidyn parisuhteen tunnustamisesta. Lakimies 2002 pp. 535-554

**National section**  
**FRANCE**

**Beatrice Weiss-Gout**

**Isabelle Rein-Lescastereyres**

**Partners in the family law firm BWG Associés, Paris**

**Laurie Dimitrov**

**Associate in the family law firm BWG Associés, Paris**

**Professor Marie-Laure Niboyet**

**Counsel in the family law firm BWG Associés, Paris**

**Dr Alexandre Boiche**

**Dr Charlotte Butrille-Cardew, LL.M**

**Veronique Chauveau**

**Partners in the family law firm CBBC, Paris**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### a) **Divorce**

##### ❖ **Conflict of law rules and international rules of jurisdiction:**

- Rules of jurisdiction are to be found in Brussels IIbis (European Regulation 2201/2003) – and, on a subsidiary basis, in Articles 1070 of the French Code of Civil Procedure and Articles 14 and 15 of the French Civil Code, see question A.2 – or in bilateral conventions (see question D.3);
- Rules of conflicts of laws are to be found since 21 June 2012 in Rome III (European Regulation 1259/2010) or in bilateral conventions (see questions A.4 and D.3)

##### ❖ **French substantive law** (Articles 229 to 262-2 of the Civil Code)

There are four grounds for divorce, namely:

Divorce by mutual consent: (Articles 230 and 232 of the French Civil Code). A petition for divorce can be presented jointly by the spouses when they agree on the dissolution of the marriage as well as on all of its consequences, including liquidation of the matrimonial regime, alimony and parental responsibility. The judge may refuse to approve the agreement if he deems it insufficiently protective of one of the spouses or of the children's interests, but he has no authority to vary the spouses' agreement.

Divorce based on acceptance of the principle of the breakdown of the marriage: (Articles 233 and 234 of the Civil Code). The spouses agree on the principle of the breakdown of the marriage by signing a document attesting their agreement. They do not necessarily agree on all the consequences of the divorce and the judge makes orders with regards to what remains disputed.

Divorce on irretrievable breakdown of the marriage: (Articles 237 and 238 of the Civil Code). This divorce is granted on the sole ground that the marriage has irretrievably broken down, which is evidenced by termination of common and shared life by the spouses, where they have stopped living together for two years since the divorce summons.

Fault-based divorce: (Articles 242 to 246 of the Civil Code). The applicant spouse may invoke the other spouse's serious or repeated failings to fulfil the duties and obligations arising from marriage. The respondent may either contest such failings to have the application dismissed, or ask that the divorce be granted on the basis of both parties' faults or of the sole applicants' fault. Last, he/she can make a counterclaim based on the irretrievable breakdown of the marriage.

But for rare circumstances, the grounds of the divorce do not bear financial consequences, nor do they impact parental responsibility.

There are several bridges from one type of divorce proceedings to another, including to mutual consent divorce in all cases (Articles 247, 247-1, 238 § 2, 246 § 2 and 247-2 of the Civil Code).

❖ **French procedural law:** (Articles 1075 to 1128 of the French Code of Civil Procedure)

In case of **mutual consent divorce**, once an agreement is reached it is filed with the court's Registrar; a single hearing date is set during which if the judge decides to approve the spouses' agreement, he/she pronounces the divorce.

In case of **contested divorces**, the divorce proceedings follow the following steps:

- Petition for divorce ("requête"), without any reference to the grounds of the divorce;
- Hearing on provisional measures, which results in an order on provisional measures which can be appealed;
- "Assignment en divorce" in which one spouse must put forward one of the above-mentioned grounds for divorce;
- Hearing on the merits of the divorce as well as on its consequences;
- Liquidation of the matrimonial property regime happens after the divorce unless an agreement is reached before.

There is no reform proposal, neither of the substantive nor of the procedural rules of divorce proceedings.

**b) Annulment**

The conditions of formal validity of marriage are subject to the provisions of the law of the state where the marriage was celebrated (French Cour de cassation, June 22th 1955, "Caraslanis"; 171-1 of the French Civil Code).

The conditions of substantial validity of marriage are subject to the provisions of the law of the nationality of the spouses (Article 3 French Civil Code) with a distributive application if the spouses have different nationalities. However, for certain conditions, the marriage must be valid under both laws (for instance, polygamy, same sex marriage).

French law sets forth **conditions of opposability in France of weddings of French nationals celebrated abroad by a foreign authority** (Articles 171-1 to 171-8 of the Civil Code):

- Issuance by the local French diplomatic or consular authority of a "certificate of capacity to marry" to the French future spouse (Article 171-2 of the Civil Code);
- Formality of publicity of the wedding ("publication des bans") (Article 63 and Article 171-2 § 2 of the Civil Code);
- Audition of the spouses by the civil officer of the residence of the future spouses or, if they live abroad, of the French diplomatic or consular authority (Article 171-3 of the Civil Code);

When French law applies:

- ❖ **Conditions of formal validity under French law** (Articles 63 to 76 of the Civil Code and Articles 165 to 171 of the Civil Code);

- ❖ Conditions of substantial validity under French law (Articles 144 to 164, together with Articles 180 to 202 of the Civil Code): opposite sex marriage only, minimum age of 18 years old (otherwise the parents, or ascendants, or the family council must give their consent), presence at the ceremony required, no polygamy, prohibition of marriage for close family relations, importance of consent to marriage.

The Civil Code also sets forth grounds for annulment in cases of **flawed consent**: duress (Article 180 § 1 of the French Civil Code) including reverential fear towards an ascendant (protection against forced marriages); error as to the person, or as to his/her essential characteristics.

It shall be mentioned that there is a major legal reform expected regarding the possibility for same sex couple to get married.

**c) Legal separation** (Articles 296 to 308 of the Civil Code and Articles 1129 to 1136 of the Code of Civil Procedure)

Legal separation can be granted at the request of one of the spouses in the same cases and subject to the same conditions as divorce. Matrimonial obligations are maintained (fidelity, respect, assistance, spousal support), except for the duty of cohabitation.

The matrimonial property regime switches to separate property.

Upon request of one of the spouses, a judgment of legal separation shall be converted as of right into a judgment of divorce where judicial separation has lasted two years. In all cases of legal separation, the latter may be converted into divorce by mutual consent, without having to respect the delay of two years. If legal separation was granted on mutual consent, it may be converted into divorce only by a new joint petition. The cause for legal separation becomes the cause for divorce.

There is no reform proposal regarding legal separation.

**2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

Under Article 1070 of the French Code of Civil Procedure, the judge having jurisdiction is the one of the place of the family's residence; if the spouses live at different places, the judge of the place of the residence of the parent with whom the minor children habitually reside; when none of the above apply, the place of the defendant's habitual residence. Where there is a joint application, the spouses may choose the jurisdiction of the place where one or the other of them habitually resides.

The territorial jurisdiction is determined in relation to the residence on the date where the original petition has been brought.

Only when none of the above-mentioned criteria set forth in Article 1070 of the French Code of Civil Procedure is met in France, one can resort to subsidiary jurisdiction rules provided for in Articles 14 and 15 of the French Civil Code: French courts may be seized on the ground of the plaintiff's or the defendant's French nationality.

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

Provisions of the French Code of Civil Procedure (Articles to 509-1 to 509-7) set forth specific rules with respect to:

- Recognition and enforcement in other Member States of judgements rendered by French courts under Brussels IIbis in matrimonial matters and in matters of parental responsibility (Article 39 of Brussels IIbis):

Petitions for purposes of certification of enforceable French decisions in view of their recognition or enforcement on a foreign territory must be presented to the chief Registrar of the court which rendered the decision or approved the agreement (Article 509-1 §1 of the French Code of Civil Procedure).

- Recognition and enforcement in France of same judgments rendered by other Member States:

Petitions must be presented to the President of the Tribunal de Grande Instance, or to his delegate. No compulsory recourse to a lawyer (Article 509-2 § 2 of the French Code of Civil Procedure).

- Recognition and enforcement in other Member States of judgements rendered by French courts under Brussels IIbis on rights of access or return of a child illicitly moved or retained (Article 41 or Article 42 of Brussels IIbis)

The French court having rendered a decision on rights of access or return of a child illicitly moved or retained is the one issuing the certificate granting binding effect to the decision in the other Member States. These proceedings are exempted from the obligation to be represented by a lawyer (Article 509-1 § 2).

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

France is a country participating in the enhanced cooperation implemented by Regulation Rome III, which came into force on June 21st 2012.

The provisions of Rome III replace from then on those of Article 309 of the French Civil Code, which used to state our rules of conflict of laws with respect to the divorce itself.

Only international conventions concluded by France, prior to the entry into force of the Regulation, with countries non-participating to the enhanced cooperation, remain applicable: bilateral convention of 1981 between France and Morocco on personal and family status and judicial cooperation, bilateral convention of 1967 between France and Poland on the applicable law, jurisdiction and enforcement in matters of personal and family law. Oppositely, Slovenia being a Member State participating in the enhanced cooperation, Rome III will prevail over the provisions of the Convention between France and Yugoslavia of 1971 on the law applicable and jurisdiction in matters of personal and family law.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

For the time being, under French case law, the spouses may not choose the law applicable to their divorce during the course of the proceedings, since the right to divorce is not a right the parties can freely dispose of (“droit indisponible”) (Cour de cassation, First Civil Chamber, 4 June 2009, n°08-11872), as opposed to the financial consequences of the divorce (Cour de cassation, First Civil Chamber, 11 March 2009, n°08-13431). However, this case law may evolve in the future given the entry into force of Rome III.

**6. Are there any formal requirements applicable to the spouses’ agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Not yet to the best of our knowledge.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

❖ **Conflict of law rules and international rules of jurisdiction:**

- Rules of jurisdiction are to be found in the European Maintenance Regulation (4/2009) – also see Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 and Hague Conventions regarding rules of jurisdiction for purpose of recognition and enforcement.
- Rules of conflicts of laws are first to be found in the Hague protocol on maintenance dated 2011 or in international conventions with third party countries. See for instance the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations towards countries which are parties to this Convention and not to the Protocol.

❖ **French substantive law** (Articles 270 to 281 of the French Civil Code).

One of the spouses can be attributed an allowance intended to compensate up to a certain extent, the financial disparity that the breakdown of the marriage creates in the respective living conditions of the couple.

The amount is set according to the needs of the spouse to whom it is paid and to the means of the other spouse, by taking into account the situation at the time of the divorce and of its evolution in a foreseeable future, according to various criteria: duration of the marriage (but not duration of the cohabitation which occurred before the marriage), age and health status of the spouses, professional qualifications and occupations, consequences of the professional choices made by one spouse during marital life for educating the children and the time which must still be devoted to their education, or for favouring his or her spouse's career to the detriment of his or her own, estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime, existing and foreseeable rights, respective situations as to retirement pensions (Article 271 of the Civil Code)

The modalities of the payment (Articles 274 to 276-1 of the French Civil Code):

- Principle: a lump sum capital paid at once when the divorce is final. However, when the debtor cannot pay the whole amount of the lump sum capital in one time, the judge can decide that payment will be made in the form of several instalments within eight years;
- Exception: when the age or the health of the creditor does not allow him/her to support himself/herself, the judge can fix the compensatory allowance in the form of a life annuity.

Monthly alimony is the only instance under which the amount of spousal maintenance may be revised, suspended or suppressed in case of a significant change in the resources or needs of either party. It shall be noted that the revision may only occur **downwards** (Article 276-3 of the French Civil Code) and that the debtor of the alimony may always ask for a conversion of whole or part of the annuity into a capital. The creditor may make the same demand if he/she establishes a modification in the debtor's situation, for instance pursuant to the liquidation of the matrimonial property regime (Article 276-4 of the French Civil Code).

- ❖ **French procedural law**: Articles 1079 to 1080 of the French Code of Civil Procedure.

There are no expected reform proposals in this area to the best of our knowledge.

## 2. Please describe the national enforcement procedure applicable in the case of maintenance claims.

### ❖ **Civil proceedings:**

#### a- Specific proceedings

- Payment by a third party ("paiement direct") (Law n°73-5, January 2<sup>nd</sup> 1973; Decree n°73-216, March 1<sup>st</sup> 1975):

The creditor can obtain alimony payment from a third party who owes money to the debtor (his employer, a welfare agency...). This procedure (via a bailiff) can be implemented as soon as the debtor fails to pay one monthly payment of the maintenance. This procedure applies to past alimony over the last 6 months as well as to future alimony, and costs are supported by the debtor.

- Payment by public authorities – "procédure de recouvrement public" (Law n°75-618, July 11<sup>th</sup> 1975; Decree n°75-1139 December 31<sup>st</sup> 1975) :

The creditor can obtain outstanding payments and future payments through agents of the Public Treasury, provided that he/she proves that he failed to obtain maintenance owed by using a private enforcement procedure (payment by a third party for instance). The application is sent to the District attorney by a registered letter with acknowledgment. Once he/she has made such a demand, the creditor cannot engage in any other action to enforce maintenance.

- Social Insurance Code (Article L.581-1) provides that the Family Allowance Funds can be seized by the creditor of child support to recover unpaid maintenance. The Fund allocates to the creditor a Family Support Allowance as an advance on the sums owed by the debtor. When the Fund obtains the payment by the

debtor, it recovers the amount of the Family Support Allowance and pays the difference to the creditor. If the creditor agrees, the Fund can also recover the payment of other unpaid maintenance, for instance between spouses.

b- Ordinary enforcement proceedings (Law n°92-644, July 13<sup>th</sup> 1992; Decree n°92-755, July 31<sup>st</sup> 1992) such seizure on a banking account, can also be used to recover the amount of unpaid alimony.

❖ **Criminal proceedings (Article 227-3):** Abandonment of the family is a criminal offense that consists of not paying alimonies owed under a court decision during more than two months. The punishment can be up to two years imprisonment and a fine of €15,000.

### 3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?

Ministère des Affaires étrangères et européennes  
Direction des Français à l'étranger et de l'administration consulaire  
Service des conventions, des affaires civiles et de l'entraide judiciaire  
Sous-direction de la protection des droits des personnes  
Bureau du recouvrement de créances alimentaires à l'étranger  
27, Rue de la Convention  
CS- 91533  
F - 75732 PARIS CEDEX 15  
Téléphone: + 33 (0)1 43 17 91 99  
Fax : +33 (0)1 43 17 81 97  
Boîte fonctionnelle électronique : [recouv-creances-alimentaires.fae-saj-pdp@diplomatie.gouv.fr](mailto:recouv-creances-alimentaires.fae-saj-pdp@diplomatie.gouv.fr)

### 4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?

Articles to 509-1 to 509-7 of the French Code of Civil Procedure have been modified to cover decisions on maintenance (Decree n°2011-1043 of 1 September 2011).

The authority designated under Article 27(1) of the Maintenance Regulation (*Jurisdiction of local courts*) is the President of Tribunal de Grande Instance or the President of the Chamber of Notaries.

The authority designated under Article 32(2) of the Maintenance Regulation (*Appeal against the decision on the application for a Declaration of enforceability*) is the Court of Appeal (Cour d'appel).

The procedure provided for in Article 33 of the Maintenance Regulation (*Proceedings to contest the decision given on appeal*) is a "pourvoi" before the Cour de Cassation. These proceedings are governed by the rules laid down in Articles 973-982 and 1009-1031 of the French Code of Civil Procedure.

Last, the review procedure provided for in Article 19 of the Maintenance Regulation takes the form of an appeal brought before the Court of Appeal with jurisdiction over the lower court that issued the contested decision.

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

In the absence of international rules of conflict of jurisdiction, international jurisdiction is dealt with by extending internal rules of jurisdiction (Articles 42 and 46 §3 of the French Code of Civil Procedure, together with Article 267 of the French Civil Code) and, on a subsidiary basis, by applying Articles 14 et 15 of the French Civil Code.

Articles 1387 to 1581 of the French Civil Code govern matrimonial property regimes.

The spouses may conclude any marriage agreements with respect to property as long as these agreements comply with the imperative rules of French law set forth under Articles 212 to 226 of the Civil Code ("primary regime").

- Failing any specific agreement, the default regime applicable under French law is the community of property limited to acquisitions:

This community is composed of acquisitions made by the spouses together or separately during the marriage, and coming both from their personal activity and from savings from their income including the income generated by their personal property.

Property acquired before the marriage, or during the marriage, through inheritance, gift, or legacy remains separate.

Debts prior to the marriage, or related to inheritance and gifts remain personal while debts which originate during the time of the marriage are common.

Any transfer of value from personal property to the community or from the community towards personal assets is subject to reimbursement with specific calculation rules that take into account the added value of the investment.

- Others matrimonial property regime may be chosen by the spouses, which they may freely adapt as long as their agreement remains in compliance with the above-mentioned imperative rules:

#### Community of chattels and acquisitions (Article 1498 of the French Civil Code)

It used to be the matrimonial property regime applicable by default prior to the community of property limited to acquisition. The only differences with the latter is that chattels acquired prior to the marriage or transferred to one spouse by inheritance or gift during the marriage are also part of the community, unless otherwise stipulated.

#### Universal Community (Article 1526 of the French Civil Code)

All assets acquired either before or after the marriage are common. The universal community correlatively encompasses all the debts of the spouses.

#### Separation of property (Article 1536 of the French Civil Code)

Each spouse's properties remain personal.

Each spouse remains solely liable for his/her own debts before or during marriage, except for what is provided in Article 220 (household expenses).

#### Participation in acquisitions (Article 1569 of the French Civil Code)

During the marriage, that regime operates as if the spouses were married under the regime of separation of property.

Upon the dissolution of the regime however, each spouse is entitled to participate by half in the net acquisitions made by the other spouse during the course of the marriage.

There is no reform proposal in the area of matrimonial property regimes to the best of our knowledge.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

### ❖ If the marriage was entered into before 1 September 1992:

French common law rules of international private law apply:

- application of the law chosen by the spouses if they have made such a choice,
- failing such a choice, research of the intent of the parties; the place of the first matrimonial domicile plays a predominant part among other criteria.

### ❖ If the marriage was entered into after 1 September 1992:

France is party to the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, which entered into force in France on 1 September 1992 and, has an universal scope.

Under the Convention the spouses may designate the internal law applicable to their matrimonial regime before the marriage (for instance in a marriage contract) among the following laws: the law of any State of which either spouse is a national at the time of designation, the law of the State in which either spouse has his habitual residence at the time of designation, the law of the first State where one of the spouses establishes a new habitual residence after marriage, as regards their real property, the law of the State where it is located (Article 3 of the Convention).

As a principle, if the spouses, before their marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State in which they establish their first habitual matrimonial residence (Article 4 of the Convention).

However, the law of the common nationality of the spouses may apply under rare circumstances.

If the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all circumstances into account, it is most closely connected.

Furthermore, there are exceptions to the general rule of the application of the law of the first matrimonial residence resulting from automatic, or voluntary, mutability of the law applicable to matrimonial property regime.

### **3. Which are the property consequences of registered partnerships?**

#### **a- Rules of conflict of laws**

Insofar as the proposal of EU Regulation on patrimonial effects of civil partnerships has not been adopted yet, the rules of conflict of laws remain governed by Article 515-7-1 of the French Civil Code which provides that the conditions of formation and the effects of registered partnerships as well as the causes and the effects of its dissolution are governed by the law of the State of registration of the partnership.

However, Article 515-7-1 of the French Civil Code seems not to cover maintenance obligations between partners (which should probably be governed by the Maintenance Regulation n°4/2009) and Article 1-1 of the Hague Protocol of 23 November 2007, nor social as well as inheritance rights.

#### **b- Rules of French internal law (Articles 515-1 to 515-7 of the French Civil Code)**

The rules governing the property consequences of registered partnerships are different depending on whether the civil partnership has been registered before or after January 1st 2007.

If the civil partnership has been registered before January 1st, 2007 (before the provisions of the June 23rd 2006 Act came into force), unless stated otherwise in the partnership agreement or in the deed of acquisition, properties shall be deemed undivided in halves. It shall be likewise when the date of acquisition of that property may not be established.

If the civil partnership has been registered after January 1st, 2007, each partner remains sole owner of all the property acquired before the civil partnership, but also of all the properties acquired after it, unless otherwise provided for in their agreement.

Each partner is bound by his/her personal debts that were born before or after the civil partnership, except for the debts that were made for the interest of the couple.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The ordinance 2011-1540 of November 16th 2011 and the decree 2012-66 of the 20th of January have transposed in France the Directive n° 2008/52/EC on certain aspects of mediation in civil and commercial matters.

The ordinance provides for a very large definition of mediation: any structured process, regardless of its name, by which one or several parties try to reach an agreement in view of the amicable resolution of their dispute, with the help of a third party, the mediator, chosen by them or designated, with their consent, by the judge having jurisdiction over their dispute.

The ordinance describes the necessary qualities of the mediator: competence and fairness. The mediator has an obligation of diligence. The French law regulates the access to the profession, which requires to pass the state diploma of family mediator (Articles R451-66 to R461-72 of the French Code of Social and Family Action).

Mediation is confidential, unless otherwise provided for in the contract. However, there are some exceptions (imperious reasons of public policy, reasons related to the protection of the child's superior interest or to a person's physical or psychological integrity, and when the disclosure is necessary in order to enforce the agreement reached during the mediation). As regards judiciary mediation, the judge who has ordered the mediation must be informed of the success or failure of the process, but not of the reasons why the mediation failed.

The agreement reached during the process of the contractual mediation can be approved by the judge, and will therefore be enforceable.

Pre-existing rules regarding family mediation and allowing the judge to summon their parties to attend one information session remained applicable (Articles 255 and 373-2-10 of the French Civil Code).

The 13th December 2011 (2011-1862) Statute makes family mediation concerning measures related to children an obligation (Article 15 of this Statute applies in replacement of Article 373-2-13 of the Civil Code until 31 December 2014 for experimental purposes). Exceptions exist if the parties ask jointly a judicial approval of their agreement, if there is a legitimate reason not to have recourse to mediation, or if there is a risk of a breach of their right to access to a judge during a reasonable delay.

According to the June 17th 2008 Statute, prescription is suspended as of the day the parties decided to have recourse to mediation.

The 22nd December 2010 (2010-1609) Statute has created the "convention de procédure participative" (Articles 2062 to 2068 of the French Civil Code and Articles 1542 to 1554 of the French Code of Civil Procedure). This contract can be concluded for divorce and legal separation matters, even though the parties are not free to dispose of their rights in these matters (Articles 2064 and 2067 of the French Code of Civil Procedure). During the process, the parties cannot bring suit before the court, unless they can bring evidence of an emergency or if one of the parties has breached the contract. Their agreement still needs to be submitted to the judge.

Last, many French lawyers are now trained in collaborative law but collaborative law is not part of the French Code of Civil Procedure yet.

## **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

This directive has been transposed into French law by Law n°2005-750 of 4 July 2005, Decree n°2005-1470 of 30 November 2005, an unbinding administrative Regulation of 29 March 2006, and Law n°2007-210 of 19 February 2007.

French law n°91-647 of 10 July 1991 already provided that people with limited financial resources could be elected for legal aid.

The main purpose of the transposition of Directive n°2003/8/EC was to adapt national rules to fully comply with European Union law:

- Legal aid is deemed subsidiary to other mechanisms supporting legal costs such as insurance contracts or other schemes of legal protection.
- Nationals of a third country who reside regularly in a Member State are eligible to legal aid.
- In civil and commercial cases, a person whose financial resources exceed the threshold for legal aid can still be eligible to legal aid in France provided that he/she proves that he/she cannot meet legal costs given the differences in living standards between France and the State where he/she resides.
- Extension of the legal aid allowance to enforcement proceedings in France of a court decision rendered in another Member State.
- Legal aid may cover the costs that result from the cross-border nature of a procedure (for instance, costs of translation, travel fees, etc.).
- A litigant can have access to a lawyer even before he/she is elected to legal aid. French law deals with this commitment through dispositions related to "access to law", under which, for instance, free consultations with lawyers are offered to the public, regardless of their financial resources, in courts, city halls, etc.

### 3. Is your country a contracting party to any bilateral or international instruments on family law?

France is a party to several multilateral or bilateral conventions:

#### Hague Conventions

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; and
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

It shall be noted that the former has been replaced by the latter in most instances. The 1961 Convention remains however applicable between France and Turkey since Turkey has not yet ratified the Convention of 1996.

Regarding rules of jurisdiction, it shall also be reminded that the provisions of Brussels IIbis prevail over those of the 1996 Hague Convention, except where the dispute concerns children residing in **a State which does not belong to the European Union and is a party to the 1996 Hague Convention.**

- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

The Maintenance Regulation only applies with respect to decisions rendered by European Member States. The 1973 Hague Convention remains applicable to recognition and enforcement of decisions rendered by non European Member States parties to this Convention.

- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, which has now been replaced in France by the :

- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations which entered into force on 18 June 2011 but for relations with non European Member States parties to the 1973 Hague Convention.
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

#### New York Convention (ONU)

Convention of 20 November 1989 on the Rights of the Child

#### Bilateral Conventions

Among the very numerous bilateral conventions signed by France, as legal professionals in family law, we are mainly faced with the application of the following ones:

- Convention between France and Algeria concerning children born from separated Franco-Algerian couples dated 21 June 1988
- Convention between France and Morocco on personal and family law and judicial cooperation dated August 10th 1981
- Convention between France and Tunisia on judicial cooperation with respect to children's rights of custody, rights of access and child support dated March 18th 1982
- Convention between France and Yugoslavia on applicable law and jurisdiction in family law matters dated May 18th 1971, which now applies between France and Serbia, Bosnia-Herzegovina and Slovenia.

Furthermore, numerous bilateral conventions between France and African countries organize judicial cooperation, recognition and enforcement of judicial decisions in civil law matters, such as for instance:

- Convention between France and Morocco on mutual judicial cooperation, enforcement of judgments and extradition dated 5 October 1957
- Convention between France and Tunisia on judicial cooperation in civil and commercial matters and on recognition and enforcement of judicial decisions (and additional protocol) dated June 28th 1972

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

The most famous and commonly used website on French law (legislation, case law, treaties) is [www.legifrance.fr](http://www.legifrance.fr).

There are also different websites providing information on family law matters:

- General websites on family law  
[www.service-public.gouv.fr](http://www.service-public.gouv.fr)  
[www.impots.gouv.fr](http://www.impots.gouv.fr)

[www.courdecassation.fr](http://www.courdecassation.fr)

[www.senat.fr](http://www.senat.fr)

[www.assemblee-nationale.fr](http://www.assemblee-nationale.fr)

[www.notaires.fr](http://www.notaires.fr) and [www.paris.notaires.fr](http://www.paris.notaires.fr)

[www.social-sante.gouv.fr](http://www.social-sante.gouv.fr)

<http://lemondedudroit.fr/>

[www.textes.justice.gouv.fr](http://www.textes.justice.gouv.fr)

[www.vos-droits.justice.gouv.fr](http://www.vos-droits.justice.gouv.fr)

<http://vosdroits.service-public.fr/particuliers/N10.xhtml>

- Divorce  
[http://ec.europa.eu/civiljustice/index\\_fr.htm](http://ec.europa.eu/civiljustice/index_fr.htm)
- Access to origins  
[www.cnaop.gouv.fr](http://www.cnaop.gouv.fr)
- Adoption  
<http://abandon-adoption.hautetfort.com/>  
[www.adoption.gouv.fr](http://www.adoption.gouv.fr)  
[www.agence-adoption.fr](http://www.agence-adoption.fr)  
[www.hcch.net](http://www.hcch.net)  
[www.diplomatie.gouv.fr](http://www.diplomatie.gouv.fr)
- Maintenance  
[http://ec.europa.eu/civiljustice/index\\_fr.htm](http://ec.europa.eu/civiljustice/index_fr.htm)
- Family allowance funds  
[www.caf.fr](http://www.caf.fr)  
[www.unaf.fr](http://www.unaf.fr)
- Children  
[www.miviludes.gouv.fr](http://www.miviludes.gouv.fr)
- Civil status  
[www.ciec1.org](http://www.ciec1.org)  
[www.etat-civil.legibase.fr](http://www.etat-civil.legibase.fr)
- Donation and inheritance  
[www.arert.eu/?lang=fr](http://www.arert.eu/?lang=fr)  
[www.successions-europe.eu/fr/home](http://www.successions-europe.eu/fr/home)
- Marriage  
[www.mariage.gouv.fr./plan.php3](http://www.mariage.gouv.fr./plan.php3)

The website of the European Judicial Network in civil and commercial matters is, of course, a source of useful information both in terms of European law and in terms of national laws of the EU Member States (<http://ec.europa.eu/civiljustice>).

Regarding international (international conventions notably) and foreign laws, [www.hcch.net](http://www.hcch.net) but also the website jafbase, set up by a French judge at the Cour de cassation, Cyril Roth (<http://www.jafbase.fr>) are of great use.

The website of the DBF (Délégation des Barreaux de France) (<http://www.dbfbruxelles.eu>) is also of interest, as well as :

[www.incadat.com](http://www.incadat.com)

[http://ec.europa.eu/civiljustice/index\\_fr.htm](http://ec.europa.eu/civiljustice/index_fr.htm)

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_fr.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_fr.htm)

<https://e-justice.europa.eu>

[www.diplomatie.gouv.fr](http://www.diplomatie.gouv.fr)

[www.eur-lex.europa.eu/n-lex/index\\_fr.htm](http://www.eur-lex.europa.eu/n-lex/index_fr.htm)

[http://ec.europa.eu/civiljustice/index\\_fr.htm](http://ec.europa.eu/civiljustice/index_fr.htm)

## **5. Please provide information on accessing and applying foreign family law in your country.**

Under the current case law of the French Cour de cassation, it rests with the French judge, who acknowledges that a foreign law is applicable, to research, either on its own initiative or at the request of a party, with the assistance of the parties or personally if necessary, the content of the foreign law (Cour de cassation, Commercial Chamber, 28 June 2005, Itraco, n° 02-14686, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007049938&fastReqId=400702208&fastPos=1> ; Cour de cassation, First Civil Chamber, 28 June 2005, Aubin, n° 00-15734, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007052360&fastReqId=824513731&fastPos=1>).

If the judge is faced with an impossibility to establish such content, he/she will apply French law on a subsidiary basis. This was notably the case in an instance where the judge was unable to establish the content of Byelorussian filiation law due to the insufficient information provided both by the Service of the European and International affairs of the Ministry of Justice to which the judge had made inquiries, and by the parties themselves. (Cour de cassation, First Civil Chamber, 21 November 2006, n°05-22002). <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007053352&fastReqId=454668932&fastPos=1>

Therefore it remains essential that the party who invokes the application of a foreign law provides the judge with the means of properly applying it, for instance by way of an affidavit drafted by an expert foreign lawyer ("certificat de coutume"). No cross-examination of the expert who issued the affidavit is provided for under French law.

As for the judge, he/she may order the same measures of investigation as those available regarding the evidence of facts, such as ordering an expertise made by a foreign lawyer appointed by the judge (Articles 10 of the Code of Civil Procedure).

The judge may also ask for the parties' assistance, such as the production of a "certificat de coutume", and may draw all the relevant conclusions from their abstention or refusal (Article 11 of the Code of Civil Procedure).

Judges may also use the systems of judicial cooperation implemented by the Council of Europe, such as those put into place pursuant to the London Convention on information on foreign law of 7 June 1968, or by the Hague Conference (cooperation between Central Authorities). Lastly, within the European Union, French judges may have recourse to the framework of the European Judicial Network in civil and commercial matters to directly question judges of other Member States (See Decision n°568/2009 CE of the Parliament and of the Council of 18 June 2009).

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

**French Cour de Cassation, First Civil Chamber, 11 July 2006, n°04-20405:** in France, the time of the seizing of the court for the purpose of Article 16 of Brussels II bis is the date of the filing of the “Requête en divorce”, ie the petition for divorce (before the conciliation hearing).

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007055728&fastReqId=515583774&fastPos=1>

**French Cour de Cassation, First Civil Chamber, 11 June 2008, n° 06-20042:** in case of filing of two petitions in two different Member States on the same day (here England France), the judge must look at the time of the filing to determine which court was first seized for the purpose of the application of the imperative rule of lis pendens stated under Article 19 of Brussels IIbis.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019001679&fastReqId=1843493599&fastPos=1>

**French Cour de Cassation, First Civil Chamber, 24 September 2008, n°07-20248 :** the Cour de cassation ruled that there was no hierarchy between the various criteria set forth in Brussels IIbis, Article 3. This ruling was confirmed by the **Hadadi decision** rendered by the Court of Justice of the European Union on 16 July 2009 (**C-168/08**).

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019535725&fastReqId=1080632422&fastPos=1>

**Cour de Cassation First Civil Chamber, 17 June 2009 n°08-12456:** the Cour de Cassation ruled that when the court of a non Member State had been seized:

- the court of a Member State should apply its own rules of lis pendens, and that
- jurisdiction of French courts based on Brussels IIbis (at the time Brussels II) does not exclude any other international jurisdiction.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020767994&fastReqId=1074491248&fastPos=1>

**French Cour de Cassation, First Civil Chamber, 17 February 2010, n°07-11648** after having referred to the Court of Justice of the European Union (**Hadadi, 16 July 2009, C-168/08**) : Brussels IIbis allowed binational spouses to put forward either of their common nationality as a ground for jurisdiction without any regards to the effectiveness of their nationality.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021854718&fastReqId=1981207490&fastPos=1>

**Cour de Cassation, First Civil Chamber, 12 January 2011, n° 09-71540:**

Article 14 of the French Civil Code remains a subsidiary criterion of jurisdiction pursuant to Article 7 of Brussels IIbis.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023434313&fastReqId=609869733&fastPos=1>

See also, for a prior instance, **Cour de cassation, First Civil Chamber, 30 September 2009 n°08-19793:**

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021105477&fastReqId=1923630232&fastPos=1>).

## Maintenance Regulation

It is too early to have any French case law applying the Maintenance Regulation but we may remind one of the most important ruling made by the Cour de cassation under Brussels I, which was formerly applicable to maintenance obligations:

**Cour de Cassation, First Civil Chamber, 12 December 2006, n° 04-15099:** a French court having jurisdiction to rule on the divorce of spouses also has jurisdiction to determine the amount of maintenance due by one spouse to the other as spousal support during the time of the divorce proceedings on the ground of Article 5-2 of Brussels I.

Pursuant to the case law of the Court of Justice of the European Union (CJCE De Cavel II C-120/79, 6 March 1980 and Van den Boogaard, C-220/95, 27 February 1997), which defines the notion of maintenance obligations, the same solution would apply to the compensatory allowance paid to one spouse after divorce.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- H. Fulchiron et C. Nourissat (dir.), Le nouveau droit communautaire du divorce et de la responsabilité parentale, Dalloz, 2005.
- B. Ancel et H. Muir Watt, « La désunion européenne : le règlement dit « Bruxelles II », RCDIP 2001, p. 416.
- P. Guez, La notion de résidence habituelle au sens du règlement « Bruxelles II bis », Gaz. Pal. 2005, rec. 2005, doct. P. 64.

#### Regulation Rome III: Cross-border divorce - applicable law

- P. Hammje, Le nouveau règlement (UE) n° 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, RCDIP 2011, pp. 291-338.
- G. Lardeux, Rome III est mort. Vive Rome III!, D 2011, p. 1835.
- A. Devers et M. Farge, Le nouveau droit international privé du divorce. - À propos du règlement Rome III sur la loi applicable au divorce, droit de la famille 2012, n° 6, étude 13.
- M. Revillard et R. Crône, Le règlement Rome III sur les divorces internationaux, Analyse et formules sur le choix de loi applicable, La revue du notariat, n°11, 15 juin 2012, p. 560-568.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- Recouvrement des obligations alimentaires dans l'Union, dossier AJ famille, n° 3/2009, avec les contributions de Cyril Nourissat, La loi applicable, p. 101, Alexandre Boiché, Les règles de compétence judiciaire, p. 107, Bente Soerensen, Suppression de l'exequatur, p. 112, Marie Salord, La coopération entre autorités centrales, p. 114, Marie Salord, Un accès effectif à la justice pour les enfants : aide judiciaire gratuite, p. 118.
- M. Farge, Promotion transfrontière du droit à obtenir des aliments : l'apport du règlement CE n. 4/2009 du 18 dec. 2008, Droit de la famille sept et oct 2011.
- B. Ancel, H. Muir Watt, Aliments sans frontières, RCDIP 2010. 457.

#### Matrimonial property regimes and property consequences of registered partnerships

##### Matrimonial property regimes

- H. Peroz, E Fongaro, Droit international privé patrimonial de la famille, Pratique notariale, Litec, 2010.
- C. Butruille-Cardew, « Les contrats nuptiaux internationaux », Revue Lamy Droit civil, 2012-91.
- C. Chalas, C. Butruille-Cardew, « Interrogations sur la validité en droit international privé des accords préparatoires », JCP N, 2007, 1257.

- G. Khairallah, La volonté dans le droit international privé commun des régimes matrimoniaux, Mel. Revillard, Défrénois, 2007, p. 200 et s.

Property consequences of registered partnerships

- Buschbaum, Markus and Simon, Ulrich, Les propositions de la Commission européenne relatives à l'harmonisation des règles de conflit de lois sur les biens patrimoniaux des couples mariés et des partenariats enregistrés, RCDIP 2011, pp. 801- 816.
- Hammje, P., Réflexions sur l'article 515-7-1 du Code civil. Loi n° 2009-526 du 12 mai 2009, article 1er, RCDIP 2009, p. 483.
- Goldstein, G. and Muir Watt, H., La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés - Etude par Gerald Goldstein et Horatia Muir Watt, Journal du Droit international, 2010.
- Peroz, H., La loi applicable aux partenariats enregistrés, JDI 2000, p. 400.
- Callé, P., Introduction en droit français d'une nouvelle règle de conflit propre aux partenariats enregistrés, Défrénois 2009, p. 38 989.

**National section**

# **GERMANY**

**Ulrike Janzen**

**Legal advisor, Private International Law Unit,  
German Ministry of Justice**

## I. NATIONAL LEGISLATION<sup>34</sup>

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The substantive law of divorce is regulated in §§ 1564 et seqq of the Bürgerliches Gesetzbuch (Civil Code = BGB). Divorce has to be requested by at least one of the spouses; it can only be pronounced by decision of a court and terminates the marriage when the decision becomes final ("res iudicata"). There is just one ground for divorce, which is the breakdown of the marriage. As a rule, divorce is possible only if the spouses have lived apart for at least one year (§ 1565 BGB) (exceptions are provided for in the law).

Provisions on the annulment of marriage are found in §§ 1313 et seqq. BGB. Annulment can be pronounced by decision of a court upon application of a spouse, or in certain circumstances on application of the competent authority or – in case of bigamy – of the previous spouse (§ 1316 BGB) within the deadline provided for in § 1317 BGB. The grounds for annulment are listed in § 1314 BGB, annulment is excluded in the circumstances described in § 1315 BGB.

The institute of legal separation is inexistent in German law.

Procedural rules on divorce and annulment of marriage can be found in §§ 121 et seqq of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG – Code of Family Procedure). Special rules for divorce are contained in §§ 133 to 150 FamFG. It should be noted, in particular, that there is a concentration of competence for divorce and related matters ("Folgesachen"), which are to be decided by the court dealing with the divorce. "Folgesachen" are matters concerning the sharing of pensions rights ("Versorgungsausgleich"), maintenance, the use of the family home and the matrimonial property, as well as – under certain conditions – matters of custody or contact for children of the spouses (see § 137 FamFG for details). Divorce and annulment of marriage proceedings require the parties to be represented by a lawyer.

For cases falling within the scope of the Brussels IIa Regulation, the Internationales Familienrechtsverfahrensgesetz (International Family Law Procedure Act = IntFamRVG) refers to the general rules of procedure as explained in the previous subparagraph (§ 14 IntFamRVG).

There are currently no proposals for reform pending.

An English translation of the BGB is available in the internet (see D. 4).

#### 2. In case no court of a member state has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

The subsidiary rule of national law is § 98 of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit

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<sup>34</sup> Editorial deadline: April 2012.

(FamFG – Code of Family Procedure). It states that German courts have jurisdiction in matters of divorce or annulment of marriage if

- a) one of the spouses is German or was German when the marriage was concluded;
- b) both spouses have their habitual residence in Germany;
- c) one of the spouses is stateless and has his or her habitual residence in Germany;
- d) one of the spouses has his or her habitual residence in Germany, unless the divorce decision would manifestly be refused recognition by the State(s) of which the spouses are nationals.

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

The framework and special rules concerning the application of the Brussels IIbis Regulation (and the 1980 Hague Convention, the 1980 Luxembourg Convention and the 1996 Hague Convention) are contained in the Internationales Familienrechtsverfahrensgesetz (IntFamRVG). An English translation is available in the internet (see D.4).

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Not decided yet.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Not decided yet.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Substantive law on maintenance has been reformed in 2007 (applicable since 1 January 2008). The substantive rules on spousal support after divorce are in §§ 1569 to 1586b Bürgerliches Gesetzbuch (Civil Code = BGB). The general rule stipulates that after divorce, each spouse has to provide for his or her own maintenance (§ 1569 BGB). Maintenance claims of spouses after divorce exist only if and to the extent that the other spouse is unable to maintain himself or herself, for instance because of the care for a child under 3 years (§ 1570 BGB), because of age (§ 1572 BGB), illness (§ 1572 BGB), unemployment, or insufficiency of the achievable income

to maintain the spouse (§ 1573 BGB), during the time of finishing a professional education (§ 1575 BGB), or by reason of equity (§ 1578 BGB). No maintenance can be claimed by a spouse who is able to maintain him- or herself through his or her own income or property. The amount of maintenance is determined in accordance with the marital standard of living, and comprises all the necessities of life (§ 1578 BGB). The divorced spouses have a duty to each other to provide, on request, information on their income and their assets (§ 1580 BGB). If the maintenance debtor is unable to pay maintenance without endangering his or her own appropriate maintenance, he is obliged to pay maintenance only to the extent that is equitable, taking into account the needs and the earnings and property situation of the divorced spouses (§ 1581 BGB). The ranking of several maintenance creditors is regulated in § 1609 BGB, which gives priority to minor children (for details see the text of that provision).

Maintenance is to be paid in form of a periodical payment (usually per month) (§ 1585 BGB). Spouses may make agreements on spousal maintenance after divorce (§ 1585c BGB); if such agreement is made before the divorce decision becomes effective, the agreements need recording in a notarial deed (§ 1585c BGB).

Special procedural rules concerning maintenance are to be found in §§ 231 to 245 FamFG and, concerning provisional measures, in §§ 246 to 248 of the Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG – Code of Family Procedure). Particular attention should be given to the special rules introduced in cases falling within the scope of international or EU instruments such as the Maintenance Regulation, which are contained in the Auslandsunterhaltsgesetz (Act on the Recovery of Maintenance abroad). They introduce e. g. a competence for certain Family Courts for cases falling within the scope of the AUG (in particular, Maintenance Regulation, Lugano Convention as far as maintenance is concerned – see §§ 28 and 35 AUG). The aim is to ensure that those specialised Family Courts can accumulate knowledge and experience in international family cases.

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement of maintenance claims follows the rules of the Zivilprozessordnung (Code of Civil Procedure, ZPO), see § 95 paragraph 1 No. 1 FamFG. The rules on enforcement are found in Book 8 of the ZPO (for an English translation, see D.4). The details are quite complex and not easy to expose in this limited framework. Precondition for the enforcement is (as a rule) the existence of an enforceable title (enforceability can be provisional), the delivery of an enforceable execution copy (vollstreckbare Ausfertigung, §§ 724 to 727 ZPO), and the notification of that title on the debtor (§ 750 ZPO).

A possibility for enforcement of maintenance claims is the attachment of claims (such as salary or bank accounts) (see §§ 828 et seqq ZPO). However, there are special rules limiting the extent to which such claims can be made subject to attachment in order to avoid that the amount necessary to allow for the debtor to cover his or her basic needs is endangered. Maintenance claims are enforceable to a greater extent than other claims (see § 850d ZPO for details).

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

Bundesamt für Justiz, 53094 Bonn ([www.bundesjustizamt.de](http://www.bundesjustizamt.de))

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

Auslandsunterhaltsgesetz (AUG), see question B.1.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Under German law, failing another agreement between the spouses, the statutory matrimonial property regime is the so-called “community of accrued gains” (§§ 1363 to 1390 Bürgerliches Gesetzbuch (Civil Code = BGB)). In reality, it is a system of separation of goods, combined with an obligation for equalisation of “accrued gains” in case of termination of the marriage (either through divorce or annulment, or by death). In case of termination of the marriage by death of one of the spouses, § 1371 BGB applies. As a rule, the surviving spouse receives an additional share in the succession, which is  $\frac{1}{4}$ , as a “lump sum” for the equalisation of accrued gains without any need to find out the exact amount of “accrued gains”, if there were any (for exceptions and details see § 1371 BGB). In other cases of termination of the marriage, the equalisation of accrued gains takes place in accordance with §§ 1372 to 1390 BGB. Accrued gains means the amount by which the final assets of a spouse exceed the initial assets (§ 1373 BGB). If the accrued gains of one spouse exceed the accrued gains of the other spouse, the half of the surplus is due to the other spouse as an equalisation claim (§ 1378 BGB). Detailed rules on how to determine the property of each spouse in the beginning and at the end of the marriage are contained in §§ 1375 et seq. BGB.

Spouses may agree on a different property regime by marriage contract. In principle, they are free to agree on the arrangements they wish (party autonomy). There are two types property regimes provided for by the law, the separation of goods (§ 1414 BGB) and the community of goods (§§ 1415 to 1518 BGB). Despite of the detailed rules on the community of goods regime, it is not frequently applied in practice. Marriage contracts need to respect the form of a notarial deed.

At the moment, there are no reforms pending. The ratification process for a French-German agreement for a common matrimonial property regime of choice is on-going.

**2. Which conflict of laws rules apply in matrimonial property disputes?**

Conflict of laws in matrimonial property regimes is codified in the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB, for an English translation see D. 4). In the absence of a choice of law, matrimonial property is governed by the law of the State of the spouses’ common nationality, or failing

that, by their habitual residence or, failing that, by the law of the State with which both spouses were most closely connected. The relevant moment in time is the conclusion of the marriage (see Article 15 paragraph 1 and Article 14 paragraph 1 EGBGB for the exact details).

The spouses have a limited choice of law. They can choose the law of the nationality of either spouse, or of his or her habitual residence, or the *lex rei sitae* in case of immovable property (Article 15 paragraph 2 EGBGB). If the spouses have made a choice of law concerning the general effects of their marriage (see Article 14 paragraphs 2 and 3, which allow for a limited choice of law of nationality in particular circumstances), that choice of law would also be relevant for the matrimonial property regime (see Article 15 paragraph 1 EGBGB), unless the spouse have agreed otherwise in accordance with Article 15 paragraph 2 EGBGB.

It should be noted that German private international law accepts *renvoi*, except where it would be contrary to the purpose of the conflict of laws rule, or where the applicable law has been chosen by the spouses (see Article 4 EGBGB for details).

### **3. Which are the property consequences of registered partnerships?**

The property consequences of registered partnerships are regulated in §§ 6 and 7 Lebenspartnerschaftsgesetz (Law on registered partnership, LPartG). The provision refers to §§ 1363 paragraph 2 and §§ 1364 to 1390 Bürgerliches Gesetzbuch (Civil Code = BGB). That means that the consequences of registered partnership correspond to those of the statutory matrimonial property regime of “community of accrued gains”. Registered partners, like spouses, have the possibility to modify the statutory arrangements by agreement, and party autonomy granted to registered partners is following the same rules as for spouses (see answer to C. 1).

The private international law of registered partnership is codified in Article 17b of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB). Its main rule says that the property consequences of registered partnership are governed by the law of the State in which the partnership was registered (excluding the conflict of law rules of that State). Unlike spouses, registered partners cannot determine the law applicable by agreement. However, if they have concluded the partnership abroad, they may register their partnership in Germany and thus achieve the application of German law to their partnership, including the property regime (Article 17b EGBGB).

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive is implemented by the "Gesetz zur Förderung der Mediation und anderer Formen der außergerichtlichen Konfliktbeilegung" (Law on promoting mediation and other forms of alternative dispute regulation). That law applies to domestic cases as well as to cross-border cases covered by the Directive. The law regulates the tasks and obligations of the mediator and provides for a series of procedural rules which shall ensure a proper conduct of mediation, providing i. a. that participants are informed about the process of mediation and that they participate on a voluntary basis. In addition, provisions are included into the Codes of procedure (e. g. ZPO (Zivilprozessordnung) and FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit)) which facilitate a proper linkage between the court proceedings and alternative dispute resolution mechanisms (e. g. the court propose parties to achieve an amicable settlement through mediation or any other ADR mechanism - § 278a ZPO / § 36a FamFG). If parties agree to do so, the court proceedings are suspended.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The implementing legislation has been included in the Code of Civil Procedure (Zivilprozessordnung, ZPO), in §§ 1076 to 1078 ZPO; insofar as § 1077 ZPO (outgoing requests) and § 1078 ZPO (incoming request) do not provide otherwise, the general rules on legal aid shall apply (see § 1076 ZPO, §§ 114 to 127a ZPO). In family proceedings, §§ 76 to 78 FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit) are applicable; in substance, they mainly refer to the rules of the ZPO (see § 76(1) FamFG).

### **3. Is your country a contracting party to any bilateral or international instruments on Family Law?**

Germany is party to a number of international Conventions in the area of Family Law; the following list is not exhaustive but names the practically most important ones:

- 1961 Hague Convention on the protection of minors
- 1980 Hague Convention on the civil aspects of international child abduction
- 1980 Luxembourg Convention on the recognition and enforcement of decisions concerning custody of children and on restoration of custody of children
- 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of Children
- 1968 European Convention on the adoption of children
- 1993 Hague Convention on intercountry adoption

- 2000 Hague Convention on the international protection of adults
- 1956 New York Convention on the recovery abroad of maintenance
- 1956 Hague Convention on the law applicable to maintenance obligations
- 1958 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations
- 1973 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations
- 1973 Hague Convention on the law applicable to maintenance obligations
- In addition Germany is bound (via the ratification of the EU) by the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is also applicable to maintenance claims. Germany is also applying the 2007 Hague Protocol on the law applicable to maintenance obligations (by virtue of the decision of the Council on the conclusion by the EU of that Protocol).

#### **4. Are there any databases or online tools providing information on Family Law matters available in your country?**

There are a number of databases for law in general, including Family Law, which can be used if purchased.

The full text of practically important laws, in particular the Bürgerliches Gesetzbuch (Civil Code = BGB), the ZPO (Zivilprozessordnung) and the FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit), and some translations thereof into English, can be found on the website:

[www.gesetze-im-internet.de](http://www.gesetze-im-internet.de)

Decisions of the Bundesgerichtshof (Supreme Court) can be accessed through the website of the Bundesgerichtshof:

[www.bundesgerichtshof.de](http://www.bundesgerichtshof.de)

The European Judicial Network in Civil and Commercial Matters provides accessible information on German Family Law on its website:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ger_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ger_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ger\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ger_en.htm)

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

The Centre for German Legal Information (CGERLI) brings together English translations of court decisions, legislation, articles and other law-related documents:

<http://www.cgerli.org/>

#### **5. Please provide information on accessing and applying foreign Family Law in your country.**

The conflict-of-laws rules have to be applied by the German courts ex officio (following the principle “iura novit curia”); this is true for all relevant conflict-of-law rules (whether deriving from national law, EU law or international conventions to which Germany is a party). If the relevant conflict-of-laws rule refers to a foreign law, the judge has to find out the content of the foreign law. If he or she does not know the foreign law, the court has to find out about it using the normal means for the taking of evidence. The court can e. g. ask for an expert opinion (e. g. Universities, Max-Planck-Institutes), apply the London Convention on information on foreign law, or ask for the assistance of a German embassy or a foreign lawyer. It can also use any other means available, such as legal literature, legal databases, etc. In an appeal concerning questions of law, the higher instance has to control whether the conflict-of-laws rules have been applied correctly. It does not check whether a foreign law has been applied correctly (see §§ 545, 560 ZPO (Zivilprozessordnung)).

Exceptions to the rule explained above are debated for cases of urgency (provisional and/or protective measures), where the discovery of an applicable foreign law would lead to delays that would jeopardise the aim of the requested urgent measure (generally, this is seen as a reason for the application of the *lex fori*).

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

The jurisprudence available does not seem to give rise to any major points of law; the decisions contain nothing more than a simple application of the text of the relevant provisions to the case. Some concern problems of a transitional nature (application of transitional provisions). None of these decisions appeared to give interesting insights into the application of the Regulation in divorce cases worth listing them at this point.

### Maintenance Regulation

Given that the Regulation has been adopted very recently, it is unsurprising that very few decision have been published so far applying that Regulation:

- OLG Karlsruhe, decision of 6/12/2011 (case 8 W 34/11), JAmt 2012, p. 110-112
- OLG Frankfurt, decision of 11/01/2012 (case 1 UFH 43/11), JAmt 2012, p. 42-43
- OLG München, decision of 12/01/2012 (case 12 UF 48/12), published by juris GmbH (legal database)
- OLG Stuttgart, decision of 17/02/2012 (case 17 UF 331/11), published by juris GmbH

The decision of the OLG Frankfurt concerned mainly the interpretation of the German rules on internal competence (concentration of competence under § 28 AUG). The three other decisions concerned recognition and enforcement, mainly aspects of scope *ratione temporis* of the Regulation. Another issue were the interaction between an enforceable maintenance decision and a pending procedure concerning filiation.

### III. NATIONAL BIBLIOGRAPHY

The extensive literature available has been limited to a realistic minimum that will allow the reader to find many other and detailed references. The references are not always repeated in the other sections of this bibliography. The selection is deliberately restricted to just a selection of publications.

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

- Andrae, Internationales Familienrecht (2. Aufl. 2006)
- Rauscher (Hrsg.), Europäisches Zivilprozess- und Kollisionsrecht (2010) (Brüssel IIa-VO, EG-UntVO, EG-ErbVO-E, HUntStProt 2007)
- Schlosser, EU-Zivilprozessrecht (3. Aufl. 2009)
- Staudinger/Spellenberg (2005), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen/Internationales Verfahrensrecht in Ehesachen
- Thomas/Putzo, Zivilprozessordnung (Kommentar) (32. Aufl. 2011)  
(All these works indicate extensive further reading.)

#### **Regulation Rome III: Cross-border divorce - applicable law**

- Becker, Die Vereinheitlichung von Kollisionsnormen im europäischen Familienrecht – Rom III, NJW 2011, 1543
- Brand, Abschied vom einheitlichen EU-Recht, DRiZ 2011, 56
- Finger, Verstärkte Zusammenarbeit im Scheidungskollisionsrecht, FuR 2011, 61 und FuR 2001, 313
- Kohler/Pintens, Entwicklungen im europäischen Personen- und Familienrecht 2010-2011, FamRZ 2011, 1433
- Mansel/Thorn/R. Wagner, Europäisches Kollisionsrecht 2011: Gegenläufige Entwicklungen, IPRax 2012, 1
- R. Wagner, Aktuelle Entwicklungen in der justiziellen Zusammenarbeit in Zivilsachen, NJW 2011, 1404
- Ganz, Internationales Scheidungsrecht – Eine praktische Einführung (Teil 1: FuR 2011, 69; Teil 2: FuR 2011, 369)

#### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law and recognition**

- Andrae, Das neue Auslandsunterhaltsgesetz, NJW 2011, 2545
- Finger, Neue kollisionsrechtliche Regeln für Unterhaltsforderungen, JR 2012, 51-57
- Heger/Selg, Die europäische Unterhaltsverordnung und das neue Auslandsunterhaltsgesetz, FamRZ 2011, 1101

- Palandt, Kommentar zum Bürgerlichen Gesetzbuch (71. Aufl. 2012)  
(Kommentierung zum Haager Unterhaltsprotokoll von 2007)

#### **Matrimonial property regimes and property consequences of registered partnerships**

- Münchner Kommentar zum BGB, Band 10 – Internationales Privatrecht (5. Aufl. 2010) (Kommentierung zu Artikel 15, 16 und 17b EGBGB)
- Palandt, Kommentar zum Bürgerlichen Gesetzbuch (71. Aufl. 2012) (insbes. Kommentierung zum nationalen Güterrecht und zu Artikel 15, 16 und 17b EGBGB)

**National section**  
**GREECE**

**Professor Dimitra Papadopoulou-Klamari**

**Assistant Professor Chrysafo Tsouka**

**Dr Nikos Davrados**

**University of Athens**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Substantive legal provisions:

[Articles 1438-1446 of the Civil Code.](#)

Article 4 [of Law 3719/2008](#) (dissolution of registered partnership).

Procedural legal provisions:

Articles 592-613 of the Code of Civil Procedure (disputed divorce).

Articles 739 et seq. (voluntary jurisdiction – consensual divorce).

The substantive provisions were amended in compliance with the constitutional rule of equality of sexes, pursuant to Law 1329/1983. The most recent amendment is by Law 4055/2012.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

Articles 3 (international jurisdiction with reference to Articles 22 et seq.), 22 (domicile of the defendant), 23 (residence of the defendant), 34 (counterclaim), 39 (last common residence of spouses for marital disputes), 41 (choice of basis of jurisdiction by claimant), 611-612 (jurisdiction of the Greek courts of one of the spouses has Greek nationality) of the Code of Civil Procedure.

#### 3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

No.

#### 4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?

No.

National conflict of laws rules for cross-border divorce cases:

[Article 16 of the Civil Code.](#)

Article 4 of [Law 3719/2008](#) (dissolution of registered partnership).

#### 5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?

No.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

N/A (Greece is not participating in this Regulation)

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Substantive legal provisions:

[Article 1442 of the Civil Code.](#)

Procedural legal provisions:

Article 681B of the Code of Civil Procedure. The case may be joined with divorce proceedings and tried in accordance with the special procedure on divorce (Article 592-613 of the Code of Civil Procedure).

There are no current reform proposals for the substantive or procedural provisions.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

Normal enforcement procedure applies (Articles 904-1054 of the Code of Civil Procedure). The first instance decision is temporarily enforceable (Article 910 paragraph 4 of the Code of Civil Procedure).

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

Ministry of Justice (<http://www.ministryofjustice.gr>)

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

No.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Substantive legal provisions:

[Articles 1394-1416 of the Civil Code.](#)

Procedural legal provisions:

Articles 17, 39, 592-613 and 681B of the Code of Civil Procedure.

There are no current reform proposals for the substantive or procedural provisions.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

Article 15 of the Civil Code.

[Law 3719/2008](#) (registered partnership) [*Article 13 Field of Application: The present law applies to every cohabitation pact, provided that it is established in Greece or before a Greek Consular Authority. In every other case, the law determined by the rules of private international law applies*].

## **3. Which are the property consequences of registered partnerships?**

Article 6 of Law 3719/2008 (property regime for registered partnership).

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

Law 3898/2010 on mediation in civil and commercial matters.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Law 3226/2004 on legal aid to citizens of low income.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### **INTERNATIONAL COMMISSION ON CIVIL STATUS**

Convention No. 5, Convention extending the competence of authorities empowered to receive declarations acknowledging natural children (14 September 1961)

Convention No. 6, Convention on the establishment of maternal descent of natural children (12 September 1962)

Convention No. 7, Convention to facilitate the celebration of marriages abroad (10 September 1964)

Convention No. 11, Convention on the recognition of decisions relating to the matrimonial bond (8 September 1967)

Convention No. 12, Convention on legitimation by marriage (10 September 1970)

Convention No. 18, Convention on the voluntary acknowledgment of children born out of wedlock (5 September 1980)

Convention No. 20, Convention on the issue of a certificate of legal capacity to marry (5 September 1980)

### **HCCH**

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

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

### **BILATERAL AGREEMENTS**

Agreement with Yugoslavia (continued with Serbia) of 18 June 1959 on Mutual Judicial Relations (ratified by Law 4009/1959)

Agreement with Yugoslavia (continued with Serbia) of 18 June 1959 on Mutual Recognition and Enforcement of Judgments (ratified by Legislative Decree 4007/1959)

Agreement with Yugoslavia (continued with Croatia) of 18 June 1959 on Mutual Judicial Relations (ratified by Legislative Decree 4009/1959)

Agreement with Yugoslavia (continued with Croatia) of 18 June 1959 on Mutual Recognition and Enforcement of Judgments (ratified by Legislative Decree 4007/1959)

Agreement with the Federal Republic of Germany of 4 November 1961 on Mutual Recognition and Enforcement of Judgments (ratified by Law 4305/1963)

Agreement with Austria of 6 December 1965 on Mutual Judicial Assistance in Civil and Commercial Law (ratified by Legislative Decree 137/1969)

Agreement with Romania of 19 October 1972 on Judicial Assistance in Civil and Criminal Matters (ratified by Legislative Decree 429/1974)

Agreement with Lebanon of 5 May 1975 on Judicial Assistance and Deportation (ratified by Law 1099/1980)

Agreement with Bulgaria of 10 April 1976 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 841/1978)

Agreement with Hungary of 8 October 1979 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 1149/1981)

Agreement with Poland of 24 October 1979 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 1184/1981)

Agreement with Czechoslovakia (continuing with the Czech Republic) of 22 October 1980 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 1323/1983)

Agreement with Tunisia of 12 April 1993 on Judicial Assistance in Civil and Commercial Matters and Arbitral Awards (ratified by Law 2228/1994)

Agreement with China of 17 October 1994 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 2358/1995)

Agreement with Ukraine of 2 July 2002 on Judicial Assistance in Civil Matters (ratified by Law 3281/2004)

**4. Are there any databases or online tools providing information on family law matters available in your country?**

No

There are general online legal databases (with a subscription).

For example:

NOMOS legal database (<http://lawdb.intrasoftnet.com>)

ISOCRATES Athens Bar Associate legal database (<http://www.dsanet.gr>)

European Judicial Network in Civil and Commercial Matters:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_gre\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_gre_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_gre\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_gre_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_gre\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_gre_en.htm)

European Judicial Atlas in Civil and Commercial Matters informs on:

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

According to Civil Procedure, the maxim *jura novit curia* also applies with respect to foreign law, which is considered as a matter of law, and not a fact (Articles 337 and 559 number 1 of the Code of Civil Procedure). However, the judge may order the proof of the contents of foreign law.

In this respect, in practice the courts order that the parties furnish legal information as to the contents of foreign law from the Hellenic Institute of International Foreign Law, which is seated in Athens (see: <http://www.hiifl.gr>).

## II. NATIONAL JURISPRUDENCE

Note: All the court cases mentioned below are published in NOMOS subscription legal database – <http://lawdb.intrasoftnet.com>

### Regulation Brussels IIbis in matters of cross-border divorce

1. Jurisdiction of the Greek courts in consensual divorce proceedings: The court has jurisdiction, because the spouses have their habitual residence in Greece (Article 3(1)(a)). The provisions of the Regulation replace the previous national provisions [One-Member Court of First Instance of Athens, decision no. 2750/2006].
2. Jurisdiction of the Greek courts in proceedings for marriage annulment: The court has jurisdiction, because the defendant has his habitual residence in Greece (Article 3(1)(a)). Annulment proceedings are included in the scope of application of the Regulation (Article 1) [Multi-Member Court of First Instance of Athens, decision no. 49/2010].
3. Recognition of a German decision granting divorce: Notwithstanding the abolition of *exequatur* (Article 21), the national courts may proceed with recognition, if the party to the proceedings so desires. The application is filed according to the national procedural provisions (Article 30). The competent national court is the One-Member Court of First Instance and the applicable procedure is that of voluntary jurisdiction. The decision for divorce will not be recognised on the grounds of Article 22. In this case, the decision was recognised [One-Member Court of First Instance of Corfu, decision no. 168/2007; similar case: One-Member Court of First Instance of Ioannina, decision no. 84/2008; similar case: One-Member Court of First Instance of Rhodes, decision no. 488/2010].
4. Incidental recognition of a German decision granting divorce (Articles 21-23) and awarding custody of the children to the mother, in domestic maintenance proceedings [One-Member Court of First Instance of Chania, decision no. 39/2006].

### Maintenance Regulation

None located.

### III. NATIONAL BIBLIOGRAPHY

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

Spyridon Vrellis, *Private International Law* (3<sup>rd</sup> ed., Athens 2008) [in Greek]

Spyridon Tsiantinis, *Jurisdiction and Recognition of Judgments in Matrimonial Matters (according to Council Regulation No. 2201/2003)* (Athens/Komotini 2008) [in Greek]

#### **Regulation Rome III: Cross-border divorce - applicable law**

Dimitris Stamatiadis, The new European international law of divorce (Rom III), *Chronicles of Private Law (Chronika Idiotikou Dikaiou)* 2012 [in Greek]

#### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

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#### **Matrimonial property regimes and property consequences of registered partnerships**

Papachristou/Koumoutzis/Tsouca, The registered partnerships – Articles 1-13 of the law 3719/2008 (2009) [in Greek]

Konstantinos Christodoulou, The cohabitation at the counterpoint between family and contract law – the “example” of the (Greek) registered partnership (2012) [in Greek]

Anastasia Grammaticaki-Alexiou/Zoi Papasiopi-Passia/Evangelos Vasilakakis, *Private International Law* (4<sup>th</sup> ed., Athens/Thessaloniki 2010) [in Greek]

## Article 16 of the Civil Code

**Section 16.- Divorce and judicial separation.** Divorce and judicial separation shall be governed by the law governing the personal relations of the spouses at the beginning of the proceedings aiming at a divorce or a separation.

## Articles 1394 – 1416 of the Civil Code

**Section 1394.– Apportionment of movables.** In case of interruption of the life in common each of the spouses shall be entitled to recover the movables belonging to him even if these were used by both or by the other spouse alone. He shall however be under an obligation to allow the other spouse to make use of the household items that are absolutely necessary to him for his separate installation if for reasons of indulgence the circumstances so require.

**Section 1395.–** In case of interruption of the life in common the spouses shall apportion the use of the movables belonging to both in accordance with their personal needs. If they disagree the apportionment shall be made by the Court which may award a reasonable compensation for the use it grants.

**Section 1396.– Extent of reciprocal responsibility.** In fulfilling

their reciprocal obligations as arising from marriage the spouses shall bear responsibility to the extent of the care they bestow on their personal affairs.

**Section 1397.– Patrimonial self-determination of spouses.** Subject to the provisions which follow marriage does not change the patrimonial self-determination of the spouses.

**Section 1398.– Presumptions in the matter of movables.** Movables in the possession of or held by one or both spouses shall be deemed for the benefit of the creditors of each of the spouses to belong to the spouse who is indebted to them. This presumption shall not hold in case of interruption of life in common.

Movables in the possession of or held by both spouses shall be presumed in the relationships as between themselves to belong to both in equal parts.

In the relationships of the spouses between themselves and between the spouses and their creditors it shall be presumed that the movables destined for the personal use of one of the spouses belong to such spouse.

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<sup>35</sup> In cooperation with Associate Professor Eugenia Dakoronia and Constantine Taliadoros.

**Section 1399.— Management of the property of one spouse by the other.** If one of the spouses has entrusted to the other the management of his personal property there is no obligation to render account and to hand over income derived from the management unless it has been agreed differently. The income is considered as part of the obligation of contribution in catering for the needs of the family.

Any resigning of the right to revoke such granting of management shall be null.

**Section 1400.— Claim to participate in the increments.** If a marriage is dissolved or annulled and the property of one of the spouses has since the celebration of marriage increased the other spouse provided he contributed in whatever manner to such increase shall be entitled to claim the attribution to him of that part of the increase which is due to his contribution. It shall be presumed that such contribution amounts to one third of the increase except if a greater or lesser contribution or no contribution at all can be proven.

The preceding paragraph shall be applicable by analogy also in the case of separation from bed and board of the spouses that lasted for more than three years.

In the increase of property of the spouses shall not be included what has been acquired by them by way of donation inheritance or legacy or

through acquisition by the disposal of the proceeds of such donation inheritance or legacy.

**Section 1401.—** The claim referred to in the preceding section shall not arise in case of death to the benefit of the heirs of the deceased spouse. It may neither be assigned or form part of the deceased's estate except if the claim had been recognised by contract or a summons instituting legal proceedings had been served. The claim shall be prescribed two years after the dissolution or the annulment of the marriage.

**Section 1402.— Security furnished.** Under reserve of the provisions of section 1262(4) each of the spouses shall have the right in case of institution of legal proceedings for divorce or annulment of a marriage or where a spouse has lodged on his own a legal action to assert a claim based on section 1400 to demand from the other spouse or from the latter's heirs the furnishing of security if having regard to the conduct of the other spouse the satisfaction of the claim is imperilled.

**Section 1403.– Choice of joint ownership.** The spouses may before marriage or during the currency thereof choose by contract in the matter of regulating the consequences of the marriage on their respective estates instead of the system contemplated in sections 1397 and 1400 to 1402 inclusive a system of community in equal parts regarding the assets of their respective estates without a right of disposal by either of his undivided share (system of joint ownership) subject to their observing the provisions of the sections that follow.

The contracts referred to in the preceding paragraph shall be drawn up in the form of a notarial deed and be registered in one special public register to be kept for this purpose. The contracts may not be set up as against third parties before registration.

**Section 1404.–** Details of the system of joint ownership that has been chosen and particularly details relating to its extent the management of the assets of the common property as well as the settlement of any outstanding reciprocal claims and the apportionment of the common items after cessation of the relationship shall be determined in the relevant (notarial) deed and be based on the principle of equality of rights and obligations as between spouses. The relevant notarial deed cannot make reference to custom to a law which is not in force or to a foreign law.

**Section 1405.–** Where there is no provision in the deed as to the extent of the joint ownership this shall include any patrimonial asset acquired by each spouse non gratuitously during the marriage with the exception of the income derived from properties he owned before mar-

riage. Shall not in any case be included in the joint ownership even if acquired non gratuitously: 1. the proprietary items of each of the spouses that are strictly destined for his personal use or for the carrying out of his profession as well as the accessories thereof 2. the claims laid down in sections 464 and 465 3. the rights of intellectual propeprty.

Where the deed does not provide differently as regards the use and the disposal of the produce the management and the disposal of the common assets shall be applicable by analogy the provisions of sections 785 to 792 inclusive of the second sentence of section 793 and of section 794.

**Section 1406.– Substitution.** Whatever each spouse acquires during marriage through the disposal of assets belonging to his personal property shall revert thereto. The spouse who claims that an acquisition was effected through such disposal shall bear the burden of proving his claim.

**Section 1407.— Transactions effected by one spouse.** Transactions relating to patrimonial assets under joined ownership which transactions according to the rules regulating the joined ownership must be carried out either jointly by the two spouses or by one of them but with the consent of the other may be validly completed with permission of the Court by one spouse only if the other spouse is in a physical or legal impossibility or refuses to express his will and the transaction is of compelling interest to the family.

**Section 1408.— Extent of guarantee afforded by the common property.** Where a system of joint property has been chosen the common property beyond any real rights or other burdens encumbering such property also guarantees: 1. any obligation assumed by one spouse within the limits of his managerial authority for the management of the said property 2. any obligation assumed by one spouse for the needs of the family 3. any obligation undertaken jointly by the two spouses.

**Section 1409.—** The common property guarantees in addition but to the extent of one half of its value and in so far as the personal creditors of each spouse are concerned when the creditors' claims cannot be satisfied out of his personal property: 1. obligations assumed by the spouse alone for the purpose of managing the common property beyond the limits of his managerial authority 2. personal debts of a spouse whenever these have been incurred.

In the cases contemplated in the preceding paragraph the creditors referred to in the preceding section shall have a right of preference over unsecured creditors.

**Section 1410.— Subsidiary guarantee of personal property.** With

regard to the debts referred to in section 1408 the creditors may direct their claims subsidiarily also against the personal property of the non debtor spouse to the extent of one half of the value of such creditors' claims in so far as the common property does not suffice to satisfy the said debts.

**Section 1411.— Cessation.** The system of joint ownership shall cease ipso jure with the dissolution or the annulment of the marriage. It shall also cease when one of the spouses has been declared to be an absentee or bankrupt and the relevant Court decision became final.

In the case of a divorce or the annulment of the marriage the cessation of joint ownership shall become effective retroactively as from the date of serving the summons instituting legal proceedings.

**Section 1412.—** A joint ownership shall cease by virtue of an agreement between the spouses evidenced by notarial deed.

**Section 1413.**— Each of the spouses may demand in Court the dissolution of the system of joint ownership: 1. if conjugal cohabitation has been interrupted for at least one year and such interruption continues during the currency of the legal action 2. if by reason of dilapidation of the property of the other spouse or of bad management by him of the common property the interests of the plaintiff are exposed to peril 3. if there is breach on the part of the other spouse of his obligation to contribute to the satisfaction of the family needs. The Court decision ordering the dissolution of the system of joint ownership shall have a retroactive effect going back to the date of serving the summons instituting legal proceedings on the defendant.

**Section 1414.**— With the exception of cessation mortis causa a cessation of the system of joint ownership can only be set up in regard to third parties in so far as in the margin of the special public register where had been registered the notarial deed organising joint ownership has been noted the relevant agreement of the spouses or the Court decision declaring the absence or the bankruptcy or in the cases mentioned in the second paragraph of section 1141 and in section 1413 the serving of the summons lodging the legal action and the relevant Court decision.

**Section 1415.**— By a cessation that takes place before the due expiry of joint ownership the spouses shall revert from the point of view of their patrimonial situation to the system contemplated in sections 1397 and 1400 to 1402 inclusive.

In such event as also when the cessation occurs by reason of dissolution or annulment of the marriage shall subject to any different agreement be applicable to the dissolution of the joint ownership and the

apportionment of the common things the provisions of sections 795 and following as well as the special provisions of the Code of civil procedure pertaining to the apportionment of common things.

**Section 1416.— Extent of application.** Subject to a different determination the provisions of this Chapter shall be applicable independently of the religion or the dogma to which the two spouses belong as well as of the form whether civil or religious under which their marriage was celebrated.

CHAPTER VII

*Divorce*

(In accordance with section 16 of law No 1329: "The provisions of Chapter VII of Book IV of the Civil Code referring to divorce (sections 1438 to 1462 inclusive) are replaced in their totality by the following provisions").

**Sectionsd 1417 to 1437.**– Abrogated.

**Section 1438.**– **How it takes place.** A marriage may be dissolved by divorce. The divorce shall be pronounced by a final Court decision when there is concurrence of the preconditions determined in the following sections.

**Section 1439.**– **Grave impairment.** Each of the spouses may demand a divorce where their relationship has been so strongly impaired on a ground imputable to the person of the defendant or also to both spouses that the continuation of the conjugal relationship became justifiably unbearable for the plaintiff.

To the extent that the defendant does not adduce proof to the contrary impairment shall be presumed in case of bigamy or adultery of the defendant abandonment of the plaintiff or plotting against the plaintiff's life by the defendant.

Where the spouses have been in dissension continually for at least four years the presumption of impairment shall not admit of proof to the contrary and a divorce may be demanded even if the ground of impairment is imputable to the person of the plaintiff. The completion of the time period of dissension shall not be prevented by small interruptions that occurred as attempts for restoring relations between the spouses.

**Section 1440.**– **Absence.** Each of the spouses may demand a divorce by reason of an officially declared absence of the other.

**Section 1441.— Consensual divorce.** Where the spouses agree to divorce they may demand the divorce by a joint request which is prosecuted in accordance with the procedure pertaining to voluntary jurisdiction (consensual divorce).

In order that a consensual divorce may be granted the marriage must have lasted at least one year before the filing of the request and the agreement of the spouses must be declared in Court by them personally or by a specially authorised attorney in the course of two hearings distant from each other by six months at least. The special power of attorney must have been given within the last month before each hearing. Where two years have elapsed since the first hearing the declared agreement (of the spouses) shall cease to be effective.

If there are minor children in order that the divorce may be granted a written agreement of the spouses must be submitted regulating the guardianship of the children and the contacts with them. Such agreement shall be confirmed by the Court and remain in force until a decision has been given in this matter pursuant to the provisions of section 1513.

**Section 1442.— Maintenance.** To the extent that one of the former spouses cannot secure his maintenance from his income or from his property he shall have the right to claim maintenance from the other: 1. if at the pronouncement of the divorce or at the end of the time periods referred to in the cases described hereunder he is of an age or in a health condition that does not allow him to be compelled to begin or to continue the carrying out of a proper profession that would secure for him his maintenance 2. if he is in charge of the guardianship of a minor child and for this reason is prevented from carrying out a proper profession 3. if he cannot find stable and appropriate work or if he needs some kind of professional training but in both cases for a time period that may not exceed three years as from the pronouncement of the divorce 4. in any other case where the judicial awarding of maintenance is called for reasons of leniency.

**Section 1443.—** The provisions of sections 1487, 1493, 1494 and 1498 shall be applicable by analogy also in regard to maintenance after divorce. The maintenance is payable in advance in money each month. The maintenance may be paid in one lump sum payment if the former spouses so agree in writing or according to the decision of the Court where particular reasons justify such decision.

**Section 1444.—** Maintenance may be excluded or be limited where this is called for on serious grounds especially if the marriage had existed

for a short time period or if the spouse entitled thereto has caused the divorce by his fault or has voluntarily brought about his indigence.

The right of maintenance shall cease if the ex-spouse entitled thereto re-marries or if he cohabits permanently with somebody else in a free union. The right of maintenance does not cease with the demise of the responsible ex-spouse but it ceases with the demise of the ex-spouse entitled thereto except if it concerns past periods or instalments due at the time of the demise.

**Section 1445.**— Each of the ex-spouses shall be under an obligation to furnish to the other accurate information about his property and income to the extent that such information is useful for determining the amount of maintenance. At the request of one of the ex-spouses which is transmitted through the intermediary of the competent public prosecutor the employer the competent Service department and the competent Tax Authority shall be under an obligation to furnish any useful information about the state of the property of the other ex-spouse and more particular about his income.

**Section 1446.**— **Extent of application.** The provisions of section 1416 shall also be applicable as regards the dissolution of a marriage pursuant to the provisions of this Chapter.

**L. 3719/2008 Reforms regarding the family, the child, the society and other provisions**

**Translated by Assistant Prof. Dr. E. Dacoronia**

**CHAPTER 1**

**COHABITATION PACT**

**Article 1**

**Establishment**

The agreement between two adults of different gender by which they organise their cohabitation (Cohabitation pact) is executed in person and is vested the notarial deed. The agreement enters into validity after a copy of the notarial deed is presented to the Registrar. The copy of the deed presented is recorded in a special book kept at the Registry Office.

**Article 2**

**Conditions**

1. Full capacity to enter juridical acts is required in order to contract a cohabitation pact.
2. Contracting a cohabitation pact is prohibited:
  - a. if there is a marriage or a cohabitation pact between the interested persons or between one of them and another person,
  - b. between blood relatives in the direct line unlimitedly, between blood relatives in the collateral line until the 4<sup>th</sup> degree of relation included, as well as between relatives by marriage in the direct line unlimitedly,
  - c. between the adoptive parent and child.
3. In case of violation of the provisions of the present article, the cohabitation pact will be null.

**Article 3**

**Nullity of the pact**

The nullity of the Cohabitation Pact according to the previous article may be invoked not only by the contracting parties but also by anybody who claims a legal interest of a family or property nature. The public prosecutor may *ex officio* ask for the acknowledgement of the nullity, in case that the cohabitation pact is against the public order.

**Article 4**

**Termination**

1. The cohabitation pact is terminated by:

- a. an agreement between the contracting parties, which is made in person and is vested the notarial deed,
  - b. a unilateral notarial statement, after it is served by a bailiff to the other cohabiter,
  - c. *Ipso jure*, in case a marriage is contracted either between the person that have contracted the pact themselves or between one of them and a third party.
2. The termination of the pact is valid after the registration of the notarial deed or of the unilateral statement with the registrar, where its establishment had also been recorded.

### **Article 5**

#### **Surname**

The cohabitation pact does not alter the surname of the parties to the pact. Each of them may, if the other consents, use the other's surname at his/her social relations or add it to his/her own.

### **Article 6**

#### **Property relations**

It is possible for the property relations of the parties to the pact and especially for the property elements that will be acquired during the cohabitation pact (assets) to be regulated by the cohabitation pact or by a posterior notarial deed. If no agreement has been contracted concerning the assets, each party is entitled, after the dissolution of the pact, with the right to claim from the other party everything the latter has acquired with the former's contribution. This claim is prescribed at after two years have elapsed from the dissolution of the pact.

### **Article 7**

#### **Maintenance after the termination of the pact**

1. The Cohabitation pact or a posterior notarial deed may comprise an agreement by which an obligation for maintenance is undertaken either by one of the parties or mutually, only for the case that, after the dissolution of the pact, one party is not capable of securing its maintenance from its income or assets. An obligation of maintenance does not exist on the part of the party, who, after consideration of his other obligations, is not capable of affording such maintenance without imperiling his own maintenance. The obligation for maintenance does not burden the heirs of the person that bears the obligation.
2. The person who has the right to maintenance, deriving from the cohabitation pact, is, to what regards the maintenance right, at the same rank with the divorced spouse of the person obliged to maintenance.
3. The person obliged to maintenance, after the annulment of the cohabitation pact, cannot invoke that obligation, in order to be discharged, fully or partially, from the obligation for contribution or maintenance of his spouse or maintenance of his minor children.

4. Without prejudice to paragraphs 2 and 3, the contractual obligation of paragraph 1 precedes the *ex lege* obligation for maintenance of other persons against the person who cannot afford, after the dissolution of the pact, to support himself by his own means.

#### **Article 8**

##### **Presumption of paternity**

1. The child born during the cohabitation pact or within 300 days from its termination or acknowledgement of its nullity, is presumed to have as father the man with whom the mother established the cohabitation pact. The presumption is refuted by an irrevocable decision. Articles 1466 ff. of the Greek Civil Code, as well as articles 614 ff. of the Greek Civil Procedure Code, apply by analogy.

2. The nullity or the annulment of the pact does not influence the paternity of the children.

#### **Article 9**

##### **Children's Surname**

1. The child born during the cohabitation pact or within 300 from its termination or the recognition of its nullity, bears the surname chosen by his parents in their common and irrevocable statement included in the pact or in a posterior notarial deed, before the birth of the first child. The surname chosen is common for all the children and is obligatorily the surname of one of the parents or a combination of their surnames. On no occasion can it comprise more than two surnames. If the statement is omitted, the child will bear a compound surname, made up by both of his parents' surnames. If the surname of one or both of the parents is compound, the child's surname will be made up by the first of the two surnames.

#### **Article 10**

##### **Parental care**

1. The parental care of the child born during the cohabitation pact or within 300 days from its termination or the recognition of its nullity belongs to both parents and is exercised by them in common. The GCC provisions for the parental care of the children who originate from a marriage apply by analogy also in this case.

2. In case of dissolution of the cohabitation pact, for the reasons mentioned in articles 2 and 4 of the present, for the exercise of the parental care article 1513 GCC applies by analogy.

#### **Article 11**

##### **Right of Inheritance**

1. After the dissolution of the cohabitation pact, because of death, the one who survives has the right to inherit as an intestate heir; the said right amounts to one sixth of the inheritance, if the person who survives inherits together with heirs of the first rank, to one third if he inherits together with heirs of the other ranks, and to the

whole of the inheritance, if there is no relative of the deceased, who can be called as an intestate heir.

2. The party who survives is entitled to a forced heirship share of the inheritance, which amounts to one half of the intestate share the said party would get. He participates in that percentage as a heir.

3. Articles 1826 ff., 1839 ff. and 1860 of the GCC apply by analogy also in this case.

## **Article 12**

### **Suspension of Prescription**

Article 256 GCC n. 1 is replaced as follows:

“1. between spouses during the time of marriage, even if it is later declared null, as well as between persons that have established a cohabitation pact for as long as the pact is valid”.

## **Article 13**

### **Field of Application**

The present law applies to every cohabitation pact, provided that it is established in Greece or before a Greek Consular Authority. In every other case, the law determined by the rules of private international law applies.

## **CHAPTER 2**

### **AMENDMENTS OF PROVISIONS OF THE GCC**

## **Article 14**

### **Irretrievable breakdown**

The third paragraph of article 1439 GCC is replaced as follows:

“If the spouses have been continuously separated for at least two years, the impairment is non-rebuttably presumed and the divorce can be demanded, even if the ground of the impairment is attributed to the plaintiff. The completion of the separation is calculated at the time of the hearing of the court action and is not prevented by brief interruptions, in an attempt by the spouses to reestablish the conjugal relationship.

## **Article 15**

### **Children born out of wedlock**

Article 1515 GCC is replaced as follows:

“Children born out of wedlock. The parental care of the minor child born and remaining out of wedlock, belongs to his mother. In case of acknowledgement of the child, the parental care also belongs to the father, who, however, exercises it only if there is an agreement between the parents according to article 1513 or if the mother’s parental care has ceased or if she is unable to exercise it due to legal or factual reasons.

Upon petition of the father, the court may also in any other case assign also to him the exercise of the parental care or of part of it, provided that this is imposed by the child's interest.

In case of judicial acknowledgement, where the father had contested the action lodged against him, he neither exercises the parental care nor replaces the mother in the exercise thereof, unless there is an agreement between the parents according to article 1513. Upon petition of the father, the court may decide differently, if this is imposed by the child's interest, as long as the mother's parental care has ceased or she is unable to exercise it due to legal or factual reasons or there is an agreement between the parents."

## **Article 16**

### **Judicial replacement of the consent**

Article 1552 GCC is replaced as follows:

"Judicial replacement of the consent. The parents' consent to the adoption of their child is replaced by a specifically justified court decision, in the following cases: a) if the parents are unknown or the child is a foundling, b) if both parents have been forfeited from the parental care or are placed under privative judicial assistance, which deprives them also of the capacity to consent to the adoption of their child, c) if the residence of the parents is unknown either before or after the provision of the general authorization according to article 1554, d) if the child is under the protection of an acknowledged social organization, the exercise of the custody has been taken away from the parents, according to the provisions of articles 1532 and 1533, and the parents abusively refuse to consent and e) if the child has been placed, with the consent of the parents, with a family for care and upbringing with the purpose of adoption, and has been integrated to it for a period of at least one year, and then the parents abusively refuse to consent. If only one of the parents falls under *literae a'* to *e'*, the court decision replaces the consent of only this parent.

The consent of the to the minor's adoption is also replaced by a court decision, if the minor is protected by an acknowledged social organization and the guardian abusively refuses to consent.

## **Article 17**

### **Audition of Relatives**

Article 1553 GCC is replaced as follows:

"Audition of Relatives. In cases under *b'* to *e'* of the first paragraph, as well as in the case of the second paragraph of the previous article, the court may demand the audition of the closest relatives, if this is possible".

## **Article 18**

### **Addition or deletion of first name**

Article 1565 GCC is replaced as follows:

"Addition or deletion of first name. The court may, by its decision on the adoption, allow the prospective adoptive parent, upon his application, to add another name to

the adopted child's first name. In this case the court may, upon application of the adoptive parent, that is submitted after the adoption but within one year from the adoption the latest, allow the deletion of the first name the adopted child had before the adoption, if this is imposed by the child's interest.

If the adopted child is over twelve years old, its consent is necessary, in any case, in order for the court to grant the permission. The second paragraph of article 1555 is also applicable in this case".

### **Article 19**

#### **Who are placed under guardianship**

Article 1589 GCC is replaced as follows:

"Who are placed under guardianship. A minor is placed under guardianship when neither of his parents has or is able to exercise the parental care, when the court appoints a guardian according to articles 1532 and 1535 or assigns the exercise of the parental care to a third person according to articles 1513, 1514, as well as in case of articles 1660 and 1661."

### **CHAPTER 3**

#### **OTHER PROVISIONS**

### **Article 20**

Subparas. 2 and 3 are added to paragraph 1 of article 800 of the Greek Civil Procedure Code, which read as follows:

"Greek courts have jurisdiction to perform adoption, when the person who adopts or is adopted bear the Greek citizenship, even if their usual residence is not in Greece. In this case, the courts of the capital of the state are competent.

### **Article 28**

#### **Spouses' Surname**

A third paragraph is added to article 1388 GCC as follows:

"Each of the spouses may, by an agreement with the other, add the latter's surname to his own. This addition is made by a common declaration before the Registrar and is valid till its revocation before the Registrar by a common declaration of both spouses or by a unilateral declaration of anyone of them, which is notified to the other. If the marriage is terminated by divorce, the declaration is considered as being revoked. If the marriage is terminated because of death, the addition of the surname continues to be valid, unless the surviving spouse contracts a new marriage or makes a declaration of revocation before the Registrar."

**National section**

# **HUNGARY**

**Dr Orsolya Szeibert**

**University of Eötvös Loránd**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The current source of law for divorce and annulment is the Act No. IV 1952, namely the Family Act on marriage, family and guardianship (Family Act). Law for divorce is regulated in §§ 18-20, Chapter III. (Extra rules affect the consequences of divorce). Law for annulment is regulated in §§ 7-16, Chapter II.

The source of law for divorce and annulment cases is Act No. III 1952, it is the Civil Procedure Act. Law for divorce and annulment cases is regulated in §§ 276-291, Chapter XV. Besides, the general procedural rules of the Act are to be applied with regard to the special rules of Chapter XV.

Both acts have been amended several times. Legal separation is unknown in Hungary as a legal institution.

The codification of the new Civil Code is continuously on the agenda. In mid-July 2012 the Bill of the new Civil Code was submitted before the Parliament. The fourth book of the Civil Code is the 'Family Law Book' which will contain the substantial and some procedural rules for divorce and annulment. Legal separation will not be introduced. The new family law rules on divorce and annulment will differ from the current rules but the differences are slight (not in relation to the divorce's legal consequences).

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

The domestic jurisdiction rules are regulated in the Law Decree No. 13 1979, namely the Law Decree (or Code) on private international law. General jurisdiction rules, exclusive jurisdiction rules and excluded jurisdiction rules can and are applied to divorce cases.

The general rule (§ 54) follows the principle of *actor sequitur forum rei*. According to the general rule Hungarian courts shall have jurisdiction in all cases in which the defendant's domicile or residence [...] is in Hungary, unless its jurisdiction is excluded by the Law Decree [§ 54(1)]. If a Hungarian court has jurisdiction in a proceeding, it shall have jurisdiction in respect of a counterclaim.

According to the exclusive jurisdiction rule (§ 62/B), in all cases concerning the personal status of Hungarian citizens a Hungarian court (or another Hungarian authority) shall have jurisdiction. This jurisdiction is exclusive, unless the cases listed in the Law Decree. Concerning divorce (and termination of registered partnership) cases this jurisdiction is not exclusive if a proceeding relating to the divorce (or termination of registered partnership) of Hungarian citizen was brought abroad and the domicile or residence of the party with Hungarian citizenship or – if both parties are Hungarian citizens – of at least one of the parties is in the country in which the proceeding court or other authority is located [§ 62/B a)].

(The personal status is to be interpreted according to the Hungarian law. Annulment and divorce cases affect personal status.)

According to the excluded jurisdiction rule (§ 62/D), there is a general rule which fixes that neither a Hungarian court nor any other Hungarian authority shall have jurisdiction – with the exceptions set forth in (2) and (3) – in cases that concern the personal status of persons who are not Hungarian citizens [§ 62/D(1)]. According to

§ 62/D(2) Hungarian courts shall have jurisdiction in proceedings between persons who are not Hungarian citizens concerning personal status if the domicile or residence of one of the parties is in Hungary.

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

No.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes, Hungary participates in the enhanced cooperation.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

There is a new rule in the Law Decree on private international law which has been introduced with the effect from 21.06.2012. According to the first sentence of § 40 spouses can exercise the choice of applicable law referred to in §§ 5-7 of 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 by the deadline set by the court on the first hearing. (Before this rule the Hungarian private international law kept some technical issues of the choice of law in silent.)

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

According to the second sentence § 40 of the Law Decree on private international law, the agreement of the spouses on designation of the applicable law is valid subject to the formal requirements of § 7(1) of the Regulation. [Before this rule the Hungarian PIL rules did not contain any regulation on the availability (and the formal requirements) of spouses' agreement on the choice of applicable law.]

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The current source of law for maintenance of spouses after divorce is the Act No. IV 1952, namely the Family Act on marriage, family and guardianship (Family Act). Law for maintenance is regulated in §§ 21-22, Chapter III. The role of the judicial practice in the interpretation of the regulation's elements is great.

The source of law for maintenance cases is Act No. III 1952, it is the Civil Procedure Act.

The codification of the new Civil Code is continuously on the agenda. In mid-July 2012 the Bill of the new Civil Code was submitted before the Parliament. The fourth book of the Civil Code is the 'Family Law Book' which will contain the substantial rules for maintenance. Although some changes in the regulation on spousal maintenance is planned to be introduced, they are not enormous ones.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement procedure is regulated in the Act No. LIII of 1994, namely Act on Judicial Enforcement. According to its general procedural rules, there are two stages in the course of the judicial enforcement proceeding, the order of the enforcement and giving effect to it. Enforcement shall be ordered by the issue of an enforcement order (§ 10). There are several enforcement orders listed in § 10. In case of maintenance claims the following ones are relevant: certificate of enforcement issued by the court or a notary public; document with an enforcement clause issued by the court or a notary public; judicial order or restraint of enforcement, or order of transfer and a decree of direct judicial notice.

The court shall issue the enforcement order upon the creditor's request [§ 11(1)]; its formal requirements are fixed in §§ 11-12. According to the general requirements the enforcement order shall be issued if the judgment (writ) the enforcement of which is requested contains an obligation against the debtor, it is a definitive one or can be enforced in preliminary way and the performance deadline is expired [§ 13(1)]. There is a special rule concerning maintenance in § 14, according to which the enforcement order may be issued for maintenance payments which are more than six months overdue if the creditor has rendered it plausible that the non-payment is attributable to the conduct *mala fide* of the debtor or the creditor has failed to take action for enforcement for substantiated reasons.

A *certificate of enforcement* is issued by the court on the basis of a court judgment in civil case or on the basis of a court-approved settlement [§ 15 a) and c) respectively]. There are some special rules in § 16 concerning the issue of a certificate of enforcement. Among them I should mention the following: in connection with maintenance decisions under Council Regulation (EC) No. 4/2009, by the local district of the general court of jurisdiction by the debtor's home address or registered office, in the absence of such, by the location of the judgment debtor's enforceable assets, in Budapest, the Budai Központi Kerületi Bíróság (Buda Central District Court), on the basis of a court decision (court settlement) adopted in a State covered by the Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007 (hereinafter referred to as the 2007 Hague Protocol) [§ 16 I)]. Special rules for the enforcement of maintenance claims are contained in § 17. A certificate of enforcement may be issued for maintenance payments becoming due in the future in the interest of the recovery of maintenance. In such case, only the sum corresponding to the maintenance payments being overdue up to the termination of the enforcement procedure may be collected and paid to the creditor. As regards the recovery of one sum maintenance payments, the certificate of enforcement shall indicate the period - showing the calendar days - covered by the commitment for maintenance payments to which the recovery procedure pertains [§ 17(1)-(2)].

The enforcement clause shall be affixed by the court on several listed documents. According to § 23/B(1) c) "in connection with maintenance decisions under Council Regulation (EC) No. 4/2009, upon the authentic instruments made out in a State that is not covered by the Hague Protocol, the local district of the general court of jurisdiction by reference to the place of residence of the debtor, in the absence of such, by the location of the debtor's enforceable assets; in Budapest, the Budai Központi Kerületi Bíróság (Buda Central District Court)". According to § 23/B b) "in connection with maintenance decisions under Council Regulation (EC) No. 4/2009, upon the authentic instruments made out in a State covered by the Hague Protocol, by the local district of the general court of jurisdiction by reference to the place of

residence of the debtor, in the absence of such, by the location of the debtor's enforceable assets; in Budapest, by the Budai Központi Kerületi Bíróság (Buda Central District Court)".

Neither a certificate of enforcement is to be issued, nor an enforcement clause is to be affixed to, but an earnings withholding order will be issued according to § 24(1) and § 25(1), respectively, if the claim is to be satisfied exclusively from the debtor's wages. In case of maintenance this is the exclusive way of enforcement.

If the court obliges a person having wages to pay maintenance, it simultaneously notifies the employer to withhold the judgment amount and pay it to the beneficiary thereof if in the judgment containing the obligation [§ 28(1)], it is the direct judicial notice.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

According to the Governmental Order 1259/2010 (XI 26) the Central Authority is the Ministry of Administration and Justice.

### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

No.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The current source of law on matrimonial property regimes is the Act No. IV 1952, namely the Family Act on marriage, family and guardianship (Family Act). §§ 27-31 of Chapter IV contain the regulation on matrimonial property law. As the Family Act regulates this issue – in harmony with the socialist perception of the fifties according to which family law is about rules of personal, and not of financial issues – laconically, the crystallised judicial practice is very important. The default matrimonial property regime is the community of property and the spouses can enter into a matrimonial property agreement.

The source of procedural law for matrimonial property issues is Act No. III 1952, it is the Civil Procedure Act.

The codification of the new Civil Code is continuously on the agenda. In mid-July 2012 the Bill of the new Civil Code was submitted before the Parliament. The fourth book of the Civil Code is the 'Family Law Book' which will contain very detailed rules for matrimonial property law. The default regime, the community of property regime, is planned to be preserved but in the frames of detailed rules. In connection with the possibility of a matrimonial property contract two other regimes will also be regulated.

### **2. Which conflict of laws rules apply in matrimonial property disputes?**

According to § 39 of Law Decree No. 13 1979 [Law Decree (or Code) on private international law] the personal and property issues of spouses are to be treated in the same way. "Personal and property issues of spouses" creates a broad circle

under the interpretation of the Law Decree (only the maintenance issues are excluded since the Maintenance Regulation is in effect).

The law which is the common personal law of the spouses at the time of the judgement shall apply to the personal and property issues of the spouses, and these issues include the bearing of the spouses' name and the matrimonial property agreement [§ 39(1)]. If the spouses have different personal laws at the time of the judgement, then their last common personal law, or in the absence thereof, the law of the state on the territory of which the spouses had the last common residence shall be applied [§ 39(2)]. If the spouses had no common residence, the law of the state of the court of the proceedings or of another authority shall be applied to their issues [§ 39(3)]. A change in the personal law will not affect the bearing of the name established on the basis of the former law and the valid property consequences including the matrimonial property agreement.

### **3. Which are the property consequences of registered partnerships?**

Act No. XXIX 2009 introduced the registered partnership. The Act entered into force in July 2009. The property consequences of this partnership are the same as that of marriage. There are differences between marriage and registered partnership but in property issues there is no difference.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Act No. LV 2002 on mediation was adopted in 2002. The act was promulgated on 17 December 2002 and entered into force in March 2003. The Act No. LXXV 2009 on the modification of several acts concerning judicial service amended some acts, among them the Act on Mediation. § 146 explicitly mentions directives, among them the Directive 2008/52/EC, with which the amendment aimed the harmonisation.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Act No. LXXX 2003 on legal aid was adopted in 2003. The act was promulgated on 6 November 2003 and entered into force on 1 April 2004 (with some exceptions as some rulers entered into force three month earlier or one month later).

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### International instruments:

- UN Convention on the Recovery Abroad of Maintenance, New York 1956;
- Convention 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children of the Hague Conference on International Private Law;
- UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage;

- UN Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- Convention 1980 on the Civil Aspects of International Child Abduction of the Hague Conference on International Private Law;
- UN Convention on the Rights of the Child, 1989;
- Convention 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibilities and Measures for the Protection of Children.

Bilateral instruments:

Agreements on legal assistance in civil and family law cases (or at least in civil law cases) with the following countries:

Albania (1960), Algeria (1976), USA (reciprocity concerning the enforcement of decisions in child maintenance and spouse maintenance), Australia (1935), Austria (1965), Belgium (1954), Bosnia and Herzegovina (1968), Bulgaria (1966), Cyprus (1981), Czech Republic (1989), Egypt (1996), Belorussia (1958, 1971), Fiji (1935), Finland (1981), France (1980), Greece (1979), Croatia (1968), Iraq (1977), Canada (1935), Kenya (1935), China (1995), North Korea (1970), Cuba (1982), Poland (1959, 1980), Lesotho (1935), Macedonia (1968), Mongolia (1968), Montenegro (1968), Great-Britain (1935), Germany (reciprocity - 1992), Italy (1977), Russia (1958), Romania (1958), Serbia (1968), Syria (1986), Slovakia (1989), Slovenia (1968), Swaziland (1935), Tonga (1935), Turkey (1988), Tunisia (1982), New-Zeeland (1935), Ukraine (2001), Vietnam (1985).

**4. Are there any databases or online tools providing information on family law matters available in your country?**

**European Judicial Network**

In divorce cases:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_hun_en.htm)

In parental responsibility

issues: [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_hun_en.htm)

Information on alternative dispute resolution:

[http://ec.europa.eu/civiljustice/adr/adr\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_hun_en.htm)

Information on legal aid:

[http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_hun_en.htm)

Information on jurisdiction of the courts:

[http://ec.europa.eu/civiljustice/jurisdiction\\_courts/jurisdiction\\_courts\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_hun_en.htm)

Information on bringing a case to a court:

[http://ec.europa.eu/civiljustice/case\\_to\\_court/case\\_to\\_court\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/case_to_court/case_to_court_hun_en.htm)

Information on interim and precautionary measures:

[http://ec.europa.eu/civiljustice/interim\\_measures/interim\\_measures\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/interim_measures/interim_measures_hun_en.htm)

Information on enforcement of judgments:

[http://ec.europa.eu/civiljustice/enforce\\_judgement/enforce\\_judgement\\_hun\\_en.htm](http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_hun_en.htm)

**European Judicial Atlas in Civil and Commercial Matters:**

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

### **Hungarian Ministries, Institutions with English/German pages**

Hungarian Government – Magyar Kormány

<http://www.kormany.hu/en>

Ministry of Public Administration and Justice – Közigazgatási és Igazságügyi Minisztérium

<http://www.kormany.hu/en/ministry-of-public-administration-and-justice>

Head office: 1055 Budapest, Kossuth Lajos tér 2-4.

Postal address: 1357 Budapest, Pf.: 2.

Phone: +36-1-795-1000

Fax: +36-1-795-0002

E-mail of the customer service: [lakossag@kim.gov.hu](mailto:lakossag@kim.gov.hu)

Phone of the customer service: +36-1-795-6411

Ministry of Human Resources – Emberi Erőforrás Minisztérium

<http://www.kormany.hu/en/ministry-of-human-resources>

Ministry of Foreign Affairs – Külügyminisztérium

<http://www.kormany.hu/en/ministry-of-foreign-affairs>

Courts of Hungary – Magyarország bíróságai

[http://www.birosag.hu/engine.aspx?page=Birosag\\_english](http://www.birosag.hu/engine.aspx?page=Birosag_english)

National Chamber of Notaries – Magyar Országos Közjegyzői Kamara

<http://www.kozjegyzo.hu>

#### **5. Please provide information on accessing and applying foreign family law in your country.**

The Law Decree No. 13 1979 (Law Decree on private international law) contains some laconic regulations on the determination of foreign law's content. According to § 5(1) the court or another authority gets a line of the unknown foreign law ex officio, gets also an expert's opinion if needed and can take into attention the evidences brought by the party. The court or another authority can turn to the Minister being responsible for justice and the Minister shall give the needed information [§ 5(2)]. (According to § 5(3) if it is impossible to determine the content of foreign law the Hungarian law has to be applied.

Another source is the European Judicial Network pages about the Hungarian law.

## **II. NATIONAL JURISPRUDENCE**

### **Regulation Brussels IIbis in matters of cross-border divorce**

There is no published (accessible) judicial practice yet.

### **Maintenance Regulation**

There is no judicial practice yet.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

Chapters in books:

- Brüsszel II A Rendelet, In, Kengyel Miklós – Harsági Viktória, *Európai polgári eljárásjog (European Procedural Law)*. Budapest 2009. pp 203-248.
- A házassági és szülői felelősséggel kapcsolatos ügyek hatályos közösségi jogi szabályai, In, Wopera Zsuzsa, *Európai családjog (European Family Law)*. Budapest, 2009. pp 35-150.
- A Brüsszel II A rendeletet érintő kérdésekről lásd Brávác Ottóné – Szőcs Tibor, Nemzetközi családjog. In, Kőrös András (ed): *A családjog kézikönyve (Commentary to Family Law)*. Budapest, 2007. pp 1137-1148, 1174-1187.
- A Tanács 2201/2003/EK rendelete. In, Gyekiczky Tamás et al (eds), *Az Európai Unió polgári eljárásjoga (Procedural law of the European Union)*. Budapest, 2007. pp 111-126.

Articles:

- Kőrös András, A közjegyzői gyakorlatot érintő jogi esetek. Jogesetek a 2201/2003. EK rendelet (Brüsszel II.A. rendelet) alkalmazása köréből. [Más joghatósági ok hiányában a magyar bíróság ún. megállapodáson alapuló joghatóságának megállapítása a szülői felelősségre vonatkozó perben (Rendelet 12. cikk) - A szülői felelősség tárgyában egy másik uniós tagállamban hozott határozat elismerése és végrehajthatósága (Rendelet 21., 23. 28. és 39. cikk)]. *Közjegyzők Közlönye*. 1. 2011. pp 33-45.
- Osztovits András: Kettős állampolgárság megítélése a házassági perek joghatósági szabályaiban. *Családi Jog*. 4. 2009. pp 24-28.
- Osztovits András: Az Európai Közösségek Bíróságának joggyakorlata a szülői felelősséggel kapcsolatos perek joghatósági kérdéseiben. *Családi Jog*. 3. 2009. pp 25-30.
- Czigler Dezső Tamás: Az első Brüsszel IIa rendelettel kapcsolatos ügyek az Európai Bíróság előtt. *Jogtudományi Közlöny*. 9. 2008. pp 449-455.
- Brávác Ottóné: Családjogi tárgyú közösségi jogszabályok a magyar jogalkalmazásban. *Magyar Jog*. 12. 2007. pp. 729-735.
- Harsági Viktória: A házassági ügyekben, valamint a szülői felelősségre vonatkozó eljárásokban hozott határozatok elismerése az Európai Unióban. *Magyar Jog*. 3. 2006, pp 169-176.
- Harsági Viktória: Az ún. "szülői felelősséggel kapcsolatos" eljárások európai joghatósági rendszere. *Családi Jog*. 3. 2006. pp 9-14.
- Szeibert Orsolya: Az Európai Unió jogalkotása a családjog területén. A Brüsszel II rendelet személyi és tárgyi hatálya. A házasság felbontására vonatkozó ügyekben irányadó jogról és joghatóságról szóló Zöld Könyv. *Európai Jog*. 2005. 6. pp 32-40.
- Wopera Zsuzsa, A házassági és szülői felelősséggel kapcsolatos ügyek új eljárási szabályai a bővülő Európai Unióban. *Magyar Jog*. 8. 2004. pp 486-495.

### **Regulation Rome III: Cross-border divorce - applicable law**

There is no published book or study yet. There are studies which mention only the Regulation Rome III but not with details.

### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

Chapters in books:

- Tartási Rendelet. In, Kengyel Miklós –Harsági Viktória, *Európai polgári eljárásjog (European Procedural Law)*. Budapest 2009. pp 251-259.
- Tartási ügyekre vonatkozó közösségi szabályozás. In, Wopera Zsuzsa, *Európai családjog (European Family Law)*. Budapest, 2009. pp 217-251.

Articles:

- Wopera Zsuzsa: A tartási ügyek új európai uniós szabályai. *Családi Jog.* 4. 2011. 15-23.

### **Matrimonial property regimes and property consequences of registered partnerships**

- Szeibert Orsolya: Házassági vagyoni jog az európai országokban. 1. rész. *Családi Jog.* 3. 2009. pp 31-36.
- Szeibert Orsolya: Házassági vagyoni jog az európai országokban. 2. rész. *Családi Jog.* 1. 2010. pp 28-32.

**National section**

# **IRELAND**

**Dr Elaine O'Callaghan**

**Sales and Marketing Manager**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The Irish Constitution is the source of law for divorce. Article 41.3.2° was incorporated into the Irish Constitution on 17 June 1996, upon the Fifteenth Amendment to the Constitution Bill being signed by the President. This Article provides that a court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

- at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- there is no reasonable prospect of a reconciliation between the spouses,
- such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- any further conditions prescribed by law are complied with.

The Family Law (Divorce) Act 1996 was passed on 27 November, 1996 and came into operation on 27 February 1997. This Act introduced a no-fault divorce system in Ireland and includes a spousal support obligation.

The Judicial Separation and Family Law Reform Act 1989, as amended by the Family Law Act 1995, is the source of law for legal separation. The Matrimonial Causes and Marriage Law Act 1870 and the Family Law Act 1995 is the source of law for the annulment of a marriage.

Part II of the Family Law Act 1995 and Part III of the Family Law (Divorce) Act 1996 contain procedural provisions enabling the court to make orders.

#### Reform Proposals

The Family Law (Divorce) Act 1996 has been criticised because of its failure to provide for the possibility of a 'clean break' in financial terms, following divorce. Reform of this is unlikely however.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

The High Court has inherent original jurisdiction to hear a cross-border divorce case.

#### 3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

S.I. No. 506 of 2005: Rules of the Superior Courts (Jurisdiction, recognition, enforcement and service of proceedings) 2005

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Ireland is not participating in the enhanced cooperation implemented by Regulation Rome III. Instead, Ireland continues to apply domestic rules on the conflicts of law to determine the law applicable to a particular case and this is set out in both legislation and case law.

Brussels IIbis applies in cross-border divorce cases in Ireland. A seminal case which demonstrates the operation of Brussels IIbis in Ireland is the High Court case of *YNR v MN* (Unreported, O'Higgins J., 3 June, 2005). This case concerned a French couple who married in France in 1978 and moved to Ireland in 1988. The marriage broke down in 2002 and in November of that year the husband initiated divorce proceedings in France. By this time, the wife had returned to France, while the husband remained in Ireland. In December 2002, the wife instituted proceedings in Ireland. Further proceedings were brought in October 2003 and January 2004. The wife challenged the constitutionality of the Brussels II Regulation and contended that only the Irish court could reorder assets within the state. O'Higgins J. declined the wife's application that the case should be heard in Ireland. He held that the Brussels II Regulation was part of Irish law and expressed the view that the Brussels II Regulation was constitutional as it arose out of the "Yes" vote in the Amsterdam Treaty. O'Higgins J. concluded that the High Court had no jurisdiction in the matter. The judge noted that, under the Brussels II Regulation, the court to which the application is first brought must hear the case. As the French court was the court to which this case was first brought, it had the right to hear the case and determine the issues.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Not applicable to Ireland.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Not applicable to Ireland.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Part III of the Family Law (Divorce) Act 1996 is the source of law for maintenance of spouses after divorce. Any order for maintenance on divorce may be varied pursuant to s. 22 of the Family Law (Divorce) Act 1996, with the exception of a lump sum payment which is not being paid in instalments. The class of person who may make an application under s. 22 includes, in the case of the re-marriage of either of

the spouses, the new spouse. Before varying any order under s. 22, the court must have regard to any change of circumstances which may have occurred, or any new evidence which there may be. In addition to varying or discharging any maintenance order previously made, the court may suspend the operation of an existing maintenance order for a period of time.

#### Reform Proposals

There have been no proposals to reform the law regarding maintenance of spouses after divorce.

### **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

On the granting of a decree of divorce, or at any time during the lifetime of the former spouse, the Irish court may make orders under s. 13 of the Family Law (Divorce) Act 1996. S.13(1)(a) governs the making of a periodical payments order to the former spouse while s. 13(1)(b) provides for the making of a periodical payments order to a former spouse, but in this case the order made is secured. S. 13(1)(c)(i) empowers the court to make a lump sum order in favour of the former spouse.

The criteria set out in s. 20 of the Family Law (Divorce) Act 1996 and the principles derived from judicial consideration of these are applied by the court in assessing maintenance upon divorce. The court seeks to strike a balance in all the circumstances and will also take into account all matters it considers proper.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

The Department of Justice and Equality is the Central Authority designated to facilitate the application of the Maintenance Regulation.

### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

The national legal instrument which was put in place for the application of the Maintenance Regulation is the European Communities (Maintenance) Regulation 2011 (S.I. No. 274 of 2011).

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The Irish Family Home Protection Act 1976 provides the non-owning spouse with a power of veto over the sale of the family home. S. 3(1) of the 1976 Act states that without the prior consent in writing of the non-owning spouse, a conveyance shall

be void. In addition to the requirement that the consent be prior consent and in writing, the courts have held that the consent must be informed.

S. 1 of the Act of 1976 defines "conveyance" as including "a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a *donatio mortis causa* and also includes an enforceable agreement, whether conditional or unconditional".

S. 4 of the 1976 Act provides the Court with the option to dispense with such consent however, where a non-owning spouse omits or refuses to consent which it considers unreasonable.

### Separation of Property

Part II of the Family Law Act 1995 in relation to judicial separation and Part III of the Family Law (Divorce) Act 1996 in relation to divorce, enable the Court to make orders for the sale of property and orders for the provision for spouse out of the estate of the other spouse.

### Reform Proposals

There are no proposals for reform of this area.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

The conflict of law rules which apply are set out in legislation.

The Jurisdiction of the Courts and Enforcement of Judgments Acts 1988 and 1993 (The Brussels and Lugano Conventions) give domestic effect to European Union Conventions [The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1969); The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1988)] which provide for the reciprocal recognition and enforcement of civil and commercial judgments, including maintenance orders by the Courts of the Members States of the European Union and the European Free Trade Association (EFTA).

## **3. Which are the property consequences of registered partnerships?**

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 confers property rights on "qualifying cohabitants." A qualifying cohabitant is defined as a person who has lived with another for 2 years or more in the case where they are the parents of one or more dependent children, or 5 years or more, in any other case.

A qualifying cohabitant has the right to seek redress from the courts in a similar manner to married couples. If a qualifying cohabitant can satisfy the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may order

- That property be transferred from one party to the other
- That maintenance be paid
- That a pension adjustment order be granted

- That a cohabitant be provided for from the estate of a deceased cohabitant where one is deceased

In making these orders the court must consider:

- The financial circumstances, needs and obligations of each cohabitant existing as at the date of the application or which are likely to arise in the future
- The rights and entitlements of any spouse or former spouse, civil partner or former civil partner
- The rights and entitlements of any dependent children
- The duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another
- The financial contributions that each of the cohabitants made or is likely to make in the foreseeable future
- Any contributions made by either of them in looking after the home
- The effect on the earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple and the degree to which a cohabitant may have forgone their career
- Any physical or mental disability of the qualified cohabitant, and
- The conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

S.I. No. 209/2011 – European Communities (Mediation) Regulations 2011 transposed the Directive into Irish law.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive 2003/8/EC was not transposed into Irish law as pre-existing legislation, the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations of 1996 and 2002 (S.I. No. 273 of 1996, S.I. No. 8 of 2002) also give effect to the measures in the Directive.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

Yes, for example, the Hague Conventions and the UN Convention on the Rights of the Child.

### **4. Are there any databases or online tools providing information on family law matters available in your country?**

- Association of Collaborative Practitioners: [www.acp.ie](http://www.acp.ie)
- Aim Family Services: [www.aimfamilyservices.ie](http://www.aimfamilyservices.ie)
- The Courts Service of Ireland: [www.courts.ie](http://www.courts.ie)
- The Family Lawyers Association: [www.familylawyers.ie](http://www.familylawyers.ie)
- Flac – promoting access to justice: [www.flac.ie](http://www.flac.ie)
- Family Support Agency: [www.fsa.ie](http://www.fsa.ie)
- Department of Justice and Equality: [www.justice.ie](http://www.justice.ie)
- Law Reform Commission: [www.lawreform.ie](http://www.lawreform.ie)
- Law Society of Ireland: [www.lawsociety.ie](http://www.lawsociety.ie)
- Legal Aid Board: [www.legalaidboard.ie](http://www.legalaidboard.ie)
- Mediation Forum –Ireland: [www.mediationforumireland.com](http://www.mediationforumireland.com)
- One Family: [www.onefamily.ie](http://www.onefamily.ie)
- Parental Equality: [www.parentalequality.ie](http://www.parentalequality.ie)
- Parental Line: [www.parentline.ie](http://www.parentline.ie)
- Roller Coaster: [www.rollercoaster.ie](http://www.rollercoaster.ie)
- Support for People Parenting Alone: [www.solo.ie](http://www.solo.ie)
- Information for unmarried parents: [www.treoir.ie](http://www.treoir.ie)
- Ombudsman for children: [www.oco.ie](http://www.oco.ie)
- Department of Children and Youth Affairs: [www.omc.gov.ie](http://www.omc.gov.ie)
- Kids' turn: [www.kidsturn.org](http://www.kidsturn.org)
- Collaborative Family Law Professionals of South Florida: [www.collaborativefamilylawfl.com](http://www.collaborativefamilylawfl.com)
- European Judicial Network in Civil and Commercial Matters:
  - Information on divorce:  
[http://ec.europa.eu/civiljustice/divorce/divorce\\_ire\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ire_en.htm)
  - Information on maintenance obligations:  
[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ire\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ire_en.htm)
  - Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ire\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ire_en.htm)

- European Judicial Atlas in Civil and Commercial Matters informs on:

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

The Rules of Court and Irish Acts are the main sources of foreign family law in Ireland. All can be accessed via the Courts Service of Ireland website: [www.courts.ie](http://www.courts.ie)

Irish judges access and apply foreign law based on the pleadings which are put forward to them in court by counsel who carry out research on the applicable law.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

YNR v MN (Unreported, O'Higgins J., 3 June, 2005).

This case concerned a French couple who married in France in 1978 and moved to Ireland in 1988. The marriage broke down in 2002 and in November of that year the husband initiated divorce proceedings in France. By this time, the wife had returned to France, while the husband remained in Ireland. In December 2002, the wife instituted proceedings in Ireland. Further proceedings were brought in October 2003 and January 2004. The wife challenged the constitutionality of the Brussels II Regulation and contended that only the Irish court could reorder assets within the state. O'Higgins J. declined the wife's application that the case should be heard in Ireland. He held that the Brussels II Regulation was part of Irish law and expressed the view that the Brussels II Regulation was constitutional as it arose out of the "Yes" vote in the Amsterdam Treaty. O'Higgins J. concluded that the High Court had no jurisdiction in the matter. The judge noted that, under the Brussels II Regulation, the court to which the application is first brought must hear the case. As the French court was the court to which this case was first brought, it had the right to hear the case and determine the issues.

### Maintenance Regulation

No case law to date.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

##### Acts

- Family Law Act 1995.
- Family Law (Divorce) Act 1996.

##### Books

- Casey J., *Constitutional Law in Ireland*, (Dublin: RoundHall, 2000).
- Binchy W., *Irish Conflicts of Laws* (Bloomsbury, 2<sup>nd</sup> edn.)

##### Articles

- Martin F., McNamara, R., "Brussels Calling: The Unstoppable Europeanisation of Irish Family Law", (2006) 3 *Irish Journal of Family Law* p 8.

#### Regulation Rome III: Cross-border divorce - applicable law

##### Acts

- Family Law Act 1995.
- Family Law (Divorce) Act 1996
- Judicial Separation and Family Law Reform Act 1989.

##### Books

- Casey J., *Constitutional Law in Ireland*, (Dublin: RoundHall, 2000).

##### Articles

- Martin F., McNamara, R., "Brussels Calling: The Unstoppable Europeanisation of Irish Family Law", (2006) 3 *Irish Journal of Family Law* p 8.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

##### Acts

- Family Law Act 1995.
- Family Law (Divorce) Act 1996
- Judicial Separation and Family Law Reform Act 1989.

##### Books

- Binchy W., *Irish Conflicts of Law*, (Bloomsbury, 2<sup>nd</sup> edn.)
- Casey J., *Constitutional Law in Ireland*, (Dublin: RoundHall, 2000).
- Duncan W., Scully P., *Marriage Breakdown in Ireland: Law and Practice* (Dublin: Butterworths, 1990).

##### Reports

- Ward P., *The Financial Consequences of Marital Breakdown* (Dublin: Combat Poverty Agency, 1999).

### **Articles**

- Martin F., "Judicial Discretion in Family Law", (December, 1997) *Irish Law Times*, p 226
- Martin F., McNamara, R., "Brussels Calling: The Unstoppable Europeanisation of Irish Family Law", (2006) 3 *Irish Journal of Family Law* p 8.

## **Matrimonial property regimes and property consequences of registered partnerships**

### **Acts**

- Family Law Act 1995.
- Family Law (Divorce) Act 1996.
- Judicial Separation and Family Law Reform Act 1989.

### **Books**

- Casey J., *Constitutional Law in Ireland*, (Dublin: RoundHall, 2000).
- Duncan W., Scully P., *Marriage Breakdown in Ireland: Law and Practice* (Dublin: Butterworths, 1990).
- Shatter, A., *Shatter's Family Law* (Dublin: Lexis Nexis, 1997).

### **Articles**

- Walsh J., Ryan F., *The Rights of De Facto Couples*, (Irish Human Rights Commission, 2006).
- Martin F., "Judicial Discretion in Family Law", (December, 1997) *Irish Law Times*, p 226

**National section**

**ITALY**

**Maria Giuliana Civinini**

**Judge**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

In a legal point of view, married life is based on three main principles: equality of the spouses, common ownership of property acquired during marriage, common parental responsibility to be exercised in the interest of children. When the material and moral union between the spouses ceases, prior to divorce, separation must be declared and this should last three years. In case of separation and divorce both parents are obliged to concur to the maintenance of children and to educate them based on a shared education project. The judge has relevant ex officio powers in gathering evidences and adopting adequate solutions for the children. One spouse can be obliged to financial support the other, not having economic resources enough to grant the level of the matrimonial life. The marriage may be annulled for failure, violence, or error. In case of catholic wedding with civil effects (matrimonio concordatario) the marriage may be annulled by a court of the Sacra Rota (religious court) and the judgment can be recognised on the basis of a procedure for enforcement.

- **Divorce:** Law 1 December 1970, n. 898 modified by the Law 1 August 1978, n. 436, Law 6 March 1987, n. 74, Law 28 December 2005, n. 263, Law 8 February 2006, n. 54 in: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-12-01;898!vig=> The law on divorce includes procedural rules (jurisdiction, form and content of the application, hearing of the spouses by the President of the Court, the settlement procedure, interim measures in the interest of the spouse and minor children, appeal, precautionary measures); for anything not directly regulated by law, the rules of the Civil Procedure Code shall apply.
- **Annulment:** Civil Code, Articles 117 – 133 ; procedural rules are contained in the Civil Procedure Code
- **Legal separation:** Civil Code, Articles 150 – 158; Civil Procedure Code, Articles 706 – 711
- **Reform proposal:** The Parliament is considering a proposal to reform the law on divorce. The proposal aims to reduce the period of separation required for submitting the application for divorce (one year or two years in presence of children instead of the current three years) and to anticipate the time of dissolution of matrimonial community ownership during the separation procedure. The Parliamentary debate can be followed on <http://www.camera.it/465?area=16&tema=583&Riduzione+di+termini+per+lo+scioglimento+del+matrimonio>

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

In case Regulation Brussels IIbis is not applicable, jurisdiction is determined according to Law 31 May 1995 n. 218, Article 32.

In matters of nullity and annulment of marriage, legal separation, dissolution of

marriage, the Italian jurisdiction exists:

- in the cases ruled by Law n. 218/1995, Article 3 that is:
  - a) when the defendant has domicile or residence in Italy or has a representative authorised to represent him or her in courts;
  - b) under the criteria set out in Sections 2, 3 and 4 of Title II of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and Protocol, signed in Brussels on September 27, 1968, as implemented with Law 21 June 1971 n. 804 and subsequent amendments, even when the defendant is not domiciled in a Contracting State, when dealing with subjects included in the scope of the Convention
- when one spouse is an Italian citizen and the marriage was celebrated in Italy

See: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1995-05-31;218!vig=>

### **3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

When the court has jurisdiction, separation (judicial and consensual), divorce (judicial or joint) and annulment proceedings can take place and are governed by the procedural rules applicable to trials between Italian citizens. If the applicable (substantive) law provides that they can obtain directly the divorce, separation is not needed.

To facilitate the implementation of Regulation Brussels IIbis, the Department for Justice Affairs at the Ministry of Justice, Civil Justice Direction, Office II is in charge of:

- compliance relating to the enforcement of international judicial cooperation agreements;
- international cooperation and security, notifications and requests to and from foreign countries and enforcement of foreign judgments and other instruments made abroad in civil

contact details:

Via Arenula 70 - 00186 Roma

tel: +39 06 68852480

fax: +39 06 68897529

e-mail: [ufficio2.dgcivile.dag@giustizia.it](mailto:ufficio2.dgcivile.dag@giustizia.it)

### **4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Italy is one of the participating Member States.

Conflict of law rules applicable to separation and divorce cases not falling under Regulation Rome III are set down in Law 31 May 1995, n. 218, Article 31.

### **5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Article 5 (3) is not applicable. The sentence: "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" has been interpreted narrowly to mean that an agreement on the applicable law can be reached during the proceeding only based on an express provision of law. Such a provision is lacking in the Italian legal system.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No formal requirement is needed for an agreement. In particular, the adoption of the special form of the marital agreements (notarial act in public form ex Article 162 Civil Code) is not requested.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

- **After legal separation:** Civil Code, Article 156; Civil Procedure Code, Article 706 - 711
- **After divorce:** Law 1 December 1970, n. 898, Articles 4, 5, par. 6 to 8, Article 9 bis; Civil Procedure Code, Article 710
- A decision on maintenance can be adopted: as provisional measure by the President of the Tribunal after having heard the spouses and tried to reconcile them or to find an agreement on economic and parental care issues; as part of the final decision on the status and on separation's or divorce's conditions; by a three judges panel when requested to modify the separation's or divorce's conditions
- No reform proposal is pending.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The enforcement of decisions concerning maintenance of the spouse is performed on the basis of the ordinary rules on the enforcement of monetary obligations, Civil Procedure Code, Articles 483 to 591. The execution or forced expropriation process is a direct steal compulsively direct to divest the debtor of certain goods (seized; movable, immovable or credits to third parties) that are part of its assets and to convert them into cash by selling at public auction, in order to satisfy the creditor.

In the event of material breach, the court may warn the defaulting parent and impose a compensation for damages and the payment of a fine (Civil Procedure Code, Article 709 ter).

The spouse who left without means of subsistence the children or the spouse, who is not legally separated at fault, can be prosecuted and convicted for the crime set down in Article 570 of the Criminal Code.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

**The Ministry of Justice - Department of Juvenile Justice** has been identified as the Italian "Central Authority" responsible for fulfilling the obligations under the EC Regulation n. 4/2009, on the effective recovery of maintenance claims in cross-border situations. To this office are to be sent instances from the following countries: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia. The Ministry of Interior - Department for Civil Liberties and Immigration maintains -, however, is responsible for obligations arising from the similar pronouncements of non-EU states that adhere to the New York Convention of 20 June 1956.

**Contact data:**

Via Damiano Chiesa,24 – 00136 Roma  
tel. +39 06.68188325 / 326 - 328 - 419  
fax. +39 06.68807087 – 06.68188600  
e-mail: [autoritàcentrali.dgm@giustizia.it](mailto:autoritàcentrali.dgm@giustizia.it)

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

No.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Civil Code, Articles 159 to 230 bis.

Civil Procedure Code, Article 706 to 711. The dissolution of matrimonial community ownership can be requested in an ordinary procedure following ordinary procedural rules.

No reform proposal is pending.

**2. Which conflict of laws rules apply in matrimonial property disputes?**

- Law n. 218/1995, Article 30, par. 1:
  - The patrimonial relations between spouses are governed by the same law that applies to personal relationships (1. common national law; 2. in case of different citizenship or multiple common citizenships, the law of the State where the marriage took place mainly).
  - The spouses may agree that their patrimonial relations are governed by the law of the State of which at least one of them is a citizen or in which at least one of them is resident.

- Law n. 218/1995, Article 51: relationship with third persons.
  - The possession, ownership and other real rights on movable and immovable property is governed by state law where the property is located. The same law regulates the gain or loss of the right, except in matters of succession and in cases where the assignment of the right depends on a family relationship.

### 3. Which are the property consequences of registered partnerships?

In Italy registered partnerships don't exist; in case of partnerships the general rule on property is applicable.

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

- Law 18 June 2009, n. 69, Article 60  
<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009-06-18;69>
- Legislative Decree 4 March 2010, n. 28
- Minister of Justice Decree 6 July 2011
- Relevant information and legal texts can be found on:  
[http://www.giustizia.it/giustizia/it/mg\\_2\\_7\\_5\\_2.wp?previousPage=mg\\_1\\_8\\_1](http://www.giustizia.it/giustizia/it/mg_2_7_5_2.wp?previousPage=mg_1_8_1)

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

- Legislative Decree 27 May 2005, n. 116  
<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-05-27;116!vig>
- The authority responsible for receiving and transmitting is the Department for Justice Affairs at the Minister of Justice, Civil Justice Direction, Office II  
[http://www.giustizia.it/giustizia/it/mg\\_12\\_1.wp](http://www.giustizia.it/giustizia/it/mg_12_1.wp)  
mail: [ufficio2.dgcivile.dag@giustizia.it](mailto:ufficio2.dgcivile.dag@giustizia.it)
- The Consiglio dell'Ordine (BAR Association Board) of the place where the court having jurisdiction sits shall decide on the request for legal aid.

### 3. Is your country a contracting party to any bilateral or international instruments on family law?

Italy is a contracting party to many international and bilateral agreements on family law; online archives organised by topic and by country can be found on the Minister of Justice website, at the following addresses:

- [http://www.giustizia.it/giustizia/it/mg\\_14\\_7.wp?search=convenzioni+internazion](http://www.giustizia.it/giustizia/it/mg_14_7.wp?search=convenzioni+internazion)

- ali&pageCode=mg\_1
- [http://www.giustizia.it/giustizia/it/mg\\_1\\_3.wp?tabaip=y](http://www.giustizia.it/giustizia/it/mg_1_3.wp?tabaip=y)

Bilateral instruments can be researched also on the website of the Minister of Foreign Affairs; it is enough to put the name of the Country and a key word (like: "minori" or "famiglia", etc):

- <http://itra.esteri.it/itrapgm/ricerca1.asp>

It is worth mentioning: the Agreement between Italy and Romania on 9 of June 2008 on cooperation for the protection of unaccompanied Romanians minors presents on the Italian territory. On October 2007 the Central Body for the protection of communitarian unaccompanied minors was created at the Minister of Justice; relevant documents on

- [http://www.giustizia.it/giustizia/it/mg\\_2\\_5\\_2\\_4.wp](http://www.giustizia.it/giustizia/it/mg_2_5_2_4.wp)

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

On the website of the Minister of Justice relevant information, legal text, modules on family and juvenile law can be found

- [http://www.giustizia.it/giustizia/it/mg\\_12\\_4.wp](http://www.giustizia.it/giustizia/it/mg_12_4.wp) (minors)
- [http://www.giustizia.it/giustizia/it/mg\\_2\\_5\\_2\\_5.wp](http://www.giustizia.it/giustizia/it/mg_2_5_2_5.wp) (minors)
- [http://www.giustizia.it/giustizia/it/mg\\_3.wp](http://www.giustizia.it/giustizia/it/mg_3.wp) (heritage, family, divorce)

On the website of the Minister of Interior relevant information on international protection seekers can be found

- [http://www.interno.it/mininterno/export/sites/default/en/themes/asylum\\_and\\_refugees/](http://www.interno.it/mininterno/export/sites/default/en/themes/asylum_and_refugees/)

The European Judicial Network in Civil and Commercial Matters provides accessible information on Italian family law on its website:

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_ita_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ita_en.htm)

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

#### **5. Please provide information on accessing and applying foreign family law in your country.**

Based on Article 14 Law n. 218/1995: "1. The ascertainment of foreign law is made by the judge. For this purpose he or she may use, as well as the instruments referred to in international conventions, information acquired through the Ministry of Justice and may also consult experts or specialised institutions. 2. If the judge is unable to ascertain the foreign law indicated by the conflict of law rules, even with the help of the parties, he or she will apply the law determined based on other

conflict of laws rules which may be provided for the same case law. In the absence of such rules, the case is governed by Italian law.”

Information can be requested to the Department for Justice Affairs at the Minister of Justice, Civil Justice Direction, Office II

- [http://www.giustizia.it/giustizia/it/mg\\_12\\_1.wp](http://www.giustizia.it/giustizia/it/mg_12_1.wp)  
mail: ufficio2.dgcivile.dag@giustizia.it

or through the European Judicial Network in civil and commercial matters

- <http://ec.europa.eu/civiljustice/>
- [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33129\\_it.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33129_it.htm)

## II. NATIONAL JURISPRUDENCE

(this part is simply representative of national jurisprudence):

### Regulation Brussels IIbis in matters of cross-border divorce

- **Territorial jurisdiction**
  - **Court of Cassation, united chambers, Ordinance no. 3680 of 17/02/2010:** The procedure of separation between husband and wife, citizens of two different EU Member States, may be validly established in front of the court of the habitual residence of the plaintiff, as provided in Article 3, no. 1, letter. a) of the EC Regulation 2201 of 2003, even if the request is not jointly submitted by the spouses. That criterion of connection is intended as an alternative in case of both joint application and application presented by one spouse only, if habitual residence of the plaintiff has lasted at least annually prior to the commencement of the process.
  - **Court of Cassation, united chambers, Ordinance no. 3680 of 17/02/2010:** The "habitual residence" of the applicant is the place where the person is established, with permanent character, the usual and permanent center of his interests and relationships, based on a substantial (and not merely formal and demographic) evaluation. On the basis of European law, for the identification of actual residence, it is relevant the place of actual and continuous development of the personal and working life at the time of submitting the application.
- **Applicable law**
  - **Court of Cassation, First Chamber, judgment n. 7599 del 04/04/2011:** With regard to separation (and divorce) of spouses not having the same nationality, Article 31, first paragraph, of Law May 31, 1995, n. 218, provides the connecting factor of the place of "marriage", which is understood in a dynamic sense, as the main center of interest and affection of the spouses. This often, but not necessarily, coincides with the family residence. Family members could also have several residencies, so even if a long married life has been localised in a State, if later, and although a short period of time, a change occurs, it is the new location that the court must refer to, pointing out the specific expression of family relationships at the time of application.
  - **Tribunal of Reggio Emilia, 13 February 2012:** Homosexual couples should enjoy the basic right to live freely their matrimonial relationship. This would be prevented, in the event of denial of the right to continue the loving relationship after moving to Italy (in this case: foreign national married in Spain, with citizen Italian). There is, therefore, the need for uniform treatment of the condition of the married couple and that of same-sex couples, according to the canon of rationality. It follows that the decision of the Police Department to deny family reunification because the couple is gay should be annulled.

### Maintenance Regulation

**Court of Cassation, UC, Ordinance no. 30646 of 30/12/2011:** The jurisdiction in matters of custody of children and their maintenance, though proposed jointly with that of judicial separation, belongs to the courts for the place where the child is habitually resident, in accordance with Article 8 of Regulation (EC) n. 2201/2003 of 27 November

2003. This policy is made in the interest of the child and, in particular the criterion of proximity, is of such significance as to exclude that the failure to contest the jurisdiction by a spouse with regard to the separation is equivalent to consent to the extension of jurisdiction over questions concerning the minor (allowed by Article 12 of the Regulation, in the presence of the consent of both spouses).

### III. NATIONAL BIBLIOGRAPHY

For bibliography references (organised by field) on European family law see:  
[http://fermi.univr.it/europa/servizi/dossier\\_diritto\\_famiglia.pdf](http://fermi.univr.it/europa/servizi/dossier_diritto_famiglia.pdf)

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- P. BIAVATI, Il futuro del diritto processuale di origine europea, *in* iv. trim. dir. proc. civ. 2010, 03, 859
- F. Mansi, Il giudice italiano e le controversie europee. I principali regolamenti comunitari di diritto processuale civile, Milano, 2010
- C. CASTRONOVO – F.MAZZAMUTO, Manuale di Diritto Privato Europeo, I, Milano, 2007
- R. BARATTA – RICCI – L. TOMASI, La famiglia nel diritto internazionale privato comunitario, 2007
- S. SCARAFONI, Il processo civile e la normativa comunitaria, Torino, 2012
- A. LUPOI, Tutele e procedure giudiziarie europee. Principi fondamentali e applicazioni pratiche, Bologna, 2011
- M.G. CUBEDDU, Accordi sull'affidamento dei figli, riconoscimento ed esecuzione dei provvedimenti urgenti, in Riv. notariato 2010, 01, 1
- M. MAZZOTTA, Brevi note sulla trascrizione nei registri dello stato civile dei matrimoni contratti all'estero, in Riv. notariato 2010, 4, 1114
- R. CONTI, Il nuovo regolamento comunitario in materia matrimoniale e di potestà parentale, in Fam.Dir., 2004, n.3, 291
- R. BARATTA, Il regolamento comunitario sulla giurisdizione e sul riconoscimento di decisioni in materia matrimoniale e di potestà dei genitori sui figli, in Giust.civ., 2002, 455
- F. MOSCONI, Un confronto tra la disciplina del riconoscimento e dell'esecuzione delle decisioni straniere nei recenti regolamenti comunitari, in Riv.Dir.Int.Priv.Proc., 2001, 545
- G.GAJA, Le convenzioni internazionali e le nuove norme sulla giurisdizione e sul riconoscimento delle sentenze straniere in Riv. trim. dir. proc. civ. 1997, 04, 823
- NASCIMBENE, Divorzio, diritto internazionale privato e dell'Unione Europea, 2011

#### Regulation Rome III: Cross-border divorce - applicable law

- I. Ottaviano, La prima cooperazione rafforzata dell'Unione europea: una disciplina comune in materia di legge applicabile a separazioni e divorzi transnazionali, Dir. Un. Eur. 2011, 01, 113
- M. C. Baruffi, Il regolamento sulla legge applicabile ai divorzi europei, in Dir. Un. Eur. 2011, 04, 867
  - I. VIARENGO, Il Regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti, in Riv.Dir.Int.Priv.Proc., 2011, 601

### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

- R.BARATTA, *Diritto Internazionale Privato*, Milano, 2011
- VILLATA, *Obblighi alimentari e rapporti di famiglia secondo il regolamento n. 4/2009*, in *Riv. dir. int.*, 2011
- POCAR – VIARENGO, *Il regolamento (CE) n. 4/2009 in materia di obbligazioni alimentari*, in *Riv.Dir.Int.Prov.Proc*, 2009, 805
- VIARENGO – BARUFFI – CAFARI PANICO, *Il recupero dei crediti alimentari nel diritto comunitario : il regolamento 4/2009 (2009)*, Padova, 2009

### **Matrimonial property regimes and property consequences of registered partnerships**

- G.OBERTO, *Gli aspetti patrimoniali della famiglia. I rapporti tra coniugi e conviventi nella fase fisiologica ed in quella patologica.*, Padova, 2010
- G. OBERTO, *Problemi di coppia, omosessualità e filiazione*, in *Dir. famiglia* 2010, 02, 802
- G. OBERTO, *La comunione legale di fonte negoziale: riflessioni circa i rapporti tra legge e contratto nel momento genetico del regime patrimoniale tra coniugi*, *Dir. famiglia* 2011, 02, 835
- AA.VV. *La comunione legale. Questioni aperte*, in *Quaderni dell’AIAF*, 2011/2
- C.SARACINO, *Le unioni civili in europa: modelli a confronto*, *Dir. famiglia* 2011, 03, 1471
- R. ZISA, *Scelta della legge regolatrice dei rapporti patrimoniali da parte di coniugi cittadini stranieri e annotazione a margine dell'atto di matrimonio*, in *Riv. notariato* 2007, 5, 1171
- N. CIPRIANI, *Rapporti patrimoniali tra coniugi, norme di conflitto e variabilità della legge applicabile*, in *Rass. Dir. Civ.*, 2009, 1, 19
- PREITE (a cura di), *Atti notarili nel diritto comunitario e internazionale*, Torino, 2011

**National section**

**LATVIA**

**Dr Irēna Kucina**

**Director of the Department of Cooperation with the European Court  
of Justice, Latvian Ministry of Justice**

**Lecturer, Latvian Judicial Training Centre and University of Latvia**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

- the current source of law for divorce:

- a) substantive law: the Civil Law<sup>36</sup>, mainly Article 69 – 83.
- b) procedural law: the Civil Procedure Law<sup>37</sup>, mainly Article 34, 233 – 244.

As of February 2011, a divorce in the Republic of Latvia can be obtained as well at notary. But divorce at notary could be obtained only in cases where 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.

Current source of law is:

- a) substantive law: the Civil Law, mainly Article 69 – 70, 74, 77.
- b) procedural law: Notariate Law<sup>38</sup>, mainly Article 325 – 339.

- the current source of law for annulment:

- a) substantive law: the Civil Law, mainly Article 59 – 68; Article 79 – 83.
- b) procedural law: the Civil Procedure Law, mainly Article 34, 233 – 244.

- the current source of law of legal separation: the institute of legal separation does not exist in the Republic of Latvia.

- reform proposals:

No substantive reform proposals are expected directly concerning matters of divorce and annulment. The draft law (Amendments in the Civil Law) which is being examined at the Latvian Parliament now explicitly foresees that court shall not set the time period for conciliation of spouses in matters of divorce or marriage annulment if it concerns domestic violence. Reform proposals are expected concerning civil procedure of the taking of the provisional measures on family legal relationships which have to be decided together with divorce or annulment of marriage. (In the Republic of Latvia in matters regarding divorce or annulment of marriage claims arising from family legal relationships shall be

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<sup>36</sup> [The Civil Law](#) (the English version is not updated after amendments done in that law in June 22, 2006)

<sup>37</sup> [Civil Procedure Law](#) (the English version is not updated after amendments done in that law in December 14, 2006)

<sup>38</sup> [Notariate Law](#) (the English version of the Law is updated and corresponds to the text of the Law in Latvian language)

adjudged at the same time. Such claims shall be disputes regarding: 1) determining of custody; 2) exercising of access rights; 3) means of support for children; 4) means for the provision of the previous welfare level or support of the spouse; 5) joint family home and household or personal articles; and 6) division of the property of spouses). The taking of these provisional measures will be speed up considerably and the procedure will be improved in order to make speed up possible.

**2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

There are no additional domestic jurisdiction rules if no court of a Member State has jurisdiction according to Regulation Brussels IIbis (*Article 7 of the Regulation*).

**3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?**

No amendments to national legal instruments/procedures have been put in place for the application of Regulation Brussels IIbis as this Regulation is a directly applicable legal instrument.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

The Republic of Latvia is participating in the enhanced cooperation implemented by Regulation Rome III.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No, the designation of the applicable law could be done only before the case is adjudicated in substance.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No, in the Republic of Latvia there are no formal requirements applicable to the spouses' agreement on the choice of applicable law.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

- the current source of law:

a) substantive law: the Civil Law<sup>39</sup>, mainly Article 80 – 81.

b) procedural law: the Civil Procedure Law<sup>40</sup>, mainly Article 34, 26.

- reform proposals:

No reform proposals are expected in matters of child's and parent's maintenance. The draft law (Amendments in the Civil Law) concerning small reforms in spousal maintenance is being examined at the Latvian Parliament now. This draft law foresees that there will be no more the need to establish fault in dissolution of marriage in order to establish obligation to pay spousal maintenance (to ensure means for the provision of the previous welfare level to the ex-spouse). Other reform proposals are expected concerning civil procedure of the taking of the provisional measures on child's maintenance. The taking of these provisional measures will be speed up considerably and the procedure will be improved in order to make speed up possible.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The Civil Procedure Law extensively regulates the enforcement procedure for court decisions or judgments. The law does not contain any special provisions on enforcement of decisions given in the field of maintenance. Therefore general rules of enforcement are applicable in the case of maintenance claims. Where the party requests enforcement of a decision or a judgment of a court, according to the Civil Procedure Law the decision or judgment is enforced by bailiffs. The bailiff commences the enforcement procedure after the court has issued the enforcement order upon the request of the person seeking the enforcement and after this person has submitted the enforcement order to the bailiff. Initially, the bailiff requests and gives a fixed period of time for the person, against whom the enforcement is sought, to comply voluntarily with the judgment (decision). If the person does not comply voluntarily with the judgment, the bailiff may use the enforcement measures determined either in the judgment (decision) or by law.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

In Latvia, the functions of the Central Authority are discharged by the Administration of the Maintenance Guarantee Fund.

Contact information:

Uzturlīdzekļu garantiju fonda administrācija

Pulkveža Brieža street 15, 2nd floor,

Riga LV-1010

Latvia

Tel.: + 371 67 830 626

Fax: + 371 67 830 636

e-mail: [pasts@ugf.gov.lv](mailto:pasts@ugf.gov.lv)

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<sup>39</sup> [The Civil Law](#) (the English version is not updated after amendments done in that law in June 22, 2006)

<sup>40</sup> [Civil Procedure Law](#) (the English version is not updated after amendments done in that law in December 14, 2006)

#### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

The Regulation of the Cabinet of the Ministers of the Republic of Latvia No 571 "Procedure by which the Administration of the Maintenance Guarantee Fund exercises the functions of Central Authority in cross – border maintenance matters"<sup>41</sup> was adopted on 19 July 2011 in order to provide appropriate exercise of functions of the Central Authorities of the Maintenance Regulation.

Other national legal instruments / procedures were not adopted in order to provide proper functioning of the Maintenance Regulation. Some amendments were made in the Civil Procedure Law, for example, Article 540 "Execution documents" of the Civil Procedure Law was amended by extending this Article with a new clause, which stipulates that also an extract from an authentic instrument issued by a competent foreign authority according to Article 48 of the Maintenance Regulation, as well as an extract from a decision issued by a competent court according to Article 20(1b) may be deemed an "execution document" in Latvia; Article 541<sup>1</sup> of the Civil Procedure Law was amended by extending it by stipulating that the extract from the decision pursuant to Article 20(1b) of the Maintenance Regulation shall be provided upon request of a case party after the judgement or the decision has entered into force, but in cases, when the judgement or the decision shall be enforced immediately – right after announcement of the judgement or decision-taking, by the court, within which the case is at that time. The Law on the Administration of the Maintenance Guarantee Fund as well was amended by providing that the Administration of the Maintenance Guarantee Fund shall upon necessity without special authorisation represent foreign persons in court and other governmental and municipal authorities, provided the persons are entitled to receipt of legal aid according to Maintenance Regulation.

### **C. Matrimonial property regimes in Europe**

#### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

- the current source of law:
  - a) substantive law: the Civil Law<sup>42</sup>, mainly Article 89 - 145.
  - b) procedural law: the Civil Procedure Law<sup>43</sup>, mainly Section 29.
- reform proposals:

No reform proposals are expected on matrimonial property regimes.

#### **2. Which conflict of laws rules apply in matrimonial property disputes?**

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<sup>41</sup> No English version available.

<sup>42</sup> [The Civil Law](#) (the English version is not updated after amendments done in that law in June 22, 2006)

<sup>43</sup> [Civil Procedure Law](#) (the English version is not updated after amendments done in that law in December 14, 2006)

Article 13 of the Civil Law provides that personal and property relations of spouses shall be determined in accordance with Latvian law, if the place of residence of the spouses is in Latvia. If property of the spouses is located in Latvia they, in respect of such property, shall be subject to Latvian law notwithstanding that they themselves do not have a place of residence in Latvia.

### **3. Which are the property consequences of registered partnerships?**

The institute of registered partnerships does not exist in the Republic of Latvia.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters has not been transported into domestic law yet. Since so far in Latvia mediation is provided on a self-organised mediators basis, the aims of the Directive are achieved within the framework of current legislation, in particular, within the framework of the court settlements (conciliation between parties encouraged and, if reached, approved by court) provided for in the Civil Procedure Law.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes is transposed into the State Ensured Legal Aid Law<sup>44</sup>.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### **I) Multilateral international conventions:**

##### Hague Conference on Private International Law:

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

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<sup>44</sup> State Ensured Legal Aid Law (the English version is not updated after amendments done in that law after October 21, 2010)

- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

Council of Europe:

- European Convention on the Adoption of Children
- European Convention on the Legal Status of Children born out of Wedlock
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention on the Exercise of Children's Rights
- Convention on Contact concerning Children - European Agreement on the Transmission of Applications for Legal Aid
- Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid

**II) Bilateral international agreements**

The Republic of Latvia has bilateral international agreements on legal assistance and legal relations with Russian Federation, Ukraine, Belarus, Uzbekistan, Kyrgyzstan, Moldova, Lithuania, Estonia and Poland. The scope of the legal assistance treaties includes both civil and criminal law matters. The legal assistance and legal relations agreements entered into by the Republic of Latvia have a very broad field of application: matters as jurisdiction, applicable law, recognition and enforcement of judgments, service of documents, taking of evidence.

**4. Are there any databases or online tools providing information on family law matters available in your country?**

**European Judicial Network in Civil and Commercial Matters**

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_lat\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_lat_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_lat\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lat_en.htm)

- Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_lat\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_lat_en.htm)

**European Judicial Atlas in Civil and Commercial Matters**

- Parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**The Ministry of Welfare**

<http://www.lm.gov.lv/>

**The Administration of the Maintenance Guarantee Fund**

<http://www.ugf.gov.lv/eng/>

**The State Inspectorate for Protection of Children's Rights**

[http://www.bti.gov.lv/eng/vbta\\_inspekcija/](http://www.bti.gov.lv/eng/vbta_inspekcija/)

**5. Please provide information on accessing and applying foreign family law in your country.**

In cases where foreign law is applied, the party to proceedings who refers to the application of foreign law shall submit to the court a translation of the text of the foreign law with a certified translation into the official language. Where the content of the submitted law is not clear to the court, it, *ex officio* or upon request of a party, may submit a request for information under a bilateral or multilateral treaty, where applicable, and where not applicable through the Ministry of Justice of Latvia.

In Latvia there is not established a non-governmental body responsible for providing for the text of foreign law as such exists in some countries.

The *European Convention of 7 June 1968 on Information on Foreign Law* and bilateral treaties in the matter of access to information on the content of foreign law are applied very rare due to the fact that in practise foreign law mostly is not applied.

**Extract for the Civil Procedure Law:**

**“Chapter 80**

**Application of Foreign Laws to Adjudication of Civil Matters**

*[7 April 2004]*

**Section 654. Texts of Foreign Laws**

In cases where foreign laws shall be applied, the participant in the matter who refers to the foreign law shall submit to the court a translation of the text in a certified translation into the official language according to specified procedures.

*[7 April 2004]*

**Section 655. Ascertaining the Contents of Foreign Law**

(1) In accordance with the specified procedures in international agreements binding on the Republic of Latvia, a court shall ascertain the contents of the foreign law to be applied.

(2) In other cases, a court through the intermediation of the Ministry of Justice and within the bounds of possibility shall ascertain the contents of the foreign law to be applied.

*[7 April 2004] “*

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

There are no important cases on application of Regulation Brussels IIbis in matters of cross-border divorce.

### Maintenance Regulation

As the Maintenance Regulation is being applied for a short period of time there are no important cases available at the moment.

### III. NATIONAL BIBLIOGRAPHY

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

- Kucina I., Zikmane A. Application of Grounds of Jurisdiction of the Brussels IIbis Regulation in Matrimonial Matters and Matters of Parental Responsibility. Rēzekne: SIA „Latgales druka”, 2010. (9.lpp.)

#### **Regulation Rome III: Cross-border divorce - applicable law**

- Rektiņa A. Jauns regulējums starptautiska rakstura laulības šķiršanas lietās. // Jurista Vārds – 2011. – Nr.9

#### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

- The Ministry of Justice. Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. #

#### **Matrimonial property regimes and property consequences of registered partnerships**

- Kalniņš E. Laulāto manta laulāto likumiskajās mantiskajās attiecībās. Tiesu Namu Aģentūra, 2010
- Ciematniece I. Laulāto mantisko attiecību regulējums Latvijā. // Jurista Vārds – 2008. - Nr. 20, Nr.21.
- Zvērinātu advokātu birojs Eversheds Bitāns. Juridiskais pētījums par vīrieša un sievietes neregistrētu partnerattiecību tiesisko regulējumu Eiropā un Latvijā (study)
- Tieslietu ministrija. Pētījums Ģimenes tiesībās Civillikuma Ģimenes tiesību daļas modernizācijai (Study)

**National section**

# **LITHUANIA**

**Ruta Bucinskaitė, LL.M**

**Adviser in the Department of Law, Supreme Court of Lithuania**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Current sources of law:

##### Substantial law:

The main source of substantial law for divorce, annulment and legal separation in Lithuania is the Civil Code. It entails following provisions on each of the questions:

##### - For divorce:

Article 3.49, which foresees the cases for termination of the marriage: marriage in Lithuania is dissolved by the death of one spouse or if it is terminated according to the provisions of law (e. i. by divorce). Divorce is possible by the mutual consent of the spouses, according to the request of one of the spouses and due to the fault of one of the spouses.

Articles 3.50 – 3.54 foresee the divorce by the mutual consent of both of the spouses.

Articles 3.55 – 3.59 foresee the divorce according to the request of one of the spouses.

Articles 3.60 – 3.65 foresee the divorce due to the fault of one of the spouses.

Articles 3.66 – 3.72 foresee the legal consequences of the divorce for both of the spouses. Legal consequences cover both: material and immaterial outcome (surname of the spouses) of the divorce.

##### - For legal separation

Articles 3.72 – 3.80 entail the provisions for legal separation of the spouses.

Please note, that legal separation is one of the alternative grounds, needed for the divorce according to the request of one of the spouses to be possible, foreseen in Article 3.55. Legal separation in Lithuanian law means, that the common life of the spouses is terminated, however other rights and duties of the spouses are not impacted. Together with the decision to establish legal separation, the court decides also upon the property of the spouses, unless those matters are already settled in the marriage contract of the spouses.

##### - Annulment of the marriage

Articles 3.37 – 3.48 foresee the requirements for the annulment of the marriage, as well as legal consequences of it.

##### Procedural law:

The main source of procedural law for divorce, annulment and legal separation is the Civil Procedure Code. It is applicable in its entirety for the court proceedings, however it entails following special provisions on each of the questions:

Articles 375 – 380 provide rules, which serve as exemptions from general civil procedure norms in family cases (e. g. it foresees the right to the court to collect evidence in family cases on its own initiative, sets the rule, that hearings of family

cases should be not open to the publics, if at least one of the parties requests so, as well as foresees the right for the children to be heard, if they are mature to express their opinion, etc.).

Articles 381 – 386 entail the rules for the procedure of divorce, legal separation and annulment of the marriage, as well as foresee the competent court for such cases (general rule for divorce and legal separation: the local court of the place of habitual residence of the respondent; in case the claimant has minors, who live with him, it can also be the court of the place of habitual residence of the claimant; for the annulment of the marriage the local court of habitual residence of the respondent (or respondents) is competent).

#### International private law provisions:

- Provisions in national law

Articles 1.24 – 1.36 of the Civil Code provide main rules on applicable law in family matters.

Articles 780 – 783 of the Civil Procedure Code entail general rules on jurisdiction in cross – border cases. Article 784 provides the rules for the jurisdiction of family matters in cross – border cases.

- Provisions in international public law

Lithuania has concluded various bilateral agreements for legal assistance, which cover also family cases and designate jurisdiction rules. Thus the provisions of bilateral agreements should be observed, if the dispute between the parties falls within the scope of such agreement.

There are no official reform proposals in this area.

## **2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

In such case domestic international civil procedure rules should apply, e. i. Article 1.30 of the Civil Code, which directs to the provisions of the Civil Procedure Code:

### ***Article 1.30. Jurisdiction in the cases of annulment, dissolution of marriage and separation***

*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.*

According to it Lithuanian courts shall have jurisdiction to hear family cases (including divorce, separation and annulment of the marriage) if at least one of the spouses is a citizen of Lithuania or a stateless person, who's place of habitual residence is in Lithuania. Lithuanian courts will have exclusive jurisdiction in family cases if both spouses have their habitual residence in Lithuania. Lithuanian courts are also competent to hear family cases also in the case, if both spouses are foreigners, but with habitual residence in Lithuania. Please find below Article 784 of the Civil Procedure Code.

### ***Article 784. Jurisdiction of family legal relation proceedings***

1. Family proceedings shall fall under the jurisdiction of courts of the Republic of Lithuania if at least one of the spouses is a citizen of the Republic of Lithuania or a stateless person, whose permanent place of residence is in the Republic of Lithuania.

2. When both spouses are permanent residents of the Republic of Lithuania, their family cases shall be heard **exclusively** by courts of the Republic of Lithuania.

3. Courts of the Republic of Lithuania shall have a remit to hear family proceedings in cases when both spouses are foreigners permanently residing in the Republic of Lithuania.

As to which exactly court within Republic of Lithuania would be competent to hear the family case Article 381 1 and 2 parts of the Civil Procedure Code shall apply. According to it the local court of respondent's habitual residence shall have competence to hear such case. In case the claimant has minors, also the local court of its habitual residence is competent to hear a case. As for the annulment of the marriage, the local court of the habitual residence of the respondent or respondents shall have jurisdiction to hear the case.

**Article 381. Filing a claim**

1. A claim concerning the dissolution of a marriage shall be filed with the area court according to place of residence of the defendant. If the plaintiff has minor children living with him, the claim concerning the dissolution of the marriage may also be filed with the area court according to the plaintiff's place of residence

2. A claim concerning the annulment of a marriage shall be filed according to the place of residence of the defendants or one of them.

<...>

Please note, that there is a special jurisdiction rule for family cases of the spouses, who both are citizens of Lithuania, but do not have neither habitual residence nor property in Lithuania (please find detailed description in answer A. 3).

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

As a general rule, Regulation Brussels IIbis is applicable directly in Lithuania. However there is also a Law on implementation of EU and international legal instruments in the field of civil procedure, which is in force and its provisions should be observed when applying Brussels IIbis, also Brussels I, also Regulation No. 1393/2007 on serving of documents, Regulation No. 1206/2001 on collecting of evidence, Regulation No. 805/2004 on European Enforcement Order, Regulation No. 1896/2006 creating a European Order for payment procedure, Regulation No. 861/2007 establishing a European Small Claims Procedure, as well Maintenance Regulation No. 4/2009.

With regard to divorce, legal separation and annulment of marriage cases Article 8 and Article 11 of the Law on implementation of EU and international legal instruments in the field of civil procedure are important.

Article 8 entails jurisdiction rule for the spouses, who are the citizens of Lithuania, but do not have habitual residence and property in Lithuania. The claimant in such case can choose to apply to any local court in Lithuania.

Article 11 provides the competent institutions for the purposes of Regulation Brussels IIbis. It foresees, that the Ministry of Justice is responsible for the courts cooperation and also in charge to provide information on the Lithuanian procedural rules concerning the implementation of Brussels II bis Regulation; the Ministry of Social Security and Labour is in charge for all other functions.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Lithuania is not participating in the enhanced cooperation implemented by Regulation Rome III. However the minister of justice of Lithuania 25 May 2012 officially requested to join the enhanced cooperation in Regulation Rome III. Official decision has not been adopted yet. However, please find provided the information on possible application of Rome III provisions in Lithuania (see answers to questions A. 5 and A. 6).

The Civil Code of Lithuania provides conflict of law rules, applicable in case of cross border divorce or legal separation in Lithuania. Please find below Article 1.29 of the Civil Code in English.

***Article 1.29. Law applicable to separation and dissolution of marriage***

*1. Separation and dissolution of marriage shall be governed by the law of the spouses' state of domicile.*

*2. 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.*

*3. If the law of the state of common citizenship of the spouses does not permit 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.*

As long as Lithuania does not participate in the enhanced cooperation implemented by Regulation Rome III the above provided conflict of law rules apply in case of cross border divorce.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Lithuania is not participating in the enhanced cooperation implemented by Regulation Rome III. However, please find provided the information on possible application of Rome III provisions in Lithuania:

It would be possible for the spouses to designate the applicable law during the course of the proceedings according to the Regulation Rome III, however such an agreement would be a subject for general limitations, entailed in the Regulation Rome III itself (paragraph 25 of the preamble), as well as Civil Code, e. i. Article 1.11 of the Civil Code on the limitations to apply foreign law. This provision limits the application of law, agreed by the parties. Please note that Article 1.11 of the Civil Code will apply as long as its application will not be contrary to the application of Regulation Rome III provisions. Please find below the text of this Article in English.

**Article 1.11. Limitation of the application of foreign law**

1. *The provisions of foreign law shall not be applied where the application thereof might be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply.*

2. *Mandatory provisions of laws of the Republic of Lithuania or those of any other state most closely related with a dispute shall be applicable regardless of the fact that another foreign law has been agreed upon by the parties. In deciding on these issues, the court shall take into consideration the nature of these provisions, their purpose and the consequences of application or non-application thereof.*

3. *In accordance with this Code, the applicable foreign law may not be given effect where, in the light of all attendant circumstances of the case, it becomes evident that the foreign law concerned is clearly not pertinent to the case or its part, with the case in question being more closely connected with the law of another state. This provision shall not apply where the applicable law is determined by the agreement of the parties.*

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No, any further formal requirements beyond the requirements, foreseen in Article 7(2) to (4) of Regulation Rome III are not entailed in national law. But please note that Lithuania is not participating in the enhanced cooperation implemented by Regulation Rome III.

**B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Current sources of law:

Substantial law:

Firstly, Article 1.36 of the Civil Code provides that maintenance obligations (alimony) within the family shall be governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. However with regard to EU Member states, Maintenance Regulation No. 4/2009 shall apply.

The main source of substantial law for maintenance obligations of the spouses in Lithuania is the Civil Code. It provides that the spouses can foresee their maintenance obligations in a marital agreement (Article 3.104 part 4 of the Civil Code), in the agreement settling the outcomes of the divorce (Article 3.53 part 3 of the Civil Code) or in the course of divorce or separation proceedings the spouse in need for maintenance can request it. Please note that if such request is not made in the agreement settling the outcomes of the divorce or during the course of the divorce proceedings, it can not be made after divorce proceedings are already over, unless a grave change in circumstances occurs. In such case the spouse, who gets in need of maintenance (becomes ill or incapable to work), can request to review the

conditions of the agreement, concluded during divorce proceedings. In case the spouses in their agreement (in case of divorce by mutual consent or in case of legal separation) explicitly indicate, that none of the spouses requires maintenance from the other spouse, even if the circumstances change, maintenance can not be requested<sup>45</sup>.

Under the case law in Lithuania<sup>46</sup>, if during the course of the divorce proceedings in case divorce is launched due to the fault of another spouse and from the case material it is evident, that the requesting spouse would be entitled for the maintenance, the court *ex officio* should follow one of the options: (1) to return the request for the divorce indicating, that it should be complemented with the request for maintenance or (2) award maintenance for the spouse, who is in need of it and he is not the spouse, of whose fault the divorce has happened.

Article 3.72 of the Civil Code provides the general rule, that maintenance after divorce should be awarded to the spouse, who is in need of it and unless the maintenance questions are not dealt with by the spouses in their marital agreement. It provides also for criteria, which are essential while deciding, if one of the spouses needs maintenance (if the income of the spouse are sufficient, he/she will have no right to maintenance; according to part 2 of the Article maintenance is presumed to be necessary if he or she is bringing up a minor child from the marriage or is incapacitated for employment because of his or her age or state of health).

Maintenance can be awarded as an order for a lump sum or periodical (monthly) payments or property adjustment.

Please find below Article 3.72 of the Civil Code.

**Article 3.72. Mutual maintenance of the former spouses**

*1. The court when making a divorce judgement shall also make a maintenance order in favour of the spouse in need of maintenance unless the matters of maintenance are settled in the agreement of the spouses concerning the consequences of divorce. A spouse shall have no right to maintenance if his or her assets or income are sufficient to fully support him or her.*

*2. Maintenance shall be presumed to be necessary if he or she is bringing up a minor child of the marriage or is incapacitated for employment because of his or her age or state of health.*

*3. A spouse that was not able to obtain any qualifications for work (complete his or her studies) because of the marriage, common interests of the family or the need to care for the children, shall have a right to demand from the former spouse to cover the costs related to the completion of his or her studies or retraining.*

*4. The spouse responsible for the breakdown of the marriage shall have no right to maintenance.*

*5. While making a maintenance order and deciding on its amount, the court shall take into account the duration of the marriage, the need for maintenance, the assets owned by the former spouses, their state of health, age, capacity for employment, the possibility of the unemployed spouse of finding employment and other important circumstances.*

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<sup>45</sup> For more information: Kudinavičiūtė – Michailovienė, Inga „Ištuokos reglamentavimas: nuostatos, integraciniai procesai ir principai“, Jurisprudencija, 2007, 3 (93), psl. 34.

<sup>46</sup> The decision of the Supreme Court of Lithuania in the case No. 3K-3-351/2005, 2005.05.27.

6. *The amount of maintenance shall be reduced, made temporary or refused if one of the following circumstances exist:*

1) *the marriage lasted for a period not exceeding a year;*

2) *the spouse entitled to maintenance has committed a crime against the other spouse or his or her next of kin;*

3) *the spouse entitled to maintenance has created his or her difficult financial situation through his or her own irresponsible acts;*

4) *the spouse requesting maintenance did not contribute to the growth of their community assets or wilfully prejudiced the interests of the other spouse or the family during the marriage.*

7. *The court may demand from the spouse obliged to provide maintenance to the other spouse to produce an adequate guarantee of fulfilment of this obligation.*

8. *The court may make maintenance orders for a lump sum or periodical (monthly) payments or property adjustment.*

9. *Where divorce is based on the application of one of the spouses because of the legal incompetence of the other spouse, the applicant spouse must cover the treatment and care expenses of the former incompetent spouse unless the expenses are covered from state social security funds.*

10. *The maintenance order shall be the basis for the forced pledge of the respondent's assets. If the former spouse defaults on his or her obligation to pay maintenance, his or her assets may be used to make payments in the procedure laid down by the law.*

11. *Where the maintenance order is for periodical payments, a significant change in the circumstances referred to in paragraph 5 of this Article may warrant the application of either of the former spouses for an increase, reduction or termination of maintenance payments. Periodical payments shall be for the life of the creditor and shall be inflation-indexed annually in the procedure laid down by the Government.*

12. *After the death of the spouse obliged to pay maintenance, the obligation to pay maintenance is devolved on his or her successors to the extent of his or her estate irrespective of the way the estate is accepted.*

13. *Where the payee dies or remarries, the maintenance payment shall be terminated. On the payee's death, the right to demand arrears of the maintenance payments shall pass to the payee's successors. The dissolution of the new marriage shall create a right to apply for the renewal of maintenance payments provided the payee is bringing up a child by his or her former spouse or is caring for a disabled child by his or her former spouse. In all other cases the duty of the subsequent spouse to maintain the payee shall take precedence over that of the first former spouse.*

The maintenance obligation could also arise in case of legal separation of the spouses, as it is foreseen in Article 3.78 of the Civil Code. Please find below this Article.

**Article 3.78. Mutual maintenance of the spouses**

1. *When issuing a separation order, the court may order the spouse at fault for the separation to pay maintenance to the other spouse in need of it unless the maintenance matters are settled in the agreement of the spouses.*

*2. When making a maintenance order and determining the amount, the court must take into consideration the duration of the marriage, the need for maintenance, the financial position of both spouses, their state of health, age as well as their earning capacity, the unemployed spouse's chances of finding employment and other important circumstances.*

*3. The court may rule that the spouse under the obligation to pay maintenance to other spouse must provide a security that the obligation will be fulfilled.*

*4. Maintenance may be ordered as a lump sum of a certain amount or periodical monthly payments or property transfer.*

*5. The maintenance order shall be the basis for the statutory pledge of the respondent's assets. If a spouse defaults on his or her obligation to provide maintenance, his or her assets may be used to make payments in the procedure laid down by the law.*

*6. Where maintenance has been ordered in the form of periodical payments, a fundamental change in the circumstances referred to in paragraph 2 of this Article, either spouse may claim an increase, reduction or termination of the payments. Periodical payments shall be indexed annually in the procedure laid down by the Government.*

As for maintenance of the minors, Article 3.193 of the Civil Code of Lithuania foresees that in case of divorce on mutual consent of the spouses or in case of legal separation, the spouses in their agreement have to foresee their obligation towards maintenance of the minors. The court can also award maintenance if one of the parents does not fulfil its obligation towards the maintenance of the children or in case the spouses did not agree on that. Article 3.196 provides possible forms of maintenance for the minors (periodical monthly payments, a certain lump sum or award of certain property). It is also possible to change the form of the maintenance, which has been awarded to the minor, this is envisaged in Article 3.201 of the Civil Code. The case law on interpretation of this provision explained, that part 3 of this Article does not define exactly, under which conditions it is possible to change the form of maintenance, thus the courts in such cases should consider the purpose of maintenance institute and to ensure the protection of the best interests of the child; as relevant grounds to change the form of maintenance are: the essential change of property relations among the parties, the change in the needs of the child<sup>47</sup>.

Please find below relevant provisions of the Civil Code of Lithuania regarding the maintenance of the minors.

***Article 3.192. Parents' duty to maintain their children***

*1. Parents shall be obliged to maintain their underage children. The procedure and form of maintenance shall be determined by the mutual agreement of the parents.*

*2. The amount for maintenance must be commensurate with the needs of the children and the financial situation of their parents; it must ensure the existence of conditions necessary for the child's development.*

*3. Both parents must provide maintenance to their underage children in accordance with their financial situation.*

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<sup>47</sup> The decision of the Supreme Court of Lithuania in the case No. 3K-7-96/2003, 2003.01.17; the decision of the Supreme Court of Lithuania in the case K-3-185/2006, 2006.03.15.

**Article 3.193. Parental agreement on the maintenance of their underage children**

1. On divorce by mutual agreement (Article 3.51 hereof) or on separation (Article 3.73 hereof) spouses shall make an agreement providing for their mutual duties in maintaining their underage children as well as the procedure, amount and form of such maintenance. The agreement shall be approved by the court (Article 3.53 hereof).

2. Parents of underage children may conclude an agreement on the maintenance of their children also when their divorce is based on other grounds.

3. If one of the parents does not comply with the agreement on the maintenance of their underage children approved by the court, the other parent shall have a right to apply to the court for the issuance of the writ of execution.

**Article 3.194. Maintenance orders**

1. If the parents (or one of the parents) fail in the duty to maintain their underage children, the court may issue a maintenance order in an action brought by one of the parents or the child's guardian (curator) or the state institution for the protection of the child's rights.

2. A maintenance order may also be issued if on divorce or on separation the parents did not agree on the maintenance of their underage children in the procedure provided for in this Book.

3. The court shall issue a maintenance order until the child attains majority, except in cases where the child lacks capacity for work due to a disability determined before the age of majority, or when the child is in need of support, he is a full-time student of institutions of secondary, vocational or higher education and is not older than 24 years of age.

4. The enforcement of the maintenance order shall be terminated when the child:

1) is emancipated;

2) attains majority;

3) is adopted;

4) dies.

5. If the person obliged to pay maintenance dies, the duty of maintenance shall pass to his or her successors within the limits of the inherited property irrespective of the way the estate is accepted under the rules of Book Five hereof.

**Article 3.195. Maintenance duty when the children are separated from their parents**

The parents' duty to maintain their underage children shall be retained after the separation of the children from their parents or the limitation of parental authority except in cases where the child is adopted.

**Article 3.196. The form and amount of maintenance**

1. The court may issue a maintenance order obligating the parents (one of the parents) who fail in their duty to maintain their children to provide maintenance to their children in the following ways:

1) periodical monthly payments:

2) a certain lump sum;

3) award of certain property.

2. Pending the outcome of the case, the court may give a ruling on the provisional payment of maintenance.

**Article 3.197. Judicial pledge (hypothec)**

If necessary, in making a maintenance order the court may institute pledge (hypothec) against the property of the parents (one of the parents). If the court judgement on the enforcement of the maintenance order is not executed, the maintenance shall be paid against the property subject to the pledge (hypothec).

**Article 3.198. Maintenance orders in respect of two or more children**

1. In making a maintenance order in respect of two or more children, the court shall determine a payment amount sufficient to meet at least the minimal needs of all the children.

2. The maintenance amount shall be used equally for all the children except in cases where objective reasons (illness, etc.) demand a departure from the principle of equality.

**Article 3.200. The date on which a maintenance order becomes operative**

A maintenance order shall take effect from the date on which the right to maintenance becomes operative; the arrears in maintenance payments, however, may not be enforced for a period exceeding three years from the date of the petition for action.

**Article 3.201. Changing the amount and form of maintenance**

1. In an action brought by the child, the child's parent, the state institution for the protection of the child's rights or a public prosecutor the court may reduce or increase the amount of maintenance if, after the award of the maintenance order, the financial situation of the parties has undergone a fundamental change.

2. An increase in the amount of maintenance may be ordered if there are additional expenses related to the care for the child (illness, injury, need for nursing or permanent attendance). If necessary, the court may issue an order for covering the future expenses related to the treatment of the child.

3. At the request of the persons referred to in Paragraph 1 the court may change the previously established form in which maintenance must be provided.

Procedural law:

There are two main sources of law for procedural rules regarding implementation of court rulings regarding maintenance. First, it is the Civil Procedure Code, which provides for enforcements procedure rules.

Articles 585 – 661 provide general rules for enforcement procedure, which have to be observed also enforcing court rulings regarding maintenance.

Articles 662 – 727 provide general rules for enforcement of judgements (also court rulings establishing maintenance) while the recovery is made from the property of the debtor (also income).

Articles 736 – 737 provide for rules for enforcement of maintenance rulings from the income of the person, entitled to pay maintenance.

Second source of law for procedure of enforcement are the rules of the Enforcement of Judgments. These rules provide a detailed description on how the enforcement of a judgement should be organised and they are rather a description

for the bailiff, how to act, which documents to provide etc. during enforcement procedure.

There are no official reform proposals on this matter.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

The creditor (in this case – the spouse, to whom maintenance is awarded, or, in case of minors maintenance – the spouse, with whom the habitual residence of the child is established after legal separation or divorce) has to get the enforcement order, which he can get from the court. Which court will provide the creditor with enforcement order and which type of procedure will be applicable, will depend on when the enforcement order will be issued.

1. According to Article 282 of the Civil Procedure Code, the award of maintenance is a subject to prompt enforcement procedure. So if the court passes a court ruling on maintenance and orders the enforcement without delay for it, the creditor has to request in writing the enforcement order to be issued and the court, which issued such ruling, will issue also the enforcement order. Please note, that also according to Article 282 part 1 of the Civil Procedure Code, appealing against ruling, which is subject to enforcement without delay, shall not stay the enforcement thereof.
2. In case the enforcement order will be produced after the court ruling awarding enforcement came into force (e. i. the court did not order the enforcement without delay; the court ruling wasn't appealed or came in force after the appeal), the court of first instance (usually it is a local court) will issue the enforcement order.

Generally, the enforcement is executed by the bailiffs and the enforcement will be launched only if the debtor does not voluntarily comply with the court decision. Depending on the form of awarded maintenance, the proceedings will differ. Generally the enforcement can be launched only if the document, which is a ground for enforcement exists, only after the debtor is requested to fulfil its obligations and the time limit for it is set. The execution from debtor's income can be done while deducting only a limited amount of the income. The debtor can claim regarding the actions of the bailiff during the enforcement proceedings to the local court of the territory, where the bailiff is based.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Central Authority in Lithuania is:

Vilnius state guaranteed legal aid office (Vilnius valstybės garantuojamos teisinės pagalbos tarnyba)  
Odminių str. 3,  
LT-01122 Vilnius  
Tel. +370 5 264 7485  
Fax. +370 5 264 7481

#### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

Yes, the Law on implementation of EU and international legal instruments in the field of civil procedure entails rules for the application of the Maintenance Regulation. Firstly, it clearly states, that national rules are applicable as long as they do not contradict to the provisions of Maintenance Regulation.

The law also provides two sets the rules: for the court decisions, adopted in the countries – members of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (further – 2007 Hague Protocol) and for the countries, who are not bound by 2007 Hague protocol.

- Legal provisions regarding court decisions, adopted in the countries – members of the 2007 Hague Protocol.

The defendant, who did not participate in the proceedings regarding maintenance, can apply for a review of a court decision in the court, which awarded maintenance, if the grounds, set in Article 19 (1) of Maintenance Regulation exist. Such a request will be examined in written proceedings, unless the court considers an oral hearing to be necessary. The court shall examine such request for review not later than 14 days after the term to submit a reply to the claim is over.

The Court of Appeal of Lithuania is competent to examine the request on refusal to execute the enforcement (wholly or in part) of the decision (Article 21 part 2 Maintenance Regulation).

The local court of the place, where the decision regarding maintenance has to be executed, examines the requests to suspend (wholly or in part) the enforcement of the court decision regarding maintenance (Article 21 part 3 Maintenance Regulation).

- Legal provisions regarding court decisions, adopted in the countries, which are not bound by the 2007 Hague Protocol

Applications for a declaration of enforceability in accordance with Article 27(1) of the Regulation and appeals against decisions on such applications in accordance with Article 32(2) of the Regulation are heard by the Court of Appeal of Lithuania.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

#### Substantive sources of law:

The main source of law is the Civil Code of Lithuania. The following provisions are relevant for the matrimonial property regime:

- Articles 3.81 – 3.83 which foresee, that in Lithuania statutory and contractual legal regime of the property of spouses are possible.
- Articles 3.87 – 3.100 which lay down the rules for statutory legal regime of the property of spouses
- Articles 3.101 – 3.108 which lay down the rules for the contractual regime of the property of spouses

Procedural sources of law:

The Civil Procedure Code, its general provisions and the provisions regarding family cases, divorce and separation proceedings (Articles 375 – 386).

There are no official reform proposals on this matter. However please note, that there is a lot of discussions in the public, in different conferences on possible changes of these provisions. So even if there is no officially registered project of law within the Parliament, this topic is very lively discussed, also with regard to the need to change the Civil Code.

## 2. Which conflict of laws rules apply in matrimonial property disputes?

Conflict of law rules are provided for in bilateral agreements, which Lithuania has concluded with other states (please find the detailed list in answer to question D. 3, e. g. agreement with Kazakhstan, Article 26, agreement with Moldova, Article 26, etc.). These agreements on family law matters provide for conflict of law rules and also rules on jurisdiction of family disputes. Thus the provisions of these agreements must be observed if the dispute between the parties falls within the scope of application of the treaty.

Otherwise, the provisions of international private law apply. Conflict of law rules in matrimonial property disputes are entailed in the Civil Code of Lithuania, Article 1.28:

**Article 1.28. Law applicable to matrimonial property relations between spouses**

*1. The matrimonial property legal regime shall be governed by the law of the state of domicile of the spouses. Where the spouses are domiciled in different states, the law of their common state of citizenship shall apply. Where the spouses have never had a common domicile and are citizens of different states, the law of the state where the marriage was solemnized shall apply.*

*2. The law applicable to contractual legal regime of matrimonial property shall be determined by the law of the state chosen by the spouses upon agreement. In this event, the spouses may choose the law of the state in which they are both domiciled or will be domiciled in future, or the law of the state in which the marriage was solemnized, or the law of the state a citizen of which is one of the spouses. The agreement of the spouses upon the applicable law shall be valid if it is in compliance with the requirements of the law of the chosen state or the law of the state in which the agreement is made.*

*3. The applicable law chosen upon agreement of the spouses may be invoked against third persons only if they knew or should have known of that fact, i.e. if the third party knew or should have known the chosen law that governed the matrimonial property regime when the legal relationship commenced.*

*4. The applicable law chosen upon agreement of the spouses may be used in resolving a dispute related to real rights in immovable property only in the event if*

*the requirements of public registration of this property and of the real rights therein, as determined by the law of the state where the property is located, were complied with.*

*5. Any agreed change of matrimonial property legal regime shall be governed by the law of the state of domicile of the spouses at the time of the change. If the spouses were domiciled in different states at the time of change of the matrimonial property legal regime, the applicable law shall be the law of their last common domicile, or failing that, the law governing matrimonial property relationships between the spouses.*

### **3. Which are the property consequences of registered partnerships?**

Registered partnership is foreseen in the Civil Code of Lithuania, Article 3.229. The rules for property, which is used or obtained within registered partnership, are foreseen in Articles 3.230 – 3.235 in the Civil Code of Lithuania. However there is no implementing law for the provisions of registered partnership, thus practically it is not possible to register partnership in Lithuania and the rules, indicated above, practically are not applicable.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive was transposed into the Law on Conciliatory Mediation in Civil Disputes (adopted on 15 July 2008, No. X-1702, the Directive was formally transposed by the latest amendments on 24 May 2011), which provides an opportunity to use conciliatory mediation in judicial and non-judicial civil disputes. English version of the Law may be accessed at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=404617](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404617)

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The provision of State-guaranteed legal aid is governed by the Law on State-Guaranteed Legal Aid (adopted 28 March 2000, No. VIII-1591, latest amendments were made on 19 June 2012). Lithuanian version of the Law may be accessed at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=429287&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=429287&p_query=&p_tr2=2)

English version (latest updates made on 16 April 2009)

[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=350869&p\\_query=&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=350869&p_query=&p_tr2=2)

The Directive is transposed into this act. The Ministry of Justice has also prepared a proposal on the amendment to the abovementioned law. The amendment provides that in cases of child abduction persons shall be eligible to secondary legal aid regardless of the property and income levels established by the

Government of the Republic of Lithuania. This amendment should eliminate any delays when receiving State-guaranteed legal aid. There is also mentioned that conciliatory mediation will be an integral part of State-guaranteed legal aid. The respective service will be provided when at least one party to the dispute is entitled to receive secondary legal aid. Special institutions under the Ministry of Justice will organise the conciliatory mediation. An attorney, providing secondary legal aid, will be able to initiate the abovementioned process.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### I) Multilateral international conventions

Convention for the Protection of Human Rights and Fundamental Freedoms with additional protocols (1950)

European Agreement on the Transmission of Applications for Legal Aid (1977)

Convention on the Law Applicable to Maintenance Obligations (1973)

Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (1973)

European Convention on Information on Foreign Law (1968)

European Agreement on the Transmission of Applications for Legal Aid (1977); Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid

#### II) Bilateral agreements

Lithuania has bilateral agreements (establishing provisions on jurisdiction in family cases, conflict of law rules, recognition of judgments, etc.) with the following States: Armenia, Azerbaijan, Belarus, Estonia, Moldova, Kazakhstan, Latvia, Poland, China, Russia, Turkey, Ukraine, Uzbekistan, the Holy See (concerning the Juridical Aspects of the Relations between the Catholic Church and the State).

### **4. Are there any databases or online tools providing information on family law matters available in your country?**

Unfortunately, one official database providing information on family law does not exist. It is possible to conduct search on legal acts in the Internet website of the Lithuanian Parliament (Seimas), this system is free of charge. Case law search in Lithuania for free is available only to a limited extent, while searching for the decisions of the Supreme Court on its website (the link provided below). Comprehensive search on case law is available only for a fee in a specialised data base (Infolex).

Please find below links to different websites, which provide information on certain aspects of family law.

#### **Seimas (Lithuanian parliament)**

(Search of the Legal Acts of the Republic of Lithuania, some of them translated into English)

[http://www3.lrs.lt/dokpaieska/forma\\_e.htm](http://www3.lrs.lt/dokpaieska/forma_e.htm)

**Supreme Court**

(Case-law search, the information is available only in Lithuanian)  
<http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html>

**National Courts Administration (general information on court system)**

<http://www.teismai.lt/en/?type=0>

**Ministry of Justice (general information, also on legal assistance)**

<http://en.tm.lt/>

**Ministry of Social Security and Labour (information about protection of children rights in Lithuania)**

<http://www.socmin.lt/index.php?-1774400810>

**Ministry of Foreign Affairs (information about bilateral, multilateral treaties and conventions, to which Lithuania is a party)**

<http://www.urm.lt/index.php?2572939637>

**European Judicial Network in Civil and Commercial Matters:**

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_lit\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_lit_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_lit\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lit_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_lit\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_lit_en.htm)

**European Judicial Atlas in Civil and Commercial Matters informs on:**

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

According to the Article 808 § 1 of the CPC (application of foreign law) in cases set forth in international agreements, a court shall apply, interpret and define the contents of foreign law on its own initiative (ex officio). If application of foreign law is set forth by a mutual agreement of the parties to the dispute, all evidence related to the contents of applicable foreign law in accordance with the official interpretation of such law as well as practice of its application and doctrine in a relevant foreign state shall be provided by the party to the dispute, that requests application of this law; at a request of the party, the court may assist the party in its efforts to collect information about the applicable foreign law (Article 808 § 2).

The official texts of laws, relevant case-law, legal doctrine and other important information may be received in various ways – through judicial cooperation networks by contacting the appointed persons or using available legal databases on the websites (for instance, the European judicial network in civil and commercial matters is often used for this purpose). Furthermore, it is also possible to seek information on the basis of bilateral agreements or other international instruments (for instance, on the basis of the European Convention on information on Foreign Law – through the Ministry of Justice; in fact, it's an exceptional measure).

## **II. NATIONAL JURISPRUDENCE**

### **Regulation Brussels IIbis in matters of cross-border divorce**

There are no decisions of the Supreme Court of Lithuania, which would deal especially with the questions of cross – border divorce while applying Brussels IIbis.

### **Maintenance Regulation**

So far there are no decisions adopted (considering the jurisprudence of all court), in which the courts would apply Maintenance Regulation.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

**Bužinskas, Gintautas, Grigienė Jurgita,** Teisingumas tarptautiniame civiliniame procese // *Teisinės informacijos centras* 2007 // Vilnius

**Gumuliauskienė, Laura,** Lietuvos teismų sprendimų pripažinimo užsienio valstybėse aspektai // *Jurisprudencija*. 2005, Nr. 69 (61), p. 62 – 73

**Mikelėnas, V.,** The impact and application of the Brussels II bis regulation in Lithuania // *Brussels II bis: Its Impact and Application in the Member States*. Antwerpen, 2007.

**Mikelėnas, Valentinas,** Šeimos teisė // *Justitia*, 2009 // Vilnius

**Nekrošius, Vytautas,** Europos Sąjungos civilinio proceso teisė. Pirma dalis. // *Justitia*, 2009 // Vilnius

**Nekrošius, Vytautas,** Anerkennung und Vollstreckung von ausländischen Gerichtsentscheidungen in den Baltischen Staaten nach deren Eintritt in die EU // *Europäisches Zivilverfahrensrecht. Bestandsaufnahme und Zukunftsperspektiven nach der EU-Erweiterung*, Wien, 2007, Band 27, p. 167-178.

**Nekrošius Vytautas, Vėbraitė Vigita,** Baltic countries // *Application of Foreign Law*. Munchen : Sellier. European law publishers, 2011, p. 119-128

**Vaigė, Laima,** The problematics of recognition of same-sex marriages originating from member states according to the EU legal regulation // *Socialinių mokslų studijos*, 2012, Nr. 4(2), p. 755-775.

**Vėbraitė, Vigita,** 2003 m. lapkričio 27 d. Reglamento dėl jurisdikcijos ir teismo sprendimų, susijusių su santuoka ir tėvų pareigomis, pripažinimo ir vykdymo (EB) Nr. 2201/2003 taikymo ribos // *Teisė*, T. 63 (2007), p. 107-115.

#### Regulation Rome III: Cross-border divorce - applicable law

No literature yet on this topic.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

**Kudinavičiūtė – Michailovienė, Inga,** Ištuokos reglamentavimas: nuostatos, integraciniai procesai ir principai // *Jurisprudencija*, 2007 3 (93), p. 29 – 37.

**Sagatys, Gediminas,** The pre-harmonization area: a comparison of Lithuanian, Latvian and Estonian child maintenance laws // *in K Boele-Woelki, J Miles and JM Scherpe (Eds) The Future of Family Property in Europe (European Family Law Series vol. 29)*. Intersentia. Antwerp-Oxford-Portland, 2011. P. 311-326

#### Matrimonial property regimes and property consequences of registered partnerships

**Kudinavičiūtė – Michailovienė, Inga,** Bendro gyvenimo neįregistruvus santuokos teisinio reglamentavimo problemos // *Jurisprudencija*, 2008 4 (106), p. 27 – 35.

**Mikelėnas, Valentinas,** Šeimos teisė // *Justitia*, 2009 // Vilnius

**National section**

# **LUXEMBOURG**

**Jean Claude Wiwinius**

**Président de Chambre à la Cour Supérieure de Justice**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The fourth title of the Civil Code is dedicated to divorce. The Articles 229 et seq. provide for cases for divorce, that is to say divorce of fault, divorce of de facto separation, and divorce of mutual consent. Articles 234 et seq. are more precisely dedicated to forms of divorce for a determined ground. We can therefore mention Article 234 determining the competence of the district court of the spouses' residence or, failing which, of the defendant's residence, Article 236 determining the formalities of the request examination and the vouchers to produce, Article 241-1 determining the way of giving evidence, Article 243 determining amendment and cross-actions, Article 244 determining extinction of an action, Article 258 and 261-1 determining the divorce judgement itself, Articles 262 and 263 determining the appeal and Articles 264 and 265 determining the mention of the judgment in the register of marriages.

Articles 275 et seq. are dedicated to divorce by mutual consent.

Articles 295 et seq. deal with the consequences of divorce.

Articles 306 et seq. of the Civil Code deal with legal separation.

Articles 180 et seq. of the Civil Code deal with annulment of a marriage.

For nearly ten years, governmental and parliamentary authorities discuss about a reform proposal for divorce. It has been planned, among others, to abolish divorce for fault and insert the notion of « splitting » as for the old-age pension of the divorced wife. It is, however, at the moment, impossible to say if this project will succeed what clauses it will contain and how long it will take, in that event, for those modifications to enter into national law.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

According to Article 234 of the Civil Code, a petition for divorce due to a determined cause may only be formed at the court of the district in which the spouses will have their conjugal residence or, failing that, the district in which the defending party resides.

According to Article 278 of the Civil Code, in terms of divorce by mutual consent, the spouses shall go in front of the president of the civil court of their district (see Article 234, aforementioned) and this same court will pronounce the divorce.

#### 3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

At the time the Regulation Brussels IIbis came into effect, the Government published the following communications (in addition to those mentioned in other places of this questionnaire):

Ad Article 29: "The application for a declaration of enforceability shall be submitted to the president of the district court."

Ad Article 33: "The appeal shall be lodged with the court of appeal."

Ad Article 34: "The judgment given on appeal may be contested only by the way of cassation."

Ad Articles 45 and 47: "Luxembourg accepts that the communications are made in German and in English, in addition to French."

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III?**

Yes

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No

## **B. Cross-border maintenance**

### **1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

According to [Article 300 of the Civil Code](#) the court that pronounces the divorce, may impose on one party the obligation to pay alimony to the other, in accordance to the needs of the creditor and the capacities of the debtor.

No alimony is paid to the spouse against whom the divorce is pronounced or who lives in community with another person.

Maintenance may always be revised, especially when the creditor is getting married again. It may also be subject to transaction or revision.

Except Article 267 bis of the Civil Code dedicated to provisory measures during divorce, there are no specific procedural rules provided for. Which means that the court will judge in accordance with the joint law civil procedure (obligation to be represented by a lawyer, written claims, etc.) to decide upon these to divorce accessory measures.

The divorce reform proposal (see question A.1.) will have an incidence as well on the maintenance law.

### **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

Article 4 of the New Code of civil procedure disposes that the police-court magistrate is competent to decide about every appeal concerning maintenance (which must be brought before a district court), no matter how much the applicant would ask for, except for those connected with a divorce or judicial separation instance.

For those last mentioned, it is possible to refer to the previous point of the questionnaire.

Practically, maintenance creditors often have recourse to attachment of wages to get their owing after the district court pronounced its judgment or even, as a measure of conservation, before the judgment has been pronounced (see Law of 11 November 1970 on transfer and seizure of salaries).

Moreover, we can also point out that « neglect of one's family », this is to say the non-payment of maintenance, is a punishable act, provided for by Article 391 bis of the Penal Code, which is often sued for.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

According to Article 2 of the Law of 3 August 2011 on the implementation of Regulation (CE) n°4/2009 of 18 December 2008 and the modification of the New Code of civil procedure, the Central Authority designated to facilitate the application of the Maintenance Regulation is the Chief Public Prosecutor.

### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

The Law of 3 August 2011 on the implementation of Regulation (CE) n°4/2009 of 18 December 2008 and the modification of the New Code of civil procedure changed the New Code of civil procedure, Article 1, as follows:

*« 1° A la Première Partie, Livre VII, Titre VI intitulé – Règles générales sur l'exécution forcée des jugements et actes –, le Chapitre III intitulé – Décisions étrangères soumises à un traité ou un acte communautaire – est subdivisé en une Section Ière intitulée «Des décisions étrangères soumises à un traité ou un acte communautaire prévoyant une procédure d'exequatur» et une Section II intitulée «Des décisions étrangères soumises à un acte communautaire prévoyant la suppression de l'exequatur».*

*2° La Section Ière comprenant les articles 679 à 685-1 est complétée par un nouvel article 685-2 libellé comme suit:*

*« Les décisions rendues dans un Etat membre non lié par le protocole de La Haye sur la loi applicable aux obligations alimentaires conclu le 23 novembre 2007 au sens du Chapitre IV, Section 2 du règlement (CE) no 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires remplissant les conditions pour être reconnues et exécutées au Luxembourg, sont rendues exécutoires dans les formes prévues par ce règlement. »*

*A la section II a été introduit un article 685-3 libellé comme suit :*

*« (1) Les décisions rendues dans un Etat membre lié par le protocole de La Haye sur la loi applicable aux obligations alimentaires conclu le 23 novembre 2007 au sens du Chapitre IV, Section 1 du règlement (CE) no 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires sont reconnues au Luxembourg sans qu'il soit nécessaire de recourir à aucune procédure et sans qu'il soit possible de s'opposer à la reconnaissance.*

*(2) En cas de demande de réexamen conformément à l'article 19 du règlement visé au paragraphe (1), la juridiction saisie d'une action introduite sur base de la décision de la juridiction compétente de l'Etat membre d'origine sursoit à statuer. Le défendeur doit, dans les 45 jours à partir de la première demande d'exécution, prouver avoir introduit cette demande de réexamen et doit informer la juridiction des suites de ladite demande de réexamen introduite auprès de la juridiction compétente de l'Etat d'origine. L'instance est reprise à l'issue de la procédure de réexamen.*

*(3) Un défendeur qui n'a pas comparu au Luxembourg a le droit de demander le réexamen de la décision devant la juridiction à l'origine de la décision, dans les conditions prévues à l'article 19 du règlement visé au paragraphe (1). Cette demande est introduite selon les formes appliquées devant la juridiction ayant rendu la décision sujette à réexamen. Si la juridiction décide que le réexamen est justifié, la nullité de la décision antérieurement prononcée ne porte que sur les demandes tranchées dans cette décision relevant du champ d'application dudit règlement.*

*(4) Si la juridiction rejette la demande de réexamen visée au paragraphe (2) au motif qu'aucune des conditions de réexamen énoncées audit paragraphe n'est remplie, la décision reste valable. »*

Finally, a Grand-ducal Regulation of 3 August 2011 on the execution of Articles 2 and 3 of the Law of 3 August 2011 determined the personal data to which persons, referred to by Articles 2 and 3 of the Law, may have access.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Articles 203 et seq. provide for the obligations arising for the spouses and Articles 212 et seq. take aim at the rights and duties of the spouses during marriage.

Title V of the Civil Code is dedicated to marriage contracts and matrimonial property.

Articles 1387 et seq. contain the general provisions, Articles 1400 et seq., the clauses related to statutory community of property, Articles 1536 et seq., regime of separate property and Articles 1569 et seq., regime of separation in acquisitions.

Title VII of Book I of Part II of the New Code of civil procedure, that is to say Articles 1008 to 1017, is dedicated to the procedure used in case of intervention of the judge concerning the rights of the spouses and Title VIII, in its Paragraph I (Articles 1018 to 1025), to petitions for a separation of estates and, in its Paragraph II (Articles 1026 to 1028) to changes of matrimonial property regime.

No reform proposal is actually in preparation.

### **2. Which conflict of laws rules apply in matrimonial property disputes?**

Traditionally, rules governing matrimonial property are considered being of contractual nature. The free parties' choice principle therefore prevails, even if both parties have the same nationality.

With the International Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, approved by a Law of 17 March 1984, operative since the 1<sup>st</sup> of September 1992 between Luxembourg, France and the Netherlands, this freedom of contract has been limited to the sole legal system capable to maintain an objective connection with patrimonial and matrimonial relations between spouses. The Law of 17 of March 1984 did not only approve the Hague Convention, but has also directly introduced the conflict of law rules, contained in Article 1 to 15 of the Convention, in national law. The choice can therefore only be about the three following laws: national law of one of the spouses, law of the place of actual residence of one of the spouses, law of the country one of the spouses is living in after the marriage. It is, moreover, possible for the spouses, whatever law they have chosen for the general regime and, even if there has been no such designation, to declare applicable to their real estates or some of them, even future, the law of the country of their location.

If, at the moment the marriage is pronounced, the spouses did not contractually set the applicable law, this one will be determined, according to the dispositions of the Hague Convention, taking into consideration the objective connection criteria. We have to say that Luxembourgish precedents did already previously attach to an objective criterion by subjecting, in default of a marriage contract, matrimonial property system to the matrimonial residence law, considered as the place both spouses did settle to after marriage with the intention to stay definitely. The rule

imposed by the Convention wants the applicable law to be the one of the country the spouses establish their first domicile after marriage. There can be an exception to this rule only in three cases, envisaged in the Convention, in favour of the common national law.

As for the scope of application, the law of the regime pointed out in accordance with the Hague Convention applies to liquidation and division and supplants the real estate law, except for the precision that formality and execution of non-amicable liquidation and division acts depend on the *lex fori*.

### **3. Which are the property consequences of registered partnerships?**

The Law of 9 July 2004 on legal effects of certain partnerships, modified by a Law of 3 August 2010, envisages in a section II the property consequences of registered partnership.

More precisely, the partners who made a registered partnership can fix the property consequences of this partnership with a written convention, which can be concluded or modified at any time.

The partners bound by a registered partnership give each other material assistance. The contribution to partnership charges is made by both partners in proportion to their respective means.

They are jointly responsible, even at the end of the partnership, as regards a third person, for the debts contracted by both or just one of them during the partnership for needs of their community daily life or expenditures connected with the common housing.

Each partner is alone responsible for debts contracted by himself, before or during the partnership.

The partners can't dispose alone of the rights insuring neither the conjugal residence nor the furniture filled in with.

Except contrary stipulations made by the parties, each of them keeps the property, movable or immovable, he can establish to be the owner of, the fruits and incomings produced by this property and the proceeds of his work. Those properties nobody can prove to be the owner of, and the fruits and incomings produced by this property shall be considered as a joint ownership.

The partners are free to gratify each other by act *inter vivos* or testament.

When the partnership comes to an end, the mutual material assistances ceases, except contrary stipulations made by the parties or judicial decision. Exceptionally, the police-court magistrate can accord maintenance to one of the partners in proportion of the needs of the claimant and the fortune his partner. No maintenance shall be owed once another partnership or marriage has been entered into by the claimant.

## **D. Horizontal issues**

- 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

A Law of 24 February 2012 on introduction of mediation in civil matter in the New Code of civil procedure and transposing the aforementioned Directive of 21 May 2008, introduced in the New Code of civil procedure a Title II entitled « Of mediation ».

According to [Article 1251-1](#) of this Code, in civil or commercial matters, every dispute, except those on which the parties are not allowed to dispose themselves, is subject to either a contractual or a judicial mediation. In divorce or other separation matters, including liquidation and division, maintenance claims and exercise of parental responsibility, the judge may suggest the parties a family mediation. Articles 1251-2 to 1251-4 provide for the details of this matter's procedure.

**2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

A Law of 21 June 2007, which incorporated into national law the aforementioned Directive of 27 January 2003, modified the pertinent Articles (Articles 28 and 37-1) of the Law of 10 August 1991 about the profession of Solicitor by instituting the benefice of a free legal aid for those persons whose resources aren't sufficient to defend themselves in front of a court.

**3. Is your country a contracting party to any bilateral or international instruments on family law?**

We can mention the following international conventions:

- Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, approved by a law of 17 May 1967.
- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, approved by a law of 16 June 2010.
- Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, approved by a law of 17 March 1984.
- Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, approve by a law of 17 July 1958.
- Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, approved by a law of 6 June 1981.
- European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, approved by a law of 28 February 1983.
- Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, approved by a law of 16 May 1986.

**4. Are there any databases or online tools providing information on family law matters available in your country?**

European Judicial Network in Civil and Commercial Matters

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_lux\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_lux_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_lux\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lux_en.htm)

- Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_lux\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_lux_en.htm)

European Judicial Atlas in Civil and Commercial Matters

- Parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

The government of the Grand Duchy of Luxembourg:

<http://www.legilux.public.lu/>

**5. Please provide information on accessing and applying foreign family law in your country.**

Generally, the Luxembourgish judge is well equipped to apply foreign law and, inevitably (in view of the Grand Duchy's territory's smallness), he is often lead to do so, except of course for those matters he isn't obliged to apply foreign law to, and not asked for by the parties.

In all the other cases, and especially in a matter of right of individuals, the Luxembourgish judge has, first of all, an ease access to all the text of European law concerning civil judicial co-operation thanks to the publication, by the Ministry of Justice, 2009, of a «Report of Community Acts», and, subsequently, through the frequently used Internet.

As for the foreign law itself, in a number of cases (above all divorce but also maintenance), judges of specialized chambers have, thanks to the « Magistrateship Central Library » or their own library, a personal knowledge of the most used texts (for example: Portuguese, German, French or Belgian Law of divorce). Otherwise, they regularly have recourse to the European Convention on Information on Foreign Law signed in London on 7 June 1968, approved in Luxembourg by a Law of 5 May 1977 (see on this subject, the book « Le droit international privé au Grand-Duché de Luxembourg » published by Monsieur Jean-Claude WIWINIUS, n° 148 à 171).

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

- Article 12 of the Regulation determines when and under what conditions the courts, competent to decide about demands in matrimonial matters, in accordance with the conditions defined by Article 3, are also competent to decide in matters of parental responsibility for children of both spouses. (*Cour, 7 juillet 2010, no 34969*).
- In compliance with provisions of the Regulation Brussels II, whose text is identical in this matter to the one of Brussels IIbis, the *lis pendens* between two courts of different member states must be raised and solved on its own by the concerned courts, so it might be raised for the first time in appeal. (*Cour, 13 décembre 2006, no 30151*).

### Maintenance Regulation

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### **III. NATIONAL BIBLIOGRAPHY**

The only book dealing completely with private international law in Luxembourg, and therefore with family law is entitled « LE DROIT INTERNATIONAL PRIVÉ AU GRAND-DUCHÉ DE LUXEMBOURG », and has been published in February 2011 by Mr Jean-Claude WIWINIUS, President of the Chamber at the Supreme Court of Justice.

We therefore sent you, concerning the subjects mentioned in the questionnaire, to the following pertinent pages:

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

→ See pages 319 et seq., 367 et seq. et 378 et seq.

#### **Regulation Rome III: Cross-border divorce - applicable law**

→ See pages 117-120 (Be careful, this part has not been updated)

#### **Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement**

→ See pages 128-129

#### **Matrimonial property regimes and property consequences of registered partnerships**

→ See pages 90-95 and 383

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## Annex

### Article 300 of the Civil Code

«(1) Le tribunal qui prononce le divorce pourra imposer à l'une des parties l'obligation de verser à l'autre une pension alimentaire.

(2) La pension alimentaire devra répondre aux besoins du créancier et être proportionnée aux facultés de la partie tenue à l'obligation.

(3) Aucune pension alimentaire ne sera due à la partie aux torts exclusifs de qui le divorce a été prononcé ou qui vit en communauté de vie avec un tiers. Sont présumées vivre en communauté de vie les personnes qui vivent dans le cadre d'un foyer commun.

(4) La pension alimentaire sera toujours révisable et révocable. Elle sera révoquée dans les cas où elle cesserait d'être nécessaire. Elle ne sera plus due d'office en cas de remariage du créancier à partir du 1er mois suivant celui du remariage. Elle ne sera plus due sur demande en cas de communauté de vie du créancier avec un tiers.

(5) La créance d'aliments pourra faire l'objet d'une transaction ou d'une renonciation.  
... »

### Article 1251-1 of the New Code of civil procedure

« (1) En matière civile et commerciale, tout différend, à l'exception (i) des droits et obligations dont les parties ne peuvent disposer, (ii) des dispositions qui sont d'ordre public et (iii) de la matière relative à la responsabilité de l'Etat pour des actes et des omissions commis dans l'exercice de la puissance publique, peut faire l'objet d'une médiation soit conventionnelle, soit judiciaire.

(2) En matière de divorce, de séparation de corps, de séparation pour des couples liés par un partenariat enregistré, y compris la liquidation, le partage de la communauté de biens et l'indivision, d'obligations alimentaires, de contribution aux charges du mariage, de l'obligation d'entretien d'enfants et de l'exercice de l'autorité parentale, le juge peut proposer aux parties de recourir à la médiation familiale. ».

**National section**

**MALTA**

**Dr Lorraine Schembri Orland, LL.D.M.Jur. (Eur.Law)**

**Lawyer**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The legal provisions regulating divorce and legal separation are to be found in the Maltese Civil Code (Chapter XVI of the Laws of Malta). Divorce was introduced by Act XIV of 2011 amending the Maltese Civil Code. These amendments came into effect on the 1<sup>st</sup> October 2011. The civil annulment of marriage is regulated by the Marriage Act<sup>48</sup> (Chapter 255 of the Laws of Malta) which also regulates the recognition of declarations of nullity of Catholic marriages given by Ecclesiastical Tribunals.

### DIVORCE

#### Introduction

Divorce in Malta was introduced in October 2011 after a national consultative referendum. There are three grounds for divorce (*see below*) which are mandatory and would require a further referendum for their amendment. It is therefore arguable that these grounds, which are cumulative, together constitute a matter of public policy. It is mandatory for the courts of Malta to determine that all these grounds do exist and a Court has no discretion to grant a divorce if one or more of these grounds are not satisfied.

#### Jurisdiction

In terms of Article 66N of the Civil Code the Maltese Courts have jurisdiction to hear and determine a demand for divorce if:

- a) at least one of the spouses was domiciled in Malta on the date of the filing of the demand for divorce before the competent civil court ; or
- (b) at least one of the spouses was ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.

In interpreting the concept of “domicile” the Maltese courts refer to the concept as interpreted by the Courts of the United Kingdom which is a source of law in the interpretation of Maltese Private International Law.

Furthermore, notwithstanding the foregoing, where a cause for personal separation is pending before a court of civil jurisdiction in Malta, including a cause being heard at appeal stage, and the court has jurisdiction to hear and determine that cause, the courts of civil jurisdiction in Malta shall also have jurisdiction to hear and determine a demand for divorce between the same parties.

The Courts competent to hear suits for personal separation and divorce are the Civil Court (Family Division) in Malta and the Court of Magistrates (Gozo) Superior Jurisdiction) (Family Division) for the Island of Gozo.

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<sup>48</sup> ACT XXXVII of 1975,

## **Grounds for Divorce**

Divorce need not be fault based. It may be demanded by joint application, in which case the competent court shall issue a decree of divorce, or on the application of one of the spouses, in which case the divorce will be granted by judgment. It is not required that the spouses are to be first legally separated.

The spouses have to fulfil three mandatory requirements prior to obtaining a divorce. A divorce shall not be granted unless the court is satisfied that:

(a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart 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; and

(b) there is no reasonable prospect of reconciliation between the spouses; and

(c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in Article 57.

### **These are the referendum grounds which are mandatory.**

The requirement of "living apart" is not equivalent to "*de facto* separation" as it is sufficient for the spouses to prove to the Court that they have not been living as husband and wife for the statutory period, albeit under the same roof.

In Maltese law it is possible for the spouses to renounce to their right of maintenance at any time.

Maintenance ordered in a judgment of separation, or stipulated in a contract of personal separation between the spouses shall *ipso jure* be deemed to be adequate maintenance. Indeed the pronouncement of a divorce between spouses who are already legally separated, whether by contract or judgment, shall not effect any changes between them other than to produce the effects of a divorce itself on their marriage, that is, the termination of marriage and the capacity to remarry.

Where the spouses are not already legally separated, the spouse requesting the divorce can bring forward all those demands which may be brought forward in proceedings for personal separation. The court is also competent to take all interim measures as are available in proceedings for personal separation. Furthermore either spouse may request the conversion of a demand for personal separation into one of divorce in proceedings for personal separation and prior to the cause being put off for final judgment.

It is possible for the parties to agree to a simple divorce, without liquidated and dividing joint property provided that they have already terminated the regime of community of acquests or community of acquests under separate administration.

In accordance with Article 1339 of the Maltese Civil Code "*Under the system of community of residue under separate administration (CORSA) the acquisitions made by each of the spouses during the marriage shall be held and administered by the spouse by whom such acquisitions are made, and subject to any limitations contained in this Sub-title shall, in relation to third parties, be dealt with by such spouse as if such spouse were the exclusive owner thereof.*

*(2) Where under the system of community of residue under separate administration property is acquired by the spouses jointly, it shall be administered jointly. The share of each spouse in such property may only be alienated inter vivos, with the*

*consent of the other spouse, or where such consent is unreasonably withheld, with the authority of the court of voluntary jurisdiction, or in a judicial sale by auction at the instance of any creditor of such spouse."*

## **PERSONAL SEPARATION**

The personal separation of the spouses is regulated by the Maltese Civil Code (Chapter XVI of the Laws of Malta). The reforms introduced by divorce legislation in 2011 also introduced various amendments to the institute of separation, particularly those effecting maintenance obligations. Parents now have a continuing obligation to maintain their children even though these have reached the age of majority, which is eighteen (18) years, where it is not reasonably possible for the children to maintain themselves adequately and these children are students who are participating in full-time education, training or learning and are under the age of twenty-three. Disabled children are also entitled to maintenance beyond the age of majority.

The amendments concerning maintenance also bind a person acting *in loco parentis* with regard to another person's child, by reason of the marriage of such person to a parent of that child, where the other parent of that child, shall have, at any time before or during the marriage, died or was declared as an absentee according to law, or is unknown.

Basically personal separation (by judgment or contract) terminates the spouses' reciprocal obligation of cohabitation, assistance and support (save maintenance) and the patrimonial regimes of the community of acquests and that of the community of acquests under separate administration. Property is liquidated and divided on separation although the spouses and the court may elect to keep property in undivided shares between them.

Either spouse may request personal separation on any or all of the grounds consisting of adultery, abandonment<sup>49</sup>, excesses, cruelty, threats or grievous injury and /or the irretrievable breakdown<sup>50</sup> of the marriage. A finding of fault on either or both of the spouses will produce sanctions contemplated at law such as forfeiture of the right to claim maintenance from the other spouse, of gifts received from the other spouse, of the right of succession to the estate of the predeceased spouse, and forfeiture of any rights to one half of the acquests accumulated principally by the work and industry of the other spouse from a date established by the court as the due fault date.<sup>51</sup>

It is possible to convert proceedings pending for personal separation into divorce proceedings and the Court will give judgment by pronouncing the divorce of the parties. A party to a separation suit may also choose to institute divorce proceedings separately. The law provides that in such case the action for separation and that of divorce are to be connected and heard by the same court even without the necessity of a demand to this effect by either of the parties.

During the pendency of proceedings either party may request the termination of the community of acquests OR of the CORSA prior to the conclusion of personal

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<sup>49</sup> Abandonment is defined as desertion of the other spouse for two years or more without good grounds.

<sup>50</sup> Provided however that the spouses have been married for more than four years.

<sup>51</sup> Article 48 of the Civil Code.

separation proceedings and if the court grants this request by preliminary judgment, the parties' regime henceforth would be that of separation of estates.

### **Mediation**

Proceedings for separation are initiated by a letter filed in the registry of the competent court by which the spouse shall first demand authority to proceed and the court shall, before granting such authority, summon the parties to appear before a mediator.<sup>52</sup> Mediation is compulsory. The court seized of an application for divorce, shall also summon the parties to appear before a mediator. Proceedings for divorce are instituted by an application. The law also imposes an obligation on the advocates assisting applicant and respondent in divorce proceedings to discuss the possibility of reconciliation with their clients and give them the names and addresses of persons qualified to offer assistance in the process of reconciliation between spouses. Prior to granting leave to proceed for divorce the court shall summon the parties to appear before a court appointed mediator unless the parties elect a mediator themselves.

### **ANULMENT OF MARRIAGE**

The Marriage Act (Chapter 255 of the Laws of Malta) provides for the annulment of civil marriages as well as for the recognition and enforcement of decisions of nullity of marriage issued by the Ecclesiastical Tribunals. These legal provisions give effect to the Agreement between the Holy See and Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals about the Same Marriages, as well as the Protocol of Application thereto, both signed in Malta on the 3rd February 1993, as well as the Second Additional Protocol thereto signed in Malta on the 6<sup>th</sup> January, 1995.

### **Validity of Marriages**

**Article 18** of the Marriage Act regulates the validity of marriage and provides that "a marriage whether celebrated in Malta or abroad, shall be valid for all purposes of law in Malta if -

(a) as regards the formalities thereof, the formalities required for its validity by the law of the country where the marriage is celebrated are observed; and

(b) as regards the capacity of the parties, each of the persons to be married is, by the law of the country of his or her respective domicile, capable of contracting marriage."

Formal validity is therefore regulated by the *lex loci celebrationis* whilst essential validity is regulated by the *lex domicilii* of the spouses.

### **Annulment of Civil Marriages**

This is regulated by Article 19 of the Act which provides that a marriage shall be void:

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<sup>52</sup> Legal Notice 397 of 2003.

- (a) if the consent of either of the parties is extorted by violence, whether physical or moral, or fear;
- (b) if the consent of either of the parties is excluded by error on the identity of the other party;
- (c) if the consent of either of the parties is extorted by fraud about some quality of the other party which could of its nature seriously disrupt matrimonial life;
- (d) if the consent of either of the parties is vitiated by a serious defect of discretion of judgment on the matrimonial life, or on its essential rights and duties, or by a serious psychological anomaly which makes it impossible for that party to fulfil the essential obligations of marriage;
- (e) if either of the parties is impotent, whether such impotence is absolute or relative, but only if such impotence is antecedent to the marriage;
- (f) if the consent of either of the parties is vitiated by the positive exclusion of marriage itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act;
- (g) if either of the parties subjects his or her consent to a condition referring to the future;
- (h) if either of the parties, although not interdicted or infirm of mind, did not have at the time of contracting marriage, even on account of a transient cause, sufficient powers of intellect or volition to elicit matrimonial consent.

In addition to the foregoing, a marriage can be declared null on the ground of non consummation.

### **Recognition of Decisions of the Ecclesiastical Tribunals**

A decision of a Church Tribunal declaring the nullity or confirming the validity of a catholic marriage, where one of the parties is domiciled or a citizen of Malta, and provided that this is executive in accordance with Canon Law, shall be recognised once registered. Registration shall be ordered by the Court of Appeal on an application of one of the parties and, once so ordered, produces the effects of a *res judicata*. Registration is effected by an annotation in the Public Registry on the Acts of Marriage. The Registrar of the Public Registry is named as a respondent in these proceedings.

The Court of Appeal will register the decree if it is satisfied that the Tribunal was competent; that during and in the proceedings before the Tribunal there was assured to the parties the right of action and defence in a manner *substantially not dissimilar* to the principles of the Constitution of Malta; and there does not exist a contrary judgement binding the parties pronounced by a court, and which has become *res judicata*, based on the same grounds of nullity. The filing of proceedings for nullity before a competent Ecclesiastical Tribunal furthermore suspends a civil annulment procedure pending before the Maltese Court.

**In view of the introduction of divorce it is now foreseen that fewer recourse will be made to civil annulments as divorce following personal separation is more expeditious, and does not require proofs other than the satisfaction of the three mandatory referendum criteria.**

## Reform Proposals

It is too soon to envisage reform proposals to the divorce legislation. A Committee for the Adaptation of Laws due to the Introduction of Divorce has been constituted but at time of writing no proposals have been legislated on. It is expected that pension regulations and fiscal laws regulating *inter alia* the pension of the surviving spouse upon divorce and the rights of a prior spouse to such pension, and capital gains tax on transfer of property on divorce, would be amended.

### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation) which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

In the Maltese legal system, the principles or grounds of jurisdiction, as in other matters of substantive and procedural law, are governed by statute.

**The Marriage Act** provides that decisions of a foreign court 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 by a competent court of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen. Jurisdiction in matters of status is determined by domicile or nationality of one of the parties to a marriage.

On the other hand, in terms of section 742 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which provides that the Maltese Court shall have jurisdiction concerning the following persons:

- (a) Citizens of Malta, provided they have not fixed their domicile elsewhere;
- (b) Any person as long as he is either domiciled or resident or present in Malta;
- (c) Any person in matters relating to property situate or existing in Malta;
- (d) Any person who has contracted an obligation in Malta, but only as regards actions touching such obligation and provided such person is present in Malta;
- (e) Any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;
- (f) Any person in regard to any obligation contracted in favour of a citizen or resident in Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta;
- (g) Any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the Court.

“Domicile” is the same concept as that prevailing in English private International Law rules and is distinct from residence. Maltese Courts, prior to accession to the European Union on 1st May 2004, have consistently retained that they enjoy discretion to exercise jurisdiction even though the parties would have expressly agreed to refer disputes before a foreign court (jurisdiction clause/ prorogation of jurisdiction). There must be a grave reason for the courts to exercise jurisdiction in these circumstances, but where it is evident for instance that it would be unjust or prejudicial to the plaintiff not to exercise jurisdiction, the Courts will respond and

exercise their jurisdiction. In this respect Courts have often quoted the traditional English common law jurisprudence on this issue.

**Forum non Conveniens:** In terms of Article 742(2) of the Code of Organization and Civil Procedure where a foreign court has a concurrent jurisdiction with the Maltese Courts, the courts may in their discretion, declare the defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust on the defendant.<sup>53</sup>

**3. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?**

The Code of Organization and Civil Procedure was amended in 2004 in order to ensure that where Regulations of the European Union provide, with regard to matters concerning enforcement of foreign judgments, in any manner which is different to the Code, the said Regulations shall prevail. Accordingly, this state of affairs provides that in cases involving the recognition and enforcement of judgments emanating from Courts of a Member State, this procedure is regulated by the applicable Regulation.<sup>54</sup>

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Malta is one of the countries participating in the enhanced cooperation implemented by Regulation Rome III. The issue which will have to be addressed by the Maltese Courts is whether they can pronounce a divorce based on grounds which do not conform to the referendum grounds of Article 66B of the Maltese Civil Code on the basis that these grounds are matters of public policy from which a Maltese court cannot derogate. Can a Maltese court grant a divorce to a married couple when, for example, they have not been living apart for the minimum requisite of four years even though a lesser period is allowed by law chosen or applicable to those spouses?

Another issue is the fact that the application of a law other than the *lex fori* is relatively rare in our courts and the implementation of this Regulation will necessitate a radical shift for judges and practitioners alike. Foreign law is a question of proof and it remains to be seen how effectively Rome III can be implemented.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulations)?**

Maltese courts would apply the *lex fori* to personal separation, divorce and annulment and it is only exceptionally, through the operation of Regulation 1259/2010 that a different legal regime will be applied. There is no provision in

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<sup>53</sup> *Reginald Micallef noe vs. Silvio Mifsud noe* (Commercial Appeal 26/11/2006), the Court of Appeal examined this issue in detail. It sets out the position under Maltese Law in the sense that unless there are valid and grave reasons for the Maltese Courts to decide otherwise, the expression of the parties' will should not be disturbed and the Maltese Courts will decline jurisdiction even in favour of a non-EU State.

<sup>54</sup> Article 825A of Chapter 12 of the Laws of Malta

Maltese law for the parties to designate a foreign law in the course of matrimonial proceedings.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Marriage contracts in Malta shall, on pain of nullity, be drawn up by public (notarial) deed. Postnuptial contracts require the authority of the competent court for validity. They hold no effect *vis a vis* third parties unless and until they are registered in the Public Registry Office.

So far no amendments have been introduced with respect to Rome III. However, Maltese private international law rules would regulate this matter on the basis of the application of the *lex loci contractus* to the question of the formal validity of the contract at the time of its conclusion whereas the essential validity would be governed by the proper law of the contract.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Maintenance of spouses after divorce is regulated by the Maltese Civil Code. Spouses have a right to receive maintenance, unless they either renounce to such right or are deemed by court judgment to have defaulted. Default as a sanction is mandatory where such spouse is guilty of adultery or desertion. But a court has discretion to apply such forfeiture in the case of other faults (*excesses, cruelty, threats or grievous injury*).

The request for maintenance can be made *in limine* even pending mediation proceedings or at any stage of judicial proceedings for divorce or personal separation. Maintenance can be in the form of regular payments or a lump sum or capital sum in lieu of some or all of the spouse's maintenance claims. Furthermore, a court may, on final judgment of separation or divorce, and if the circumstances so exist, order the provision of a guarantee the future payment of maintenance up to a sum not exceeding the equivalent of five years' maintenance payments.

With reference to cross-border maintenance claims, even before Malta's accession to the EU, Malta signed reciprocity agreements for the enforcement of maintenance orders. These are now regulated by Maintenance Orders (Reciprocal Enforcement) Act (Chapter 242 of the Laws of Malta). The United Kingdom of Great Britain and Northern Ireland, Canada, the Commonwealth of Australia and Gibraltar, are considered to be reciprocating countries for the purpose of this Act.

By means of this Act where the debtor under a maintenance order made by a court in Malta is residing in a reciprocating country, the creditor under the order may apply for the order to be sent to that country for enforcement. The courts are also competent to make provisional maintenance orders which are to be transmitted to the country in which the debtor resides. Reciprocity allows for the enforcement of orders made in reciprocating countries.

There are no reform proposals pending.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

In terms of the International Maintenance Obligations Order 2011<sup>55</sup> enacted to implement Council Regulation (EC) No. 4/2009 named "*On Jurisdiction, Applicable law, Recognition and Enforcement of decisions and cooperation in matters relating to Maintenance Obligations*" the competent court to determine an application of enforceability or a refusal or suspension of enforcement under the Regulation is the Civil Court (Family Section).

The Civil Court (Family Section) shall have jurisdiction of enforcement to determine –

(a) the question of refusal or suspension of enforcement under Article 21 of the EC Regulation; and

(b) an application for a declaration of enforceability under Article 27 of the EC Regulation.

A defendant who fulfils the criteria laid down by review procedure may apply by means of an application to the Civil Court (Family Section) for a review within the time limit set out by Article 19.2 of the EC Regulation.

In essence a party wishing to enforce a judgement will need to file an application before the competent court whereby the demand for recognition and enforcement is put forward. The application is accompanied by the necessary documentation. The application is dealt with by the Court in chambers and a decree is forthcoming generally within a few days. In the event that the application is acceded to, the applicant will then have to take steps to serve the application with the documents and the decree of the Court. This is done by a Court Bailiff.

If the debtor decides to appeal an application it is submitted before the Court of Appeal within thirty days. The application is served on the creditor who has a right to reply to the appeal application. The case is then appointed for hearing before a decision is given. If a party against whom enforcement is sought has his/her habitual residence in a Member State other than that in which the declaration of enforceability was given, then the time for appeal shall be forty-five days and shall run from the date of service of the decision.<sup>56</sup>

So far there have been no judgments on Council Regulation (EC) No. 4/2009 but the enforcement of a claim under Brussels I has come before the Maltese courts in the case *Elwira Maria Opatecka v. Andrew Francis Ciantar*<sup>57</sup> Ms Opatecka, a Polish national, sought to enforce a judgment of maintenance given by the Polish Courts against Mr Ciantar, a Maltese national residing in Malta in terms of EC Regulation 44/2001 of the 22 December 2000 '*On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*' as amended by EC Regulation 1496/02. The plaintiff in this case applied for the enforcement of the Polish judgment by exhibiting the documentation required of Regulation 44/2001.

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<sup>55</sup> Legal Notice 452 of 2011.

<sup>56</sup> Article 7(2) of the Legal Notice.

<sup>57</sup> Civil Appeals dated 27th January 2006.

The Court deemed the requirements of the Regulation satisfied and granted the request.

### 3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?

The functions under the EC Regulation shall be discharged by the Director responsible for Welfare as the Central Authority and shall receive and transmit an application for a declaration of enforceability under Article 27 of the EC Regulation.<sup>58</sup>

### 4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?

The International Maintenance Obligations Order published on the 11<sup>th</sup> November 2011<sup>59</sup> implements the relevant provisions of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The relevant provisions have been discussed in answer to question B. 1.

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals for reform?

Matrimonial property regimes are regulated by the Maltese Civil Code (Chapter XIV of the Laws of Malta).

**Article 1316** provides that unless the spouses agree to the contrary by public deed they will automatically be regulated by the regime of the community of acquests. This not only applies to persons who marry in Malta but also to persons who, although having celebrated their marriage outside Malta, subsequently establish themselves in Malta and the regime would apply to any property acquired after their arrival.<sup>60</sup> It is possible for spouses to exclude the application of the community of acquests by a prenuptial or post nuptial deed. In such case the spouses may opt for a complete separation of property or for the regime known as the Community of Acquests Under Separate Administration (CORSA)<sup>61</sup>.

However, if the spouses do not so opt, it shall not be lawful for them to derogate from the provisions of this Code in so far as they relate to the community of

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<sup>58</sup> Article 4 of L.N. 452 of 2011

<sup>59</sup> L.N. 452 of 2011

<sup>60</sup> Article 1316: "*(1) Marriage celebrated in Malta shall, in the absence of an agreement to the contrary by public deed, produce ipso jure between the spouses the community of acquests. (2) Marriage celebrated outside Malta by persons who subsequently establish themselves in Malta, shall also produce between such persons the community of acquests with regard to any property acquired after their arrival.*"

<sup>61</sup> Article 1339 of the Maltese Civil Code.

acquests.<sup>62</sup> The right of each of the spouses to the community of acquests shall, saving any other provision of the law, commence from the day of the celebration of the marriage and terminate on the dissolution thereof.<sup>63</sup>

The Community of Acquests comprises the following assets:

(a) all that is acquired by each of the spouses by the exercise of his or her work or industry;

(b) the fruits of the property of each of the spouses including the fruits of property settled as dowry or subject to entail, whether the husband or wife possessed the property since before the marriage, or whether the property has come to either of them under any succession, donation, or other title, provided such property shall not have been given or bequeathed on conditions that the fruits thereof shall not form part of the acquests;

(c) saving any other provision of this Code to the contrary, the fruits of such property of the children as is subject to the legal usufruct of the father or of the mother;

(d) any property acquired with moneys or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses;

(e) any property acquired with moneys or other things which either of the spouses possesses since before the marriage, or which, after the celebration of the marriage, have come to him or her under any donation, succession, or other title, even though such property may have been so acquired in the name of such spouse, saving the right of such spouse to deduct the sum disbursed for the acquisition of such property;

(f) fortuitous winnings made by either or both spouses, and such part of a treasure trove found by either of the spouses, as is by law assigned to the finder, whether such spouse has found the treasure trove in his or her own tenement, or in the tenement of the other spouse, or of a third party.

Provided that such part of the treasure trove as is granted to the owner of the tenement shall belong entirely to the party in whose tenement the treasure trove is found.

Property is presumed to form part of the acquests and it is incumbent on the spouses claiming otherwise to prove his/her claim. However any property deriving from a title anterior to marriage will be excluded from the community even if possession arises after marriage.

There are no proposals for reform pending.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

If the spouses establish themselves in Malta, any immovable property they may acquire in Malta from that point onwards shall be regulated by the regime of the community of acquests (See also answer to question C. 1).

However in the absence of this eventuality, once a court has determined that the juridical nature of the question which requires decision is one of matrimonial

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<sup>62</sup> Article 1318 of the Maltese Civil Code.

<sup>63</sup> Article 1319 of the Maltese Civil Code.

property rights, then such an issue would be dependant on the law of the domicile at the time of the marriage.

The law of the domicile of the parties is the principal connecting factor which the Maltese courts would apply to a cross-border issue.

### **3. Which are the property consequences of registered Partnerships?**

Malta does not recognise registered partnerships although legislation to regulate cohabitation is at the time of writing, tabled before the House of Representatives. Persons who have registered a partnership would be recognised as owners only if they appear as signatories on contracts of acquisition or show that the other partner has benefited from contributions to property in the latter's name by application of the principles of *quasi contract* on unjustified enrichment. Partners would also not be entitled to succession rights including the right of use and habitation to the common residence unless the parties specifically so provide by testamentary disposition.

## **D. Horizontal issues**

### **1. How is Directive no. 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

Legislative amendments in 2003 not only provided for the setting up of the Family Court in a separate competence, but also introduced a mandatory mediation procedure in the settlement of family disputes. Mediation is mandatory in connection with "disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children".<sup>64</sup>

The Mediation Act (Chapter 474 of the Laws of Malta) regulates domestic mediations, which mean "*any mediation of a civil, family, social, commercial and industrial nature*" and cross – border mediations.

### **2. How is Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes transposed into domestic law?**

The Maltese Government is not bound to assume any costs related to participation of legal counsel/advisers or court proceedings, except when such costs may be covered by legal aid. The provision of legal aid would be applicable if the requirements of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) are met with. The relevant provisions were introduced to give effect to Directive 2003/8/EC. The Competent Authority in Malta is the Advocate for Legal Aid.<sup>65</sup>

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<sup>64</sup> The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes (Gozo) (Superior Jurisdiction) (Family Section), L/N. 397 of 2003 Article 9(1)(a).

<sup>65</sup> Article 928C of the Maltese Code of Organisation and Civil Procedure.

**Article 928B** provides that “(1) Legal aid shall be granted to the applicants involved in a cross-border dispute who are, partially or totally, unable to meet the costs of the proceedings as a result of their economic situation.

(2) Applicants who have received legal aid in a Member State other than Malta in respect of proceedings before a court in that other Member State shall be entitled to receive legal aid in Malta if recognition or enforcement of the judgement is sought in Malta.

(3) Legal aid applies to:

(a) pre-litigation advice with the aim of reaching a settlement prior to instituting legal proceedings;

(b) legal assistance and representation in court, even at the appeal stage, with or without the cost of proceedings of the recipient;

(c) the costs of the opposing party had the recipient lost the case and would be so obliged to pay such costs if he were domiciled or habitually resident in the Member State in which the court is sitting;

(d) the enforcement of authentic instruments in another Member State;

(e) extrajudicial procedures under the conditions defined in the Directive if there is a legal requirement for the parties to use them or if the parties to the dispute are ordered by the court to have recourse to them.

(4) Legal aid shall be granted or refused by the competent authority when the Court is sitting in Malta and by the competent authority of the Member State other than Malta when the Court is sitting outside Malta.

(5) Without prejudice to subarticle (4), legal aid applicants may not be prevented from legal aid if they prove that they are unable to pay the cost of the proceedings as a result of differences in the cost of living between the Member State of domicile or habitual residence and of the forum.”

**Article 928D** provides that “It shall be the duty of the competent authority:

(a) to act as a receiving or transmitting authority for legal aid applications;

(b) to assist the applicant in ensuring that the application is accompanied by all the supporting documents known by such applicant to be required to enable the application to be determined;

(c) as a transmitting authority, to assist the applicant in providing the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in another Member State;

(d) as a receiving authority, to assess the economic situation of a person in the light of the provisions of Article 912, including the amount of the resources of persons who are financially dependent on the applicant;

(e) to grant or refuse legal aid;

(f) to consider, when taking a decision on the merits of an application, and without prejudice to paragraph (d), the importance of the individual case to the applicant, and may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss, or when the application concerns a claim arising directly out of the applicant’s trade or self-employed profession;

(g) to keep the applicant informed with the processing of the application, and where the application is totally or partially rejected, to give reasons for the rejection;

(h) to decide whether recipients of legal aid must refund in whole or in part the assistance granted if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient and to collect any reimbursement so due.”

**Article 928E** provides that “(1) Legal aid applications by persons who are domiciled or habitually resident in Malta may be submitted either:

(a) to the competent authority in Malta hereinafter referred to as "the transmitting authority"; or

(b) to the competent authority of the Member State in which the court is sitting or where the decision is to be enforced, hereinafter referred to as "the receiving authority".

(2) Legal aid applications shall be completed in accordance with such forms as may be prescribed by the Minister responsible for justice by Order in the Gazette.

(3) The competent authority in Malta may decide to refuse to transmit an application to the receiving authority of another Member State if it is manifestly:

(a) unfounded; or

(b) outside the scope of the Directive.”

When an application for transmission is totally or partially rejected, the reasons for rejection shall be given and the report shall be examined by the Civil Court First Hall. The parties shall have the opportunity to be heard and make submissions before it decides.<sup>66</sup>

When the competent authority in Malta receives a request for legal aid in relation to proceedings which are being heard before a court in a Member State other than Malta, it shall transmit the application to the competent receiving authority in the other Member State within fifteen days of the receipt of the application duly completed in one of the languages of the Member State of the competent receiving authority, and the supporting documents translated, where necessary, into one of those languages.

**When Malta is acting as a receiving authority, legal aid shall cover the costs as follows:**

(a) interpretation;

(b) translation of documents required by the court or by the competent authority and presented to the recipient, which are necessary for the resolution of the case;

(c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant’s case is required in court, and the court is satisfied that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Legal aid granted by the competent authority in Malta when it is acting as a transmitting authority shall cover the following costs:

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<sup>66</sup> Article 917 C.O.C.P.

(a) costs relating to the assistance of a local lawyer or another person entitled to give legal advice, incurred by the competent authority until the application for legal aid has been received in the Member State where the court is sitting;

(b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities of that Member State where the court is sitting.<sup>67</sup>

Costs related to the translation of the application and supporting documents incurred by the competent authority following an application for legal aid by a person domiciled or habitually resident in Malta shall be repaid to the competent authority if the application is rejected by the competent authority of the Member State other than Malta where the Court is sitting.<sup>68</sup>

### **3. Is your country a contracting party to any bilateral instruments on family law?**

Malta has signed and ratified the Hague Convention of the 25th October 1980 on the Civil Aspects of International Child Abduction. This Convention was acceded to on the 30th of January 1995. The provisions of this convention, together with the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children which was signed in Luxembourg on the 20th May, 1980 are enshrined in Maltese Law in Chapter 410 of the Laws of Malta (Child Abduction and Custody Act).

Malta has also signed reciprocal agreements on the Reciprocal Enforcement of Maintenance Orders which is regulated by Chapter 242 of the Laws of Malta Chapter entitled Maintenance Orders (Reciprocal Enforcement) Act.<sup>69</sup>

### **4. Are there any databases or online tools providing information on family law matters available in your country?**

There are no specific family law databases.

Judgments of the Courts of Malta can be accessed online through the website [www.gov.mt](http://www.gov.mt).

Other useful websites are:

Agenzija Appogg at [www.appogg.mt](http://www.appogg.mt)

**Foundation for Social Welfare Services**

[www.fsws.gov.mt](http://www.fsws.gov.mt)

**Agenzija Sedqa**

[www.sedqa.gov.mt](http://www.sedqa.gov.mt)

**Ministry for Justice and Home Affairs**

[www.mjha.gov.mt](http://www.mjha.gov.mt)

**The European Judicial Network in Civil and Commercial Matters:**

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_mlt\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_mlt_en.htm)

- Information on maintenance obligations:

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<sup>67</sup> Article 928F of the C.O.C.P.

<sup>68</sup> Article 982G C.O.C.P.

<sup>69</sup> Reciprocal orders were signed with Gibraltar, Manitoba (Canada) the United Kingdom and Australia.

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_mlt\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_mlt_en.htm)

- Information on parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_mlt\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_mlt_en.htm)

**The European Judicial Atlas in Civil and Commercial Matters informs on**

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

There are no such tools at the disposal of the practitioner in Malta. Foreign law is a matter of proof.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

Divorce has only been recently introduced in Malta and there is no jurisprudence on cross-border divorce within the context of Brussels II. Practical issues have arisen on *lis alibi pendens* in order to establish the court first seized of proceedings in divorce/personal separation.

### Maintenance Regulation

There is no jurisprudence yet. But there was one case on the enforcement of a maintenance judgment under Brussels I (See B. 2)<sup>70</sup>.

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<sup>70</sup> *Maria Opatecka v. Andrew Francis Ciantar* - Civil Appeals dated 27th January 2006.

### **III. NATIONAL BIBLIOGRAPHY**

No relevant bibliography available.

**National section**

# **THE NETHERLANDS**

**Professor Katharina Boele-Woelki**

**Roderic ter Rele**

**Utrecht Centre for European Research into Family Law**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

- Dutch Civil Code, Book 1 (Persons and Family Law), Title 9 (Dissolution of Marriage) and Title 10 (Decree of Judicial Separation and the Dissolution of the Marriage after Judicial Separation) (<http://wetten.overheid.nl/BWBR0002656/>)
- Dutch Civil Procedure Code, Book 3, Title 6 (<http://wetten.overheid.nl/BWBR0001827/>).

There are currently no reform proposals.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

If no court of a Member State has jurisdiction according to the Brussels IIbis Regulation, Article 4 subsection 1 Dutch Civil Procedure Code declares that the Regulation's rules on jurisdiction are *mutatis mutandis* applicable to divorces which do not fall within the scope of the Regulation. This means that even if the Brussels IIbis regulation is not applicable, Articles 3, 4 and 5 of the regulation apply according to Dutch law.

#### 3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

For the Netherlands the implementation rules have been laid down in the *Uitvoeringswet internationale kindbescherming* (International Child Protection Implementation Act of the 16<sup>th</sup> February 2006, Netherlands Bulletin of Acts and Decrees 2006, no. 123.) The Act entered into force on 1<sup>st</sup> May 2006. This Implementation Act also implements the Hague Convention of the 10<sup>th</sup> October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of the child.

#### 4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?

The Netherlands does not participate in the enhanced cooperation implemented by Regulation Rome III. The case law during the last 30 years has shown that under the former Statute (Dissolution of Marriages and Judicial Separations Act of 1982) Dutch law has been applied in the vast majority of cases. Therefore Article 10:56 Dutch Civil Code determines that whether dissolution of a marriage or a judicial separation can be decreed and on which grounds shall be determined according to Dutch law. However, the law of the common foreign nationality of the spouses shall be applied if in the proceedings (a) the spouses jointly made a choice of that law or such a choice by one of the spouses has not been rebutted; or (b) one of the spouses has made a choice of that law and both spouses have an actual societal connection with the country of such a common nationality.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

The Rome III Regulation does not apply in the Netherlands. Under Article 10:56 (2) (a) Dutch Civil Code the choice of the applicable law should be made jointly by the parties or such a choice has not been rebutted by one of the parties. The choice can be made before the court during the course of the proceedings. The choice must be made expressly or must otherwise be sufficiently clear from the wording used in the application or statement of defence, Article 10:56 (3) Dutch Civil Code.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

See question A. 5. There are no formal requirements.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

- Dutch Civil Code, Articles 1:157-160 (<http://wetten.overheid.nl/BWBR0002656/>)
- Dutch Civil Code, Article 10:90 (<http://wetten.overheid.nl/BWBR0030068/>)
- Dutch Civil Procedure Code, third book, sixth title (<http://wetten.overheid.nl/BWBR0001827/>)

In July 2012 a private member bill (Parliamentary documents Dutch Second chamber 2011/12, 33 311, Nos. 1-2) was submitted to parliament. It proposes to reduce the length of the period for maintenance between partners (former spouses and registered partners).

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

When so requested by a former spouse who is entitled to maintenance, the *Landelijk Bureau Inning Onderhoudsbijdragen* (LBIO, National Bureau for Collection of Maintenance) assumes responsibility for the recovery of maintenance. (Article 1:408 paragraph 2 Dutch Civil Code).

The cost of collection by the LBIO may be recovered from the person from whom the maintenance is due, in addition to the cost of judicial proceedings and execution (Article 1:408 paragraph 3 Dutch Civil Code)

Collection of maintenance will only be undertaken when the person with an entitlement at the time when the application is lodged has shown *prima facie* that the person obliged to pay maintenance has failed to fulfil his or her obligations as regards at least one periodical payment within at most six months preceding the lodging of the application. (Article 1:408 paragraph 4 Dutch Civil Code).

Prior to proceeding to recover costs, the person obliged to pay maintenance must be notified by letter of the intention thereto. The LBIO may proceed to collect on the fourteenth day after the letter has been sent (Article 1:408 paragraph 5 Dutch Civil Code).

Collection made on the application of the person entitled to maintenance ends only if payment is regularly made for at least half a year to the LBIO and there are no amounts still due (Article 1:408 paragraph 6 Dutch Civil Code).

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The *Landelijk Bureau Inning Onderhoudsbijdragen* (National Bureau for Collection of Maintenance) has been designated as Central Authority (Article 2 subsection 1 *Uitvoeringswet internationale inning levensonderhoud* (International Maintenance Recovery Implementing Act)) (<http://wetten.overheid.nl/BWBR0030555/>).

Contact details:

P.O. Box 8901

3009 AX Rotterdam

Netherlands

phone number: +31 10 2894 895

(Monday to Friday 09:00-12:00 AM and 01:00-04:00 PM)

Fax Number: +31 10 2894 882

### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

For the Netherlands the implementation rules have been laid down in the *Uitvoeringswet internationale inning levensonderhoud* (International Recovery of Maintenance Act of the 29<sup>th</sup> September 2011, Netherlands Bulletin of Acts and Decrees 2011, no. 460.) The Act entered into force on 15<sup>th</sup> October 2011. This Implementation Act also implements the Hague Convention of the 23<sup>rd</sup> October 2007 on the international recovery of child support and other forms of maintenance.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

- Dutch Civil Code, Book 1, Titles 6, 7 and 8  
(<http://wetten.overheid.nl/BWBR0002656/>)
- Dutch Civil Code, Book 10, Title 3, Section 3  
(<http://wetten.overheid.nl/BWBR0030068/>)
- Dutch Civil Procedure Code, third book, Sixth title  
(<http://wetten.overheid.nl/BWBR0001827/>)

There are no proposals to reform.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

The law applicable to the matrimonial property regime is designated by the provisions of the Convention on the Law applicable to Matrimonial Property Regimes, concluded in the Hague on 14<sup>th</sup> March 1978. France, Luxemburg and the Netherlands are the only contracting states of this convention.

- Convention on the Law Applicable to Matrimonial Property Regimes
- Articles 10:42-53 Dutch Civil Code (<http://wetten.overheid.nl/BWBR0030068/>)

## **3. Which are the property consequences of registered partnerships?**

According to Dutch domestic law, registered partnership has the same property consequences as marriage (Article 1:80b Dutch Civil Code).

Registered partners may designate the law of a legal system that has the institution of registered partnership (Article 10:70 Dutch Civil Code).

If no applicable law has been designated and the registered partnership is entered into in the Netherlands, Dutch law shall govern their property regime. If the registered partnership was entered into outside the Netherlands, the partnership property regime shall be governed by the law of the state where they entered into registered partnership, including that state's private international law (Article 10:71 Dutch Civil Code).

Partners may designate another internal law during their registered partnership (Article 10:72 Dutch Civil Code).

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Mediation Directive will be implemented by an amendment of the Dutch Civil Code and the Dutch Civil Procedure Code. The Bill (*No. 32 555*) is under discussion in the Senate. This amendment contains the following provisions:

- a limitation period will be interrupted by mediation
- during a procedure, the judge may invite parties to use mediation to settle their dispute at any moment
- if parties agree the mediation to be confidential, the mediator shall not be compelled to give evidence in a proceeding, unless (i) where this is necessary for overriding considerations of public interest in particular to protect the best interest of children or (ii) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

- if mediation results in a settlement, parties may request to have their agreement to be contained in the (enforceable) court's minutes

**2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Directive has been transposed in Dutch law by an amendment of the *Wet op de Rechtsbijstand* (Legal Aid Act) (*Staatsblad* 2005, No. 90). A chapter on legal aid in cross-border disputes within the European Union has been added to this act.

**3. Is your country a contracting party to any bilateral or international instruments on family law?**

The Netherlands is party to the following instruments on family law:

Council of Europe

- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, Luxembourg 20 May 1980
- Convention on the Establishment of a Scheme of Registration of Wills, Basle 16 May 1972

Hague Conference

- Convention on Celebration and Recognition of the Validity of Marriages, The Hague 14 March 1978
- Convention on the Law Applicable to Matrimonial Property Regimes, The Hague 14 March 1978
- Convention on the Recognition of Divorces and Legal Separations, The Hague 1 June 1970
- Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, The Hague 19 October 1996
- Convention on the Civil Aspects of International Child Abduction, The Hague 25 October 1980
- Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, The Hague 29 May 1993
- Convention on the Law Applicable to Maintenance Obligations, The Hague 2 October 1973
- Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, The Hague 2 October 1973
- Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, The Hague 5 October 1961

International Commission on Civil Status

- Convention on the Establishment of Maternal Descents of Natural Children, Brussels 12 September 1962

- Convention on Legitimation by Marriage, Rome 10 September 1970
- Convention on the Recognition of Decisions Recording a Sex Reassignment, Vienna 12 September 2000
- Convention applicable to Surnames and Given Names, Munich 5 September 1980
- Convention on the Recognition of Decisions Relating to the Matrimonial Bond, Luxembourg 8 September 1967

#### United Nations

- Convention on the Recovery Abroad of Maintenance, New York 20 June 1956

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

- Kluwer Navigator
- Opmaat
- Rechtsorde
- Legal Intelligence
- European Judicial Network in Civil and Commercial Matters:
  - Information on divorce:  
[http://ec.europa.eu/civiljustice/divorce/divorce\\_net\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_net_en.htm)
  - Information on maintenance obligations:  
[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_net\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_net_en.htm)
  - Information on parental responsibility  
[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_net\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_net_en.htm)
- European Judicial Atlas in Civil and Commercial Matters:
  - Matrimonial matters and matters of parental responsibility  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)
  - Maintenance obligations  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

#### **5. Please provide information on accessing and applying foreign family law in your country.**

In the Dutch system, conflict of law rules and the law designated by these rules are to be applied ex officio (Article 10:2 Dutch civil Code). The court can obtain information about foreign law from the International Judicial Institute (*Internationaal Juridisch Instituut*). This institute has a special arrangement with the Ministry of Security and Justice regarding the costs for courts which require legal information providing by the institute. Information about foreign family law as regards European jurisdictions can also be obtained at the website of the Commission on European Family Law ([ceflonline.net](http://ceflonline.net))

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

The Dutch decisions on the application of the Brussels IIbis Regulation are reported in the *Nederlands international privaatrecht* journal which is published by the T.M.C. Asser Instituut in The Hague. More than 720 decisions in which the Brussels IIbis Regulation has been applied are documented in this journal. The most important decisions and trends are analysed in the recently published book *Nederlands internationaal personen- en familierecht*, Deventer: Kluwer 2012 (see the list under National Bibliography).

### Maintenance Regulation

To date no Dutch decision on the application of the Maintenance Regulation has been reported.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- A.E. Oderkerk, 'Ontbinding van het huwelijk', Th.M. de Boer & F. Ibili et al., *Nederlands internationaal personen- en familierecht*, Deventer: Kluwer 2012, p. 133-152

#### Regulation Rome III: Cross-border divorce - applicable law

- K. Boele-Woelki, 'For better or for worse: The Europeanization of international divorce law', *Yearbook of Private International Law* 2010, 2011, p. 17-41

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- Th.M. de Boer, 'Nieuwe regels voor de internationale alimentatie', *FJR* 2011, p. 121
- L.Th.L.G. Pellis, 'Alimentatie', in: Th.M. de Boer & F. Ibili et al., *Nederlands internationaal personen- en familierecht*, Deventer: Kluwer 2012, p. 201-252

#### Matrimonial property regimes and property consequences of registered partnerships

- K. Boele-Woelki & B. Braat, 'Marital agreements and Party Autonomy in Dutch law', in: J. Scherpe (ed), *Marital Agreements and Private Autonomy in a Comparative Perspective, The legal status of pre-nuptial, post-nuptial and separation agreements*, Oxford: Hart 2012, p. 231-255
- B.E. Reinhartz, 'Boek 10, Titel 3, Afdeling 3. Het huwelijksvermogensregime', in: *Tekst & Commentaar Burgerlijk Wetboek*, Deventer: Kluwer 2011, p. 4889
- M.H. ten Wolde, 'Huwelijk, persoonlijke betrekkingen tussen echtgenoten, huwelijksvermogensrecht', in: Th.M. de Boer & F. Ibili et al., *Nederlands internationaal personen- en familierecht*, Deventer: Kluwer 2012, p. 95-132

**National section**

**POLAND**

**Jacek Gołaczyński**

**Professor of Civil Law, University of Wrocław  
Judge, Court of Appeal Wrocław**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The substantive source of law for divorce, annulment and legal separation is the Family and Guardianship Code of February 25, 1964<sup>71</sup>. The Code has been amended nineteen times since it entered into force on 1 January 1965. Divorce is governed by Articles 56 – 61. Legal separation is a quite new legal institution in the Polish legal system. It was introduced into the Code by an amendment on 21 May 1999, which entered into force on 16 December 1999. Provisions on legal separation are contained in Articles 61<sup>1</sup> – 61<sup>6</sup>. Provisions on the annulment of marriage are included, together with the provisions which relate to negative conditions that prevent effective conclusion of the marriage, in Articles 10 – 22.

Matters relating to divorce, legal separation, and annulment of marriage are dealt with by courts in accordance with the provisions of the Code of Civil Procedure of November 17, 1964<sup>72</sup>. They are considered in litigious mode according to separate rules provided for this kind of matter in Articles 425 – 452. There are only two exceptions to these rules: matters concerning legal separation on the basis of consistent application made by the parties and matters concerning cancellation of legal separation are considered in non litigious mode according to Articles 567<sup>1</sup> – 567<sup>5</sup>.

There are proposals to reform in the area of divorce, annulment of marriage and legal separation. They are connected with the work on progress on the new Civil Code in Poland<sup>73</sup>, carried out by the Civil Law Codification Commission ("*Komisja Kodyfikacyjna Prawa Cywilnego*") working at the Ministry of Justice. The work of the Commission is not far advanced, when it comes to changes on divorce, annulment of marriage and legal separation. The main assumption of the proposed changes is the inclusion of the regulation on divorce, annulment and legal separation, contained in the Family Code, in the new Civil Code.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

When no court has jurisdiction to hear a matter, it may be described as a negative jurisdictional conflict. The Polish Civil Procedure envisages specific provisions in order to prevent such an undesirable effect. If there is a lack of circumstances which justify jurisdiction by the Polish courts and it is impossible to carry out proceedings before a foreign court or other foreign competent authority, according to Article 1099<sup>1</sup> Civil Procedure, a Polish court shall be competent to hear such a matter only if it manifests sufficient connection with the Polish legal system. Criteria of sufficient

<sup>71</sup> Hereinafter referred to as „Family Code” – text in Polish available on web site:

<http://isap.sejm.gov.pl/Download?id=WDU19640090059&type=3>;

<sup>72</sup> Hereinafter referred to as „Civil Procedure” – text in Polish available on web site:

<http://isap.sejm.gov.pl/Download?id=WDU19640430296&type=3>;

<sup>73</sup> See: interview with former chairman of Civil Law Codification Commission (2006 – 2010) - <http://prawo.rp.pl/artykul/450390.html>;

connection is not strictly specified, therefore it should be evaluated in the light of the circumstances of the particular matter.

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

No instrument or procedure has been introduced to apply Regulation Brussels IIbis in Poland. Of course, the application of Regulation Brussels IIbis is closely related to the application of the rules of Civil Procedure, but there has been no need to amend the Civil Procedure or to put in place any new proceedings or legal instruments.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Poland has not participated in the enhanced cooperation implemented by Council Regulation (EU) No 1259/2010 (Rome III).

In cross-border divorce cases, the act on private international law of February 4, 2011<sup>74</sup> applies. According to Article 54 (1), the law applicable for dissolution of marriage is the law of the spouses' common citizenship at the time of the request for termination (*lex patriae*). If they do not have common citizenship, the law applicable shall be the law of state in which the spouses have common domicile at the time of the request for termination (*lex domicilii*). If they do not have common domicile, the law applicable shall be the law of the state in which the spouses had their last place of common habitual residence, with the restriction that one of the spouses still have in this state his/her habitual residence. Should the provisions presented above do not enable the law applicable to be designated, Polish law shall be applicable. All these provisions which concern dissolution of marriage shall be applicable as appropriate to legal separation.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Polish law does not allow spouses to choose the law applicable to divorce and legal separation. The law applicable is governed by conflict of law rules, which are based on objective points of contact.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Under Polish law such an agreement is not acceptable. Spouses are not allowed to choose the law applicable to divorce or legal separation.

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<sup>74</sup> Text in Polish available on web site: <http://dziennikustaw.gov.pl/DU/2011/s/80/432>;

## **B. Cross-border maintenance**

### **1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The current substantive source of law for maintenance of spouses after divorce is the Family Code, Articles 60 – 61. These two articles are the exclusive legal basis for maintenance arrangements between the former spouses after divorce. There is no proposal to amend the regulations on maintenance between spouses after divorce.

Matters concerning maintenance after divorce are heard by civil courts according to the general provisions of Civil Procedure in a litigious mode. There are no specific procedural provisions concerning recovery of maintenance. Courts do not apply provisions of specific proceedings applicable in matrimonial matters, which apply only to divorce, legal separation and marriage annulment.

There are reform proposals in the area of maintenance of spouses after divorce, which are connected with the work on progress on the new Civil Code in Poland (see the answer A. 1). The main assumption of the proposed changes is the inclusion of the regulation on maintenance of spouses after divorce, contained in the Family Code, in the new Civil Code.

### **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

Court decisions adjudicating maintenance claims have immediate enforceability. According to Article 333 § 1 (1) Civil Procedure, the court grants *ex officio* immediate enforceability privileges if it awards maintenance as regards to installments paid after the date when legal action was brought, and the installments paid before proceedings were initiated, for a period not exceeding three months. The privilege of immediate enforceability allows the maintenance creditor to establish the claims asserted against the debtor before the judgment becomes final. Judgment which is not final, but provided with immediate enforceability, is the enforcement title ("*tytuł egzekucyjny*"), such a judgment, once this has been granted by court enforcement clause ("*klauzula wykonalności*") is the basis of execution against the debtor. The privilege of immediate enforceability cannot be granted for installments payable for the period prior to three months before legal action is brought against the maintenance debtor. In case of such installments, the judgment has to be final in order to have the enforcement clause granted by the court, which is the basis of execution against the maintenance debtor.

If maintenance is established by court settlement, then for enforcement of such a settlement, on the initiative of the creditor, a court enforcement clause shall be granted. Court settlement is, according to Article 777 § 1 (1) Civil Procedure, an enforcement title, with a court enforcement clause it is a basis of execution against the maintenance debtor.

The Polish legal system also contains a legal instrument intended to help persons entitled to maintenance. It is an act on assistance to persons entitled to

maintenance of September 7, 2007<sup>75</sup>. The act provides legal measures for a situation in which execution against the debtor is ineffective. According to Article 2 (2) Assistance Act, execution is ineffective when as a result of this execution the maintenance arrears and current maintenances have not been recovered in full during the last two months. Execution is also ineffective when proceedings against a maintenance debtor residing outside Poland cannot be initiated, in particular because there is no legal basis in the debtor's place of residence to execute the enforcement title or the creditor is unable to identify the debtor's place of residence in a foreign country.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Central Authority designated in the Republic of Poland pursuant to Article 49(1) of Regulation No 4/2009 is the Ministry of Justice – Department of International Cooperation and European Law (address: Al. Ujazdowskie 11, PL - 00-950 Warsaw). District Courts are the authorities designated to perform the tasks of the Central Authority referred to in Article 51 of Regulation No 4/2009 for the transfer of applications and to take any appropriate action in relation to applications submitted. In Poland there are forty five District Courts. The languages accepted by the Polish Central Authority for the purpose of passing on information in accordance with Article 59 of Regulation No 4/2009 are Polish and English<sup>76</sup>.

### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

In order to execute the provisions of Regulation No 4/2009, an act amending the Code of Civil Procedure, the law on legal aid in civil proceedings conducted in the Member States of the European Union and on legal aid has been introduced, in order to settle the dispute before the commencement of such proceedings, as well as an act on assistance to persons entitled to maintenance of April 28, 2011<sup>77</sup>. Provisions which have been introduced concern procedural issues with enforcement titles on maintenance and court enforcement clauses. Provisions have also been introduced on legal aid in cross-border maintenance matters, inquiry at the debtor's domicile, to determine the family situation, income and professional situation of the debtor, and his state of health and reasons for non recovery of maintenance.

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<sup>75</sup> Hereinafter referred to as „Assistance Act” – text in Polish available on web site: <http://dziennikustaw.gov.pl/du/2009/s/1/7/D2009001000701.pdf>;

<sup>76</sup> Text of Information referred to Article 71(l) of Council Regulation No 4/2009 available in English on web site: <http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/alimenty/download,1507,2.html>;

<sup>77</sup> Text available on web site: <http://dziennikustaw.gov.pl/du/2011/s/129/735/D2011129073501.pdf>;

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

The substantive source of law on matrimonial property regimes in Poland is the Family Code, Articles 31 – 54. Fundamentally, in Poland there are two types of property regime, namely the statutory property regime and the contractual property regime. By concluding a matrimonial property agreement, spouses are allowed to create one of three other property regimes: conjugal community (which may be extended or limited in comparison with the statutory conjugal community), division of marital property, division of marital property with the alignment of the property after termination of marriage.

Matters concerning matrimonial property regimes shall be subject to the general provisions of litigious mode with separate provisions provided for proceedings intended to establish the division of marital property. According to Article 452 Civil Procedure, in matters concerning division of marital property, the provisions of Articles 426, 431, 432, 435 § 1, 441 and 446 shall be applicable. In non litigious mode there are two types of cases in the field of matrimonial property regimes which concern decisions on relevant family matters (including aspects of the property) and a division of joint property after termination of marriage. For the division of joint property the appropriate provisions intended for the non litigious mode of Civil Procedure concerning the division of inheritance, Articles 680 – 689 shall be applicable.

There are planned changes on matrimonial property regimes, which are connected with work on progress on the new Civil Code in Poland (see the answer to a question 1). The main assumption of the proposed changes is the inclusion of the regulation on matrimonial property regimes, contained in the Family Code, in the new Civil Code.

### 2. Which conflict of laws rules apply in matrimonial property disputes?

In matrimonial property disputes Articles 51 – 52 of the act on private international law (PIL) apply. According to the provisions of PIL, spouses are free to choose the law applicable for their matrimonial property relationships. The choice of law is strictly limited to the law of citizenship, domicile, or place of habitual residence of one of the spouses. If they do not choose, the law applicable shall be the law of the spouses' common citizenship (*lex patriae*). Where they do not have common citizenship, the applicable law shall be the law of the state in which spouses have common domicile (*lex domicilii*). If they do not have common domicile, the applicable law shall be the law of state in which they have a common place of habitual residence. If spouses do not have a common place of habitual residence, the final rule for designating the applicable law is that the law of the state in which spouses in a different way (other than: common citizenship, common domicile, common habitual place of residence) are closely connected shall apply. Moreover, the parties are free to choose the law applicable for their matrimonial property agreement. The choice of law for the agreement may be made in the same manner as for matrimonial property relationships. If spouses do not choose the law applicable to matrimonial property agreement, it shall be governed by the law

designated in Article 51 PIL, which specifies the law applicable for matrimonial property relationships.

### **3. Which are the property consequences of registered partnerships?**

In Poland there are no regulations on registered partnerships. Under Polish law, marriage is the only relationship which entails certain kinds of property consequences, even cohabitation does not involve such consequences.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The provisions of Civil Procedure on mediation in civil and commercial matters are consistent with Directive No 2008/52/EC. The Polish regulation on mediation has been altered via an act amending Civil Procedure of July 28, 2005, it entered into force on 10 December 2005. This provision concerning mediation entered into force before Directive No 2008/52/EC was adopted, nevertheless they are fully compatible with the provisions of the Directive<sup>78</sup>. That is why there was no need to amend Civil Procedure or introduce a new act in order to implement the provisions of the Directive in the Polish legal order.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive No 2003/8/EC has been implemented through an act on legal aid in civil proceedings conducted in the Member States of the European Union and on legal aid in order to settle the dispute before the commencement of such proceedings of December 17, 2004<sup>79</sup>. In order to implement the provisions of the Directive a completely new legal act (mentioned above) has been introduced. Issues that are the subject of this new act in relation to domestic disputes are contained in the act on court costs in civil matters of July 28, 2005. Therefore the legislature has decided not to put the legislation on legal aid in domestic and cross-border disputes in a single act but has introduced separate acts in order to implement the provisions of the Directive.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

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<sup>78</sup> S. Pieckowski, *Arbitraż a alternatywne metody rozwiązywania sporów w sprawach cywilnych (ADR)* [in:] *Arbitraż handlowy Tom 8 System Prawa Handlowego*, Ed. by A. Szumański, Warsaw 2010, p. 1009;

<sup>79</sup> Hereinafter referred to as „Act on legal aid” – text in Polish available on web site: <http://dziennikustaw.gov.pl/du/2005/s/10/67/D2005010006701.pdf>;

Poland is a contracting party to twelve multilateral conventions on family law and fourteen bilateral conventions on family law. Many of the multilateral conventions to which Poland is a contracting party have been concluded under the auspices of international organisations, in particular the Hague Conference on Private International Law.

Poland is a party to the following multilateral conventions on family law concluded under the auspices of the United Nations:

- Convention on the Recovery Abroad of Maintenance done at New York, on 20 June 1956<sup>80</sup>;

Poland is a party to the following multilateral conventions on family law concluded under the auspices of the Hague Conference on Private International Law:

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants<sup>81</sup>;
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations<sup>82</sup>;
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations<sup>83</sup>;
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations<sup>84</sup>;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction<sup>85</sup>;
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>86</sup>;
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children<sup>87</sup>;
- According to Article 216 (2), Treaty on the Functioning of the European Union, Poland is bound by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations<sup>88</sup>;

Poland is a party to the following multilateral conventions on family law concluded under the auspices of the Council of Europe:

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<sup>80</sup> Text available on web site: [http://www.hcch.net/upload/ny\\_conv\\_e.pdf](http://www.hcch.net/upload/ny_conv_e.pdf);

<sup>81</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt10en.pdf>;

<sup>82</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt18en.pdf>;

<sup>83</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt23en.pdf>;

<sup>84</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt24en.pdf>;

<sup>85</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt28en.pdf>;

<sup>86</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt33en.pdf>;

<sup>87</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt34en.pdf>;

<sup>88</sup> Text available on web site: <http://www.hcch.net/upload/conventions/txt39en.pdf>;

- ETS No.: 58 – European Convention on the Adoption of Children, signed 24 April 1967, in Strasbourg<sup>89</sup>;
- CETS No.: 85 – European Convention on the Legal Status of Children born out of Wedlock, signed 15 October 1975, in Strasbourg<sup>90</sup>;
- CETS No.: 105 – European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, signed 20 May 1980, in Luxembourg<sup>91</sup>;
- CETS No.: 160 – European Convention on the Exercise of Children's Rights, signed 25 January 1996, in Strasbourg<sup>92</sup>;

Poland is a party to fourteen bilateral agreements relating, among others, to family law and three protocols which have amended bilateral agreements:

- Agreement between the People's Republic of Poland and the Kingdom of Belgium on the recognition of judgments in divorce of 17 December 1986<sup>93</sup>;
- Agreement between the Polish Republic and the Republic of Belarus on Legal Assistance and Legal Relations in civil, family, employment and criminal matters of 26 October 1994<sup>94</sup>;
- Agreement between the People's Republic of Poland and the People's Republic of Bulgaria on legal assistance and legal relations in civil, family and criminal matters of 4 December 1961<sup>95</sup> amended by the Protocol to the Agreement between the People's Republic of Poland and the People's Republic of Bulgaria on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed at Warsaw on 4 December 1961, of 27 June 1980<sup>96</sup>;
- Agreement between the People's Republic of Poland and the Czechoslovak Socialist Republic on legal assistance and legal relations in civil, family, employment and criminal matters of 21 December 1987<sup>97</sup>, amended by an Agreement<sup>98</sup> between the Republic of Poland and the Czech Republic to amend and supplement the Agreement between the People's Republic of Poland and the Czechoslovak Socialist Republic on Legal Assistance and Legal Relations in

<sup>89</sup> Text available on web site: <http://conventions.coe.int/Treaty/en/Treaties/Word/058.doc>;

<sup>90</sup> Text available on web site: <http://conventions.coe.int/Treaty/en/Treaties/Word/085.doc>;

<sup>91</sup> Text available on web site: <http://conventions.coe.int/Treaty/en/Treaties/Word/105.doc>;

<sup>92</sup> Text available on web site: <http://conventions.coe.int/Treaty/en/Treaties/Word/160.doc>;

<sup>93</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008347.pdf> (Dutch),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008348.pdf> (French),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008349.pdf> (Polish);

<sup>94</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000006672.pdf> (Belarussian),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000006671.pdf> (Polish);

<sup>95</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000010585.pdf> (Polish – Bulgarian);

<sup>96</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000009024.pdf> (Bulgarian),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000009025.pdf> (Polish);

<sup>97</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008283.pdf> (Polish),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008284.pdf> (Slovak);

<sup>98</sup> The Agreement in the version of 21 December 1987 is still in force between Poland and Slovakia. The Agreement of December 1987 amended by the Agreement of 30 October 2003 is in force between Poland and the Czech Republic. It is a consequence of the disintegration of Czechoslovakia;

Civil, Family, Labour and Criminal Matters, signed at Warsaw on 21 December 1987, of 30 October 2003<sup>99</sup>;

- Agreement between the People's Republic of Poland and the Republic of Finland on legal protection and legal assistance in civil, family and criminal matters of 27 May 1980<sup>100</sup>;
- Agreement between the People's Republic of Poland and the Republic of France on Applicable Law, Jurisdiction and the Enforcement of personal and family law of 5 April 1967<sup>101</sup>;
- Agreement between the People's Republic of Poland and the Democratic People's Republic of Korea on legal aid in civil, family and criminal matters of 28 September 1986<sup>102</sup>;
- Agreement between the People's Republic of Poland and the Republic of Cuba on mutual assistance in civil, family and criminal matters of 18 November 1982<sup>103</sup>;
- Agreement between the People's Republic of Poland and the People's Libyan Arab Jamahiriya Socialist state on legal assistance in civil, commercial, family and criminal matters on 2 December 1985<sup>104</sup>;
- Agreement between the Republic of Poland and the Republic of Lithuania on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters of 26 January 1993<sup>105</sup>;
- Agreement between the Republic of Poland and the Republic of Latvia on legal assistance and legal relations in civil, family, employment and criminal matters of 23 February 1994<sup>106</sup>;
- Agreement between the Republic of Poland and Mongolia on legal assistance and legal relations in civil, family, employment and criminal matters of 19 October 1998<sup>107</sup>;
- Agreement between the Republic of Poland and the Socialist Republic of Vietnam on legal assistance and legal relations in civil, family and criminal matters of 22 March 1993<sup>108</sup>;

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<sup>99</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008904.pdf> (Czech);

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008905.pdf> (Polish);

<sup>100</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008826.pdf> (Polish),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008827.pdf> (Finnish);

<sup>101</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000015617.pdf> (Polish – French);

<sup>102</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008380.pdf> (Korean),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008381.pdf> (Polish – Russian);

<sup>103</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008558.pdf> (Spanish),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008559.pdf> (Polish);

<sup>104</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008417.pdf> (Polish),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008418.pdf> (Arabic);

<sup>105</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007499.pdf> (Polish),

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007500.pdf> (Lithuanian);

<sup>106</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007607.pdf> (Latvian);

<http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007608.pdf> (Polish);

<sup>107</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007320.pdf> (Polish – Mongolian);

- Agreement between the People's Republic of Poland and the Hungarian People's Republic on Legal Assistance in Civil, Family and Criminal Matters of 6 March 1959<sup>109</sup>, amended by a Protocol to amend and supplement the Agreement between the People's Republic of Poland and the Hungarian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed in Budapest on 6 March 1959, of 18 September 1980<sup>110</sup>;

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

There are public databases with judgments of all Courts of Appeal in Poland (11 courts). These databases are general in nature and apart from decisions in other branches of civil law also include rulings on some family law matters. In databases there are not published matters concerning divorce, legal separation and incapacitation. The databases can be found online: <http://orzeczenia.ms.gov.pl/>. Selected Supreme Court decisions are also published on its website <http://www.sn.pl/orzecznictwo/SitePages/Najnowsze%20orzeczenia.aspx>. The database on this website is general in nature and contains court decisions concerning different branches of law among others family law. There is no database that contains only judgments in family law matters.

#### **5. Please provide information on accessing and applying foreign family law in your country.**

According to Article 1143 Civil Procedure, if relevant conflict of law rules are designated as applicable foreign law, a Polish court is obliged to establish the content and to apply such a foreign law. This provision is applicable in all kinds of civil matters and also includes family law matters. A Court may fundamentally obtain information on the content of foreign family law in two ways, and this is provided for expressly in the Civil Procedure. First of all, a Court may request the Ministry of Justice to make available the text of a foreign law or to explain foreign court practice. A Court may also ask a legal expert to prepare an opinion on the content of foreign law. In addition, Poland is a party to the European Convention on information on foreign law, signed in London on 7 June 1968, therefore, the Polish courts may request other states, which are a party to the London convention, to provide information on the content of this law. In fact, a Court is not obliged to use the above mentioned measures in order to establish the contents of foreign family law. A Court may obtain information on the content of foreign family law by any available means. A catalogue of tools to establish the content of foreign family law according to Polish Civil Procedure is non exhaustive. Parties in dispute are not obliged to prove or provide the content of foreign family law. If foreign family law is applicable under the relevant conflict of laws rule, a Court is obliged to establish the content of foreign family law and parties might find it useful to meet this obligation but they are not obliged to do so. A Court applies foreign family law as a

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<sup>108</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007830.pdf> (Polish), <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007831.pdf> (Vietnamese), <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000007832.pdf> (French);

<sup>109</sup>Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000014319.pdf> (Polish – Hungarian);

<sup>110</sup> Text available on web site: <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008912.pdf> (Hungarian), <http://www.traktaty.msz.gov.pl/fd.aspx?f=P0000008913.pdf> (Polish);

law not as a fact, foreign law is treated as equivalent to national law. A Polish court may refuse to apply foreign family law in only two situations, where its use could lead to results incompatible with the fundamental principles of public order and when a Court cannot determine the content of foreign law in a reasonable time.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

In Polish judicial practice there are relatively few decisions on the application of the provisions of the Regulation Brussels IIbis in relation to matrimonial matters, despite the fact that it entered into force in general, on 1 March 2005. There are far more decisions concerning parental responsibility matters than matrimonial matters. Poland mainly publishes decisions of the Supreme Court and Courts of Appeal, which also may lead to the situation that there are not a large number of cases published relating to matrimonial matters in Brussels IIbis.

1. Decision ("Postanowienie") the District Court in Włocławek of August 28, 2009, Case No **V CZ 37/09**;

According to the decision: staying on the territory of a Member State may be qualified as "habitual residence" within the meaning of article 8 paragraph 1 Regulation Brussels IIbis only if the person's center of life is in the Member State.

2. Decision ("Postanowienie") the Court of Appeal in Katowice of May 15, 2009, Case No **V ACz 252/09**<sup>111</sup>;

According to the decision: when action concerning divorce or legal separation is brought to a member state the same court which has jurisdiction in this kind of matters has also jurisdiction in parental responsibility matters which is connected with divorce or legal separation matters if only: one of the spouses is obliged to fulfill duties which follow from parental responsibility; jurisdiction of this court has been recognized directly or unequivocally by the parents; jurisdiction of this court is in accordance with the child's best interest.

3. Decision ("Postanowienie") the Supreme Court of April 9, 2008, Case No **V CSK 419/07**;

According to the decision: Brussels IIbis does not apply to the recognition of judgments concerning claims of former spouses arising from the contract between them concerning payment rules of their debts after a divorce, which have been run up in the course of marriage.

### Maintenance Regulation

Polish judicial practice contains relatively few decisions on the application of the provisions of Regulation No 4/2009. This may result from the relatively short period of application of this act, in fact Regulation No 4/2009 has only been applicable since 18 June 2011.

1. Decision („Postanowienie”) the Court of Appeal in Wrocław of January 31, 2012, Case No **I ACz 137/12**;

According to the decision: court of first instance shall examine application for enforcement of the judgment of the court of another EU member state only from a formal point of view .

2. Decision ("Postanowienie") the Supreme Court of November 16, 2006, Case No **II CSK 178/06**.

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<sup>111</sup> Decision thesis is available in Newsletter - jurisprudence of the Court of Appeal in Katowice and District Courts from the Court of Appeal in Katowice territory scope of competence, from the years 2003-2009 on web site: [http://www.katowice.sa.gov.pl/container/biuletyny//biuletyn\\_2009\\_2.pdf](http://www.katowice.sa.gov.pl/container/biuletyny//biuletyn_2009_2.pdf);

According to the decision: Regulation No 1347/2000 has been replaced by Brussels IIbis and it did not apply to matters concerning repeal of a maintenance obligation between a parent and an adult child, but only in matters specified in Article 1 of this Regulation.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- Bodnar, U. Dąbrowska, J. Ignaczewski, J. Maciejowska, A. Stempniak, A. Śledzińska – Simon, *Rozwód i separacja*, wyd. 2, Ed. by J. Ignaczewski, Warsaw 2011, p. 497 – 542;
- J. Ciszewski, *Europejskie prawo małżeńskie i dotyczące odpowiedzialności rodzicielskiej. Jurysdykcja, uznawanie i wykonywanie orzeczeń. Komentarz*, Warsaw 2004, pp. 238;
- J. Ciszewski, *Przepisy przejściowe rozporządzenia Rady Nr 2201/2003/WE z dnia 27 listopada 2003 r. dotyczącego jurysdykcji oraz uznawania i wykonywania orzeczeń w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej*, Rejent 2006, nr 7 – 8, p. 59 – 76;
- J. Gołaczyński, *Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej*, Ed. 2nd, Warsaw 2007, pp. 292;
- J. Maciejowska, *Orzecznictwo ETS na gruncie rozporządzenia Rady WE Nr 2201/2003 z 27.11.2003 r. o jurysdykcji oraz uznawaniu i wykonywaniu orzeczeń w sprawach małżeńskich oraz w sprawach oraz w sprawach dotyczących odpowiedzialności rodzicielskiej, uchylające rozp. Nr 1347/2000*, Rodzina i Prawo 2009, nr 13, p. 90-108;
- W. Sadowski, M. Taborowski, *Współpraca sądowa w sprawach cywilnych, System Prawa Unii Europejskiej – Podręcznik Tom XI cz. 3*, Ed. 1st, Warsaw 2011, pp. 338;
- Szklarczyk, *System uznania zagranicznych rozwodów*, Rejent 2005, nr 6, p. 122 – 144;
- J. Zatorska, *Komentarz do rozporządzenia Rady (WE) nr 2201/2003 dotyczącego jurysdykcji oraz uznawania i wykonywania orzeczeń w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej, uchylającego rozporządzenie (WE) nr 1347/2000*, LEX/el. – LEX System of Legal Information Commentary available in electronic version
- K. Weitz, *Jurysdykcja krajowa w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej w prawie wspólnotowym*, Kwartalnik Prawa Prywatnego Rok XVI: 2007 z. 1, p. 83 – 154;
- J. Maliszewska – Ninartowicz, *Stosowanie prawa Unii Europejskiej przez sądy*. Tom I, Ed. 1st, Ed. by. A. Wróbel, Warsaw 2010, p. 468 – 504.

#### Regulation Rome III: Cross-border divorce - applicable law

- P. Mostowik, *Prawo właściwe dla rozvodu i separacji w świetle rozporządzenia unijnego 1259/2010*, Kwartalnik Prawa Prywatnego, Rok XX: 2011 nr 2, p. 337 – 390.

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- J. Ignaczewski, M. Karcz, W. Maciejko, M. Romańska, *Alimenty*, wyd. 2, Ed. by J. Ignaczewski, Warsaw 2011, p. 493 – 541;
- Juryk, *Alimenty w prawie prywatnym międzynarodowym*, Ed. 1st, Warszawa 2012, pp. 332;
- Juryk, *Prawo właściwe dla alimentów w świetle protokołu haskiego z 2007 r.*, Kwartalnik Prawa Prywatnego, Rok XX: 2011 nr 4, p. 961 – 1018;
- P. Rodziewicz, *Autonomia woli stron w zakresie prawa właściwego dla zobowiązań alimentacyjnych w świetle Protokołu haskiego*, Europejski Przegląd Sądowy, nr 7/2011, p. 13 – 19.

#### **Matrimonial property regimes and property consequences of registered partnerships:**

- B. Bieniek, A. Bieranowski, S. Brzeszczyńska, J. Ignaczewski, G. Jędrejek, A. Stępień – Sporek, *Mażeńskie prawo majątkowe*, Ed. 2nd, Ed. by J. Ignaczewski, Warsaw 2011, pp. 1008;
- G. Bieniek, *Umowne ustroje majątkowe*, Rejent 2005, Nr 9, p. 111 – 127;
- A. Dyoniak, *Ustawowy ustrój małżeński*, Ossolineum 1985, pp. 227;
- J. Gajda, J. Ignatowicz, K. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy. Komentarz*. Ed. 3rd, Ed. by K. Pietrzykowski, Warsaw 2012, pp. 1300;
- J. Ignaczewski, *Mażeńskie ustroje majątkowe. Art. 31 - 54 KRO. Komentarz*, Ed. 3rd, Warsaw 2008, pp. 264;
- G. Jędrejek, *Intercyza. Pojęcie. Treść. Dochodzenie roszczeń*, Ed. 1st, Warsaw 2010, pp. 458;
- T. Mróz, *Zgoda małżonka na dochodzenie czynności prawnej w ustroju majątkowej wspólności ustawowej*, Warsaw 2011, pp. 256;
- M. Nazar, *Rozdział VI Ustawy ustrój majątkowy – wspólność ustawowa* [in:] *Prawo Rodzinne i Opiekuńcze. System Prawa Prywatnego*, Ed. by T. Smyczyński, Warsaw 2009, p. 229 – 422;
- J.S. Piątkowski, *Stosunki majątkowe między małżonkami*, Warsaw 1955, pp. 162;
- M. Ryznar, A. Stępień – Sporek, *Harmonizacja małżeńskiego prawa majątkowego w USA i w Unii Europejskiej*, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. IX, A.D. MMXI, p. 35 - 53<sup>112</sup>;
- E. Skowrońska – Bocian, *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich*, Warsaw 2010, pp. 248;
- E. Skowrońska – Bocian, *Mażeńskie ustroje majątkowe*, Warsaw 2010, pp. 168;

<sup>112</sup> Article available in Polish on web site: <http://www.europeistyka.uj.edu.pl/documents/3458728/ed244a69-5282-4fbf-b202-305ed7847268>;

- T. Smoczyński, *Rozdział VII Umowne ustroje majątkowe* [in:] Prawo Rodzinne i Opiekuńcze. System Prawa Prywatnego, Ed. by T. Smoczyński, Warsaw 2009, p. 423 – 478;
- J. Strzebińczyk, *Prawo rodzinne*, Ed. 3rd, Warsaw 2010, pp. 375;
- J. Winiarz, *Mażeńskie stosunki majątkowe*, Warszawa 1967, pp. 112;
- J. Zralek, *Odpowiedzialność małżonków za zobowiązania po nowelizacji przepisów o ustawowej wspólności majątkowej*, Rejent 2005, nr 9, p. 351 - 367;

**National section**

# **PORTUGAL**

**Carlos M. G. de Melo Marinho**

**Judge of Court of Appeal**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

In the Portuguese legal system, the current source of law for divorce, annulment and legal separation is the Civil Code. The rules on annulment are contained in Articles 1631 to 1648, the provisions on divorce are in Articles 1773 to 1795-D and we can find the rules on legal separation in Articles 1767 to 1772. The Civil Code also considers a legal regime on the non-existence of the marriage, in Articles 1628 to 1630. Legal separation includes the exclusive separation of property and the separation of spouses and property.

The last reform on these matters was introduced by the Law N° 61/2008, of 31 October, that entered into force on 1 December 2008.

There are specific procedural provisions on divorce and legal separation without the consent of the other spouse. These provisions are in Articles 1407 and 1408 of the Civil Procedure Code. The last Article relates to the rules of the ordinary declaratory proceeding should the defendant lodge a statement of opposition.

The provision that contains the legal regime of private international law on divorce and legal separation of spouses and property is Article 55 of the Civil Code that makes a reference to Article 52 of the same Code.

At the present time, there are no new legislative initiatives in this domain.

#### 2. In case no Court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which Court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

In case no Court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), the Court with jurisdiction is the Court of the domicile or residence of the plaintiff – this results from the combination of Articles 65(1)(b) and 75 of the Civil Procedure Code. The concept of 'domicile', in this case, can be found in Article 82 of the Civil Code.

According to the Law on the Organisation and Functioning of the Portuguese Judicial Courts, the internal Courts with jurisdiction to decide on matters of divorce and legal separation of persons and property are the Family Courts – Article 81(b) of Law 3/99 of 3 January. Where such Courts do not exist, the Courts with specific civil jurisdiction – 'Varas Cíveis' - have jurisdiction, according to Article 97(2) and (1)(a) of the same law. Where such Courts also do not exist, the District Courts have jurisdiction - *ibidem*, Article 77(1)(a).

#### 3. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?

No, there are no other national legal instruments or procedures put in place for the application of Regulation Brussels IIbis. This European Regulation is directly applicable without the intervention or previous application of distinct legal rules.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes, Portugal participates in the enhanced cooperation implemented by Regulation Rome III.

**5. Is it possible for the spouses to designate the applicable law before the Court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No, in the Portuguese legal system it is not possible for the spouses to designate the applicable law before the Court during the course of the proceedings of divorce and legal separation of persons and property.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law?**

Please see the answer to question A.5.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The source of law for maintenance of spouses after divorce is the Civil Code.

Article 1675 includes the maintenance obligations that emerge from marriage; Article 2009(1)(a) states that ex-spouses are bound by maintenance obligations; Article 1688 points out that such obligations continue to exist after the dissolution of the marriage and Article 1795<sup>o</sup>-A says that the maintenance obligation also remains in cases of legal separation of persons and property; Article 1775(1)(c) allows the conclusion of a spouses' agreement on maintenance in the context of divorce by mutual consent; in litigious divorce, maintenance is one of the aspects that can be submitted for decision by the judge – Article 470(2) of the Civil Procedure Code; in Article 2016(1)(2) of the Civil Code it is specified that each spouse must support himself/herself after divorce but that he/she has maintenance rights independent of the kind of divorce.

Besides the reciprocal maintenance obligation between divorced spouses, Article 1905 of the Code imposes maintenance obligations on the spouses for any children, in cases of divorce, legal separation of persons and property, nullity and annulment of the marriage. The concrete responsibility for the payment of maintenance, its amount and ways to fulfill the obligation must be regulated through agreements that need official confirmation; such approval shall be refused if the agreement does not take account of the interests of the minor.

The provisions that regulate maintenance obligations are contained in Articles 2003 to 2020 of the Civil Code. The specific rules applicable to the maintenance of

spouses are in Articles 2015 to 2019. Article 2020 has a particular ruling on maintenance in non-marital partnerships.

Articles 399 to 402 of the Civil Procedure Code (CPC) contain the provisions for proceedings on provisional measures on maintenance.

Articles 1118 to 1121-A of the CPC specifically deal with the enforcement of maintenance obligations.

Presently, there are no reform proposals in this area.

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

There is a special enforcement procedure applicable to maintenance claims in Articles 1118 to 1121-A of the Civil Procedure Code.

This procedure presupposes the existence of an official decision imposing maintenance obligations.

In this enforcement procedure, the claimant can ask for the allocation of part of wages, pensions or other sums that the debtor is receiving or the payment of income from certain assets that belong to him, in order to assure the payment of maintenance credits already due. This is independent from the seizure of his property.

The documents are served on the debtor only after that seizure and his opposition does not suspend the enforcement.

If the enforcement is based on a decision given in provisional maintenance proceedings, the procedure ceases if such decision stops the production of effects due to caducity. The request for ceasing or changing of maintenance payments starts a proceeding that runs appended to the enforcement process. If the seized assets were sold before, the remaining amount is not returned without being shown the payment of credits falling due in the future (unless a deposit is made or other guarantee is given). Its amount is defined by the judge according to equity criteria.

In the Law on Minors Protection – Decree N° 314/78, of 27 October – there is a special rule on the enforcement of minors' maintenance rights – Article 189. As shown in the epigraph of this Article, its objective is to make such rights effective. Its strategy is in line with the one adopted in the general enforcement proceeding since it allows the direct deduction of part of wages, rents, pensions, commissions, percentages, gratifications, incomes or any other payments.

The sums which can be deducted also include the maintenance credits successively falling due.

Such amounts are directly paid to the creditor.

To collect minors' maintenance credits, representation by a lawyer or another legal professional is not mandatory.

In relation to other maintenance credits, the need for such representation depends on the value of the amount to be collected. The parties can always present, without any representation, applications where no legal questions are raised.

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Central Authority designated to facilitate the application of the Maintenance Regulation is:

Direcção-Geral da Administração da Justiça  
Av. D. João II, nº 1.08.01 D/E - Pisos 0 e 9º ao 14º  
1990-097 LISBOA - PORTUGAL  
Tel.: (351) 21 790 62 00 - (351) 21 790 62 23  
Fax: (351)211545100/60  
Email: [correio@dgaj.mi.pt](mailto:correio@dgaj.mi.pt)  
Website: [www.dgaj.mj.pt](http://www.dgaj.mj.pt)

### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

No, there are no other national legal instruments or procedures put in place for the application of the Maintenance Regulation. This European Regulation is directly applicable without the intervention or previous application of distinct legal rules.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The current source of conflict of laws and substantive legal rules in matrimonial property regimes is the Civil Code. Articles 53 and 54 regulate the conflict of laws. Articles 1680, 1693, 1698, 1714, 1715 and 1717 to 1736 contain the substantive law.

Article 352 of the Civil Procedure Code allows the spouse that has the position of a third party in a proceeding to react to the seizure or any judicial act of arrest of his/her personal property or common assets unduly reached by the seizure or arrest. This reaction is not allowed in insolvency proceedings. Article 427(1) of the same Code provides for a specific provisional procedure of enrolment of the common property of the spouses or of individually held assets under the administration of the other spouse as a preliminary measure to the divorce or legal separation of persons and property.

Article 825 of the Civil Procedure Code regulates the situation where common property is object of seizure in a proceeding that runs exclusively against one of the spouses, establishing procedural reactions to protect the party that is not the defendant.

Article 864-A grants special procedural status to the spouse of the defendant in the enforcement proceeding, allowing him/her to exercise all the procedural rights of the defendant in the specific context of such rule.

After the divorce, legal separation, declaration of nullity or annulment of the marriage, any spouse can apply for an inventory and separation of assets, except if the matrimonial property regime is of absolute separation. This proceeding has semi-judicial nature and complies with the rules of the Law 29/2009 of 29 June.

In relation to other situations connected with such regimes, common proceedings are applicable.

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

The conflict of law rules applicable in matrimonial property disputes are contained in Articles 53 and 54 of the Civil Code.

According to this, the substance and the effects of the matrimonial property regime (legal or under the terms of a spouses' agreement) are defined by the national law of the spouses at the time of the celebration of the marriage. If they do not have common nationality, the law of their common habitual residence at the time of marriage is applicable and, if this does not exist, the law of the place of their first residence after marriage. If the law applicable is a foreign law and one of the spouses has habitual residence in Portuguese territory, the spouses can choose one of the matrimonial property regimes of the Portuguese Civil Code.

The spouses are allowed to change that regime (legal or by agreement) if the applicable law authorises them to do so. Such a law is the one indicated in Article 52 – the common national law or, if such law does not exist, the spouses' common residence law or, if it also does not exist, the law of the country where the family has closer connections. This choice has no retrospective effect that can result in prejudice for a third party.

## **3. Which are the property consequences of registered partnerships?**

Portuguese legislation does not recognise registered partnerships but only the 'de facto relationship' (or 'partnership') – that corresponds to the legal situation of two persons that, irrespective of their gender, live in conditions similar to married couples for more than two years.

This relationship has relevance in some domains – protection of the rights of common residence, labour rights, hiring in public administration, tax, social protection in the case of death and special pensions for relevant services. It has also effects on the granting of compensation of the liability for non patrimonial damages – Article 496(3) of the Civil Code – and in house renting – Article 1072(2)(b) and 1093(2) of the same Code.

The transfer of rent agreements in case of death is conferred by Article 1106(1)(a) and (2) of the Code, provided the partners lived in the house for more than one year.

The surviving partner has maintenance rights that take precedence over other heirs. Such relationship has no other property consequences.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Law N° 29/2009 of 29 June (amended by the Law N° 1/2010 of 15 January) started the process of transposition of Directive No 2008/52/EC, adding new Articles to the Civil Procedure Code in order to promote the use of mediation as a mean for the solution of conflicts.

Following this, Decree No 203/2011 of 20 May was approved with a view to defining and regulating the systems of pre-judicial mediation which suspend the time periods for caducity and loss of right. It also sought to identify the judicial mediation systems that can suspend proceedings. It stated that, for the effects of Articles 249-A, 249-B, 249-C and 279 of the Civil Procedure Code, can be considered as mediation systems: a) the public systems already existing or b) the mediation systems of another Member State of the European Union whose activity is legally recognised in the country of its insertion.

## **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive No 2003/8/EC was transposed into the Portuguese legal system through the Law N° 34/2004 of 29 July (amended by the Law 47/2007 of 28 August) and the Law–Decree N° 71/2005 of 17 March.

Via these laws legal aid is available to solve concrete questions or in the context of judicial procedures. The applicant must show an individual interest connected with rights violated or under risk of violation.

Legal aid can consist of pre-litigation advice, legal assistance, representation in Court and exemption from (or assistance with) the cost of proceedings.

In cross-border cases where the Court with jurisdiction is that of another state, legal aid also includes the payment of the specific expenses that might emerge from such cross-border nature – interpretation and translation services and travel by the applicant, where such travel appears strictly necessary.

Its rules are applicable before all Courts and for systems of extra-judicial solution of disputes.

National citizens, EU citizens, foreigners and stateless persons with valid residence title in one Member State are entitled to legal aid. Foreigners without a valid title of residence can apply for legal aid if there is reciprocity from their countries in relation to Portuguese citizens.

Also non-profit legal persons have the right to legal aid, apart from pre-litigation advice.

Evaluation of inability to meet the costs of pre-litigation advice and the proceedings is made under the terms of objective criteria expressly specified by the legislator.

The application can be presented before any public social security attendance service and the decision given can be the object of an application for a review by a Court.

## **3. Is your country a contracting party to any bilateral or international instruments on family law?**

In Portugal the following international instruments are applicable in the area of family law:

## **I. Multilateral international conventions**

### **Council of Europe**

- European Convention on the Adoption of Children of 24-04-1967;
- European Convention on the Legal Status of Children born out of Wedlock of 15-10-1975;
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20-05-1980.

### **Hague conference on private international law**

- Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions as regards to divorce and separation – applicable to Portugal and Romania;
- Convention of 12 June 1902 relating to the settlement of guardianship of minors – applicable to Belgium, Portugal and Romania;
- Convention of 17 July 1905 relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates – applicable to Italy, Portugal and Romania;
- Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
- Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;
- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants;
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations;
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption;
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

### **International Commission on Civil Status**

- Convention extending the competence of authorities empowered to receive declarations acknowledging natural children, signed at Rome on 14 September 1961;
- Convention on the issue of a certificate of legal capacity to marry, signed at Munich on 5 September 1980.

## II. Bilateral international conventions

- Convention on judicial cooperation on minors protection between Portugal and France, signed on 20-07-1983;
- Convention between Portugal and Luxembourg on legal aid in matters of custody rights and rights of access, signed on 12-06-1992;
- Concordat between the Holy See and Portugal, signed on 18-05-2004;
- Agreement on recovery of maintenance between Portugal and Cape Verde, signed on 03-03-1982;
- Agreement on recovery of maintenance between Portugal and São Tomé and Príncipe, signed on 07-05-1984;
- Agreement on recovery of maintenance between Portugal and the U.S.A, signed on 30-05-2000.

### 4. Are there any databases or online tools providing information on family law matters available in your country?

Information on family law matters can be found in the following online databases:

- 'Diário da República Electrónico': <http://dre.pt/index.html>
- 'Leis da Justiça': <http://www.dgpj.mj.pt/sections/leis-da-justica>
- 'Procuradoria-Geral Distrital de Lisboa': [http://www.pgdlisboa.pt/pgdl/leis/lei\\_main.php](http://www.pgdlisboa.pt/pgdl/leis/lei_main.php)
- 'Bases Jurídico-Documentais do Ministério da Justiça': <http://www.dgsi.pt/>
- 'Biblioteca Digital da Justiça Portuguesa': <http://biblioteca.mj.pt/Paginas/default.aspx>
- 'Family mediation': [http://www.portaldocidadao.pt/PORTAL/entidades/MJ/GRAL/pt\\_SER\\_mediacao+familiar.htm](http://www.portaldocidadao.pt/PORTAL/entidades/MJ/GRAL/pt_SER_mediacao+familiar.htm)

The European Judicial Network in Civil and Commercial Matters provides accessible information on Portuguese Family Law on its website:

- Information on divorce: [http://ec.europa.eu/civiljustice/divorce/divorce\\_por\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_por_en.htm)
- Information on maintenance obligations: [http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_por\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_por_en.htm)
- Information on parental responsibility [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_por\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_por_en.htm)

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_informati\\_on\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_informati_on_en.htm)
- Maintenance obligations [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country. Please list applicable procedural provisions and any institutions, mechanisms, available tools or other sources of foreign law at national level.**

Information on accessing and applying foreign family law can be obtained on the basis of the:

- European Convention on Information on Foreign Law of 07-06-1968;
- Additional Protocol to the European Convention on Information on Foreign Law of 15-03-1978.

Portugal is bound by both international law texts and the national organ of reception and transmission on foreign law under the Convention is:

Gabinete de Documentação e Direito Comparado  
Rua do Vale de Pereiro, 2  
1269-113 Lisboa  
Portugal  
Telef: (351) 213820300  
Fax: (351) 213820301  
e-mail: mail@gddc.pt

The Courts can also collect information on foreign law in civil and commercial matters through:

The Portuguese Contact Point of the European Judicial Network in Civil and Commercial Matters

Rua Mouzinho da Silveira, n.º 10, 1269-273 Lisboa, Portugal  
Tel.: (+351) 213 220 042/020  
Fax: (+351) 213 474 918  
E-mail: redcivil@csm.org.pt  
URL: in <http://www.redcivil.mj.pt/>

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

#### Lisbon Appeal Court:

- Article 3(1) of Regulation (EC) 2201/2003; criteria for the definition of the national Courts' jurisdiction: habitual residence, nationality of both spouses and common domicile – Case 546/09.5TMLSB.L1-1 of 20-09-2011:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/fb54b8ff7452d0008025791f00486230?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

- Obligatory character of the Regulation (EC) No 2201/2003 and direct application of its rules; principle of confidence; lack of interest in the action; prohibition of the recognition of a foreign judicial decision on divorce by an Appeal Court; jurisdiction of a District Court for such recognition – Case 1105/10.5TYRLSB-1 of 10-05-2011:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2f8420ade7a2b175802578d2003551b0?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

;

- Superior hierarchical level of Regulation (EC) 2201/2003 in face of the Portuguese and French internal law; divorce – Case 9244/08.6TBCSC-A.L1 of 13-01-2011:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/b4675f790b1a07c7802578290036e89b?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

;

- Choice of law; Article 23 of Regulation (EC) 2201/2003 – Case 9217/2008-8 of 29-01-2009; legal separation:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/0a5a64a1dc979bea80257582003cd6a0?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

;

#### Porto Appeal Court:

- Applicability of Regulation (EC) 2201/2003; exclusion from its object of the causes of the divorce, patrimonial effects of marriage and eventual accessory measures; legitimacy for asking for the recognition of a foreign Courts' decision on divorce – Case 2186/06.1TBVCD-A.P1 of 17-11-2009:

<http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/838350741a4e298480257687004ab645?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

- Recognition of judgements on divorce under the Regulation (EC) 2201/2003; lack of jurisdiction of an Appeal Court - Case 0825474 of 09-02-2009:

<http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/550e4d51581fa9678025756f003566d2?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

### **Coimbra Appeal Court:**

- Non applicability of the Regulation (EC) 2201/2003 in the Channel Islands (Guernsey and Jersey) – Case 233/11.4T2OBR.C1 of 08-05-2012:  
<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/14adb75d4413a54280257a050043661b?OpenDocument&Highlight=0,carlos,de,melo,marinho;>
- Articles 3(1)(a) And 17 of Regulation (EC) 2201/2003; annulment of marriage; Court with jurisdiction; Member-State of the service of documents on the Defendant; impossibility of determining the habitual residence of the spouses – Case 255/09.5TBFZZ.C1 of 28-06-2011:  
<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/5554709a8bcb2a1a802578ca003a5909?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>
- Automatic recognition of judgements under the Regulation (EC) 2201/2003; exclusive incidence on positive decisions of dissolution of the matrimonial link; non applicability to a decision granting liability for damages emerging from divorce; decision on costs – Case 225-C/1998.C1:  
<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/36afc3b838df489680257432003bc1ee?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>
- Entry into force of Regulation (EC) 2201/2003; obligatory character of such Regulation; principle of confidence; exclusion of its incidence on causes for the divorce and patrimonial effects of the dissolution of the marriage; lack of legitimacy to act; jurisdiction of the Minors and Family Court; non-existence of jurisdiction of the Appeal Court – Case 232/08.3YRCBR of 20-11-2008:  
<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/120ee6953e0ae7938025754a0054da15?OpenDocument&Highlight=0,Regulamento,2201%2F2003;>

### **Maintenance Regulation**

#### **Porto Appeal Court:**

- Need for a previous recognition decision under Regulation (EC) 4/2009 – Case 660/07.1TBAMT.P1 of 20-01-2011:  
<http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/54fa0c7598980a2480257830004a7cf7?OpenDocument&Highlight=0,Regulamento,44%2F2001;>

### III. NATIONAL BIBLIOGRAPHY

#### **Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition**

BRITO, Maria Helena, Descrição breve do Regulamento (CE) No. 2201/2003 do Conselho, de 27 de Novembro de 2003, relativo à competência, ao reconhecimento e à execução de decisões em matéria matrimonial e em matéria de responsabilidade parental, Seminário Internacional sobre a Comunitarização do direito internacional privado (International Seminar on the Communitarization of Private International law), 2005, p. 127-148;

MARINHO, Carlos M. G. de Melo, Textos de Cooperação Judiciária Europeia em Matéria Civil e Comercial, Coimbra, Coimbra Editora, 2008;

PINHEIRO, Luís de LIMA, Reconhecimento autónomo de decisões estrangeiras e controlo do Direito aplicável”, in Estudos de Direito Internacional Privado, Coimbra, Almedina, 2006;

PINHEIRO, Luís de Lima, Estudos de direito internacional privado : contratos, obrigações extracontratuais, insolvência, operações bancárias, operações sobre instrumentos financeiros e reconhecimento de decisões estrangeiras / Luís de Lima Pinheiro; volume II, Coimbra, Almedina, 2009;

RIBEIRO, António da Costa Neves, Processo Civil da União Europeia - II - Principais Aspectos - Textos em Vigor, Anotados, Coimbra, Coimbra Editora, 2006;

SILVA, Paula Costa, A Jurisdição nas relações entre Portugal e a Santa Sé: os Regulamentos (CE) N. 1347-2000 e N. 2201-2003 e a Concordata, Coimbra, Coimbra Editora, 2004.

#### **Regulation Rome III: Cross-border divorce - applicable law**

There is no available bibliography on Regulation Rome III.

#### **Maintenance Regulation: Cross-border maintenance – jurisdiction, applicable law, recognition and enforcement**

VICENTE, Dário Moura, Direito Internacional Privado – Textos Normativos Fundamentais, Coimbra, Coimbra Editora, 2012.

#### **Matrimonial property regimes and property consequences of registered partnerships**

CRUZ, Guilherme Braga da, Regimes de bens do casamento: disposições gerais, Lisboa, 1957;

CASTRO, Artur A. de / NOGUEIRA, Mário M. Reymão, História de direito português: direitos de família, casamento e regimes de bens, Coimbra, Atlântida, 1930;

CRUZ, Guilherme Braga da, Regimes de bens do casamento, 1963;

CUNHA, Mário Augusto, Natureza dos rendimentos dos bens próprios nos regimes matrimoniais de separação propriamente ditos: um caso omissis, Coimbra : M. Cunha, 1943;

GONÇALVES, Cunha, Direitos de família e direitos das sucessões, Lisboa, Edições Ática, 1955;

MOTA, Helena, Os Efeitos Patrimoniais do Casamento em Direito Internacional Privado – Em Especial, o Regime Matrimonial Primário, Coimbra, Coimbra Editora, 2012;

MOTA, Helena, Algumas Considerações Sobre a Autonomia da Vontade Conflitual em Matéria de Efeitos Patrimoniais do Casamento, in Estudos em Homenagem ao Professor Doutor Jorge Ribeiro de Faria, Coimbra Editora, Coimbra, 2003;

OLIVEIRA, Guilherme de, Temas de Direito da Família, Coimbra, Coimbra Editora, 2001;

OLIVEIRA, Guilherme de / COELHO, Francisco Pereira, Curso de Direito da Família - Volume I, Coimbra, Coimbra Editora, 2008;

OLIVEIRA, Guilherme de, Sobre o Contrato-Promessa de Partilha de Bens Comuns, Revista de Legislação e Jurisprudência, Ano 129º (1996), p. 279 to 287;

PINHEIRO, Jorge Duarte, O Direito da Família Contemporâneo, Lisboa, A.A.F.D.Lisboa, 2010

VARELA, Antunes, Direito da Família, Lisboa, Petrony, 1982;

XAVIER, M. Rita Aranha da Gama Lobo, Limites à Autonomia Privada na Disciplina das Relações Patrimoniais entre os Cônjuges, Coimbra, Almedina, 2000.

**National section**

# **ROMANIA**

**Simona Bacsin**

**Judge, Court of Appeal Galati**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Substantive provisions:

**Book II, Title II - "Marriage", Articles 293-306, Articles 373-395 of the New Civil Code of Romania (NCC)**, published in the Romanian Official Gazette, Part I No.511 of July 24, 2009, as amended and supplemented *inter alia* by Law No. 71/2011, Constitutional Court Decision No.1514/2011 and Law No. 60/2012, republished in the Romanian Official Gazette, Part I No. 255 of April 17, 2012; **it entered into force on the 1st October 2011 and replaced the current Civil Code.**

For the full legal text please see: <http://noulcodcivil.just.ro/Materialeutile.aspx>

For further details please consult:

- <http://noulcodcivil.just.ro/Desprefamilie/Divor%c5%a3ul.aspx>
- [http://www.csm1909.ro/csm/linkuri/30\\_09\\_2011\\_43985\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/30_09_2011_43985_ro.pdf)

Procedural provisions:

**Chapter VI -"Divorce", Articles 607-619 of the Civil Procedure Code of Romania (CPC)**, published in Brochure No.0 of July 26, 1993, as amended and supplemented *inter alia* by Law No.177/2010 for the amendment and supplementation of Law No.47/1992 on the organisation and operation of the Constitutional Court;

**Law No.202/2010** on certain measures for the acceleration of trial settlement, published in the Romanian Official Gazette, Part I No.714 of October 26, 2010;

**Book VI, Title I - "Divorce proceeding", Articles 903-923 of the New Civil Procedure Code of Romania (NCPC)**, published in the Romanian Official Gazette, Part I No.485 of July 15, 2010, as amended and supplemented *inter alia* by Law No. 76/2012, published in the Romanian Official Gazette, Part I No.365 of May 30, 2012; **it will enter into force on 1<sup>st</sup> September 2012 and it will replace the current CPC.**

**Law No. 105 of 22 September 1992** on the settlement of the private international law relations (Article 155). For the full legal text please consult:

<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEenmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx>

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

**According to Article 607 of the Civil Procedure Code of Romania (CPC)**, the application for divorce should be lodged with the court with jurisdiction in the place where the last joint domicile of the spouses is located. If the spouses did not have a joint domicile or if neither spouse any longer lives in the place where their last joint domicile was located, the application should be lodged with the court with jurisdiction for the place where the defendant's domicile. However, if the defendant does not have the domicile in Romania, the application should be lodged with the court with jurisdiction for the place where the applicant's domicile is located.

According to Article 155 of the Law No. 105/1992 on the settlement of the private international law relations, if the Romanian courts are competent and it is not possible to establish which of them is competent to settle the suit, the request shall be addressed, according to the rules of competence *ratione materiae* to **the Court of First Instance of the Municipality of Bucharest, District 1.**

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

The instrument put in place for the application of this Regulation is **Law No. 191 of 19 June 2007** for the approval of the Government Emergency Ordinance No. 119/2006 concerning certain measures required for the implementation of certain Community regulations as from the date of Romania's accession to the European Union.

According to Article 1 Para. 1, the **tribunal shall be competent to solve the requests for recognition, as well as those for approval of enforcement on the Romanian territory** of the judgments in matrimonial matters and the matters of parental responsibility, given in another Member State of the European Union, under the terms of the provisions of Regulation No. 2201/2003.

The judgment given according to paragraph 1 shall **only be subject to appeal.**

As for the judgments given in Romania for which recognition or the approval of enforcement in another Member State of the European Union is requested, the **first instance shall be competent to issue**, according to Article 39, Article 41 (1) and Article 42 (2) of the Regulation No. 2201/2003, **the certificates provided in Annexes I, II, III and IV of the same Regulation.**

For the full legal text please consult:

<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Calendarjuridicintern/tabid/817/Default.aspx>

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes, Romania participates in the enhanced cooperation in the area of the law applicable to divorce and legal separation implemented by Council Regulation (EU) No. 1259/2010 (Rome III Regulation).

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

According to the national law - Article 2598 Para. 2 of the New Civil Code of Romania (NCC) - the spouses may designate the applicable law at the first hearing day at the latest, when the parties are legally summoned.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Article 2599 of the New Civil Code of Romania (NCC) provides that an agreement on choice of law shall be **in writing, dated and signed by both spouses**. In the light of these legal provisions, the Romanian formal requirements are identical to those of the Article 7 (2) of Rome III Regulation.

## B. Cross-border maintenance

### 1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?

Substantive provisions:

**Book II, Title V- "Maintenance Obligation", Articles 513- 534 of the New Civil Code of Romania (NCC)**, republished in the Romanian Official Gazette, Part I No. 255 of April 17, 2012; **it entered into force on 1st October 2011 and replaced the current Civil Code**. For the full legal text please see: <http://noucodcivil.just.ro/Materialeutile.aspx>

Procedural provisions:

**Articles 611, 613<sup>2</sup> of the Civil Procedure Code of Romania (CPC)**, published in Brochure No.0 of July 26, 1993, as amended and supplemented *inter alia* by Law No.177/2010 for the amendment and supplementation of Law No.47/1992 on the organisation and operation of the Constitutional Court;

**Law No.202/2010** on certain measures for the acceleration of trial settlement, published in the Romanian Official Gazette, Part I No.714 of October 26, 2010;

**Article 907, Article 908 and Article 919 Para.2 of the New Civil Procedure Code of Romania (NCPC)**, published in the Romanian Official Gazette, Part I No.485 of July 15, 2010, as amended and supplemented *inter alia* by Law No.76/2012, published in the Romanian Official Gazette, Part I No.365 of May 30, 2012; **it will enter into force on 1<sup>st</sup> September 2012 and it will replace the current CPC**.

### 2. Please describe the national enforcement procedure applicable in the case of maintenance claims.

In order to enforce a maintenance obligation that the debtor does not wish to comply with voluntarily, the legislation includes various forms of execution, ranging from **judicial execution of movable assets to judicial execution of immovable assets**, including the garnishment of income obtained by the debtor or of moneys existing in accounts with various credit institutions.

A specific aspect of the coercive enforcement of maintenance obligations is represented by Article 453 Para. 2 of the Civil Procedure Code of Romania (CPC), according to which, for amounts that are due as maintenance, garnishment **is ordered by the court of first instance, ex officio, as soon as the judgement becomes enforceable under the law**, whenever the enforcement is carried out against the salary or other known periodical income obtained by the debtor. The mechanism of attachment ordered *ex officio* will be cancelled under the New Civil Procedure Code of Romania (NCPC), which does not include such provisions anymore.

Consequently, from 1st September 2012, coercive enforcement of maintenance obligations by garnishment will be ruled by the provisions of ordinary law concerning this form of execution. Garnishment will be set up by the bailiffs, which will involve, first of all, the approval of coercive enforcement by a local court.

It is also important to mention the existence of a **maximum limit for the garnishment of income**, as a solution that the NCPC is taking over from the NPC, up to an ampler ceiling in the event of claims regarding maintenance or child support (**1/2 of the net monthly income**) than for other claims (1/3 of the net monthly income) (**Article 718 Para.1 NCPC**).

Another specific provision allows enforcement against the debtor's aid for temporary incapacity to work, compensation granted to employees in the event of dissolution of an individual work contract, and amounts due to the unemployment. (**Article 718, Para 4 of NCPC**)

The instrument put in place for the application of the Maintenance Regulation is **Law no. 36/2012** which contains specific provisions **on the collaboration between the Ministry of Justice** - the Romanian Central Authority designated under Article 49 of the Regulation (EC) No. 4/2009 - and the **public notaries and judicial enforcers** to the extent that they are involved in the implementation of the above mentioned normative act (Articles 14-19).

For an English version of Law no. 36/2012 please consult: [http://www.heidelberg-conference2013.de/tl\\_files/downloads/Ausfuehrungsgesetz\\_Romania\\_\(EN\)\\_Law\\_no\\_36\\_from\\_2012\\_on\\_maintenance\\_regulation\\_and\\_hague\\_convention%20.pdf](http://www.heidelberg-conference2013.de/tl_files/downloads/Ausfuehrungsgesetz_Romania_(EN)_Law_no_36_from_2012_on_maintenance_regulation_and_hague_convention%20.pdf)

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

**The Ministry of Justice** is the Romanian Central Authority designated under Article 49 of the Regulation (EC) No. 4/2009, in relation with the Member States of the European Union and also in relation with third contracting States to the Hague Convention 2007 (**Law No.36/2012-Article 2**).

For an English version of Law No.36/2012 please consult: [http://www.heidelberg-conference2013.de/tl\\_files/downloads/Ausfuehrungsgesetz\\_Romania\\_\(EN\)\\_Law\\_no\\_36\\_from\\_2012\\_on\\_maintenance\\_regulation\\_and\\_hague\\_convention%20.pdf](http://www.heidelberg-conference2013.de/tl_files/downloads/Ausfuehrungsgesetz_Romania_(EN)_Law_no_36_from_2012_on_maintenance_regulation_and_hague_convention%20.pdf)

### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

The instrument put in place for the application of this Regulation is **Law no. 36/2012** on certain measures required to implement certain regulations and decisions of the Council of the European Union, as well as private international law instruments in the field of maintenance obligations, published in the Romanian Official Gazette, Part 1 No.183 of March 21, 2012.

For an English version of Law No.36/2012 please consult: [http://www.heidelberg-conference2013.de/tl\\_files/downloads/Ausfuehrungsgesetz\\_Romania\\_\(EN\)\\_Law\\_no\\_36\\_from\\_2012\\_on\\_maintenance\\_regulation\\_and\\_hague\\_convention%20.pdf](http://www.heidelberg-conference2013.de/tl_files/downloads/Ausfuehrungsgesetz_Romania_(EN)_Law_no_36_from_2012_on_maintenance_regulation_and_hague_convention%20.pdf)

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

Substantive provisions:

**Book II, Title II, Chapter VI- "Matrimonial property regimes", Article 312-372 of the New Civil Code of Romania (NCC)**, published in the Romanian Official Gazette, Part I No.511 of July 24, 2009, as amended and supplemented *inter alia* by Law No.71/2011, Constitutional Court Decision No.1514/2011 and Law No.60/2012, republished in the Romanian Official Gazette, Part I No.255 of April 17, 2012; **it entered into force on 1st October 2011 and replaced the current Civil Code.**

For the full legal text please see:

<http://noulcodcivil.just.ro/Portals/0/documente/Legea%20nr.%20287%20din%2009%20privind%20Codul%20civil.pdf>

For further details please consult:

[http://www.csm1909.ro/csm/linkuri/30\\_09\\_2011\\_43987\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/30_09_2011_43987_ro.pdf)

Procedural provisions:

**Chapter VII, Articles 673<sup>1</sup>-673<sup>14</sup> of the Civil Procedure Code of Romania (CPC)**, published in Brochure No.0 of July 26, 1993, as amended and supplemented *inter alia* by Law No.177/2010 for the amendment and supplementation of Law No.47/1992 on the organisation and operation of the Constitutional Court;

**Law No.202/2010** on certain measures for the acceleration of trial settlement, published in the Romanian Official Gazette, Part I No.714 of October 26, 2010;

**Book VI, Title V, Articles 965-981 of the New Civil Procedure Code of Romania (NCPC)**, published in the Romanian Official Gazette, Part I No.485 of July 15, 2010, as amended and supplemented *inter alia* by Law No.76/2012, published in the Romanian Official Gazette, Part I No.365 of May 30, 2012; **it will enter into force on 1<sup>st</sup> September 2012 and will replace the current CPC.**

**Law No.105 of 22 September 1992** on the settlement of the private international law relations (**Article 151 Para.5**); for the full legal text please see:

<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEenmateriecivil%C4%83%C5%9Ficomercial%C4%83/Calendarjuridicintern/tabid/817/Default.aspx>

### 2. Which conflict of laws rules apply in matrimonial property disputes?

The New Civil Code of Romania (NCC) implements substantial amendments as regards the applicable law on the matrimonial property disputes. In accordance with Article 2589 of the NCC, the patrimonial relations between spouses shall be subject **to the law of their common residence**. For lack of common residence the patrimonial relations shall be subject **to the law of common citizenship**. In case of lack of both common residence and common citizenship, matrimonial property disputes are subject **to the law of the place where the marriage is contracted**.

However, it is also possible for the spouses to designate the applicable law, but their choice is restricted by three reference points: habitual residence, citizenship or

first common residence after having contracted the marriage (Article 2590 of the NCC). The formal conditions of the agreement are either regulated by *lex loci*, or by the law applicable to the matrimonial regime. The agreement must be expressed and shall be executed in writing or shall be determined under the marriage deed clauses (Article 2591 Para.2 of the NCC). In the absence of an agreement between the spouses, the matrimonial regime shall be subject to the applicable law determined pursuant to Article 2589 of the NCC.

### 3. Which are the property consequences of registered partnerships?

Registered partnerships do not exist under Romanian law.

Moreover, Romania does not recognise same-sex marriages contracted abroad between foreign or Romanian citizens, or civil partnership contracted abroad by Romanian or foreign citizens, irrespective of the partners' sex (Article 277 of the New Civil Code of Romania (NCC)).

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

Unfortunately, the Directive No.2008/52/EC has not yet been transposed into national legislation, but the national law, adopted in 2006 (**Law No.192/2006 on mediation and organising the mediator profession**) took into consideration the GREEN PAPER on alternative dispute resolution in civil and commercial law.

More information about national law:

[http://www.edumondemediation.ro/uploads\\_ro/images/515/Law192\\_EN.pdf](http://www.edumondemediation.ro/uploads_ro/images/515/Law192_EN.pdf)

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Directive No.2003/8/EC is transposed into national law by **the Government Emergency Ordinance No.51**, concerning the judicial public aid in civil matters, published in the Official Gazette of Romania, Part 1, No.327 of April 25, 2008, as amended and supplemented *inter alia* by Law No.193 /2008, Law No.251/2011 and Law No.76/2012.

In order to improve the access to justice for the citizens of the European Union, the Government Emergency Ordinance is applicable in family, civil, commercial, administrative, labor and social security disputes for all *physical persons* having domicile or residence in Romania or in other Member States of the European Union, **with a net medium income per family member of up to 300 lei and up to 600 lei**. For the first case there is no tax involved, while for the second, half of the established tax has to be paid. According to Article 8, legal aid shall not exceed, per total, during a year, the maximum amount equivalent to 10 minimum gross salaries, at the level of the year in which the application was lodged.

As an exception, legal aid is granted regardless of the financial situation of the applicant, if a special law provides the right to legal aid or free legal aid, **as a measure of protection, considering special situations such as minority, disability, a certain statute** and other such situations.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### I) Multilateral international conventions

The Hague Conference on Private International law

- The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
  - a. The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children:

Council of Europe:

- b. The Convention of 15 May 2003 on Contact concerning Children;  
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=192&CM=8&DF=12/07/2012&CL=ENG>
- c. The European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;  
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=105&CM=8&DF=12/07/2012&CL=ENG>
- d. The European Convention of 7 July 1968 on Information on Foreign Law;  
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=062&CM=8&DF=12/07/2012&CL=ENG>

For further details:

<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/ConsiliulEuropei/tabid/823/Default.aspx>

Other

- e. The Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956

#### II) Bilateral international agreements

Romania has bilateral international agreements including judicial cooperation in civil matters with the following States (that are applicable also to family matters, like recognition and enforcement of judgment): Albania, Algeria, Bosnia and Herzegovina, Croatia, Serbia, PR of China, PDR of Korea, Cuba, Egypt, Macedonia, Morocco, Moldova, Mongolia, Russia, Syria, Tunisia, Turkey and Ukraine

### **4. Are there any databases or online tools providing information on family law matters available in your country?**

The European Judicial Network in Civil and Commercial Matters provides useful information on national family law existing **before the New Civil Code of Romania (NCC) and the New Civil Procedure Code of Romania (NCPC)**:

- a. Information on divorce  
[http://ec.europa.eu/civiljustice/divorce/divorce\\_rom\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_rom_en.htm)
- b. Information on maintenance obligation  
[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_rom\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm)
- Information on parental responsibility  
[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_rom\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_rom_en.htm)

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

The Superior Council of Magistracy provides useful information **on the current NCC and NCPC**

- c. Information on divorce  
[http://www.csm1909.ro/csm/linkuri/30\\_09\\_2011\\_43986\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/30_09_2011_43986_ro.pdf)
- Parental responsibility  
[http://www.csm1909.ro/csm/linkuri/30\\_09\\_2011\\_43985\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/30_09_2011_43985_ro.pdf)
- d. Marital agreement  
[http://www.csm1909.ro/csm/linkuri/30\\_09\\_2011\\_43987\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/30_09_2011_43987_ro.pdf)

Ministry of Justice

- e. Information on parental responsibility-related to Brussels IIbis Regulation  
<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Raportdestinatpracticienilor/tabid/1696/Default.aspx>
- Information on judicial cooperation on civil matters  
<http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEenmateriecivil%C4%83%C5%9Ficomercial%C4%83/tabid/736/Default.aspx>

The Romanian Association for Common Custody provides relevant information on parental responsibility and child abduction: <http://www.arpcc.ro/wiki>

## 5. Please provide information on accessing and applying foreign family law in your country.

**According to Article 2562 Para 1, 2, 3 of the New Civil Code of Romania (NCC)** the content of the foreign law is established by the court by obtaining information from the state authorities who issued it, by an expertise of a specialised person or by in other adequate manner. The party who invokes a foreign law can be asked to prove its contents. If the content of the foreign law can not be established, the Romanian law shall be applied.

There are two ways of obtaining the content of the foreign law:

- By accessing **the European Judicial Network in civil and commercial matters** between the Member States that was established by Council Decision 2001/470/EC (an informal way, but very efficient and broadly used). Romania has appointed 2 contact persons, both of them employees of the Ministry of

Justice. Each Romanian judge has direct access to the contact points and is invited to ask information related to judicial cooperation.

- Through **Law No.189/2003** regarding international judicial assistance in civil and commercial cases, republished in in the Romanian Official Gazette, Part I No.543 of August 5, 2009(**Chapter IV, Articles 27-29**), for the legal text in English please consult: [http://www.hcch.net/upload/auth20ro\\_att.pdf](http://www.hcch.net/upload/auth20ro_att.pdf)

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

1. **Jurisdiction** (alternative grounds of jurisdiction in matters of divorce, Romanian common nationality of the spouses who are habitually resident in another Member State, **Article 3 Para.1 b** of Brussels IIbis Regulation, Article 155 of the Law 105/1992 on the settlement of the private international law relations)
  - Decision No.1688/R/2008 of the Bucharest Tribunal (as appellate court) approving Decision No.1892/2005 of the Court of First Instance of the Municipality of Bucharest, District 5);
  - Decision No.78/2009 of the Court of Appeal Alba Iulia (as appellate court), approving decision 3105/2008 of the District Court of Alba Iulia.
  
2. **Jurisdiction** (alternative grounds of jurisdiction in matters of divorce, the competence of the court where the respondent is habitually resident – **Article 3 Para.1 a** of Brussels IIbis Regulation)

Decision No.105/R/2011 of the Court of Appeal Galati (as final appellate court) approving Decision No. 165/2010 of the Galati Tribunal (as appellate court)
  
3. **Jurisdiction** (Lis pendens, Article 19 of Regulation Brussels IIbis)
  - Decision of 12<sup>th</sup> May 2008 of the Court of First Instance of the Municipality of Bucharest, District 1 (as district court);
  - Decision No.12527/2008 of the Court of First Instance of the Municipality of Bucharest, District 1 (as district court);
  - Decision No.444/R/2010 of the Court of Appeal Cluj (as final appellate court) that quashed the decision 565/A/2009 of the Cluj Tribunal (as appellate court) and decision 2149/2009 of the Turda District Court.
  
4. **Recognition and enforcement** (Article 21 Para.3 of Regulation Brussels IIbis, stay of proceedings, Article 27 Para. 1 of Regulation Brussels IIbis)
  - Decision No.968/2010 of the Prahova Tribunal (as court of first instance);
  - Decision 13/2009 of the Court of Appeal Iasi (as final appellate court), that quashed the Decision of Iasi Tribunal (D.4314/99/2008).

### The Maintenance Regulation

Unfortunately, we do not dispose of representative jurisprudence based on the new Maintenance Regulation. I could identify only one decision **on the enforcement of judgment** (abolition of the exequatur for the decisions given in a Member State bound by the 2007 Hague Protocol, Article 17 of the Maintenance Regulation).

Decision No.192/R/2012 of the Court of Appeal Galati-final judgment

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

Alexandru, Elena; Alexandru, George, *Regulamentele comunitare europene in materie de divorț*, e-juridic, Portalul lumii juridice;

Andrei, Laura; Radu, Laura, *Jurisprudența relevantă CEJ privind cooperarea judiciară în materie civilă*, Editura Universul Juridic, București, 2010;

Cristus, Nicoleta; Lupascu, Dan, *Practica judiciară și legislație în materia dreptului internațional privat*, Editura Wolters Kluwer, 2009;

*Culegere de legislație comunitară referitoare la cooperarea judiciară în materie civilă și comercială*, Comisia Europeană, Oficiul pentru Publicații ale Uniunii Europene, 2011;

Dragomir, Eduard, *Noul Cod civil Comentat și Annotat (Articles 2.557-2.664). Cartea a VII-a: Dispoziții de Drept Internațional Privat*, Editura Nomina Lex, 2012

#### Regulation Rome III: Cross-border divorce - applicable law

Burduf, Ioana; Onaca, Viviana; Schuster, Wolfgang, *Noi instrumente comunitare în domeniul cooperării judiciare în materie civilă, comercială și dreptul familiei*, București, Euro Standard, 2010;

Dariescu, Cosmin, *Propunere de lege ferenda privind normele conflictuale asupra desfacerii căsătoriei din Noul Cod civil român*, în *Revista Curierul Judiciar* 6/2011;

Dragomir, Eduard, *Noul Cod civil Comentat și Annotat (Articles 2.557-2.664). Cartea a VII-a: Dispoziții de Drept Internațional Privat*, Editura Nomina Lex, 2012;

Noi instrumente comunitare în domeniul cooperării judiciare în materie civilă, comercială și dreptul familiei :

<http://www.just.ro/LinkClick.aspx?fileticket=j5GFMxubJ60%3D&tabid=1481>

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

Andrei, Laura, *Instituții implicate în protecția juridică a minorilor*, Manual realizat pentru Școala Națională de Grefieri în cadrul proiectului PHARE Ro 2006/018-147.01.04.04.01 Continuarea dezvoltării școlii naționale de grefieri;

Burduf, Ioana; Onaca, Viviana; Wolfgang Schuster, *Noi instrumente comunitare în domeniul cooperării judiciare în materie civilă, comercială și dreptul familiei*, Manual, București, Euro Standard, 2010;

Burduf, Ioana; Onaca, Viviana, *Regulamentul (CE) nr. 4/2009 al Consiliului din 18 decembrie 2008 privind competența, legea aplicabilă, recunoașterea și executarea hotărârilor și cooperarea în materie de obligații de întreținere, Protocolul de la Haga din 23 noiembrie 2007 privind legea aplicabilă obligațiilor de întreținere și Convenția de la 23 noiembrie 2007 privind obținerea pensiei de întreținere în străinătate pentru copii și alți membri ai familiei*, Partea I, în [Revista Romana de Jurisprudența nr. 3/2011](#) (hereinafter referred to as **the RRJ**, București);

Burduf, Ioana; Onaca, Viviana, **RRJ** 4/2011, Partea a 2 a;

Burduf, Ioana; Onaca, Viviana, **RRJ** 5/2011, Partea a 3 a;

Burduf, Ioana; Onaca, Viviana, **RRJ** 6/2011, Partea a 4 a ;

Burduf, Ioana; Onaca, Viviana Ioana Burduf, **RRJ** 1/2012, Partea a 5 a;

Culegere de legislație comunitară referitoare la cooperarea judiciară în materie civilă și comercială, Comisia Europeană, Luxembourg, Oficiul pentru Publicații al Uniunii Europene, 2011;

Noi instrumente comunitare în domeniul cooperării judiciare în materie civilă, comercială și dreptul familiei:

<http://www.just.ro/LinkClick.aspx?fileticket=j5GFMxubJ60%3D&tabid=1481>

### **Matrimonial property regimes and property consequences of registered partnerships**

Avram, Marieta; Nicolescu, Cristina, *Regimurile matrimoniale*, Editura Hamangiu, 2010;

Cerasela, Anitei Nadia, *Convenția matrimonială potrivit noului cod civil*, Editura Hamangiu, 2012;

Dariescu, Cosmin, *Relațiile patrimoniale dintre soți în dreptul internațional privat*, Editura C.H. Beck, 2009;

Dariescu, Cosmin; Cerasela, Nadia, *Convenția matrimonială în dreptul internațional privat român*, Editura C.H. Beck, 2007;

Dariescu, Cosmin; Cerasela, Nadia, *Relațiile patrimoniale dintre soți în dreptul internațional privat*, Editura C.H. Beck, 2008;

Dragomir, Eduard, *Noul Cod civil Comentat și Annotat (Articles 2.557-2.664). Cartea a VII-a: Dispoziții de Drept Internațional Privat*, Editura Nomina Lex, 2012;

Nicolescu, Cristina Mihaela, *Coeziunea patrimonială a cuplului – finalitatea a regimului matrimonial primar (II)*, Curierul Judiciar nr. 7/2008, p. 60-75;

Nicolescu, Cristina Mihaela, *Considerații generale privind convenția matrimonială*, în Analele Universității București 2007-IV, p. 73-105;

Nicolescu, Cristina Mihaela, *Considerații generale privind regimul matrimonial primar (I)*, în Curierul Judiciar nr. 6/2008, p. 55-61;

Nicolescu, Cristina Mihaela, *Independența economică și socială a soților conturată de dispozițiile regimului matrimonial primar (III)*, Curierul Judiciar nr. 9/2008, p. 91-100;

Tomescu, Milena, *Legea aplicabilă convenției matrimoniale în dreptul internațional privat român*, Reviste - Analele Universității București, nr.1/2003

**National section**

# **SCOTLAND**

**Janeen M Carruthers**

**Professor of Private Law, University of Glasgow**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### Jurisdiction

The relevant primary legislation, with regard to divorce, legal separation and marriage annulment, is the [Domicile and Matrimonial Proceedings Act 1973](#) (hereinafter 'DMPA 1973'), as amended first by the European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001 (SI 2001/36) (taking account of Brussels II Regulation), and subsequently by the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (taking account of Brussels II*bis* Regulation). *For detail, see question A.2.*

Additionally, there are special rules of jurisdiction for actions of declarator of marriage (section 7(3), DMPA 1973), and in relation to declarators of nullity of marriage, where one party was dead at the date of the action, and that party was domiciled at death in Scotland, or had been habitually resident there for one year before death (s.7(3A), DMPA 1973).

##### Recognition and enforcement of judgments

The relevant primary legislation, with regard to recognition of overseas decrees of divorce, legal separation and marriage annulment, differs according to the geographical source of the decree.

Recognition in Scotland of a divorce etc. granted by a court of an EU Member State (other than Denmark) rests upon the scheme of rules contained in Brussels II*bis*.

Recognition in Scotland of non-EU decrees, and of Danish decrees, is regulated by the [Family Law Act 1986](#) (hereinafter 'FLA 1986'). See, in particular, sections 44 - 51.

In terms of section 44(1) of FLA 1986, no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the UK unless granted by a court of civil jurisdiction. Under section 44(2), subject to section 51 of the Act (q.v.), the validity of any divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands shall be recognised throughout the UK. No extra-judicial divorces pronounced in the UK can be recognised.

Importantly, FLA 1986, in its treatment of the recognition of non-EU consistorial decrees, differentiates between divorces and annulments obtained *by means of proceedings* (section 46(1)) and divorces and annulments obtained *otherwise than by means of proceedings* (section 46(2)). A stricter test for recognition applies in the latter case. Section 46 of FLA 1986 provides as follows:

(1) The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if–

(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;<sup>113</sup> and

(b) at the relevant date either party to the marriage–

(i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

(ii) was domiciled in that country; or

(iii) was a national of that country.

(2) The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if–

(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;

(b) at the relevant date–

(i) each party to the marriage was domiciled in that country; or

(ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

(c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.

(3) In this section "the relevant date" means–

(a) in the case of an overseas divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings;

(b) in the case of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained.

Section 47(2) provides that where a legal separation, the validity of which is entitled to recognition by virtue of the provisions of section 46 of the Act is converted, in the country in which it was obtained, into a divorce which is effective under the law of that country, the validity of the divorce shall be recognised in Scotland whether or not it would itself be entitled to recognition by virtue of that provision.

Section 51 narrates the bases on which recognition may be refused, viz.:

51. (1) Subject to section 52 of this Act, recognition of the validity of–

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<sup>113</sup> See *Kellman v Kellman* [2000] 1 F.L.R. 785; *Emin v Yeldag* [2002] 1 F.L.R. 956; *H v H (Validity of Japanese Divorce)* [2006] EWHC 2989 (Fam), [2007] 1 FLR 1318; and *H v H (talaq divorce)* [2007] E.W.H.C. 2945 (Fam).

(a) a divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands, or

(b) an overseas divorce, annulment or legal separation,

may be refused in any part of the United Kingdom if the divorce, annulment or separation was granted or obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the marriage of the parties previously given (whether before or after the commencement of this Part) by a court of civil jurisdiction in that part of the United Kingdom or by a court elsewhere recognised or entitled to be recognised in that part of the United Kingdom.

(2) Subject to section 52 of this Act, recognition of the validity of—

(a) a divorce or judicial separation granted by a court of civil jurisdiction in any part of the British Islands, or

(b) an overseas divorce or legal separation,

may be refused in any part of the United Kingdom if the divorce or separation was granted or obtained at a time when, according to the law of that part of the United Kingdom (including its rules of private international law and the provisions of this Part), there was no subsisting marriage between the parties.

(3) Subject to section 52 of this Act, recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—

(a) in the case of divorce, annulment or legal separation obtained by means of proceedings, it was obtained—

(i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken;<sup>114</sup> or

(ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or

(b) in the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings—

(i) there is no official document certifying that the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; or

(ii) where either party to the marriage was domiciled in another country at the relevant date, there is no official document certifying that the divorce, annulment or legal separation is recognised as valid under the law of that other country; or

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<sup>114</sup> e.g. *Duhur-Johnson v Duhur-Johnson* [2005] 2 F.L.R. 1042. cf. generally *Akhtar v Rafiq* [2006] 1 F.L.R. 27.

(c) in either case, recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.<sup>115</sup>

## Applicable law

### *Divorce and legal separation*

The UK is not a participating Member State<sup>116</sup> for the purpose of 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').<sup>117</sup> Accordingly, the pre-existing national choice of law rule continues to apply in Scots courts.

The Scottish choice of law rule concerning applicable law in divorce and legal separation rests in common law, and is to the effect that courts in Scotland, once seised of jurisdiction, will apply their own domestic law to grounds of divorce.<sup>118</sup>

The Scots domestic law on grounds of divorce is to be found in section 1 of the [Divorce \(Scotland\) Act 1976](#) (as amended by the [Family Law \(Scotland\) Act 2006](#)).

### *Marriage annulment*

With regard to Scots domestic law on grounds of nullity, reference should be made to the [Marriage \(Scotland\) Act 1977](#), as amended.

The Scottish choice of law rule concerning applicable law in annulment rests partly in common law and partly in statute.

In determining the validity of a marriage in an action of nullity, the approach of the Scots courts is to examine the nature of the alleged defect, to determine whether it pertains to essentials or form.

If the alleged defect relates to *form*, reference will be made to the *lex loci celebrationis* (section 38(1), Family Law (Scotland) Act 2006).

If the alleged defect relates to *essentials*, reference will be to the law of the domicile (section 38(2), Family Law (Scotland) Act 2006).

With regard to *capacity to marry*, where the parties have different domiciles, reference will be made to the law of the domicile of the party alleged to lack capacity, but if, by that law, the marriage is valid, reference then should be made to the law of the domicile of the other party. For a marriage to be valid in that area of essential matters which concerns legal capacity to marry (age, consanguinity etc.), each party must have capacity, in general, and in particular, to marry the other party, according to the law of his/her domicile immediately before the purported marriage; in other words, the laws apply cumulatively, and the stricter of the two laws must be satisfied before the marriage can be held valid by a Scots court.

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<sup>115</sup> See, e.g. *Ahmed v Ahmed*, 2006 S.L.T. 135; and *Abbassi v Abbassi* [2006] E.W.C.A. Civ. 355 (Fam). Also, earlier, *Perin* 1950 S.L.T. 51.

<sup>116</sup> Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia were the states who addressed a request to the Commission indicating that they intended to establish enhanced cooperation among themselves in the area of applicable law in matrimonial matters. Greece withdrew its request on 3 March 2010 (Rome III, recital (6)).

<sup>117</sup> The UK exercised its right not to opt-in to the proposed measure: Hansard 18 Apr 2007: Col WS7.

<sup>118</sup> *Zanelli v Zanelli* (1948) 64 T.L.R. 556.

With regard to *consent to marry*, section 38(2) of the 2006 Act directs the question whether a person has consented to enter into a marriage to the law of the domicile of that person immediately before the marriage. This provision makes clear the basic rule in the general case. The more complicated type of case, however, is one which concerns lack of consent by reason of duress, mental error, or unilateral mental reservation. Section 2 of the 2006 Act, which inserts a particular rule concerning void marriages into section 20A of the Marriage (Scotland) Act 1977, is applicable. Where the purported marriage takes place in Scotland, section 2 introduces a mandatory rule of the *lex loci celebrationis*, as follows:

*Coerced marriage* (section 20A(2)): a marriage solemnised in Scotland shall be void if, at the time of the marriage ceremony, a party to the marriage who was capable of consenting to the marriage purported to give consent, but did so by reason only of duress or error. Error is defined for the purposes of the legislation as (a) error as to the nature of the ceremony; or (b) a mistaken belief held by a person that the other party at the ceremony with whom the first party purported to enter into a marriage was the person whom the first party had agreed to marry (section 20A(5)).

*Lack of understanding* (section 20A(3)): a marriage solemnised in Scotland shall be void if at the time of the marriage ceremony, a party to the marriage was incapable of (a) understanding the nature of marriage; and (b) consenting to the marriage.

*Sham marriages* (section 20A(4)): if a party to a marriage purported to give consent to the marriage other than by reason only of duress or error, the marriage shall not be void by reason only of that party's having tacitly withheld consent to the marriage at the time when it was solemnised.

Significant cases include:

*Di Rollo v Di Rollo*<sup>119</sup>

*Akram v Akram*<sup>120</sup>

*Hakeem v Hussain*<sup>121</sup> (reversed on appeal *sub nom. SH v KH*<sup>122</sup>)

*Singh v Singh*<sup>123</sup>

*Sohrab v Kahn*<sup>124</sup>

## Proposals for reform

There are, at present, no proposals for reform of the rules here outlined.

## 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

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<sup>119</sup> 1959 S.L.T. 278.

<sup>120</sup> 1979 S.L.T. (Notes) 87.

<sup>121</sup> 2003 S.L.T. 515.

<sup>122</sup> 2005 S.L.T. 1025.

<sup>123</sup> 2005 S.L.T. 749.

<sup>124</sup> 2002 S.L.T. 1255.

As indicated at question A.1 the relevant rules of jurisdiction are contained in section 7(2A) of [Domicile and Matrimonial Proceedings Act 1973](#) (hereinafter 'DMPA 1973'), to the effect that the Court of Session (higher court) has jurisdiction to entertain an action for divorce or separation, if and only if:

- (1) the Scottish courts have jurisdiction under Brussels II*bis*; or
- (2) the action is an excluded action and either of the parties to the marriage is domiciled in Scotland on the date when the action is begun.

The term "excluded action" is defined in section 12(5)(d), DMPA 1973 (introduced by reg.2(5)(d) of SSI 2001/36, and substituted by SSI 2005/42, reg.8) as "an action in respect of which no court of a Contracting State has jurisdiction under the Council Regulation and the defender is not a person who is (i) a national of a Contracting State (other than the United Kingdom or Ireland); or (ii) domiciled in Ireland."

Equivalent rules of jurisdiction, *mutatis mutandis*, are laid down for the sheriff court (lower court) in section 8 (as amended by section 15 of the Forced Marriage (Protection and Jurisdiction) (Scotland) Act 2011).

### Conflicting jurisdictions

DMPA 1973 set out for Scotland, *per* section 11 and Schedule 3, a dual system of mandatory and discretionary sists for the treatment of instances of conflicting jurisdictions in consistorial causes. In terms of Schedule 3(7), there is a duty on the pursuer or on any other person who has entered appearance in a consistorial action in either the Court of Session or the sheriff court in which proof has not begun, to give notice of any proceedings relating to, or capable of affecting the validity of, that marriage in another jurisdiction, whether within or outside Great Britain.

#### *Mandatory sists*

The approach of DMPA 1973 is that where, before proof has begun in an action of divorce in the Court of Session, or sheriff court, a party shows that an action of divorce or nullity relating to the same marriage is proceeding in a related jurisdiction (that is within England and Wales, Northern Ireland, Jersey, Guernsey (including Alderney and Sark) and Isle of Man)<sup>125</sup> and, broadly speaking, that the parties resided together after the marriage and last resided together in that other jurisdiction, and that either party was habitually resident in that other jurisdiction throughout the year ending with the date on which they last resided together before that other action was begun, the Scottish court *must* sist the action.<sup>126</sup>

A question arises as to whether the system of mandatory sists within the UK was affected by the system of *lis pendens* put in place by Brussels II*bis*. Secondary legislation does not appear to have repealed the mandatory stay system, but since the systems which apply under the 1973 Act, Schedule 3, paragraph 8, and Brussels II*bis*, Article 19, respectively, do not differ in essence, the point is academic.

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<sup>125</sup> Sch 3 para 3.

<sup>126</sup> Sch 3 para 8.

### *Discretionary sists*

Where, before proof has begun in any consistorial action in the Court of Session or sheriff court, it appears that there are other proceedings relating to the marriage in another jurisdiction (i.e. within or outside Great Britain) and that the balance of fairness, including convenience, between the parties is such that it is appropriate for those other proceedings to be disposed of before further steps are taken in the Scottish action, the court *may* if it thinks fit sist the action.<sup>127</sup> The need for a judicial disposal with regard to heritable property within Scotland may dissuade that forum from sisting.<sup>128</sup>

Difficulties may arise in relation to demarcation of the respective scope of operation of the Brussels system of *lis pendens* set out in Article 19 of Brussels IIbis, and the discretionary system provided by DMPA 1973 (e.g. where one spouse initiates a divorce action in Scotland, founding on a ground under Article 3 of Brussels IIbis, and in response the other spouse argues that the court of a non-EU country, say, Iowa, USA, is a more appropriate forum, and seeks a sist of the Scottish proceedings).<sup>129</sup> There is, as yet, no Scottish decision on the point. In *JKN v JCN*,<sup>130</sup> an English case, the court concluded that the English court's discretion to stay under DMPA 1973, Schedule 1(9) remained in place where the competing proceedings were in a non-Member State.

### **3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

#### **Relevant secondary legislation includes:**

- [\*Rules of the Court of Session, Ch.49 \(Family Actions\)\*](#)

Part I (General Provisions), Rule 49.18 - applications for sist/recall under Sch 3, DMPA 1973.

Part XVI (Action for declarator of recognition or non-recognition of a foreign decree), Rule 49.91- action for declarator in relation to certain foreign decrees.

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<sup>127</sup> Sch.3 para.9. See the following (English) cases: *Shemshadford v Shemshadford* [1981] 1 All E.R. 726; *De Dampierre v De Dampierre* [1987] 2 All E.R. 1; *Thyssen-Bornemisza v Thyssen-Bornemisza* [1995] 1 All E.R. 58; *Butler v Butler (No.2)* [1997] 2 All E.R. 822, CA; *Breuning v Breuning* [2002] 1 F.L.R. 888; *A v S (Financial Relief after Overseas US Divorce)* [2002] E.W.H.C. 1157 (Fam); *Otobo v Otobo* [2003] 1 F.L.R. 192; *T v M-T* [2005] E.W.H.C. 79 (Fam); *Ella v Ella* [2007] E.W.C.A. Civ. 99; and *A v L (also known as F v F)* [2009] E.W.H.C. 1448 (Fam).

<sup>128</sup> *Mitchell v Mitchell*, 1993 S.L.T. 123.

<sup>129</sup> cf. in the commercial sphere *Owusu v Jackson* [2005] Q.B. 801. The problem was perhaps capable of arising in *Breuning v Breuning* [2002] 1 F.L.R. 888, but does not appear to have been noticed by the court. See also, in England, *A v L (also known as F v F)* [2009] E.W.H.C. 1448 (Fam); and *JKN v JCN* [2010] E.W.H.C. 843 (Fam).

<sup>130</sup> [2010] E.W.H.C. 843 (Fam).

- *Rules of the Court of Session, Ch.62 (Recognition, registration and enforcement of foreign judgments, etc.)*

Part XI (Registration and enforcement of judgments under Council Regulation (E.C.) No. 2201/2003 of 27th November 2003(a), rule 62.67 – 62.80.

- *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) (as amended), Ch.33 (Family Actions)*

Rule 33.17 – applications for sist.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

As explained at question A. 1 the UK is not a participating Member State<sup>131</sup> for the purpose of 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').<sup>132</sup>

The Scottish choice of law rule concerning applicable law in divorce (and legal separation) rests in common law. Courts in Scotland, once seised of jurisdiction, will apply their own domestic law to grounds of divorce.<sup>133</sup> The domestic law on grounds of divorce is to be found in s.1 of the [Divorce \(Scotland\) Act 1976](#) (as amended by the [Family Law \(Scotland\) Act 2006](#)).

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No. Under Scottish choice of law rules in divorce, parties are not permitted to exercise choice of applicable law.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Not applicable.

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<sup>131</sup> Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia were the states who addressed a request to the Commission indicating that they intended to establish enhanced cooperation among themselves in the area of applicable law in matrimonial matters. Greece withdrew its request on 3 March 2010 (Rome III, recital (6)).

<sup>132</sup> The UK exercised its right not to opt-in to the proposed measure: Hansard 18 Apr 2007: Col WS7.

<sup>133</sup> *Zanelli v Zanelli* (1948) 64 T.L.R. 556.

## B. Cross-border maintenance

### 1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?

In domestic Scots law, the law on aliment, including, *inter alia*, the obligation to provide reasonable financial support, owed by one spouse to the other during the subsistence of their marriage, is set out in sections 1 – 7 of the [Family Law \(Scotland\) Act 1985](#).

Likewise, the principles applicable in domestic Scots law concerning financial provision on divorce etc. are set out in sections 8 – 17 of the 1985 Act.

With regard to international private law rules concerning maintenance, the position in Scots law is as follows:

#### Jurisdiction and judgment enforcement

Council Regulation (EC) No 4/2009<sup>134</sup> of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ('the Maintenance Regulation'), has applied in the United Kingdom,<sup>135</sup> as it has in other Member States, since 18 June 2011 (subject to transitional provisions<sup>136</sup>).

#### Choice of law

Article 15 of the Maintenance Regulation provides that, in member states bound by the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations, the law applicable to maintenance obligations shall be determined in accordance with that Protocol. The Protocol was signed and ratified by the EU on 8 April 2010, but, the UK having decided not to take part in the relevant Council Decision,<sup>137</sup> the Protocol will have no effect in the UK. Accordingly, in British courts, the law to be applied to maintenance obligations continues to be that of the domestic *lex fori*. In Scotland, this is expressly set out in section 40 of the Family Law (Scotland) Act 2006: subject to the Maintenance Orders (Reciprocal Enforcement) Act 1972 (q.v.), a court in Scotland shall apply Scots internal law in any action for aliment which comes before it.

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<sup>134</sup> OJ 2009 L7/1.

<sup>135</sup> See Commission Decision of 8 June 2009 on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (2009/451/EC), OJ 2009 L149/73.

<sup>136</sup> Article 75.

<sup>137</sup> Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC), recital (11) (cf. recital (12) re. Denmark), and Article 3 (OJ 2009 L331/17). Contrast Council Decision of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (2011/220/EU), in the adoption and application of which the UK *is* a participant (recital (6)). Denmark gave notice, on 14 January 2009, of its intention to implement the Regulation to the extent to which it modifies the Brussels I Regulation (OJ 2009 L149/80)

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

**Civil Jurisdiction and Judgments (Maintenance) Regulations 2011**<sup>138</sup>

The 2011 Maintenance Regulations make provision to facilitate the application of the Maintenance Regulation in the United Kingdom from 18 June 2011.<sup>139</sup>

*Regulation 3 and Schedule 1, Part 1* makes provision for designation of Central Authorities for England and Wales, Scotland and Northern Ireland, and for the enforcement of maintenance decisions made in EU member states in each part of the United Kingdom in a manner equivalent to maintenance orders made in domestic courts.<sup>140</sup>

*Schedule 1, Part 2* applies to the recognition and enforcement of maintenance decisions made by courts in member states which apply the 2007 Hague Protocol on applicable law (i.e. Maintenance Regulation states, that is, all member states other than Denmark), and allows for enforcement in the United Kingdom without prior registration of the order (i.e. direct enforceability in the State of enforcement<sup>141</sup>). In Scotland, the court to which the application for enforcement of the maintenance decision is sent is the sheriff court. Enforcement jurisdiction lies with the courts in which the person against whom enforcement is sought (the debtor) is resident, or in which assets belonging to that person and which are susceptible to enforcement are situated or held, or in which any other matter relevant to enforcement arises (Sch. 1, para 4(3)). The court undertaking enforcement of the foreign decision shall have the same powers as if it had been made locally by that enforcing court. The Regulation gives the debtor two routes by which to challenge the enforcement process: (i) to apply for review in the Member State of origin, *per* Article 19; or (ii) to apply in the enforcing Member State for refusal or suspension of enforcement, *per* Article 21.

*Schedule 1, Part 3* applies to the recognition and enforcement of maintenance decisions made by courts in Denmark (which, like the UK, but unlike all other member states, does *not* apply the Hague Protocol<sup>142</sup>). Orders from Denmark require registration prior to enforcement. Owing to the special position of the UK and Denmark, the Maintenance Regulation has established parallel, or twin, regimes for recognition and enforcement of maintenance decisions.

*Schedule 1, Part 4* makes general provision relating to orders from all member states re. interest on judgments; currency of payment; and proof-related issues. Any sums paid under a maintenance decision enforced in the UK shall be in Sterling, converted on the exchange rate prevailing when the application for

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<sup>138</sup> SI 2011/1484. See generally Explanatory Note on the Regulations for detailed information. See also, in England, Family Procedure Rules 2010, Practice Direction 34C.

<sup>139</sup> With effect from 18 June 2011, it is not possible to enforce maintenance orders within the EU *per* Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

<sup>140</sup> Article 41(1).

<sup>141</sup> cf. enforcement regime *per* Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims. *Sed contra* enforcement regime *per* Brussels I Regulation.

<sup>142</sup> In turn, 'outgoing' UK orders require a declaration of enforceability in the relevant overseas jurisdiction: Maintenance Regulation, Chapter IV, Sections 2 (especially Article 26) and 3.

enforcement or registration was received by the UK Central Authority for transmission to a court.

*Regulation 4 and Schedule 2*, concerning information-sharing, make provision for access to, and the transmission and use of, information between the designated UK Central Authorities and certain public bodies designated for the purposes of providing that information under Article 61 of the Maintenance Regulation (which requires the disclosure of specific information to Central Authorities for use in the recovery of maintenance in intra-EU cross border cases). This will enable relevant information about the maintenance debtor to be shared on an EU-basis.

*Regulation 5 and Schedule 3*, concerning authentic instruments and court settlements, make the necessary modifications to Schedule 1 to facilitate the enforcement of authentic instruments and court settlements from other member states, as required by Article 48 of the Maintenance Regulation. This should include, e.g. Minutes of Agreement, including mediated outcomes subject, e.g. to Directive No 2008/52/EC (q.v., below).

*Regulation 6 and Schedule 4* amend the Civil Jurisdiction and Judgments Act 1982 in order to take account of the application of the Maintenance Regulation.

*Regulation 7 and Schedule 5* amend the Civil Jurisdiction and Judgments Order 2001 to take account of the application of the Maintenance Regulation, so that the 2001 Order does not apply to maintenance cases to which the Maintenance Regulation applies.

*Regulation 8 and Schedule 6*, concerning the allocation within the UK of jurisdiction in maintenance matters, determines, as between the parts of the UK, whether the courts of a particular part of the UK, or any particular court in that part, have/has jurisdiction in proceedings where the subject matter is within the scope of the Maintenance Regulation (*per* Article 1 of that instrument). In short, Schedule 6 adapts the jurisdictional rules of the Maintenance Regulation to apply as between the different territorial units of the UK.

*Regulation 9 and Schedule 7* make amendments to legislation consequential upon the application of the Maintenance Regulation. In particular, legislation is amended where it provides rules of international jurisdiction which are incompatible with those of the Maintenance Regulation, and where the legislative machinery of enforcement for domestic maintenance orders needs to be adapted to apply to orders to be enforced in the United Kingdom by virtue of the Maintenance Regulation.

*Regulation 10* requires the Secretary of State to review the operation and effect of these Regulations in relation to England and Wales only and to publish a report within five years after they come into force and within every five years after that.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (*Chapter VII of the Regulation*)?**

The Civil Jurisdiction and Judgments (Maintenance) Regulations 2011,<sup>143</sup> in Regulation 3 and Schedule 1, Part 1, para 2, make provision for designation of Central Authorities for England and Wales, Scotland and Northern Ireland.

The designated Central Authority for Scotland is the Scottish Ministers. In practice, the Scottish Government's Private International Law Branch exercises the relevant powers.

Contact details are as follows:

Scottish Government - International and Human Rights Branch  
2nd Floor West  
St Andrew's House  
Edinburgh  
EH1 3DG.

Tel: 0131 244 4827 or 0131 244 2417  
Fax: 0131 244 4848

#### **4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

##### **[The Civil Jurisdiction and Judgments \(Maintenance\) \(Rules of Court\) Regulations 2011](#)**<sup>144</sup>

The Rules of Court Regulations make provision consequent upon the application of the Maintenance Regulation. By Regulation 1(3), Regulations 3 to 7 extend not only to England and Wales, and Northern Ireland, but also to Scotland.

Regulations 2 to 6 extend the scope of existing powers to make rules of court necessary for the proper operation of the Council Regulation.

Regulation 7 applies the rule making powers in section 48 of the Civil Jurisdiction and Judgments Act 1982 to permit procedural rules to be made for authentic instruments and court settlements which are enforceable, by virtue of Article 48 of the Council Regulation, as well as for decisions of courts.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Under domestic Scots law, marriage *per se* has no effect upon the property rights of spouses. The [Family Law \(Scotland\) Act 1985](#), section 24, states that marriage shall not of itself affect the respective rights of parties to the marriage in relation to their property. Scots law, therefore, has a system of separation of

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<sup>143</sup> SI 2011/1484.

<sup>144</sup> SI 2011/1215.

property, except for (i) piecemeal legislative provision, such as the Family Law (Scotland) Act 1985, section 25 (presumption of equal shares in household goods) and section 26 (presumption of equal shares in money and property derived from housekeeping allowance); (ii) "equalisation" provisions which obtain at termination of marriage by divorce *per* Family Law (Scotland) Act 1985, sections 8-17; and (iii) the modifying effect of the surviving spouse's claim for legal rights (protected rights of family inheritance) in the moveable estate of the predeceaser on his/her death intestate, a very long established feature of Scots law.

The Scottish choice of law rules concerning matrimonial property are partly statutory and partly common law. The United Kingdom did not sign the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes, and so that instrument has no effect in Scots or English law. More recently, however, Scots conflict rules of matrimonial property were placed on a legislative footing in terms of the [Family Law \(Scotland\) Act 2006](#), section 39.

## 2. Which conflict of laws rules apply in matrimonial property disputes?

Account must be taken of section 39 of the [Family Law \(Scotland\) Act 2006](#).

In the first place, however, it is important to note that section 39 shall not apply in relation to the law on aliment, financial provision on divorce, transfer of property on divorce or succession (section 39(6)(a)).

Secondly, by virtue of section 39(6)(b), the Scots matrimonial property conflict rules provided thereby are subject to the spouses' contrary agreement. The rules set out in section 39 do not apply, therefore, to the extent that spouses agree otherwise. Since the traditional approach of Scots conflict of laws in this area has been to assimilate the effect of statutory codes (e.g. establishing, by default, community of goods between spouses) to that of private marriage contracts, it is assumed (for the 2006 Act does not explicitly provide this) that the choice of law rules contained in section 39 are subject not only to the spouses' contrary agreement *per* private contract, but also to rights which have vested under a statutory code.

Thus, in the absence of party agreement to the contrary, the following choice of law rules shall apply:

By section 39(1), the rights of spouses to each other's *immoveable property* arising by virtue of the marriage shall be determined by the *lex/leges situs*. By section 39(4), any question relating to the use of the contents of a matrimonial home, or to the use or occupation of a moveable matrimonial home, shall be determined by the law of the country in which the home is situated (for the time being, it is presumed).

By section 39(2), the rights of spouses to each other's *moveable property* arising by virtue of the marriage shall be determined by the law of the common domicile. The relevant time at which domicile for this purpose is to be ascertained is not specified in the Act; it may be a reference to the domicile of the spouses at the date of acquisition of the property in question, or possibly to the immediate post-nuptial domicile. Section 39(5) provides that a change of

domicile by one or both spouses shall not affect a right in moveable property which, immediately before the change, has vested in either spouse.

By section 39(3), where the parties are domiciled in different countries (no *tempus inspiciendum* is specified), the spouses shall be taken to have the same rights in each other's moveable property arising by virtue of the marriage as they had immediately before the marriage (by which law, however, the Act does not explain). This less than clear rule is also subject to the provision on vested rights contained in section 39(5).

### Private marriage contracts

With regard to the validity and interpretation of private marriage contracts, the following choice of law rules apply in Scotland:

#### *Governing law*

"Obligations arising out of matrimonial property regimes, [and] property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage" are excluded from the Rome I Regulation by Article 1.2.c.<sup>145</sup> Hence, marriage contracts are governed by Scots common law conflict of laws rules, though a marriage contract involving trusts will be regulated by the Recognition of Trusts Act 1987.<sup>146</sup> Consequently, the proper or governing law of a private marriage contract is either the law by which the parties expressly, or by implication, agree that it is to be governed, or, failing any such express or implied agreement, the law with which the contract has the most real and substantial connection.<sup>147</sup>

#### *Capacity to enter into a marriage contract*

As regards immoveables, capacity to enter into a marriage contract is governed by the *lex situs*.<sup>148</sup> As regards moveables, there is no recent authority, but application of the putative proper law (that is, the law which would govern the contract if it were valid) seems appropriate.

#### *Formal validity*

To be formally valid, a marriage contract should comply either with the putative proper law or the law of the place where the contract was executed.<sup>149</sup>

#### *Essential validity*

Essential validity is governed by the *lex situs* as regards immoveables, and, as regards moveable property, by the putative proper law,<sup>150</sup> being the law with

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<sup>145</sup> cf. 'Rights in property arising out of a matrimonial relationship' Rome I Convention, Article 1.2.b.

<sup>146</sup> Implementing the 1986 Hague Convention on the Law Applicable to Trusts and on their Recognition.

<sup>147</sup> See, e.g. *Brown v Brown* (1913) 2 S.L.T. 314; *Eadie's Trs v Henderson* (1919) 1 S.L.T. 253; and *Gould Stuart's Trs v McPhail* 1947 S.L.T. 221.

<sup>148</sup> *Black v Black's Trs* 1950 S.L.T. (Notes) 32.

<sup>149</sup> English cases: *Guepratte v Young* (1851) 4 De G. & Sm. 217; *Van Grutten v Digby* (1862) 31 Beav. 561; *Re Bankes* [1902] 2 Ch. 333.

<sup>150</sup> *Countess of Findlater & Seafield v Seafield Grant*, February 8, 1814, F.C.; *Williamson v Taylor* (1845) 8 D. 156; *Scott v Sinclair* (1865) 3 M. 918; *Earl of Stair v Head* (1844) 6 D. 904; *Corbet v Waddell* (1879) 7 R. 200; *Brown's Trs* (1890) 17 R. 1174; *Brown v Brown* (1913) 2 S.L.T. 314; *Lister's J.F. v Syme* 1914 S.C. 204; *Battye's Trs* 1917 S.C. 385; *Montgomery v Zarifi* 1918 S.C. (HL) 128; *Eadie's Trs v Henderson* (1919) 1 S.L.T. 253;

reference to which the contract was made, and by which the parties intended their rights and liabilities to be governed, or, failing such ascertainable or deemed intention, by the law of most real and substantial connection, objectively construed. Thus, the putative proper law shall govern all questions of substance, including the validity of the provisions of the deed, and whether or not the deed is revocable.

### *Interpretation*

The meaning of the terms of a marriage contract is determined by the law governing interpretation thereof, which might be expressed by the parties, or could be inferred from the language of the deed; failing which the putative proper law will apply.<sup>151</sup>

### *Effect of divorce*

It is clear that a Scots forum, if properly seised of jurisdiction in divorce, will apply its own law to the grounds of divorce and to the rules of property distribution upon divorce.<sup>152</sup> In the main, and subject to section 9 of the Family Law (Scotland) Act 1985, a Scots divorce court will endeavour to give effect to parties' wishes as expressed in their marriage contract, provided that the contract is valid, essentially and formally, and that the parties had capacity to enter into it. In light of this predisposition to give effect upon divorce to the provisions of a marriage contract (though instances are few), the recent decision of the Supreme Court of the UK in *Radmacher v Granatino*,<sup>153</sup> to uphold the property arrangements contained in the divorcing parties' ante-nuptial marriage contract, should be viewed as being consonant with the Scots approach, though it has given rise to comment in England, as softening the strict attitude based on policy grounds against giving effect to ante-nuptial contracts.

Likewise in Scotland, in divorce proceedings or in the winding-up and distribution of the estate of the predeceasing spouse, effect will be given to the provisions of a statutory marriage code if it can be established that the parties, at marriage, submitted to such a code.

Currently, in Scots case law, authorities, of domestic or conflict of laws import, regarding the effect of marriage contracts, statutory or private, upon the property of spouses, are few and old. The matter of matrimonial property has been the subject of recent statutory provision in the Family Law (Scotland) Act 2006, as described above. Whether or not the UK deems it beneficial to opt in to any EU Regulation on the subject as may emerge under the Stockholm or later Programmes remains to be seen.

## **3. Which are the property consequences of registered partnerships?**

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*Goold-Stuart's Trs v McPhail* 1947 S.L.T. 221; *Stevenson v Stevenson's Trs* (1905) 13 S.L.T. 457; *Black's Trs* 1950 S.L.T. (Notes) 32; *Lashley v Hog* (1804) 4 Paton 581.

<sup>151</sup> *Corbet v Waddell* (1879) 7 R. 200; *Hope Vere v Hope Vere* (1907) 13 S.L.T. 774, aff'd by HL (1907) 15 S.L.T. 361; and *Drummond v Bell-Irving* 1930 S.C. 704.

<sup>152</sup> See, for Scots law, Family Law (Scotland) Act 1985, s.14(2)(h) (power to grant an incidental order, including an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement – but such an order may be made only if justified by the principles set out in s.9 of the Act); and ss.16 and 17 (judicial power to vary contractual terms agreed by parties to come into effect in the event of divorce or nullity).

<sup>153</sup> [2011] 1 A.C. 534.

### Registered partnerships (heterosexual)

Scots domestic law currently does not make provision for registered heterosexual partnerships.

Although the matter has never arisen in a Scots court for decision, it may be speculated that, with regard to the property consequences of a foreign registered heterosexual partnership, and in particular, the effect, if any, upon moveable and immoveable property situated in Scotland, the Scottish court would apply, in the first instance, the governing law of the *de iure* relationship (that is, the law of registration) to determine whether the regime imposed by that law purports to have extraterritorial effect upon property belonging to the partners and situated abroad.

If a foreign registered partnership regime, or a private contractual arrangement between registered partners, purports to affect all property belonging to the couple, the Scottish *lex situs* still would retain absolute control over any immoveable property situated in Scotland, and any moveable property situated there from time to time, and would have an undeniable right to recognise, or not, the purported extraterritorial proprietary effects of the foreign regime/contract.

### Registered partnerships (same sex): civil partnership

Since December 2005, Scots and English law have provided the institution of civil partnership, by virtue of the Civil Partnership Act 2004. The Act contains not only domestic, but also conflict of laws, rules.

A civil partnership is defined as a legal relationship between two people of the same sex which is formed when they register as civil partners of each other, in accordance with the relevant provisions of the 2004 Act, and which ends only on death, dissolution or annulment. Generally, with regard to registered partnerships there is little if any express guidance in the Civil Partnership Act 2004 on choice of law.

The Act is in 8 parts and has 30 schedules.<sup>154</sup> Part 1 establishes the requirements for the creation of a valid civil partnership, as to both formal and essential validity. Separate provision is laid down for the different jurisdictions of the UK: Part 2 (England and Wales), Part 3 (Scotland), and Part 4 (Northern Ireland). Determination of when each Part shall apply appears to depend upon the place of registration (*locus registrationis*) of the civil partnership in question.<sup>155</sup> Within each Part are special rules concerning formation and eligibility, registration, occupancy rights and tenancies, dissolution and financial arrangements. Part 5, containing the conflict of laws provisions, is concerned with civil partnerships formed or dissolved abroad.

*Registration of overseas relationships treated as civil partnerships: Part 5, Chapter 2*

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<sup>154</sup> It is accompanied by relevant secondary legislation making necessary consequential changes to primary law, e.g. the Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 (SSI 2005/623).

<sup>155</sup> s.1(1)(a).

Section 215 provides that two people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship, if under the relevant law they had capacity to enter into the relationship, and met all requirements necessary *per* the *lex loci registrationis* to ensure the formal validity of the relationship. The 'relevant law' means, in terms of section 212(2), the law of the country of registration of the relationship, including its rules of private international law. Thus, if by the *lex loci registrationis*, parties are required to have capacity also by their personal law, this will constitute an extra requirement. Two people shall not be treated in UK law as having formed a civil partnership upon the registration of an overseas relationship if, at the date of registration, they were not of the same sex under UK law.

#### *Property and financial consequences*

In the case of civil partnerships registered in England, the property and financial consequences are detailed in Civil Partnership Act 2004, Part 2, Chapter 3 (sections 65 – 72).

Part 3 of the 2004 Act (civil partnership: Scotland) does not contain a direct equivalent to Part 2, Chapter 3. Instead, Part 3, Chapter 3 makes provision with regard to occupancy rights and tenancies.<sup>156</sup> As regards the financial consequences of a civil partnership (registered in Scotland?), or of the death intestate of a civil partner (by inference, domiciled at death in Scotland), section 261(2) and Schedule 28 of the 2004 Act extend to civil partners, *mutatis mutandis*, the rules contained in the Succession (Scotland) Act 1964 concerning intestate and testate succession; rights in moveable property and money conferred by the Family Law (Scotland) 1985, and also the financial relief provisions of that Act upon dissolution of a relationship; and certain other miscellaneous legislative provisions concerning, *inter alia*, bankruptcy, damages, and housing.

These various rights will arise whenever Scots law is the governing law, but there may well be doubt as to when this will be the case. There is no reported case law interpretative of these points.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

#### **Cross-Border Mediation (EU Directive) Regulations 2011**<sup>157</sup>

The Cross-Border Mediation (EU Directive) Regulations 2011 came into force on 20 May 2011, and apply only in respect of mediations relating to cross-border disputes<sup>158</sup> (as defined in Article 2 of the Directive), commencing on or after that

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<sup>156</sup> The conflict of laws dimension of the Act is not clear: occupancy rights and tenancies in respect of properties situated in Scotland? Or in respect of Scottish domiciliaries?

<sup>157</sup> SI 2011/1133.

<sup>158</sup> The European scheme does not extend to domestic mediations or to mediations between parties based within the separate jurisdictions of the UK (namely those of England and Wales; Northern Ireland; and

date. They make provision to implement Directive 2008/52/EC. Part 1 of the Mediation Regulations extends to the whole of the UK; Part 2 to England and Wales; and Parts 3 and 4 to the same extent as the provisions that they amend.<sup>159</sup>

The definition of cross-border disputes, *per* Article 2 of the Directive, has been adopted by the UK.<sup>160</sup> Article 2.1 defines a cross-border dispute, for its purposes, as one in which at least one of the parties is domiciled<sup>161</sup> or habitually resident in a Member State other than that of any other party on the date on which:

- (a) the parties agree to use mediation after the dispute has arisen;
  - (b) mediation is ordered by a court;
  - (c) an obligation to use mediation arises under national law; or
- for the purposes of Article 5 (judicial invitation to the parties to have recourse to mediation), an invitation to go to mediation is made to the parties.

### **Cross-Border Mediation (Scotland) Regulations 2011**<sup>162</sup>

The Cross-Border Mediation (Scotland) Regulations 2011 came into force on 6 April 2011,<sup>163</sup> making further provision to implement Directive 2008/52/EC in Scotland. The pre-existing arrangements for mediation in Scotland already complied with Articles 4 (ensuring the quality of mediation), 5 (recourse to mediation), 6 (enforceability of agreements resulting from mediation) and 9 (information for the general public) of the Directive, and so no further implementation was required in relation to those provisions. Implementation was required in Scotland, however, of Articles 7 and 8 of the Directive.

#### *Article 7 – Confidentiality of mediation*

Regulation 3 of the Mediation (Scotland) Regulations 2011 implements Article 7 of the Directive by providing that a mediator or person involved in the administration of mediation in relation to a relevant cross-border dispute is not to be compelled in any civil proceedings<sup>164</sup> or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation, except where all the parties to the mediation otherwise agree; or in the circumstances set out in Article 7.1(a) or (b) of the Directive,

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Scotland). Mediations which are internal as opposed to cross-border, as defined in the Directive, are not subject to any formal legislative structure.

<sup>159</sup> See generally Explanatory Memorandum to the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133).

<sup>160</sup> Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133), reg. 8(b); and Cross-Border Mediation (Scotland) Regulations 2011 (SSI 2011/234), reg. 2.

<sup>161</sup> Determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>162</sup> SSI 2011/234.

<sup>163</sup> See Executive Note, Cross-Border Mediation (Scotland) Regulations 2011 (SSI 2011/234).

<sup>164</sup> With regard to family mediation, see the Civil Evidence (Family Mediation) (Scotland) Act 1995, ss.1 and s 2 (exceptions thereto); and Act of Sederunt (Civil Evidence) (Family Mediation) 1996 (SI 1996/140). See, on recovery of evidence, including confidentiality, in civil and commercial actions: Rules of the Court of Session (1994, as amended), Ch 35; and Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), as amended, Ch 28.

namely, overriding public policy considerations; or where disclosure is necessary to implement the terms of the agreement.

*Article 8 – Effect of mediation on limitation and prescription periods*

Regulations 4 to 9 of the Mediation (Scotland) Regulations 2011 implement Article 8 of the Directive by amending prescription and limitation periods in primary legislation, most importantly in the Prescription and Limitation (Scotland) Act 1973, to ensure that if a prescription or limitation period would have expired while cross-border mediation is ongoing, or within 8 weeks after the mediation has ended,<sup>165</sup> that period will be extended until 8 weeks *after* the end of the mediation and the parties' rights to go to court are not prejudiced.

In family actions,<sup>166</sup> the court may direct a referral to a mediator accredited to a specified family mediation organisation, at any stage of an action in which an order in relation to parental responsibilities or parental rights is at issue.<sup>167</sup>

Regulation 9(4) of the Cross-Border Mediation (Scotland) Regulations 2011 has inserted into the Family Law (Scotland) Act 2006, as section 29A, a provision to the effect of extending time limits for applications under sections 28 (financial provision where cohabitation ends otherwise than by death) and 29 (application to court by survivor for provision on intestacy) where parties have been referred to mediation in the context of a cross-border dispute.

**2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

**Civil Legal Aid (Scotland) Regulations 2002**<sup>168</sup>

Council Directive 2003/8/EC of the European Council on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (as corrected by a corrigendum published on 7

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<sup>165</sup> In respect of which, see Mediation (Scotland) Regulations 2011, reg. 5.

<sup>166</sup> As defined in Rules of the Court of Session (Ch 49 – Family Actions), rule 49.1, to include divorce, dissolution of civil partnership, judicial separation of spouses or partners, nullity of marriage or civil partnership, declarator of marriage, aliment, financial provision after divorce or annulment (or dissolution or annulment of a civil partnership) in an overseas country, and declarator of recognition or non-recognition of a relevant foreign decree. There are certain family actions, however, in which referral to mediation is considered inappropriate, e.g. cases involving domestic abuse or threats of violence.

<sup>167</sup> Rules of the Court of Session (Ch 49 – Family Actions), rule 49.23 (Referral to family mediation). See also Rules of the Court of Session, (Ch 40 – Appeals from Inferior Courts), rule 40.21 (Referral to family mediation in appeals from the sheriff court): In an appeal from the sheriff court in which an order in relation to parental responsibilities or parental rights under section 11 of the Children (Scotland) Act 1995(a) is in issue, a procedural judge may, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation. Further, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), as amended, rule 33.22: in any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may at any stage of the action where he considers it appropriate refer that issue to a mediator accredited to a specified family mediation organisation (and rule 33A.22, *mutatis mutandis*, re. any civil partnership action in which an order in relation to parental responsibilities or parental rights is in issue).

<sup>168</sup> SSI 2002/494.

February 2003<sup>169</sup>) establishes common rules for legal aid in relation to cross-border disputes.

The Civil Legal Aid (Scotland) Regulations 2002 were amended by the [Civil Legal Aid \(Scotland\) Amendment \(No. 2\) Regulations 2004](#),<sup>170</sup> so as to provide, in regulation 48 of the 2002 Regulations, for cross-border disputes.

Regulation 5 of the 2004 Regulations disapplies certain of the regulations in the Civil Legal Aid (Scotland) Regulations 2002 where a person is applying for legal aid for the purposes of pursuing a cross-border dispute. Cross-border dispute, for this purpose, has the same meaning given by Article 2 of Council Directive 2003/8/EC. (New) Regulation 48(2) provides that:

2) These [2002] Regulations are modified to the extent provided in the following sub paragraphs in the case of a person resident outwith the United Kingdom in a Member State to which Article 1 of the Council Directive applies, who applies for legal aid for the purpose of pursuing by way of proceedings a cross-border dispute, namely–

(a) [regulation 5](#) above is modified so as to provide that such an application for legal aid shall be in such form and completed and signed in such manner as is specified in terms of Article 16 of the Council Directive;

(b) [paragraphs \(1\)](#) and [\(4\) of regulation 19](#) above are modified so as to provide that the Board is not required to notify its decision to grant, or as the case may be, refuse legal aid, or its grounds for refusing legal aid to that person's solicitor; and

(c) [paragraph \(2\) of regulation 20](#) above is modified so as to provide that that person, or any solicitor acting for that person, is not required to intimate to any opponent an application for review of a decision by the Board to refuse legal aid.

### **[Civil Jurisdiction and Judgments \(Maintenance\) Regulations 2011](#)**<sup>171</sup>

*Regulation 9 and Schedule 7*, which make amendments to legislation consequential upon the application of the Maintenance Regulation,<sup>172</sup> include provision in relation to legal aid in Scotland to comply with the legal aid provisions of Chapter V of the Maintenance Regulation. The relevant provision for England and Wales and Northern Ireland is made in separate legislation. Regulation 46 of the Civil Legal Aid (Scotland) Regulations 2002<sup>173</sup> is altered accordingly.

### **3. Is your country a contracting party to any bilateral or international instruments on Family Law?**

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<sup>169</sup> OJ 2003 L32/15.

<sup>170</sup> SSI 2004/491.

<sup>171</sup> SI 2011/1484. See generally Explanatory Note on the Regulations for detailed information.

<sup>172</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

<sup>173</sup> As amended by SSI 2011/161.

In addition to Brussels II*bis*, the following instruments apply in the UK:

### **Multilateral instruments**

The United Kingdom is a contracting state to various Hague Conventions: see, for detail, status charts at <http://www.hcch.net>

The United Nations Convention on the Rights of the Child was signed by the UK on 19 April 1990, and ratified on 16 December 1991.

### **Bilateral instruments**

In 2003, senior judges from Pakistan and the UK signed the [UK-Pakistan Protocol on Children Matters](#). This is a judicial understanding between the two countries, which aims to secure the return of an abducted child to the country where they normally live, without regard to the nationality, culture or religion of the parents.

#### **4. Are there any databases or online tools providing information on Family Law matters available in your country?**

Information is available from the following websites:

The Scottish Courts Website:

<http://www.scotcourts.gov.uk/>

The Scottish Government:

<http://www.scotland.gov.uk/Topics/Justice/legal>

The British and Irish Legal Information Institute:

<http://www.bailii.org/>

The European Judicial Network:

[http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm):

- Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_sco\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_sco_en.htm)

- Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_sco\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_sco_en.htm)

- Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_sco\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_sco_en.htm)

The European Judicial Atlas in Civil and Commercial Matters

- Parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

The Scottish Law Commission:

<http://www.scotlawcom.gov.uk/>

The Law Society of Scotland:

<http://www.lawscot.org.uk/>

The Family Law Association:

<http://www.familylawassociation.org/>

Scottish Law Online:

<http://www.scottishlaw.org.uk/>

##### **5. Please provide information on accessing and applying foreign Family Law in your country.**

Where foreign law arguably is applicable in a British court, its content requires to be pleaded and proved to the court as a matter of fact by the party who seeks to rely upon it. There is a presumption in UK courts that the law of a foreign country is the same as the *lex fori* – or, alternatively, that on failure of proof of foreign law, the *lex fori* applies by default – and the onus is on a person who maintains otherwise to aver the foreign law and to prove it.<sup>174</sup> Pleading foreign law is voluntary. If the foreign law is not pleaded and proved to the court's satisfaction, then the court will not have judicial knowledge of that law and will treat the case as a purely domestic one. In this way, the content of a foreign *lex causae* may be assumed to be the same as the *lex fori*, through default of proof to the contrary.

A UK court generally does not take notice of foreign laws; the judge is treated as neither knowing, nor being able to know of his own volition, the content of the foreign law to be applied, and s/he cannot investigate and apply foreign law *ex officio*. The court cannot of its own initiative order a proof of the content of foreign law. Although it will apply the appropriate choice of law rule (even if

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<sup>174</sup> *Stuart v Potter, Choate and Prentice* 1911 1 S.L.T. 377; *Naftalin v London, Midland and Scottish Railway Co.* 1933 S.C. 259; *Faulkner v Hill* 1942 J.C. 20; *Pryde v Proctor and Gamble Ltd* 1971 S.L.T. (Notes) 18; *Bonnor v Balfour Kilpatrick Ltd* 1975 S.L.T. (Notes) 3; *Rodden v Whatlings Ltd* 1960 S.L.T. (Notes) 96; *Scottish National Orchestra Soc. Ltd v Thomson's Executor* 1969 S.L.T. 325; *Armour v Thyssen Edelstahlwerke AG* 1986 S.L.T. 182 and in HL, 1990 S.L.T. 891; and *Kraus's Administrators v Sullivan* 1998 S.L.T. 963.:

the parties fail to plead it), in the absence of proof of foreign law, operation of the choice of law rule of the forum effectively will be frustrated.

Proof of foreign law generally is done by means of expert evidence delivered orally. The effect of absence of proof of foreign law, or of proof being incomplete, is that the *lex fori* supplies the lack.

## II. NATIONAL JURISPRUDENCE

- **Regulation Brussels IIbis in matters of cross-border divorce**

With regard to the courts in Scotland, there is, at the time of writing, extremely limited reported case law on the interpretation and/or operation of those provisions of Brussels IIbis which pertain to matrimonial proceedings. A rare example is:

*Williamson v Williamson* 2010 S.L.T. (Sh.Ct.) 41; 2009 Fam L.R. 153 (Sheriff Court – Sheriff Principal); jurisdiction in divorce.

- **the Maintenance Regulation**

At the time of writing, there is no reported case law in Scotland on the interpretation and operation of the Maintenance Regulation.

### III. NATIONAL BIBLIOGRAPHY

#### ○ Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

##### *Books*

- P R Beaumont and P E McEleavy, *Anton's Private International Law*, 3<sup>rd</sup> edition (2011), W.Green (Ch 16 – Divorce and Dissolution).
- E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 3<sup>rd</sup> edition (2010), W.Green (Ch 12 – Consistorial Causes).
- G Maher and B Rodger, *Civil Jurisdiction in the Scottish Courts* (2010), W.Green (Ch 10 – Family Proceedings and Actions Related to Status).

##### *Articles*

- A Fiorini (2010) 59 I.C.L.Q. 1143.
- P E McEleavy, 'The Brussels II Regulation: How the European Community has Moved into Family Law' (2002) 51 I.C.L.Q. 883.
- P McEleavy, 'The Communitarization of Divorce Rules: What Impact for English and Scottish Law?' (2004) 53 I.C.L.Q. 605.
- G Maher, 'Nullity of Marriage in the Sheriff Court: a Problem of Jurisdiction' 2007 S.L.T. 237.

#### ○ Regulation Rome III: Cross-border divorce - applicable law

##### *Books*

- P R Beaumont and P E McEleavy, *Anton's Private International Law*, 3<sup>rd</sup> edition (2011), W.Green (Ch 16 – Divorce and Dissolution).
- E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 3<sup>rd</sup> edition (2010), W.Green (Ch 12 – Consistorial Causes).

##### *Articles*

- A Fiorini (2010) 59 I.C.L.Q. 1143.

#### ○ Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

##### *Books*

- P R Beaumont and P E McEleavy, *Anton's Private International Law*, 3<sup>rd</sup> edition (2011), W.Green (Ch 19 – Maintenance).
- E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 3<sup>rd</sup> edition (2010), W.Green (Ch 13 – Proprietary and Financial Consequences of Marriage, etc).

### *Articles*

- P Beaumont, 'International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity' (2009) 73 *Rebels Zeitschrift* 509.

### ○ **Matrimonial property regimes and property consequences of registered partnerships**

#### *Books*

- P R Beaumont and P E McEleavy, *Anton's Private International Law*, 3<sup>rd</sup> edition (2011), W.Green (Ch 20 – The Effects of Marriage and Divorce on Property).
- E B Crawford and J M Carruthers, *International Private Law: A Scots Perspective*, 3<sup>rd</sup> edition (2010), W.Green (Ch 13 – Proprietary and Financial Consequences of Marriage, etc).

#### *Articles*

- J M Carruthers, '*De Facto* Cohabitation: the International Private Law Dimension' (2008) Edin. L.R. 51.

**Domicile and Matrimonial Proceedings Act 1973**

**DOMICILE AND MATRIMONIAL PROCEEDINGS ACT 1973 C. 45**  
**ss. 7, 8, 10, 11, 12, and Sch.3**

**Part III JURISDICTION IN CONSISTORIAL CAUSES (SCOTLAND)**

**7.— Jurisdiction of Court of Session.**

(1) [Subsections (2A) to (10)] <sup>1</sup> below shall have effect, subject to section 12(6) of this Act, with respect to the jurisdiction of the Court of Session to entertain—

(a) an action for divorce, separation, declarator of nullity of marriage, [or ] <sup>2</sup> declarator of marriage [...] <sup>3</sup>; and

[(aa) an action for declarator of recognition, or non-recognition, of a relevant foreign decree.

] <sup>4</sup>

[...] <sup>5</sup>

[...] <sup>6</sup>

[(2A) The Court shall have jurisdiction to entertain an action for divorce or separation if (and only if)—

(a) the Scottish courts have jurisdiction under the Council Regulation; or

(b) the action is an excluded action and either of the parties to the marriage in question is domiciled in Scotland on the date when the action is begun.

] <sup>7</sup>

(3) The Court shall have jurisdiction to entertain an action for declarator of marriage [...] <sup>8</sup> if (and only if) either of the parties to the marriage—

(a) is domiciled in Scotland on the date when the action is begun; or

(b) was habitually resident in Scotland throughout the period of one year ending with that date; or

(c) died before that date and either—

(i) was at death domiciled in Scotland, or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

[(3A) The Court shall have jurisdiction to entertain an action for declarator of nullity of marriage [ or for declarator of recognition, or non-recognition, of a relevant foreign decree] <sup>10</sup> if (and only if)–

(a) the Scottish courts have jurisdiction under the Council Regulation; or

(b) the action is one to which subsection (3B) below applies and either of the parties to the marriage–

(a) is domiciled in Scotland on the date when the action is begun; or

(b) died before that date and either–(i) was at death domiciled in Scotland; or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

(3B) This subsection applies to an action–

(a) which is an excluded action; or

(b) where one of the parties to the marriage died before the date when the action is begun.

] <sup>9</sup>

[...] <sup>5</sup>

(5) The Court shall, at any time when proceedings are pending in respect of which it has jurisdiction by virtue of subsection (2) [, (2A), (3) or (3A) above] <sup>11</sup> (or of this subsection), also have jurisdiction to entertain other proceedings, in respect of the same marriage, for divorce, separation or declarator of marriage, [or ] <sup>12</sup> declarator of nullity of marriage [...] <sup>13</sup> , notwithstanding that jurisdiction would not be exercisable [under any of those subsections] <sup>14</sup> .

[(5A) Subsection (5) does not give the Court jurisdiction to entertain proceedings in contravention of [Article 6] <sup>16</sup> of the Council Regulation.

] <sup>15</sup>

(6) Nothing in this section affects the rules governing the jurisdiction of the Court of Session to entertain, in an action for divorce, an application for payment by a co-defender of damages or expenses.

(7) The foregoing provisions of this section are without prejudice to any rule of law whereby the Court of Session has jurisdiction in certain circumstances to entertain actions for separation as a matter of necessity and urgency.

(8) No action for divorce in respect of a marriage shall be entertained by the Court of Session by virtue of [this section] <sup>17</sup> while proceedings for divorce or nullity of marriage, begun before the commencement of this Act, are pending (in respect of the same marriage) in England and Wales, Northern Ireland, the Channel Islands or the Isle of Man; and provision may be made by rules of court as to when, for the purposes of this subsection, proceedings are to be treated as begun or pending in any of those places.

[(9) In this section, “relevant foreign decree” means a decree of divorce, nullity or separation granted outwith a member state of the European Union.

(10) References in subsection (3A) to a marriage shall, in the case of an action for declarator of recognition, or non-recognition, of a relevant foreign decree, be construed as references to the marriage to which the relevant foreign decree relates.

] <sup>18</sup>

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1. Words substituted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(2)(a)(i) (May 4, 2006: substitution has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  2. Word inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) Sch.2 para.1(a)(i) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  3. Words repealed subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) Sch.2 para.1(a)(ii) (May 4, 2006: repeal has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  4. Inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(2)(a)(ii) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  5. Repealed by Presumption of Death (Scotland) Act 1977 (c.27), s. 19, Sch. 2
  6. Repealed subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) Sch.2 para.1(b) (May 4, 2006: repeal has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  7. Added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(b) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)
  8. Words repealed by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(c) (March 1, 2001: repeal shall not apply in respect of proceedings commenced before March 1, 2001)
  9. Added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(d) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)
  10. Words inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(2)(b) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  11. Words substituted by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(e)(i) (March 1, 2001: substitution shall not apply in respect of proceedings commenced before March 1, 2001)
  12. Word inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) Sch.2 para.1(c)(i) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  13. Words repealed subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) Sch.2 para.1(c)(ii) (May 4, 2006: repeal has effect subject to transitional provisions specified in SSI 2006/212 art.4)
  14. Words substituted by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(e)(ii) (March 1, 2001: substitution shall not apply in respect of proceedings commenced before March 1, 2001)
  15. Added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(f) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)
  16. Words substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(2) (March 1, 2005)
  17. Words substituted by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(2)(g) (March 1, 2001: substitution shall not apply in respect of proceedings commenced before March 1, 2001)
  18. Inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(2)(c) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)

## 8.— Jurisdiction of sheriff court in respect of actions for separation.

(1) Subsections (2) to [(6)] <sup>1</sup> below shall have effect, subject to section 12(6) of this Act, with respect to the jurisdiction of the sheriff court to entertain [...] <sup>2</sup>

[(a) an action for separation or divorce; [...] <sup>3</sup>

(b) an action for declarator of recognition, or non-recognition, of a relevant foreign decree [; and] <sup>4</sup>

] <sup>2</sup>

[(c) an action for declarator of nullity of marriage.

] <sup>4</sup>

(2) The court shall have jurisdiction to entertain an action for separation [ or divorce ] <sup>5</sup>[ or for declarator of recognition, or non-recognition, of a relevant foreign decree] <sup>6</sup> if (and only if)—

[(a) either—

(i) the Scottish courts have jurisdiction under the Council Regulation; or

(ii) the action is an excluded action [and] <sup>8</sup> either party to the marriage in question is domiciled in Scotland at the date when the action is begun; and

] <sup>7</sup>

(b) either party to the marriage—

(i) was resident in the sheriffdom for a period of forty days ending with that date, or

(ii) had been resident in the sheriffdom for a period of not less than forty days ending not more than forty days before the said date, and has no known residence in Scotland at that date.

[(2A) The court shall have jurisdiction to entertain an action for declarator of nullity of marriage if (and only if)—

(a) either party to the marriage—

(i) was resident in the sheriffdom for a period of forty days ending with the date when the action is begun; or

(ii) had been resident in the sheriffdom for a period of not less than forty days ending not more than forty days before that date and has no known residence in Scotland at that date; and

(b) either—

(i) the Scottish courts have jurisdiction under the Council Regulation; or

(ii) the action is one to which subsection (2B) below applies and a condition mentioned in either subsection (2C) or (2D) is satisfied.

(2B) This subsection applies to an action—

(a) which is an excluded action; or

(b) where one of the parties to the marriage in question died before the date when the action is begun.

(2C) The condition is that either party to the marriage in question is domiciled in Scotland on the date when the action is begun.

(2D) The condition is that either party to the marriage in question died before the date when the action is begun and either—

(a) was at death domiciled in Scotland; or

(b) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

] <sup>9</sup>

(3) In respect of any marriage, the court shall have jurisdiction to entertain an action for separation [ or divorce ] <sup>10</sup>[ or declarator of nullity of marriage] <sup>11</sup> (notwithstanding that jurisdiction would not be exercisable under subsection (2) [ or (2A)] <sup>12</sup> above) if it is begun at a time when an original action is pending in respect of the marriage; and for this purpose “original action” means an action in respect of which the court has jurisdiction by virtue of subsection (2), [(2A) or] <sup>13</sup> this subsection .

[(3A) Subsection (3) does not give the court jurisdiction to entertain an action in contravention of [Article 6] <sup>15</sup> of the Council Regulation.

] <sup>14</sup>

(4) The foregoing provisions of this section are without prejudice to any jurisdiction of a sheriff court to entertain an action of separation [ or divorce ] <sup>16</sup>[ or declarator of nullity of marriage] <sup>17</sup> remitted to it in pursuance of any enactment or rule of court [, provided that entertaining the action would not contravene [Article 6] <sup>15</sup> of the Council Regulation] <sup>18</sup> .

[(5) In this section, “relevant foreign decree”has the meaning given by section 7(9).

(6) References in subsection (2) to a marriage shall, in the case of an action for declarator of recognition, or non-recognition, of a relevant foreign decree, be construed as references to the marriage to which the relevant foreign decree relates.

] <sup>19</sup>

1. Word substituted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(3)(a)(i) (May 4, 2006: substitution has effect subject to transitional provisions specified in SSI 2006/212 art.4)
2. Existing text renumbered as s.8(1)(a), and (b) and word inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(3)(a) (May 4, 2006: modification has effect subject to transitional provisions specified in SSI 2006/212 art.4)
3. Word repealed by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(2)(a) (November 28, 2011)
4. Added by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(2)(b) (November 28, 2011)
5. Words inserted by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1) 7(4), Sch. 1 para. 18(b)
6. Words inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(3)(b) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)
7. Substituted by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(3)(a) (March 1, 2001: substitution shall not apply in respect of proceedings commenced before March 1, 2001)
8. Word substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(3)(a) (March 1, 2005)
9. Added by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(3) (November 28, 2011)
10. Words inserted by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1), 7(4), Sch. 1 para. 18(c)
11. Words inserted by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(4)(a) (November 28, 2011)
12. Words inserted by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(4)(b) (November 28, 2011)
13. Words substituted by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(4)(c) (November 28, 2011)
14. Added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(3)(b) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)
15. Words substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(3)(b) (March 1, 2005)
16. Words inserted by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1), 7(4), Sch. 1 para. 18(d)
17. Words inserted by Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 asp 15 (Scottish Act) Pt 2 s.15(5) (November 28, 2011)
18. Words added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(3)(c) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)
19. Inserted subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.37(3)(c) (May 4, 2006: insertion has effect subject to transitional provisions specified in SSI 2006/212 art.4)

## 10.— Ancillary and collateral orders.

[(1) Where after the commencement of this Act an application is competently made to the Court of Session or to a sheriff court for the making, or the variation or recall, of an order which is ancillary or collateral to an action for any of the following remedies, namely, divorce, separation, declarator of marriage and declarator of nullity of marriage (whether the application is made in the same proceedings or in other proceedings and whether it is made before or after the pronouncement of a final decree in the action), then, if the court has or, as the case may be, had by virtue of this Act or of any enactment or rule of law in force before the commencement of this Act jurisdiction to entertain the action, it shall have jurisdiction to entertain the application [...] <sup>2</sup> whether or not it would have jurisdiction to do so apart from this subsection.

] <sup>1</sup>

[(1A) For the purposes of subsection (1) above, references to an application for the making, or the variation or recall, of an order are references to the making, or the variation or recall, of an order relating to children, aliment, financial provision on divorce, judicial separation, nullity of marriage or expenses.

] <sup>3</sup>

[(1B) Subsection (1) above does not give the Court of Session or a sheriff court jurisdiction to entertain an application in proceedings where—

(a) the court is exercising jurisdiction in the proceedings by virtue of [Article 3] <sup>5</sup> of the Council Regulation; and

(b) the making or variation of an order in consequence of the application would contravene [Article 6] <sup>6</sup> of the Council Regulation.

] <sup>4</sup>

[(1C) If the application or part of it relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the Court of Session or a sheriff court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.

(1D) In subsection (1C) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.

] <sup>7</sup>

(2) It is hereby declared that where—

(a) the Court of Session has jurisdiction by virtue of this section to entertain an application for the variation or recall as respects any person of an order made by it, and

(b) the order is one to which section 8 (variation and recall by the sheriff of certain orders made by the Court of Session) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 applies,

then, for the purposes of any application under the said section 8 for the variation or recall of the order in so far as it relates to that person, the sheriff, as defined in that section, has jurisdiction as respects that person to exercise the power conferred on him by that section.

Words substituted by Children (Scotland) Act 1995 c. 36 Sch.4 para.20(2)(a)(i) (April 1, 1997)

1.

2. Words repealed by Children (Scotland) Act 1995 c. 36 Sch.4 para.20(2)(a)(ii) (April 1, 1997)

3. Added by Children (Scotland) Act 1995 c. 36 Sch.4 para.20(2)(b) (April 1, 1997)

4. Added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(4) (March 1, 2001: insertion shall not apply in respect of proceedings commenced before March 1, 2001)

5. Words substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(4)(a) (March 1, 2005)
6. Words substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(4)(b) (March 1, 2005)
7. Added by Civil Jurisdiction and Judgments (Maintenance) Regulations 2011/1484 Sch.7 para.7 (June 18, 2011)

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## 11. Sisting of certain actions.

[(1) The provisions of Schedule 3 to this Act shall have effect with respect to the sisting of actions for any of the following remedies, namely, divorce, separation, declarator of marriage or declarator of nullity of marriage, and with respect to the other matters mentioned in that Schedule; but nothing in that Schedule—

(a) requires or authorises a sist of an action which is pending when this Act comes into force; or

(b) prejudices any power to sist an action which is exercisable by any court apart from the Schedule.

(2) Subsection (1) above and Schedule 3 to this Act and any power mentioned in subsection (1)(b) are subject to Article 19 of the Council Regulation.

] <sup>1</sup>

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1. Existing s.11 renumbered as s.11(1) and s.11(2) inserted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(5) (March 1, 2005)

## 12.— Supplementary.

(1) In relation to any action for any of the following three remedies, namely, declarator of marriage, declarator of nullity of marriage, and declarator of freedom and putting to silence, references in this Part of this Act to the marriage shall be construed as including references to the alleged, or, as the case may be, the purported, marriage.

(2) References in this Part of this Act to an action for a particular remedy shall be construed, in relation to a case where the remedy is sought along with other remedies in one action, as references to so much of the proceedings in the action as relates to the particular remedy.

(3) References in this Part of this Act to the remedy of separation shall be construed, in relation to an action in a sheriff court, as references to the remedy of separation and aliment.

(4) For the purposes of this Act the period during which an action in the Court of Session or a sheriff court is pending shall be regarded as including any period while the taking of an appeal is competent and the period while any proceedings on appeal are pending; and in this subsection references to an appeal include references to a reclaiming motion.

(5)

[In this Part of this Act—

(a) any reference to an enactment shall, unless the contrary intention appears, be construed as a reference to that enactment as amended or extended, and as including a reference thereto as applied, by or under any other enactment (including this Act);

[(b) “Contracting State” means Belgium, Cyprus, Czech Republic, Germany, Greece, Spain, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Austria, Poland, Portugal, Slovak Republic, Slovenia, Finland, Sweden and the United Kingdom;

] <sup>2</sup>

[(c) “the Council Regulation” means Council Regulation (EC) No. 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility <sup>4</sup>; and

] <sup>3</sup>

(d) “excluded action” means an action in respect of which no court of a Contracting State has jurisdiction under the Council Regulation and the defender is not a person who is—(i) a national of a Contracting State (other than the United Kingdom or Ireland); or

(ii) domiciled in Ireland.

] <sup>1</sup>

(6) Nothing in this Part of this Act affects any court's jurisdiction to entertain any proceedings begun before the commencement of this Act.

(7) Subject to subsection (6) above, the enactments described in Schedule 4 to this Act shall have effect subject to the amendments therein specified, being amendments consequential on the provisions of this Part of this Act.

1. Existing text renumbered as s.12(a) and s.12(b)-(d) is added by European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001/36 (Scottish SI) reg.2(5) (March 1, 2001: modification shall not apply in respect of proceedings commenced before March 1, 2001)
2. Substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(6)(a) (March 1, 2005)
3. Substituted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.2(6)(b) (March 1, 2005)
4. O.J. No. L 338, 23.12.2003, p.1. Council Regulation (EC) No. 2201/2003 repealed Council Regulation (EC) No. 1347/2000 (O.J. No. L 160, 30.6.2000, p.19)

## Schedule 3 SISTING OF CONSISTORIAL ACTIONS (SCOTLAND)

### 1.

The following six paragraphs have effect for the interpretation of this Schedule.

[1](#)

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1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

### 2.

“Consistorial action” means any action so far as it is one or more of the following, namely, actions for— divorce,  
separation,  
declarator of marriage,  
declarator of nullity of marriage.

[1](#)

---

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

### 3.—

(1) “Another jurisdiction” means any country outside Scotland.

(2) “Related jurisdiction” means any of the following countries, namely, England and Wales, Northern Ireland, Jersey, Guernsey and the Isle of Man (the reference to Guernsey being treated as including Alderney and Sark).

[1](#)

---

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

### 4.

For the purposes of this Schedule—

(a) in any action in the Court of Session or a sheriff court neither the taking of evidence on commission nor a separate proof relating to any preliminary plea shall be regarded as part of the proof in the action; and

(b) any such action is continuing if it is pending and not sisted.

[1](#)

---

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

### 5.

Any reference in this Schedule to proceedings in another jurisdiction is to proceedings in a court of that jurisdiction and to any other proceedings in that jurisdiction which are of a description prescribed for the purposes of this paragraph; and provision may be made by rules of court as to when proceedings of any description in another jurisdiction are continuing for the purposes of this Schedule.

[1](#)

---

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

## 6.

“Prescribed” means prescribed by rules of court.

<sup>1</sup>

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1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

## 7.

While any consistorial action is pending in the Court of Session or a sheriff court and proof in that action has not begun, it shall be the duty of the pursuer, and of any other person who has entered appearance in the action, to furnish, in such manner and to such persons and on such occasions as may be prescribed, such particulars as may be so prescribed of any proceedings which—

(a) he knows to be continuing in another jurisdiction; and

(b) are in respect of that marriage or capable of affecting its validity.

<sup>1</sup>

---

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

## Mandatory sists

## 8.

Where before the beginning of the proof in any action for divorce which is continuing in the Court of Session [or in the Sheriff Court] <sup>1</sup> it appears to the Court [concerned] <sup>2</sup> on the application of a party to the marriage—

(a) that in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and

(b) that the parties to the marriage have resided together after the marriage was contracted; and

(c) that the place where they resided together when the action in the Court was begun or, if they did not then reside together, where they last resided together before the date on which that action was begun is in that jurisdiction; and

(d) that either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which that action was begun;

it shall be the duty of the Court, subject to paragraph 10(2) below, to sist the action before it.

<sup>3</sup>

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1. Words inserted by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1), 7(4), Sch. 1 para. 19(a)

2. Words inserted by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1), 7(4), Sch. 1 para. 19(b)

3. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

## Discretionary sists

### 9.—

(1) Where before the beginning of the proof in any consistorial action which is continuing in the Court of Session or in a sheriff court, it appears to the court concerned—

(a) that any other proceedings in respect of the marriage in question or capable of affecting its validity are continuing in another jurisdiction, and

(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for those other proceedings to be disposed of before further steps are taken in the action in the said court,

the court may then if it thinks fit sist that action.

(2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being sisted, or not being sisted.

(3) Sub-paragraph (1) above is without prejudice to the duty imposed [...] <sup>1</sup> by paragraph 8 above.

(4) If, at any time after the beginning of the proof in any consistorial action which is pending in the Court of Session or a sheriff court, the court concerned is satisfied that a person has failed to perform the duty imposed on him in respect of the action and any such other proceedings as aforesaid by paragraph 7 above, sub-paragraph (1) of this paragraph shall have effect in relation to that action and to the other proceedings as if the words “before the beginning of the proof” were omitted; but no action in respect of the failure of a person to perform such a duty shall be competent.

<sup>2</sup>

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1. Words repealed by Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c.12), ss. 6(1), 7(4), Sch. 1 para. 20, Sch. 2

2. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

### 10.—

(1) Where an action is sisted in pursuance of paragraph 8 or 9 above, the court may if it thinks fit, on the application of a party to the action, recall the sist if it appears to the court that the other proceedings by reference to which the action was sisted are sisted or concluded or that a party to those other proceedings has delayed unreasonably in prosecuting those other proceedings.

(2) Where an action has been sisted in pursuance of paragraph 8 above by reference to some other proceedings, and the court recalls the sist in pursuance of the preceding sub-paragraph, the court shall not again sist the action in

pursuance of the said paragraph 8.

<sup>1</sup>

1. Words of enactment omitted under authority of Statute Law Revision Act 1948 (c. 62), s. 3

## 11.—

(1) The provisions of sub-paragraphs (2) and (3) below shall apply where an action for any of the following remedies, namely, divorce, separation and declarator of nullity of marriage, is sisted by reference to proceedings in a related jurisdiction for any of those remedies; and in this paragraph—

“custody” includes access to the child in question;

“the other proceedings”, in relation to any sisted action, means the proceedings in another jurisdiction by reference to which the action was sisted;

“relevant order” means [an interim order relating to aliment or children] <sup>1</sup>; and

“sisted” means sisted in pursuance of this Schedule.

(2) Where an action such as is mentioned in sub-paragraph (1) above is sisted, then, without prejudice to the effect of the sist apart from this paragraph—

(a) the court shall not have power to make a relevant order in connection with the sisted action except in pursuance of paragraph (c) below; and

(b) subject to the said paragraph (c), any relevant order made in connection with the sisted action shall (unless the sist or the relevant order has been previously recalled) cease to have effect on the expiration of the period of three months beginning with the date on which the sist comes into operation; but

(c) if the court considers that as a matter of necessity and urgency it is necessary during or after that period to make a relevant order in connection with the sisted action or to extend or further extend the duration of a relevant order made in connection with the sisted action, the court may do so, and the order shall not cease to have effect by virtue of paragraph (b) above.

(3) Where any action such as is mentioned in sub-paragraph (1) above is sisted and at the time when the sist comes into operation, an order is in force, or at a subsequent time an order comes into force, being an order made in connection with the other proceedings and providing for any of the following four matters, namely periodical payments for a spouse of the marriage in question, periodical payments for a child, the [arrangements to be made as to with whom a child is to live, contact with a child, and any other matter relating to parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995 or parental rights within the meaning of section 2(4) of that Act] <sup>2</sup>, then, as from the time when the sist comes into operation (in a case where the order is in force at that time) or (in any other case) on the coming into force of the order,—

(a) any relevant order made in connection with the sisted action shall cease to have effect in so far as it makes for a spouse or child any provision for any of the said matters as respects which the same or different provision for that spouse or child is made by the other order; and

(b) the court shall not have power in connection with the sisted action to make a relevant order containing for a spouse or child provision for any of the matters aforesaid as respects which any provision for that spouse or child is made by the other order.

(4) Nothing in this paragraph affects any power of a court—

(a) to vary or recall a relevant order in so far as the order is for the time being in force; or

(b) to enforce a relevant order as respects any period when it is or was in force; or

(c) to make a relevant order in connection with an action which was, but is no longer, sisted.

Words substituted by Children (Scotland) Act 1995 c. 36 Sch.4 para.20(3)(a) (April 1, 1997)

1.

2. Words substituted by Children (Scotland) Act 1995 c. 36 Sch.4 para.20(3)(b) (April 1, 1997)

**DIVORCE (SCOTLAND) ACT 1976 C. 39**

**s. 1**

**1.— [Grounds of divorce] <sup>1</sup>**

(1)

[In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that—

(a) the marriage has broken down irretrievably; or

(b) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage.

] <sup>1</sup>

References in this Act (other than in sections 5(1) and 13 of this Act) to an action for divorce are to be construed as references to such an action brought after the commencement of this Act.

(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—

(a) since the date of the marriage the defender has committed adultery; or

(b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or

[...] <sup>2</sup>

(d) there has been no cohabitation between the parties at any time during a continuous period of [one year] <sup>3</sup> after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or

(e) there has been no cohabitation between the parties at any time during a continuous period of [two] <sup>4</sup> years after the date of the marriage and immediately preceding the bringing of the action.

(3) The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of subsection (2)(a) of this section if the adultery mentioned in the said subsection (2)(a) has been connived at in such a way as to raise the defence of lenocinium or has been condoned by the pursuer's cohabitation with the defender in the knowledge or belief that the defender has committed the adultery.

(4) Provision shall be made by act of sederunt—

(a) for the purpose of ensuring that, where in an action for divorce to which subsection (2)(d) of this section relates the defender consents to the granting of decree, he has been given such information as will enable him to understand—

(i) the consequences to him of his consenting as aforesaid; and

(ii) the steps which he must take to indicate his consent; and

(b) prescribing the manner in which the defender in such an action shall indicate his consent, and any withdrawal of such consent, to the granting of decree;

and where the defender has indicated (and not withdrawn) his consent in the prescribed manner, such indication shall be sufficient evidence of such consent.

[...] <sup>5</sup>

(6) In an action for divorce the standard of proof required to establish the ground of the action shall be on balance of probability.

1. Existing text renumbered as s.1(1)(a), s.1(1)(b) is inserted and heading is substituted by Gender Recognition Act 2004 c. 7 Sch.2(2) para.6 (April 4, 2005)
2. Repealed subject to transitional provisions specified in SSI 2006/212 art.4 by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.12 (May 4, 2006: repeal has effect subject to transitional provisions specified in SSI 2006/212 art.4)
3. Words substituted by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.11(a) (May 4, 2006)
4. Word substituted by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.11(b) (May 4, 2006)
5. Repealed by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.13 (May 4, 2006)

**MARRIAGE (SCOTLAND) ACT 1977 C. 15**

**ss. 1, 2, 5, 7, 20A, and 23A**

An Act to make new provision for Scotland as respects the law relating to the constitution of marriage, and for connected purposes.

[26th May 1977]

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**1.— Minimum age for marriage.**

(1) No person domiciled in Scotland may marry before he attains the age of 16.

(2) A marriage solemnised in Scotland between persons either of whom is under the age of 16 shall be void.

**2.— Marriage of related persons.**

(1) [ Subject to [subsection (1A)] <sup>2</sup> below, ] <sup>1</sup> a marriage between a man and any woman related to him in a degree specified in column 1 of Schedule 1 to this Act, or between a woman and any man related to her in a degree specified in column 2 of that Schedule shall be void if solemnised—

(a) in Scotland; or

(b) at a time when either party is domiciled in Scotland.

[(1A) Subsection (1) above does not apply to a marriage between a man and any woman related to him in a degree specified in column 1 of paragraph 2 of Schedule 1 to this Act, or between a woman and any man related to her in a degree specified in column 2 of that paragraph, if—

(a) both parties have attained the age of 21 at the time of the marriage; and

(b) the younger party has not at any time before attaining the age of 18 lived in the same household as the other party and been treated by the other party as a child of his family.

[...] <sup>4</sup>

] <sup>3</sup>

(2) For the purposes of this section a degree of relationship exists—

(a) in the case of a degree specified in paragraph 1 of Schedule 1 to this Act, whether it is of the full blood or the half blood; [...] <sup>5</sup>

[...] <sup>6</sup>

(3) Where a person is related to another person in a degree not specified in

Schedule 1 to this Act that degree of relationship shall not, in Scots law, bar a valid marriage between them; but this subsection is without prejudice to—

(a) the effect which a degree of relationship not so specified may have under the provisions of a system of law other than Scots law in a case where such provisions apply as the law of the place of celebration of a marriage or as the law of a person's domicile; or

(b) any rule of law that a marriage may not be contracted between persons either of whom is married to a third person.

[(4) References in this section and in Schedule 1 to this Act to relationships and degrees of relationship shall be construed in accordance with section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986.

] <sup>7</sup>

[(5) Where the parties to an intended marriage are related in a degree specified in paragraph 2 of Schedule 1 to this Act, either party may (whether or not an objection to the marriage has been submitted in accordance with section 5(1) of this Act) apply to the Court of Session for a declarator that the conditions specified in paragraphs (a) and (b) of subsection (1A) above are fulfilled in relation to the intended marriage.

] <sup>8</sup>

[(6) [Subsection (1A)] <sup>10</sup> above and [paragraph 2 of Schedule 1] <sup>11</sup> to this Act have effect subject to the following modifications in the case of a party to a marriage whose gender has become the acquired gender under the Gender Recognition Act 2004 ("the relevant person").

(7) Any reference in those provisions to a former wife or former husband of the relevant person includes (respectively) any former husband or former wife of the relevant person.

[(7A) This section and Schedule 1 to this Act have effect as if any reference in paragraphs 1 and 2 of that Schedule to a mother within any of the degrees of relationship specified in either column included a woman who is a parent of a child by virtue of section 42 or 43 of the Human Fertilisation and Embryology Act 2008 (c. 22).

] <sup>12</sup>

[...] <sup>13</sup>

] <sup>9</sup>

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1. Words inserted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), s. 2, Sch. 2 para. 2(a)
  2. Words substituted by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.1(a)(i) (May 4, 2006)
  3. S. 2(1A)-(1B) inserted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), s. 2, Sch. 2 para. 2(b)
  4. Repealed by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.1(a)(ii) (May 4, 2006)
  5. Word repealed by Law Reform (Parent and Child) (Scotland) Act 1986 (c.9), ss. 9, 10(2), Sch. 2
  6. Repealed by Law Reform (Parent and Child) (Scotland) Act 1986 (c.9), ss. 9, 10(2), Sch. 2
  7. S. 2(4) inserted by Law Reform (Parent and Child) (Scotland) Act 1986 (c.9), ss. 9, 10(1), Sch. 1 para. 17

8. S. 2(5) inserted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), s. 2, Sch. 2 para. 2(c)
9. Added by Gender Recognition Act 2004 c. 7 Sch.4(2) para.7 (April 4, 2005)
10. Words substituted by Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006/384 (Scottish SI) art.4(a)(i) (June 30, 2006)
11. Words substituted by Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006/384 (Scottish SI) art.4(a)(ii) (June 30, 2006)
12. Added by Human Fertilisation and Embryology (Consequential Amendments and Transitional and Saving Provisions) Order 2009/1892 Sch.1(1) para.1 (September 1, 2009)
13. Repealed by Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006/384 (Scottish SI) art.4(b) (June 30, 2006)

...

## 5.— Objections to marriage.

(1) Any person may at any time before the solemnisation of a marriage in Scotland submit an objection in writing thereto to the district registrar:

Provided that where the objection is on the ground mentioned in subsection (4)(d) below, it shall [not be treated as submitted until there has also been produced to the registrar] <sup>1</sup> a supporting certificate [attested in the prescribed manner] <sup>2</sup> by a registered medical practitioner.

[(1A) For the purpose of subsection (1) above, an objection which is submitted to the registrar by electronic means is to be treated as in writing if it is received in a form which is legible and capable of being used for subsequent reference.

] <sup>3</sup>

(2) Where the district registrar receives an objection in accordance with subsection (1) above he shall—

(a) in any case where he is satisfied that the objection relates to no more than a misdescription or inaccuracy in the marriage notice or approved certificate, notify the parties to the marriage of the nature of the objection and make such enquiries into the matter mentioned in it as he thinks fit; and thereafter he shall, subject to the approval of the Registrar General, make any necessary correction to any document relating to the marriage;

(b) in any other case—

(i) forthwith notify the Registrar General of the objection;

(ii) pending consideration of the objection by the Registrar General, suspend the completion or issue of the Marriage Schedule in respect of the marriage;

(iii) where, in the case of a marriage to be solemnised by an approved celebrant, the Marriage Schedule has already been issued to the parties, if possible notify that celebrant of the objection and advise him not to solemnise the marriage pending the said consideration.

(3) [Subject to subsection (3A) below,] <sup>4</sup> if the Registrar General is satisfied, on consideration of an objection of which he has received notification under subsection (2)(b)(i) above, that—

(a) there is a legal impediment to the marriage, he shall direct the district registrar to take all reasonable steps to ensure that the marriage does not take place and shall notify, or direct the district registrar to notify, the parties to the intended marriage accordingly;

(b) there is no legal impediment to the marriage, he shall inform the district registrar to that effect.

[(3A) Where—

(a) an objection of which the Registrar General has received notification under subsection (2)(b)(i) above is on the ground that—

(i) the parties are related in a degree specified in paragraph 2 of Schedule 1 to this Act; and

(ii) the conditions specified in paragraphs (a) and (b) of section 2(1A) of this Act are not satisfied; and

(b) an extract decree of declarator that those conditions are satisfied, granted on an application under section 2(5) of this Act, is produced to the Registrar General,

the Registrar General shall inform the district registrar that there is no legal impediment to the marriage on that ground.

] <sup>5</sup>

(4) For the purposes of [this section] <sup>6</sup> and section 6 of this Act, there is a legal impediment to a marriage where—

(a) that marriage would be void by virtue of section 2(1) of this Act;

(b) one of the parties is, or both are, already married [ or in civil partnership] <sup>7</sup> ;

(c) one or both of the parties will be under the age of 16 on the date of solemnisation of the intended marriage;

(d) one or both of the parties is or are incapable of understanding the nature of a marriage ceremony or of consenting to marriage;

(e) both parties are of the same sex; or

(f) one or both of the parties is, or are, not domiciled in Scotland and, on a ground other than one mentioned in paragraphs (a) to (e) above, a marriage in Scotland between the parties would be void ab initio according to the law of the domicile of the party or parties as the case may be.

(5) A person who has submitted an objection in accordance with subsection (1) above may at any time withdraw it:

Provided that the Registrar General shall be entitled to have regard to that objection notwithstanding such withdrawal.

1. Words substituted by Local Electoral Administration and Registration Services (Scotland) Act 2006 asp 14 (Scottish Act) Pt 2 s.50(3)(a)(i) (October 1, 2006 for the purposes specified in SSI 2006/469 Sch.1; January 1, 2007 otherwise)
2. Words substituted by Local Electoral Administration and Registration Services (Scotland) Act 2006 asp 14 (Scottish Act) Pt 2 s.50(3)(a)(ii) (October 1, 2006 for the purposes specified in SSI 2006/469 Sch.1; January 1, 2007 otherwise)
3. Added by Local Electoral Administration and Registration Services (Scotland) Act 2006 asp 14 (Scottish Act) Pt 2 s.50(3)(b) (October 1, 2006 for the purposes specified in SSI 2006/469 Sch.1; January 1, 2007 otherwise)
4. Words inserted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), ss. 2, 6(6), Sch. 2 para. 4(a)
5. S. 5(3A) inserted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), ss. 2, 6(6), Sch. 2 para. 4(b)
6. Words substituted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c. 16), ss. 2, 6(6), Sch. 2 para. 4(c)
7. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(4) para.44 (December 5, 2005)

...

## **7.— Marriage outside Scotland where a party resides in Scotland.**

(1) Where a person residing in Scotland is a party to a marriage intended to be solemnised in—

(a) England or Wales with a party residing in England or Wales and desires;  
or

(b) any country, territory or place outside Great Britain, and, for the purpose of complying with the law in force in that country, territory or place, is required to obtain from a competent authority in Scotland,

a certificate in respect of his legal capacity to marry, he may submit, in the form and with the fee and documents specified in [section 3(1)(a) , (b) and (d)] <sup>1</sup> of this Act, notice of intention to marry to the district registrar for the district in which he resides (the said registrar being in this section referred to as the “appropriate registrar”) as if it were intended that the marriage should be solemnised in that district, and sections 3(2) and (3) and 4 of this Act shall apply accordingly.

(2) The appropriate registrar shall, if satisfied (after consultation, if the appropriate registrar considers it necessary, with the Registrar General) that a person who has by virtue of subsection (1) above submitted a marriage notice to him is not subject to any legal incapacity (in terms of Scots law) which would prevent his marrying, issue to that person a certificate in the prescribed form that he is not known to be subject to any such incapacity:

Provided that the certificate shall not be issued earlier than 14 days after the date of receipt (as entered by the appropriate registrar in the marriage notice book) of the marriage notice.

(3) Any person may, at any time before a certificate is issued under subsection (2) above, submit to the appropriate registrar an objection in writing to such issue; and the objection shall be taken into account by the appropriate registrar in deciding whether, in respect of the person to whom the certificate would be issued, he is satisfied as mentioned in the said subsection (2).

[(4) For the purpose of subsection (3) above, an objection which is submitted by electronic means is to be treated as in writing if it is received in a form which is

legible and capable of being used for subsequent reference.

] <sup>2</sup>

- 
1. Words substituted by Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16), ss. 2, 6(6), Sch. 2 para. 6
  2. Added by Local Electoral Administration and Registration Services (Scotland) Act 2006 asp 14 (Scottish Act) Pt 2 s.50(5) (October 1, 2006 for the purposes specified in SSI 2006/469 Sch.1; January 1, 2007 otherwise)

...

### [20A Grounds on which marriage void

(1) Where subsection (2) or (3) applies in relation to a marriage solemnised in Scotland, the marriage shall be void.

(2) This subsection applies if at the time of the marriage ceremony a party to the marriage who was capable of consenting to the marriage purported to give consent but did so by reason only of duress or error.

(3) This subsection applies if at the time of the marriage ceremony a party to the marriage was incapable of—

(a) understanding the nature of marriage; and

(b) consenting to the marriage.

(4) If a party to a marriage purported to give consent to the marriage other than by reason only of duress or error, the marriage shall not be void by reason only of that party's having tacitly withheld consent to the marriage at the time when it was solemnised.

(5) In this section "error" means— (a) error as to the nature of the ceremony; or

(b) a mistaken belief held by a person ("A") that the other party at the ceremony with whom A purported to enter into a marriage was the person whom A had agreed to marry.

] <sup>1</sup>

- 
1. Added by Family Law (Scotland) Act 2006 asp 2 (Scottish Act) s.2 (May 4, 2006)

**[23A.— Validity of registered marriage.**

(1) Subject to sections 1 and 2 of and without prejudice to section 24(1) of this Act, where the particulars of any marriage at the ceremony in respect of which both parties were present are entered in a register of marriages by or at the behest of an appropriate registrar, the validity of that marriage shall not be questioned, in any legal proceedings whatsoever, on the ground of failure to comply with a requirement or restriction imposed by, under or by virtue of this Act.

(2) In subsection (1) above, “appropriate registrar” means— (a) in the case of a civil marriage, an authorised registrar; and

(b) in any other case, a district registrar.

] <sup>1</sup>

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1. S. 23A inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), s. 22(1)(d)

**FAMILY LAW ACT 1986 C. 55**

**ss. 44, 45, 46, 47, 48, 50, and 51**

**Part II RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS**

**Divorces, annulments and judicial separations granted in the British Islands**

**44.— Recognition in United Kingdom of divorces, annulments and judicial separations granted in the British Islands.**

(1) Subject to section 52(4) and (5)(a) of this Act, no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction.

(2) Subject to section 51 of this Act, the validity of any divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands shall be recognised throughout the United Kingdom.

**[45. Recognition in the United Kingdom of overseas divorces, annulments and legal separations.**

(1) Subject to subsection (2) of this section and sections 51 and 52 of this Act, the validity of a divorce, annulment or legal separation obtained in a country outside the British Islands (in this Part referred to as an overseas divorce, annulment or legal separation) shall be recognised in the United Kingdom if, and only if, it is entitled to recognition—

(a) by virtue of sections 46 to 49 of this Act, or

(b) by virtue of any enactment other than this Part.

(2) Subsection (1) and the following provisions of this Part do not apply to an overseas divorce, annulment or legal separation as regards which provision as to recognition is made by [Articles 21 to 27, 41(1) and 42(1)] <sup>2</sup> of the Council Regulation.

] <sup>1</sup>

1. Amended by European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001/310 reg.9 (March 1, 2001)

2. Words substituted by European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005/265 reg.17 (March 1, 2005)

## Overseas divorces, annulments and legal separations

### 46.— Grounds for recognition.

(1) The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if—

(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and

(b) at the relevant date either party to the marriage—

(i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

(ii) was domiciled in that country; or

(iii) was a national of that country.

(2) The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if—

(a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;

(b) at the relevant date—

(i) each party to the marriage was domiciled in that country; or

(ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

(c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.

(3) In this section “the relevant date” means— (a) in the case of an overseas divorce, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings;

(b) in the case of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained.

(4) Where in the case of an overseas annulment, the relevant date fell after the death of either party to the marriage, any reference in subsection (1) or (2) above to that date shall be construed in relation to that party as a reference to the date of death.

(5) For the purpose of this section, a party to a marriage shall be treated as domiciled in a country if he was domiciled in that country either according to the law of that country in family matters or according to the law of the part of the United Kingdom in which the question of recognition arises.

#### **47.— Cross-proceedings and divorces following legal separations.**

(1) Where there have been cross-proceedings, the validity of an overseas divorce, annulment or legal separation obtained either in the original proceedings or in the cross-proceedings shall be recognised if—

(a) the requirements of section 46(1)(b)(i), (ii) or (iii) of this Act are satisfied in relation to the date of the commencement either of the original proceedings or of the cross-proceedings, and

(b) the validity of the divorce, annulment or legal separation is otherwise entitled to recognition by virtue of the provisions of this Part.

(2) Where a legal separation, the validity of which is entitled to recognition by virtue of the provisions of section 46 of this Act or of subsection (1) above is converted, in the country in which it was obtained, into a divorce which is effective under the law of that country, the validity of the divorce shall be recognised whether or not it would itself be entitled to recognition by virtue of those provisions.

#### **48.— Proof of facts relevant to recognition.**

(1) For the purpose of deciding whether an overseas divorce, annulment or legal separation obtained by means of proceedings is entitled to recognition by virtue of section 46 and 47 of this Act, any finding of fact made (whether expressly or by implication) in the proceedings and on the basis of which jurisdiction was assumed in the proceedings shall—

(a) if both parties to the marriage took part in the proceedings, be conclusive evidence of the fact found; and

(b) in any other case, be sufficient proof of that fact unless the contrary is shown.

(2) In this section “finding of fact” includes a finding that either party to the marriage— (a) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

(b) was under the law of that country domiciled there; or

(c) was a national of that country.

(3) For the purposes of subsection (1)(a) above, a party to the marriage who has appeared in judicial proceedings shall be treated as having taken part in them.

...

## **50. Non-recognition of divorce or annulment in another jurisdiction no bar to remarriage.**

Where, in any part of the United Kingdom—

(a) a divorce or annulment has been granted by a court of civil jurisdiction,  
or

(b) the validity of a divorce or annulment is recognised by virtue of this Part,

the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from [forming a subsequent marriage or civil partnership in that part of the United Kingdom or cause the subsequent marriage or civil partnership of either party (wherever it takes place) to be treated as invalid in that part.]<sup>1</sup>

## **51.— Refusal of recognition.**

(1) Subject to section 52 of this Act, recognition of the validity of—

(a) a divorce, annulment or judicial separation granted by a court of civil jurisdiction in any part of the British Islands, or

(b) an overseas divorce, annulment or legal separation,

may be refused in any part of the United Kingdom if the divorce, annulment or separation was granted or obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the marriage of the parties previously given (whether before or after the commencement of this Part) by a court of civil jurisdiction in that part of the United Kingdom or by a court elsewhere and recognised or entitled to be recognised in that part of the United Kingdom.

(2) Subject to section 52 of this Act, recognition of the validity of—

(a) a divorce or judicial separation granted by a court of civil jurisdiction in any part of the British Islands, or

(b) an overseas divorce or legal separation,

may be refused in any part of the United Kingdom if the divorce or separation was granted or obtained at a time when, according to the law of that part of the United Kingdom (including its rules of private international law and the provisions of this Part), there was no subsisting marriage between the parties.

(3) Subject to section 52 of this Act, recognition by virtue of section 45 of this Act of the validity of an overseas divorce, annulment or legal separation may be refused if—

(a) in the case of a divorce, annulment or legal separation obtained by means of proceedings, it was obtained—

(i) without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without a party to the marriage having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or

(b) in the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings—

(i) there is no official document certifying that the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; or

(ii) where either party to the marriage was domiciled in another country at the relevant date, there is no official document certifying that the divorce, annulment or legal separation is recognised as valid under the law of that other country; or

(c) in either case, recognition of the divorce, annulment or legal separation would be manifestly contrary to public policy.

(4) In this section—

“official”, in relation to a document certifying that a divorce, annulment or legal separation is effective, or is recognised as valid, under the law of any country, means issued by a person or body appointed or recognised for the purpose under that law;

“the relevant date” has the same meaning as in section 46 of this Act;

and subsection (5) of that section shall apply for the purposes of this section as it applies for the purposes of that section.

(5) Nothing in this Part shall be construed as requiring the recognition of any finding of fault made in any proceedings for divorce, annulment or separation or of any maintenance, custody or other ancillary order made in any such proceedings.

**FAMILY LAW (SCOTLAND) ACT 2006 asp 2**

**ss. 2, 14, 15, 38, 39, 40**

An Act of the Scottish Parliament to amend the law in relation to marriage, divorce and the jurisdiction of the courts in certain consistorial actions; to amend the Matrimonial Homes (Family Protection) (Scotland) Act 1981; to amend the law relating to the domicile of persons who are under 16 years of age; to make further provision as respects responsibilities and rights in relation to children; to make provision conferring rights in relation to property, succession and claims in damages for persons living, or having lived, together as if husband and wife or civil partners; to amend Part 3 of the Civil Partnership Act 2004; to make further provision in relation to persons entitled to damages under the Damages (Scotland) Act 1976; to make provision in relation to certain rules of private international law relating to family law; to make incompetent actions for declarator of freedom and putting to silence; and for connected purposes.

**2 Void marriages**

After section 20 of the Marriage (Scotland) Act 1977 (c.15) there shall be inserted—

**Void marriages**

**“20A Grounds on which marriage void**

(1) Where subsection (2) or (3) applies in relation to a marriage solemnised in Scotland, the marriage shall be void.

(2) This subsection applies if at the time of the marriage ceremony a party to the marriage who was capable of consenting to the marriage purported to give consent but did so by reason only of duress or error.

(3) This subsection applies if at the time of the marriage ceremony a party to the marriage was incapable of—

(a) understanding the nature of marriage; and

(b) consenting to the marriage.

(4) If a party to a marriage purported to give consent to the marriage other than by reason only of duress or error, the marriage shall not be void by reason only of that party's having tacitly withheld consent to the marriage at the time when it was solemnised.

(5) In this section “error” means— (a) error as to the nature of the ceremony; or

(b) a mistaken belief held by a person (“A”) that the other party at the ceremony with whom A purported to enter into a marriage was the person whom A had agreed to marry.”.

...

#### **14 Collusion no longer to be bar to divorce**

(1) Any rule of law by which collusion between parties is a bar to their divorce shall cease to have effect.

(2) Section 9 of the 1976 Act (abolition of the oath of calumny) shall be repealed.

#### **15 Postponement of decree of divorce where religious impediment to remarry exists**

After section 3 of the 1976 Act (action for divorce following on decree of separation) there shall be inserted—

##### **“3A Postponement of decree of divorce where religious impediment to remarry exists**

(1) Notwithstanding that irremediable breakdown of a marriage has been established in an action for divorce, the court may—

(a) on the application of a party (“the applicant”); and

(b) if satisfied—

(i) that subsection (2) applies; and

(ii) that it is just and reasonable to do so,

postpone the grant of decree in the action until it is satisfied that the other party has complied with subsection (3).

(2) This subsection applies where—

(a) the applicant is prevented from entering into a religious marriage by virtue of a requirement of the religion of that marriage; and

(b) the other party can act so as to remove, or enable or contribute to the removal of, the impediment which prevents that marriage.

(3) A party complies with this subsection by acting in the way described in subsection (2)(b).

(4) The court may, whether or not on the application of a party and notwithstanding that subsection (2) applies, recall a postponement under subsection (1).

(5) The court may, before recalling a postponement under subsection (1), order the other party to produce a certificate from a relevant religious body confirming that the other party has acted in the way described in subsection 2(b).

(6) For the purposes of subsection (5), a religious body is “relevant” if the

applicant considers the body competent to provide the confirmation referred to in that subsection.

(7) In this section—

“religious marriage” means a marriage solemnised by a marriage celebrant of a prescribed religious body, and “religion of that marriage” shall be construed accordingly;

“prescribed” means prescribed by regulations made by the Scottish Ministers.

(8) Any reference in this section to a marriage celebrant of a prescribed religious body is a reference to—

(a) a minister, clergyman, pastor or priest of such a body;

(b) a person who has, on the nomination of such a body, been registered under section 9 of the Marriage (Scotland) Act 1977 (c.15) as empowered to solemnise marriages; or

(c) any person who is recognised by such a body as entitled to solemnise marriages on its behalf.

(9) Regulations under subsection (7) shall be made by statutory instrument; and any such instrument shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

...

### **38 Validity of marriages**

(1) Subject to the Foreign Marriage Act 1892 (c.23), the question whether a marriage is formally valid shall be determined by the law of the place where the marriage was celebrated.

(2) The question whether a person who enters into a marriage—

(a) had capacity; or

(b) consented,

to enter into it shall, subject to subsections (3) and (4) and to section 50 of the Family Law Act 1986 (c.55) (non-recognition of divorce or annulment in another jurisdiction no bar to remarriage), be determined by the law of the place where, immediately before the marriage, that person was domiciled.

(3) If a marriage entered into in Scotland is void under a rule of Scots internal law, then, notwithstanding subsection (2), that rule shall prevail over any law under which the marriage would be valid.

(4) The capacity of the person to enter into the marriage shall not be determined

under the law of the place where, immediately before the marriage, the person was domiciled in so far as it would be contrary to public policy in Scotland for such capacity to be so determined.

(5) If the law of the place in which a person is domiciled requires a person under a certain age to obtain parental consent before entering into a marriage, that requirement shall not be taken to affect the capacity of a person to enter into a marriage in Scotland unless failure to obtain such consent would render invalid any marriage that the person purported to enter into in any form anywhere in the world.

### **39 Matrimonial property**

(1) Any question in relation to the rights of spouses to each other's immoveable property arising by virtue of the marriage shall be determined by the law of the place in which the property is situated.

(2) Subject to subsections (4) and (5), if spouses are domiciled in the same country, any question in relation to the rights of the spouses to each other's moveable property arising by virtue of the marriage shall be determined by the law of that country.

(3) Subject to subsections (4) and (5), if spouses are domiciled in different countries then, for the purposes of any question in relation to the rights of the spouses to each other's moveable property arising by virtue of the marriage, the spouses shall be taken to have the same rights to such property as they had immediately before the marriage.

(4) Any question in relation to—

(a) the use or occupation of a matrimonial home which is moveable; or

(b) the use of the contents of a matrimonial home (whether the home is moveable or immoveable),

shall be determined by the law of the country in which the home is situated.

(5) A change of domicile by a spouse (or both spouses) shall not affect a right in moveable property which, immediately before the change, has vested in either spouse.

(6) This section shall not apply—

(a) in relation to the law on aliment, financial provision on divorce, transfer of property on divorce or succession;

(b) to the extent that spouses agree otherwise.

(7) In this section, "matrimonial home" has the same meaning as in section 22 of the 1981 Act.

## **40 Aliment**

Subject to the Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18), a court in Scotland shall apply Scots internal law in any action for aliment which comes before it.

**RULES OF THE COURT OF SESSION**  
**Ch.49 (Family Actions), rr. 49.18 and 49.91**

**CH.49 (FAMILY ACTIONS)**

**Applications for sist**

**49.18.** An application for a sist, or the recall of a sist, under Schedule 3 to the Domicile and Matrimonial Proceedings Act 1973(a) shall be made by motion.

**PART XVI**

**ACTION FOR DECLARATOR OF RECOGNITION OR NON-RECOGNITION OF A  
FOREIGN DECREE**

**Action for declarator in relation to certain foreign decrees**

**49.91.—**(1) This rule applies to an action for declarator of recognition, or non-recognition, of a decree of divorce, nullity or separation granted outwith a member state of the European Union.

(2) In an action to which this rule applies, the pursuer shall state in the condescendence of the summons—

- (a) the court, tribunal or other authority which granted the decree;
- (b) the date of the decree of divorce, annulment or separation to which the action relates;
- (c) the date and place of the marriage to which the decree of divorce, nullity or separation relates;
- (d) the basis on which the court has jurisdiction to entertain the action;
- (e) whether to the pursuer's knowledge any other proceedings whether in Scotland or in any other country are continuing in respect of the marriage to which the action relates or are capable of affecting its validity or subsistence; and
- (f) where such proceedings are continuing—
  - (i) the court, tribunal or authority before which the proceedings have been commenced;
  - (ii) the date of commencement;
  - (iii) the names of the parties; and
  - (iv) the date, or expected date of any proof (or its equivalent), in the proceedings.

(3) Where—

- (a) such proceedings are continuing;
- (b) the action in the Court of Session is defended; and
- (c) either—
  - (i) the summons does not contain the statement referred to in paragraph (2)(e), or
  - (ii) the particulars mentioned in paragraph (2)(f) as set out in the summons are incomplete or incorrect,

any defences or minute, as the case may be, lodged by any person to the action shall include that statement and, where appropriate, the further or correct particulars mentioned in paragraph (2)(f).

(4) Unless the court otherwise directs, a declarator of recognition, or non-recognition, of a decree under this rule shall not be granted without there being produced with the summons—

(a) the decree in question or a certified copy of the decree;

(b) the marriage extract or equivalent document to which the action relates.

(5) Where a document produced under paragraph (4)(a) or (b) is not in English it shall, unless the court otherwise directs, be accompanied by a translation certified by a notary public or authenticated by affidavit.

(6) For the purposes of this rule, proceedings are continuing at any time after they have commenced and before they are finally disposed of.

**THE CIVIL JURISDICTION AND JUDGMENTS  
(MAINTENANCE) REGULATIONS 2011**

**SI 2011 No. 1484**

*Made 13th June 2011*

*Laid before Parliament 13th June 2011*

*Coming into force 18th June 2011*

The Secretary of State for Justice, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972<sup>1</sup> in relation to private international law<sup>2</sup>, makes the following Regulations in exercise of the power under section 2(2) of the European Communities Act 1972.

**1.— Citation, commencement and extent**

(1) These Regulations may be cited as the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, and shall come into force on 18th June 2011.

(2) These Regulations extend to England and Wales, Scotland and Northern Ireland.

(3) An amendment, repeal or revocation made by these Regulations has the same extent as the enactment amended, repealed or revoked.

**2. Interpretation**

In these Regulations—

“the Act” means the Civil Jurisdiction and Judgments Act 1982;

“the Order” means the Civil Jurisdiction and Judgments Order 2001<sup>1</sup>;

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009<sup>2</sup> including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark<sup>3</sup>;

“Maintenance Regulation State” in any provision, in the application of that provision in relation to the Maintenance Regulation, refers to any of the Member States.

**Notes**

<sup>1</sup> Amended by S.I. 2007/1655.

<sup>2</sup> OJ No. L7, 10.1.2009, p.1-79.

<sup>3</sup> OJ No. L 299 16.11.2005, p.62 -70.

**3. The Maintenance Regulation**

Schedule 1 (which contains provisions relating to the enforcement of maintenance decisions pursuant to the Maintenance Regulation) has effect.

**4. Provisions relating to information**

Schedule 2 (which contains provisions relating to access to, and the transmission and use of, information) has effect.

**5. Provisions relating to authentic instruments and court settlements**

Schedule 3 (which contains provisions relating to authentic instruments and court settlements) has effect.

## **6. Amendments to the Civil Jurisdiction and Judgments Act 1982**

Schedule 4 (which makes amendments to the Act) has effect.

## **7. Amendments to the Civil Jurisdiction and Judgments Order 2001**

Schedule 5 (which makes amendments to the Order) has effect.

## **8. Allocation of jurisdiction within the United Kingdom**

Schedule 6 (which contains rules for the allocation of jurisdiction within the United Kingdom in relation to maintenance) has effect.

## **9. Consequential amendments**

Schedule 7 (which makes consequential amendments) has effect.

## **10.— Review**

(1) Before the end of each review period, the Secretary of State must—

- (a) carry out a review of the provisions of these Regulations,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) The review shall relate to the operation of these Regulations as they affect England and Wales only.

(3) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how the Maintenance Regulation has been given effect in other Member States.

(4) The report must in particular—

- (a) set out the objectives intended to be achieved by the provisions of these Regulations,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate, and, if so, the extent to which they could be achieved in a manner that imposes less regulation.

(5) “Review period” means—

(a) the period of five years beginning with the day on which these Regulations come into force, and

(b) subject to paragraph (6), each successive period of five years.

(6) If a report under this regulation is published before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is published.

*Signed by authority of the Secretary of State for Justice*

*McNally*

Minister of State

Ministry of Justice

13th June 2011

## **SCHEDULE 1**

### **THE MAINTENANCE REGULATION**

#### **Regulation 3**

#### **PART 1**

#### **Introductory**

#### **1.— Interpretation**

(1) In this Schedule—

“court” includes a tribunal, and any administrative authority which is a court for the purposes

of the Maintenance Regulation by virtue of Article 2(2) of that Regulation;  
“debtor”, in relation to a maintenance decision, means the person liable, or alleged to be liable, to make the payments for which that decision provides;  
“maintenance decision” has the meaning given to “decision” by Article 2 of the Maintenance Regulation.

(2) In this Schedule—

(a) any reference to a numbered Article is a reference to the Article so numbered in the Maintenance Regulation and any reference to a sub-division of a numbered Article shall be construed accordingly;

(b) references to a registered decision include, to the extent of its registration, references to a decision so registered to a limited extent only.

(3) Anything authorised or required by the Maintenance Regulation or by this Schedule to be done by, to or before a particular magistrates' court may be done by, to or before any magistrates' court acting for the same local justice area (or, in Northern Ireland, the same petty sessions district) as that court.

## **2.— Central Authorities**

(1) The following are designated as Central Authorities under Article 49 of the Maintenance Regulation—

(a) in relation to England and Wales, the Lord Chancellor;

(b) in relation to Scotland, the Scottish Ministers;

(c) in relation to Northern Ireland, the Department of Justice.

(2) If a person outside the United Kingdom does not know to which Central Authority in the United Kingdom a communication should be addressed, the person may address it to the Lord Chancellor.

## **PART 2**

### **Recognition and enforcement of maintenance decisions made by courts in Maintenance Regulation States other than Denmark**

#### **3. Application of Part 2**

This Part shall apply to maintenance decisions made by courts in Maintenance Regulation States other than Denmark.

#### **4.— Enforcement of maintenance decisions**

(1) Subject to sub-paragraph (2), where a maintenance decision falls to be enforced in the United Kingdom under Section 1 of Chapter IV of the Maintenance Regulation, the court to which an application for enforcement is to be made is—

(a) in England and Wales, a magistrates' court,

(b) in Scotland, a sheriff court, and

(c) in Northern Ireland, a magistrates' court.

(2) An application for enforcement is to be transmitted to the magistrates' court or sheriff court designated for these purposes by rules of court (“the enforcing court”)—

(a) in England and Wales, by the Lord Chancellor,

(b) in Scotland, by the Scottish Ministers, and

(c) in Northern Ireland, by the Department of Justice.

(3) Jurisdiction in relation to applications for enforcement of such maintenance decisions lies with the courts for the part of the United Kingdom in which—

(a) the person against whom enforcement is sought is resident,

- (b) assets belonging to that person and which are susceptible to enforcement are situated or held, or
- (c) any other matter relevant to enforcement arises.
- (4) For the purposes of the enforcement of a maintenance decision—
- (a) the decision shall be of the same force and effect,
- (b) the enforcing court shall have in relation to its enforcement the same powers, and
- (c) proceedings for or with respect to its enforcement may be taken, as if the decision had originally been made by the enforcing court.
- (5) Sub-paragraph (4) is subject to sub-paragraphs (6) and (7).
- (6)
- (a) A maintenance decision which is enforceable in England and Wales by virtue of Section 1 of Chapter IV of the Maintenance Regulation and these Regulations shall be enforceable in a magistrates' court in England and Wales in the same manner as a maintenance order made by that court, save that sections 76 and 93 of the Magistrates' Courts Act 1980 have effect as modified by section 5(5B) and (5C)<sup>1</sup> of the Act.
- (b) In this sub-paragraph “maintenance order” has the meaning given by section 150(1)<sup>2</sup> of the Magistrates' Courts Act 1980.
- (7) A maintenance decision which is enforceable in Northern Ireland by virtue of Section 1 of Chapter IV of the Maintenance Regulation and these Regulations shall be enforceable in a magistrates' court in Northern Ireland in the same manner as an order made by that court, save that Article 98 of the Magistrates' Courts (Northern Ireland) Order 1981<sup>3</sup> has effect as modified by section 5(6A)<sup>4</sup> of the Act.
- (8) Sub-paragraph (4) is also subject to—
- (a) Article 21 (application by debtor for refusal or suspension of enforcement);
- (b) paragraph 8 below;
- (c) any provision made by rules of court as to the procedure for the enforcement of maintenance decisions given in another Maintenance Regulation State.
- (9)
- (a) The debtor under a maintenance decision which is or has been the subject of enforcement proceedings in England and Wales or Northern Ireland by virtue of Section 1 of Chapter IV of the Maintenance Regulation and these Regulations must give notice of any change of address to the designated officer, or in Northern Ireland, the clerk, of the court in which enforcement proceedings have been, or are being, taken.
- (b) A person who without reasonable excuse fails to comply with this sub-paragraph shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.
- (10) An application for refusal or suspension of enforcement under Article 21(2) or (3) of the Maintenance Regulation shall be made—
- (a) in England and Wales and Northern Ireland, to a magistrates' court by way of complaint, and
- (b) in Scotland, to a sheriff court by way of summary application.

#### Notes

<sup>1</sup> Section 5(5B) and 5(5C) were inserted by section 10 of and paragraph 21 of Schedule 1 to the Maintenance Enforcement Act 1991 (c.17). Substituted subsection (5) of section 5(5B) was amended by section 109(1) and paragraph 268 of Schedule 8 to the Courts Act 2003 (c.39).

<sup>2</sup> The definition of magistrates' court maintenance order in section 150(1) was inserted by section 33(1) of and paragraph 88 of Schedule 2 to the Family Law Reform Act 1987 (c.42).

<sup>3</sup> S.I.1981/1675 (N.I.26).

<sup>4</sup> Section 5(6A) was inserted by S.I. 1993/1576 (N.I.6).

### PART 3

## **Recognition and enforcement of maintenance decisions made by courts in Denmark etc**

### **5. Application of Part 3**

This Part applies in relation to—

- (a) maintenance decisions made by courts in Denmark, and
- (b) maintenance decisions to which Sections 2 and 3 of Chapter IV of the Maintenance Regulation apply by virtue of Article 75(2)(a) or (b).

### **6.— Recognition and enforcement of maintenance orders**

(1) Subject to sub-paragraph (2), the court to which an application for registration of a maintenance decision under Section 2 of Chapter IV of the Maintenance Regulation is to be made is—

- (a) in England and Wales, a magistrates' court,
- (b) in Scotland, a sheriff court, and
- (c) in Northern Ireland, a magistrates' court.

(2) An application for registration is to be transmitted to the magistrates' court or sheriff court designated for these purposes by rules of court (“the registering court”)—

- (a) in England and Wales, by the Lord Chancellor,
- (b) in Scotland, by the Scottish Ministers, and
- (c) in Northern Ireland, by the Department of Justice.

(3) Where an application for registration of a maintenance decision is transmitted to a court—

- (a) the decision may be registered for enforcement by the court, and
- (b) if so registered, the decision shall be treated as having been declared enforceable for the purposes of Section 2 of Chapter IV of the Maintenance Regulation.

(4)

(a) An application for registration shall be determined in the first instance by the prescribed officer of the registering court.

(b) In this sub-paragraph, “prescribed” means prescribed by rules of court.

(5) For the purposes of the enforcement of a registered maintenance decision—

- (a) the decision shall be of the same force and effect,
- (b) the registering court shall have in relation to its enforcement the same powers, and
- (c) proceedings for or with respect to its enforcement may be taken, as if the decision had originally been made by the registering court.

(6) Sub-paragraph (5) is subject to sub-paragraphs (7) and (8).

(7)

(a) A maintenance decision which is enforceable in England and Wales by virtue of Section 2 of Chapter IV of the Maintenance Regulation and these Regulations shall be enforceable in a magistrates' court in England and Wales in the same manner as a maintenance order made by that court, save that sections 76 and 93 of the Magistrates' Courts Act 1980 have effect as modified by section 5(5B) and (5C) of the Act.

(b) In this sub-paragraph “maintenance order” has the meaning given by section 150(1) of the Magistrates' Courts Act 1980.

(8) A maintenance decision which is enforceable in Northern Ireland by virtue of Section 2 of Chapter IV of the Maintenance Regulation and these Regulations shall be enforceable in a magistrates' court in Northern Ireland in the same manner as an order made by that court, save that Article 98 of the Magistrates' Courts (Northern Ireland) Order 1981 has effect as modified by section 5(6A) of the Act.

(9) Sub-paragraph (5) is also subject to—

- (a) Article 36(3) (restriction on enforcement where appeal pending or time for appeal unexpired);
- (b) paragraph 8 below;

(c) any provision made by rules of court as to the procedure for the enforcement of maintenance decisions registered under the Maintenance Regulation and these Regulations.  
(10)

(a) The debtor under a maintenance decision registered in accordance with this paragraph in a magistrates' court in England and Wales or Northern Ireland must give notice of any change of address to the designated officer, or in Northern Ireland, the clerk of that court.

(b) A person who without reasonable excuse fails to comply with this sub-paragraph shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.

## **7. Proceedings to contest decisions given on appeal in connection with applications for registration**

An appeal under Article 33 may only be on a point of law and lies—

(a) in England and Wales, to a county court in accordance with section 111A<sup>1</sup> of the Magistrates' Courts Act 1980;

(b) in Scotland, to the Inner House of the Court of Session;

(c) in Northern Ireland, to the Court of Appeal.

*SI 2011/1484 Page 10*

### **Notes**

<sup>1</sup>Section 111A was inserted by Article 4(1) and (3) of S.I.2009/871.

## **PART 4**

### **Recognition and enforcement of maintenance decisions - general**

#### **8.— Interest on judgments**

(1) Subject to sub-paragraphs (2) and (3) and rules of court as to the payment of interest under this paragraph, where a person applying for registration or enforcement of a maintenance decision shows that—

(a) the decision provides for the payment of a sum of money, and

(b) in accordance with the law of the Maintenance Regulation State in which the maintenance decision was given and the terms of the decision, interest on that sum is recoverable at a particular rate and from a particular date or time,  
the debt resulting from registration or enforcement of the decision is to carry interest at that rate and from that date or time.

(2) In the case of an application for registration of a maintenance decision, interest is not recoverable unless the rate of interest and the date or time referred to in sub-paragraph (1)(b) are registered with the decision.

(3)

(a) Interest on arrears of sums payable under a maintenance decision which falls to be enforced in a magistrates' court in England and Wales or Northern Ireland by virtue of the Maintenance Regulation and these Regulations shall not be recoverable in that court.

(b) But this sub-paragraph does not affect the operation in relation to any such maintenance decision of section 2A of the Maintenance Orders Act 1958<sup>1</sup> or section 11A of the Maintenance and Affiliation Orders Act (Northern Ireland) 1966<sup>2</sup> (which enables interest to be recovered if the decision is registered for enforcement in the High Court).

(4) Except as mentioned in sub-paragraph (3), debts under maintenance decisions enforceable in the United Kingdom by virtue of the Maintenance Regulation shall carry interest only as provided by this paragraph.

### **Notes**

<sup>1</sup>Section 2A was inserted by section 37 of and Part II of Schedule 11 to the Civil Jurisdiction and Judgments Act 1982 (c.27).

2 1966 c.35 (N.I.). Section 11A was inserted by section 37 of and Part II of Schedule 11 to the Civil Jurisdiction and Judgments Act 1982 (c.27).

### **9.— Currency of payments under maintenance decisions**

(1) Sums payable under a maintenance decision enforceable in the United Kingdom by virtue of the Maintenance Regulation, including any arrears so payable, shall be paid in sterling where an order is made on an application for enforcement in England and Wales, Scotland or Northern Ireland.

(2) Where the maintenance decision is expressed in any other currency, the amount shall be converted on the basis of the exchange rate prevailing on the date on which the application for enforcement or registration of the decision was received by a Central Authority in the United Kingdom for transmission to a court.

(3) For the purposes of this paragraph, a written certificate purporting to be signed by an officer of any bank in the United Kingdom and stating the exchange rate prevailing on a specified date shall be evidence of the facts stated (and in Scotland, sufficient evidence of those facts).

### **10.— Proof and admissibility of certain maintenance decisions and related documents**

(1) For the purposes of proceedings relating to the Maintenance Regulation—

(a) a document, duly authenticated, which purports to be a copy of a maintenance decision given by a court in a Maintenance Regulation State shall without further proof be deemed to be a true copy, unless the contrary is shown; and

(b) an extract from a maintenance decision issued by a court in a Maintenance Regulation State in accordance with Article 20 or Article 28 (as the case may be) shall be evidence that that decision is enforceable there.

(2) A document purporting to be a copy of a maintenance decision given by a court mentioned in

sub-paragraph (1)(a) is duly authenticated for the purposes of this paragraph if it purports—

(a) to bear the seal of that court; or

(b) to be certified by any person in his capacity as a judge or officer of that court to be a true copy of a maintenance decision given by that court.

(3) Nothing in this paragraph shall prejudice the admission in evidence of any document which is admissible apart from this paragraph.

## **SCHEDULE 2**

### **PROVISIONS RELATING TO INFORMATION**

#### **Regulation 4**

##### **1.—**

(1) The following are designated for the purposes of Article 61(1) of the Maintenance Regulation to provide the information referred to in Article 61(2) to the Central Authorities designated under paragraph 2 of Schedule 1—

(a) the Secretary of State;

(b) the Child Maintenance and Enforcement Commission;

(c) the Commissioners for Her Majesty's Revenue and Customs;

(d) the Department for Employment and Learning in Northern Ireland;

(e) the Department of the Environment in Northern Ireland;

(f) the Department of Finance and Personnel in Northern Ireland;

(g) the Department for Social Development in Northern Ireland.

(2) The information to be supplied by the Secretary of State is limited to information held for

functions relating to social security or employment or training.

**2.**

Subject to the provisions of Chapter VII of the Maintenance Regulation, the persons and authorities to whom the Central Authorities transmit information in accordance with Article 62(1) of that Regulation may process that information in any manner necessary to facilitate the adjudication and recovery of maintenance claims.

**3.—**

(1) Information referred to in Article 61(2) of the Maintenance Regulation which is received by a Central Authority, or by a person supplying services to a Central Authority, from a body or person designated under paragraph 1 cannot be disclosed to another person unless the disclosure is in connection with a function of the Central Authority under, and is in accordance with, Chapter VII of the Maintenance Regulation.

(2) Sub-paragraph (1) does not apply to—

- (a) the disclosure of information which is in the form of a summary or collection of information so framed as not to enable identification of any person from the information;
- (b) disclosure which is made in pursuance of an order of a court;
- (c) disclosure which is required by any other enactment.

**4.—**

(1) Subject to sub-paragraph (3), a person who—

(a) is or has been employed by a Central Authority designated under paragraph 2 of Schedule 1; or

(b) provides or has provided services to such a Central Authority, is guilty of an offence if he or she discloses, otherwise than in accordance with paragraph 3, information referred to in Article 61(2) of the Maintenance Regulation which has been obtained from a person or body designated under paragraph 1 and which relates to a person whose identity is specified in the information disclosed or can be deduced from it.

(2) It is a defence to prove that, at the time of the alleged offence, the person believed that he or she was making the disclosure lawfully in accordance with this Schedule and the Maintenance Regulation, and had no reasonable cause to believe otherwise.

(3) Sub-paragraph (1) does not apply to disclosure of information received by such a person—

(a) from the Department for Employment and Learning in Northern Ireland, the Department of the Environment in Northern Ireland, or the Department of Finance and Personnel in Northern Ireland;

(b) from the Secretary of State where the information so disclosed is held by the Secretary of State for the purposes of employment and training only.

**5.**

A person found guilty of an offence under this Schedule shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both;

(b) on summary conviction, to imprisonment for a term not exceeding 3 months or to a fine not exceeding the statutory maximum or to both.

**SCHEDULE 3**

**PROVISIONS RELATING TO AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS**

## **Regulation 5**

### **1.**

References in this Schedule to authentic instruments and court settlements are references to those authentic instruments and court settlements (as defined in Article 2 of the Maintenance Regulation) which are to be recognised and enforceable in the same way as maintenance decisions by virtue of Article 48 of that Regulation.

### **2.—**

(1) In relation to an authentic instrument or court settlement which is enforceable in the Maintenance Regulation State of origin, Schedule 1 applies, subject to the modifications in sub-paragraphs (2), (3) and (4), as if that authentic instrument or court settlement was a maintenance decision given by a court in that Maintenance Regulation State.

(2) Paragraphs 4(4) and 6(5) of Schedule 1 apply in relation to authentic instruments and court settlements as if, for the words “as if the decision had been originally made” there were substituted “as if it was a decision which had originally been made”.

(3) Paragraph 10 of Schedule 1 applies to authentic instruments as if—

(a) in sub-paragraph (1)(a), for the words “given by a court” there were substituted “drawn up by, registered by, authenticated by or concluded before a competent authority”;

(b) for sub-paragraph (1)(b) there were substituted—

“(b) an extract from an authentic instrument issued by a competent authority in a Maintenance Regulation State in accordance with Article 48 shall be evidence that that instrument is enforceable there.”;

(c) for sub-paragraph (2) there were substituted—

“(2) A document purporting to be a copy of an authentic instrument drawn up by, registered by, authenticated by or concluded before a competent authority in a Maintenance Regulation State is duly authenticated for the purposes of this paragraph if it purports to be certified to be a true copy of such an instrument by a person duly authorised in that State to do so.”

(4) Paragraph 10(1)(b) of Schedule 1 applies to court settlements as if, for the words “Article 20 or Article 28 (as the case may be)” there were substituted “Article 48”.

### **3.**

Section 18(7) of the Act (disapplication of section 18) has effect to disapply section 18 in relation to an authentic instrument or court settlement to which Article 48 applies.

## **SCHEDULE 4**

### **AMENDMENTS TO THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982**

#### **Regulation 6**

##### **1.**

The Civil Jurisdiction and Judgments Act 1982<sup>1</sup> is amended as follows.

##### **Notes**

<sup>1</sup> The Civil Jurisdiction and Judgments Act 1982 was amended by section 3 of, and Schedule 2 to the Civil Jurisdiction and Judgments Act 1991 (c.12), Article 4 of, and Schedule 2 to S.I.2001/3929, regulations 2, 16 and 17 of S.I. 2009/3131 and section 226(1) of and paragraph 12 of Schedule 5 to the Bankruptcy and Diligence etc (Scotland) Act 2007 (2007 asp 3).

##### **2.**

In section 16 (allocation within UK of jurisdiction in certain civil proceedings), in subsection (4)

after “Regulation” insert “, Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011”.

**3.**

In section 18 (enforcement of UK judgments in other parts of the UK), in subsection (7) after “section 4 or 5 of this Act” insert “or by virtue of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

**4.**

In section 20 (rules as to jurisdiction in Scotland), in subsection (3)—

(a) the words “to the extent that it determines jurisdiction in relation to any matter to which Schedule 8 applies” become paragraph (a);

(b) after that paragraph insert—  
“; and

(b) to the extent that it relates to any matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

**5.—**

(1) Section 24 (interim relief and protective measures in cases of doubtful jurisdiction) is amended as follows.

(2) In subsection (1), after paragraph (c) insert—  
“; or

(d) the proceedings involve a reference of any matter relating to the Maintenance Regulation to the European Court under Article 267 of the Treaty on the Functioning of the European Union.<sup>1</sup>”.

(3) In subsection (2), after paragraph (c) insert—  
“; or

(d) the proceedings involve a reference of any matter relating to the Maintenance Regulation to the European Court under Article 267 of the Treaty on the Functioning of the European Union.”.

**Notes**

<sup>1</sup> O.J. No. C 83, 30.3.2010, p.1.

**6.—**

(1) Section 25 (interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings) is amended as follows.

(2) In subsection (1)—

(a) in paragraph (a), after “a Regulation State” insert “or a Maintenance Regulation State”;

(b) in paragraph (b), after “Article 1 of the Regulation” insert “, within the scope of the Maintenance Regulation as determined by Article 1 of that Regulation”;

(c) in that paragraph, after “whether or not the Regulation” insert “, the Maintenance Regulation”.

(3) In subsection (3)—

(a) in paragraph (a), after “Regulation State” insert “or a Maintenance Regulation State”;

(b) in paragraph (b) omit “either”;

(c) in that paragraph, after “Article 1 of the Regulation” insert “, the Maintenance Regulation as determined by Article 1 of that Regulation”.

**7.—**

(1) Section 27 (provisional and protective measures in Scotland in the absence of substantive proceedings) is amended as follows.

(2) In subsection (2)—

(a) in paragraph (a), after “Regulation State” insert “, in another Maintenance Regulation State”;

(b) in paragraph (b), after the second “Regulation” insert “or is within the scope of the Maintenance Regulation as determined by Article 1 of that Regulation”.

(3) In subsection (3)—

(a) in paragraph (a), for “or Regulation State” substitute “, Regulation State or Maintenance Regulation State”;

(b) in paragraph (b), at the end insert “or the Maintenance Regulation as determined by Article 1 of that Regulation”;

(c) in paragraph (d), for “or Regulation State” substitute “, Regulation State or Maintenance Regulation State”.

**8.—**

(1) Section 28 (application of s.1 of the Administration of Justice (Scotland) Act 1972) is amended as follows.

(2) The existing provision becomes subsection (1).

(3) After that subsection insert—

“(2) When any proceedings have been brought or are likely to be brought in another Maintenance Regulation State or in England and Wales or Northern Ireland in respect of any matter which is within the scope of the Maintenance Regulation as determined by Article 1 of that Regulation, the Court of Session has the like power to make an order under section 1 of the Administration of Justice (Scotland) Act 1972 as if the proceedings in question had been brought, or were likely to be brought, in that court.”.

**9.**

In section 32 (overseas judgments given in proceedings brought in breach of agreement for settlement of disputes), in subsection (4)(a) after “the Regulation” insert “or the Maintenance Regulation”.

**10.**

In section 33 (certain steps not to amount to submission to jurisdiction of overseas court), in subsection (2) after “the Regulation” insert “or the Maintenance Regulation”.

**11.**

In Schedule 4 (Chapter II of the Regulation as modified for allocation of jurisdiction within the UK), paragraph 3(b) is repealed.

**12.**

Paragraph 5 of Schedule 5 (proceedings excluded from Schedule 4) is repealed.

**13.**

In Schedule 8 (rules as to jurisdiction in Scotland), paragraph 2(e) is repealed.

**SCHEDULE 5**

**AMENDMENTS TO THE CIVIL JURISDICTION AND JUDGMENTS ORDER 2001**

**Regulation 7**

**1.**

Schedule 1 to the Order is amended in accordance with this Schedule.

**2.**

In paragraph 3, sub-paragraphs (1) and (2) are revoked.

**3.—**

(1) Paragraph 4 is amended as follows.

(2) In sub-paragraph (1), “other than a maintenance order” is revoked.

(3) Sub-paragraph (3) is revoked.

**SCHEDULE 6**

**ALLOCATION WITHIN THE UNITED KINGDOM OF JURISDICTION  
RELATING TO MAINTENANCE MATTERS**

**Regulation 8**

**1.**

The provisions of this Schedule have effect for determining, as between the parts of the United Kingdom, whether the courts of a particular part of the United Kingdom, or any particular court in that part, have or has jurisdiction in proceedings where the subject-matter of the proceedings is within the scope of the Maintenance Regulation as determined by Article 1 of that Regulation.

**2.**

In this Schedule, a reference to an Article by number alone is a reference to the Article so numbered in the Maintenance Regulation.

**3.**

The provisions of Chapter II of the Maintenance Regulation apply to the determination of jurisdiction in the circumstances mentioned in paragraph 1, subject to the modifications specified in the following provisions of this Schedule.

**4.**

Article 3 applies as if—

(a) the references in Article 3(a) and (b) to the court for the place where the defendant or the creditor is habitually resident were references to the court for the part of the United Kingdom in which the defendant, or the creditor, as the case may be, is habitually resident;

(b) the references to a person's nationality were references to a person's domicile.

**5.**

Article 4(1) to (3) applies as if—

(a) for “Member State”, wherever it occurs, there were substituted “part of the United Kingdom”;

(b) the reference to a person's nationality was a reference to a person's domicile.

**6.**

Article 5 applies as if—

(a) after “this Regulation” there were inserted “as modified by Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011”;

(b) for “Member State” there were substituted “part of the United Kingdom”.

**7.**

Where Article 6, as read with the second paragraph of Article 2(3), indicates that the courts of the United Kingdom have jurisdiction under the Maintenance Regulation, and the parties are domiciled in different parts of the United Kingdom, the courts of either part may exercise jurisdiction (subject to Article 12 as it has effect by virtue of this Schedule).

**8.**

Article 7 applies as if for the second sentence there were substituted—  
“The dispute must have a sufficient connection with the part of the United Kingdom in which the court seised is located.”.

**9.—**

(1) Sub-paragraphs (2) and (3) have effect in addition to Article 8.

(2) Where a decision is given in a part of the United Kingdom where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other part of the United Kingdom as long as the creditor remains habitually resident in the part of the United Kingdom in which the decision was given.

(3) Sub-paragraph (2) does not apply where—

(a) the parties have agreed that the courts of that other part of the United Kingdom are to have jurisdiction in accordance with Article 4 as applied by paragraph 5 of this Schedule, or

(b) the creditor submits to the jurisdiction of the courts of that other part of the United Kingdom pursuant to Article 5 as applied by paragraph 6 of this Schedule.

**10.**

Article 9 does not apply.

**11.—**

(1) Sub-paragraphs (2) and (3) have effect instead of Articles 10 and 11.

(2) Where a defendant habitually resident in one part of the United Kingdom is sued in a court of another part of the United Kingdom and does not enter an appearance, the court will declare of its own initiative that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Schedule.

(3) The court will stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

**12.**

Article 12 applies as if after “different Member States” there were inserted “or different parts of the United Kingdom”.

**13.**

Article 13 applies as if after “different Member States” there were inserted “or different parts of the United Kingdom”.

**14.**

Article 14 applies as if—

(a) for “a Member State” there were substituted “a part of the United Kingdom”;

(b) after “another Member State” there were inserted “or another part of the United Kingdom”.

## **15.**

Notwithstanding the preceding provisions of this Schedule, the exercise of jurisdiction in any proceedings in a court in the United Kingdom is subject to—

- (a) the Maintenance Regulation;
- (b) the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007<sup>1</sup>;
- (c) the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels on the 27th September 1968<sup>2</sup>; and
- (d) the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Lugano on the 16th September 1988<sup>3</sup>.

### **Notes**

<sup>1</sup> O.J. No.L 339, 21.12.2007, p.3.

<sup>2</sup> O.J. No. L.299, 31.12.1972, p.32-42

<sup>3</sup> O.J. No. L 319, 25.11.1988, p.9-48.

## **16.**

This Schedule does not apply to—

- (a) matters in relation to which—
  - (i) the Child Maintenance and Enforcement Commission has jurisdiction to make a maintenance calculation by virtue of section 44 of the Child Support Act 1991<sup>1</sup>;
  - (ii) the Department for Social Development in Northern Ireland has jurisdiction to make a maintenance calculation by virtue of Article 41 of the Child Support (Northern Ireland) Order 1991<sup>2</sup>;
- (b) proceedings for, or otherwise relating to, an order under any of the following provisions—
  - (i) paragraph 23 of Schedule 2 to the Children Act 1989 (contribution orders);
  - (ii) section 106 of the Social Security Administration Act 1992<sup>3</sup> (recovery of expenditure on benefit from person liable for maintenance);
  - (iii) section 80 of the Social Work (Scotland) Act 1968 (enforcement of duty to make contributions);
  - (iv) section 81 of the Social Work (Scotland) Act 1968 (provisions as to decrees for aliment);
  - (v) Article 101 of the Health and Personal Social Services (Northern Ireland) Order 1972<sup>4</sup> (recovery of cost of accommodation for persons in need);
  - (vi) section 101 of the Social Security Administration (Northern Ireland) Act 1992 (recovery of expenditure on benefit from person liable for maintenance);
  - (vii) Article 41 of the Children (Northern Ireland) Order 1995<sup>5</sup> (contribution orders).

### **Notes**

<sup>1</sup> Section 44 of the Child Support Act 1991 was amended by section 22 of the Child Support Pensions and Social Security Act 2000 (c.19) and section 13(4) of and paragraphs 1 and 46 of Schedule 3 to the Child Maintenance and Other Payments Act 2008 (c.6).

<sup>2</sup> S.I.1991/2628 (N.I.23).

<sup>3</sup> Section 106 of the Social Security Administration Act 1992 is prospectively repealed by sections 9(3)(b) and 58(1)

of and Schedule 7 to the Welfare Reform Act 2009 (c.29).

<sup>4</sup> 1972 N.I.14.

<sup>5</sup> S.I..1995/755 (N.I.2).

**SCHEDULE 7**  
**CONSEQUENTIAL AMENDMENTS**

**Regulation 9**

**Maintenance Orders Act 1950 (c.37)**

**1.—**

(1) The Maintenance Orders Act 1950 is amended as follows.

(2) In section 15<sup>1</sup> (service of process), for subsection (1)(a)(vi), substitute—

“(vi) Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011; or”.

(3) In section 22 (discharge and variation of maintenance orders registered in summary or sheriff courts)—

(a) in subsection (1), at the beginning insert “Subject to subsection (1ZA),”;

(b) after that subsection insert—

“(1ZA) The power under subsection (1) to vary the rate of payments may not be exercised where paragraph 9(2) of Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 applies (restriction on modifying maintenance decision where creditor remains habitually resident in the part of the United Kingdom in which the decision was made).”.

**Notes**

<sup>1</sup> Section 15(1) was substituted by section 3 of and paragraph 11 of Schedule 3 to the Administration of Justice Act 1977 (c.38); section 15(1)(a)(vi) was inserted by section 16(5) of the Civil Jurisdiction and Judgments Act 1982 (c.27).

**Maintenance Orders Act 1958 (c.39)**

**2.—**

(1) The Maintenance Orders Act 1958 is amended as follows.

(2) Section 1 (application of Part 1) is amended as follows.

(3) In subsection (1A)<sup>1</sup> after “any order” insert “, decision, settlement or instrument”.

(4) After subsection (4)<sup>2</sup>, insert—

“(5) For the purposes of this section—

(a) a maintenance decision which is enforceable by a magistrates' court by virtue of Section 1 of Chapter IV of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court;

(b) a maintenance decision which is registered by a magistrates' court under the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court;

(c) an authentic instrument or court settlement which is enforceable by a magistrates' court by virtue of Article 48 of the Maintenance Regulation (application of provisions relating to maintenance decisions to authentic instruments and court settlements) and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court.

(6) In subsection (5)—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“authentic instrument” and “court settlement” have the meanings given by Article 2 of the Maintenance Regulation;

“maintenance decision” has the meaning given to “decision” by Article 2 of the Maintenance Regulation.”.

(5) In section 4A(1)<sup>3</sup>, after “section 1(4)” insert “or (5)”.

**Notes**

<sup>1</sup> Section 1(1A) was inserted by section 27(3) of the Administration of Justice Act 1970 (c.31).

<sup>2</sup> Section 1(4) was inserted by section 22(1) of and paragraph 4 of the Schedule to the Maintenance Orders (Reciprocal

Enforcement) Act 1972 (c.18).

<sup>3</sup> Section 4A was inserted by section 10 of and paragraph 10 of Schedule 1 to the Maintenance Enforcement Act 1991 (c.17).

**Administration of Justice Act 1970 (c.31)**

**3.—**

(1) The Administration of Justice Act 1970 is amended as follows.

(2) In section 28 (other provisions for the interpretation of Part 2), in subsection (1), in the definition of “maintenance order”—

(a) after “any order” insert “, decision, settlement or instrument”;

(b) for “such an order” substitute “one”;

(c) after “discharged” insert “or has otherwise ceased to operate”.

(3) In Schedule 8 (which lists maintenance orders for the purposes of the Maintenance Orders Act

1958 and Part 2 of the Administration of Justice Act 1970), after paragraph 13A<sup>1</sup> insert—

**“13B.—**

(1) A decision, court settlement or authentic instrument which falls to be enforced by a magistrates' court by virtue of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.

(2) In this paragraph—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“decision”, “court settlement” and “authentic instrument” have the meanings given by Article 2 of the Maintenance Regulation.”.

**Notes**

<sup>1</sup> Paragraph 13A was inserted by Article 5 of and paragraph 8 of Schedule 3 to S.I.2001/3929.

**Attachment of Earnings Act 1971 (c.32)**

**4.—**

(1) The Attachment of Earnings Act 1971 is amended as follows.

(2) In section 2 (principal definitions), in the definition of “maintenance order”—

(a) after “any order” insert “, decision, settlement or instrument”;

(b) for “such an order” substitute “one”;

(c) after “discharged” insert “or has otherwise ceased to operate”.

(3) In Schedule 1 (which lists maintenance orders to which that Act applies) after paragraph 14<sup>1</sup>

insert—

**“14A.—**

(1) A decision, court settlement or authentic instrument which falls to be enforced by a magistrates' court by virtue of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.

(2) In this paragraph—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including

as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

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“decision”, “court settlement” and “authentic instrument” have the meanings given by Article 2 of that Regulation.”.

**Notes**

<sup>1</sup> Paragraph 14 was inserted by Article 5 of and paragraph 9 of Schedule 3 to S.I.2001/3929.

**Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18)**

**5.**

In the Maintenance Orders (Reciprocal Enforcement) Act 1972, in section 4<sup>1</sup> (power of sheriff to make provisional maintenance order)—

(a) in subsection (1), for “Rule 2(5) of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982” substitute “the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011”;

(b) after subsection (6) insert—

“(7) In this section, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Notes**

<sup>1</sup> Section 4(1) was substituted by section 23(2) of and paragraph 3(1) of Schedule 12 to the Civil Jurisdiction and Judgments Act 1982 (c.27).

**Matrimonial Causes Act 1973 (c.18)**

**6.—**

(1) The Matrimonial Causes Act 1973 is amended as follows.

(2) In section 27<sup>1</sup> (financial provision orders in case of neglect to maintain), for subsection (2), substitute—

“(2) The court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

(3) In section 35 (alteration of agreements by court during lives of parties)—

(a) in subsection (1), for “subsection (3)” substitute “subsections (1A) and (3)”;

(b) after that subsection insert—

“(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) the requirement as to domicile or residence in subsection (1) does not apply to the application or that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”.

(4) In section 52<sup>2</sup>, in subsection (1), after the definition of “maintenance calculation” insert—  
““the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.

**Notes**

<sup>1</sup> Section 27(2) was amended by section 6(1) of the Domicile and Matrimonial Proceedings Act 1973 (c.45).

<sup>2</sup> In Section 52(1), the definition of maintenance calculation was substituted by section 26 of and paragraph 3(1) and (4) of Schedule 3 to the Child Support Pensions and Social Security Act 2000 (c.19).

## **Domicile and Matrimonial Proceedings Act 1973 (c.45)**

### **7.**

In the Domicile and Matrimonial Proceedings Act 1973, in section 10 (ancillary and collateral orders), after subsection (1B)<sup>1</sup> insert—

“(1C) If the application or part of it relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the Court of Session or a sheriff court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.

(1D) In subsection (1C) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

#### **Notes**

<sup>1</sup> Section 10(1) was amended by section 105(4) of and paragraph 20(2)(a) of Schedule 4 to the Children (Scotland)

Act 1995 (c.36). Subsection (1B) of section 10 was inserted by regulation 2(1), and (4) of S.S.I. 2001/36.

## **Domestic Proceedings and Magistrates' Courts Act 1978 (c.22)**

### **8.**

In the Domestic Proceedings and Magistrates' Courts Act 1978, in section 30 (provisions as to jurisdiction and procedure)—

(a) in subsection (1), after “subject to” insert “subsection (1A) and to”;

(b) after that subsection insert—

“(1A) If an application or part of an application for an order under this Part relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, a magistrates' court may not entertain that application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(c) after subsection (5) insert—

“(6) In this section “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

## **Magistrates' Courts Act 1980 (c. 43)**

### **9.—**

(1) The Magistrates' Courts Act 1980 is amended as follows.

(2) In section 60<sup>1</sup> (revocation, variation etc of orders for periodical payments), after subsection (10) insert—

“(10A) The power in subsection (1) is not exercisable in relation to a maintenance order which falls to be enforced by a magistrates' court by virtue of —

(a) the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, or

(b) the Council Regulation.

(10B) In subsection (10A)—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“the Council Regulation” means Council Regulation (EC) No 44/2001 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) Section 95<sup>2</sup> (remission of arrears and manner in which arrears to be paid) is amended as follows.

(4) After subsection (1) insert—

“(1A) The power in subsection (1) is not exercisable in relation to a maintenance order which falls to be enforced by a magistrates' court by virtue of—

(a) the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, or  
(b) the Council Regulation.”.

(5) In subsection (7)—

(a) after “In this section—” insert—

““the Council Regulation” means Council Regulation (EC) No 44/2001 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”;

(b) after the definition of “English maintenance order” insert—

““the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”;

(c) in the definition of “non-English maintenance order”—

(i) in paragraph (a), for sub-paragraph (v) substitute—

“(v) under the Council Regulation;”;

(ii) the “or” at the end of paragraph (b) is repealed;

(iii) at the end of paragraph (c) insert—

“or

(d) a maintenance order which falls to be enforced by a magistrates' court by virtue of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

(6) In section 150 (interpretation of other terms), in subsection (1), in the definition of “maintenance order”—

(a) after “any order” insert “, decision, settlement or instrument”;

(b) for “such an order” substitute “one”;

(c) after “discharged” insert “or has otherwise ceased to operate”.

#### Notes

<sup>1</sup> Section 60 was substituted by section 4 of the Maintenance Enforcement Act 1991 (c.17). It is modified by section

9 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18), section 4 of the Maintenance Orders (Facilities for Enforcement) Act 1920 (c.33), section 22 of the Maintenance Orders Act 1950 (c.37), and section 4 of the Maintenance Orders Act 1958 (c.39) (as amended by section 261(1) of and paragraph 22 of Schedule 27 to the Civil Partnership Act 2004 (c.33)).

<sup>2</sup> Section 95 was substituted by section 11(1) of, and paragraph 8 of Schedule 2 to, the Maintenance Enforcement

Act 1991 (c.17). Subsection (7)(a)(v) was inserted by article 5 of and paragraphs 10 and 12(c) of Schedule 3 to S.I. 2001/3929, which was amended by regulation 5 and paragraphs 8 and 10 of the Schedule to S.I.2007/1655.

## **Matrimonial and Family Proceedings Act 1984 (c. 42)**

### **10.—**

(1) The Matrimonial and Family Proceedings Act 1984 is amended as follows.

- (2) In section 15<sup>1</sup> (jurisdiction of the court)—
- (a) in subsection (1), for “subsection (2)”, substitute “subsections (1A) and (2)”;
- (b) after that subsection, insert—
- “(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.”;
- (c) in subsection (2)—
- (i) the words from “or by virtue of Council Regulation” to “at p 62)” are repealed;
- (ii) in paragraphs (a) and (b), the words “that Regulation or” are repealed;
- (d) after subsection (2) insert—
- “(3) In this section, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.
- (3) In section 16 (duty of court to consider whether England and Wales is appropriate venue)—
- (a) in subsection (1), at the beginning, insert “Subject to subsection (3),”;
- (b) after subsection (2) insert—
- “(3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in subsection (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule.
- (4) In this section, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.
- (4) In section 28<sup>2</sup> (circumstances in which a Scottish court may entertain application for financial provision)—
- (a) in subsection (1), for “subsection (4)” substitute “subsections (3A) and (4)”;
- (b) after subsection (3) insert—
- “(3A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—
- (a) those requirements are to be satisfied in respect of the application, or that part of it, instead of the requirements set out in subsection (2), and
- (b) the condition mentioned in subsection (3)(e) does not apply.”;
- (c) in subsection (4)—
- (i) the words from “or by virtue of Council Regulation” to “at p 62)” are repealed;
- (ii) in paragraphs (a) and (b) the words “that Regulation or” are repealed;
- (d) after that subsection insert—
- “(5) “The Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

#### Notes

<sup>1</sup> Section 15(2) was amended by article 5 of and paragraphs 18 and 19 of Schedule 3 to S.I.2001/3929, and by paragraphs 12 and 13 of the Schedule to S.I.2007/1655.

<sup>2</sup> Section 28(4) was amended by article 5 of and paragraphs 18 and 20 of Schedule 3 to S.I.2001/3929, and by paragraphs 12 and 14 of the Schedule to S.I.2007/1655.

## **Debtors (Scotland) Act 1987 (c.18)**

### **11.—**

(1) The Debtors (Scotland) Act 1987 is amended as follows.

(2) In section 54 (current maintenance arrestment to be preceded by default)—

(a) in subsection (1)(a)(i), after “(a)” insert “, (aa)”;

(b) in subsection (1)(a)(ii), after “(g)” insert “, (ga)”;

(c) in subsection (2)(a), for “or (g)” substitute “, (g) or (ga)”;

(d) after subsection (3) insert—

“(4) In subsections (1) and (2), “order” includes decision, settlement and instrument.

(5) In the case of a decision, settlement or instrument mentioned in paragraph (aa)

of the definition of “maintenance order” in section 106, the reference in subsection (1)(a)(i) to the making of the order is to be construed as a reference—

(a) in the case of a decision, to the making of the decision;

(b) in the case of a settlement, to the approval by or, as the case may be, conclusion before a court of the settlement;

(c) in the case of an instrument, to the authentication by a competent authority of the instrument.”.

(3) In section 55 (review and termination of current maintenance arrestment)—

(a) in subsection (9), for “or (g)” substitute “, (g) or (ga)”;

(b) after subsection (9) insert—

“(10) In subsections (8)(a) and (9), “order” includes decision, settlement and instrument.”.

(4) In section 66 (recall and variation of conjoined arrestment order)—

(a) in subsection (5), for “or (g)” substitute “, (g) or (ga)”;

(b) after subsection (10) insert—

“(11) In subsections (4)(b) and (5), “order” includes decision, settlement and instrument.”.

(5) In section 73A(4) (arrestment and action of furthcoming: interpretation), in the definition of

“decree”, after paragraph (d) insert—

“(da) a decision, court settlement or authentic instrument (within the meaning of Article 2 of the Maintenance Regulation) which is enforceable in Scotland by virtue of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011;”.

(6) In section 106 (interpretation)—

(a) in the definition of “maintenance order”—

(i) after paragraph (a) insert—

“(aa) a decision, court settlement or authentic instrument (within the meaning of Article 2 of the Maintenance Regulation) which falls to be enforced by the sheriff court by virtue of Section 1 of Chapter IV of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011;”;

(ii) after paragraph (g) insert—

“(ga) a decision, court settlement or authentic instrument (within the meaning of Article 2 of the Maintenance Regulation) which is registered in Scotland under the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011;”;

(b) after that definition insert—

““the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.

### **Children Act 1989 (c.41)**

#### **12.—**

(1) Schedule 1 to the Children Act 1989 is amended as follows.

(2) In paragraph 10—

(a) in sub-paragraph (2), for “Where” substitute “Subject to sub-paragraph (2A), where”;

(b) after that sub-paragraph insert—

“(2A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) the requirement as to domicile or residence in sub-paragraph (2) does not apply to the application or that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.

(2B) In sub-paragraph (2A), “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) For paragraph 14 substitute—

#### **“14.—**

(1) If an application under paragraph 1 or 2, or part of such an application, relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.

(2) In sub-paragraph (1), “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

### **Child Support Act 1991 (c.48)**

#### **13.**

In section 44 of the Child Support Act 1991, after subsection (3) insert—

“(4) The Commission does not have jurisdiction under this section if the exercise of jurisdiction would be contrary to the jurisdictional requirements of the Maintenance Regulation.

(5) In subsection (4) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

### **Social Security Administration Act 1992 (c.5)**

#### **14.**

In section 108<sub>1</sub> of the Social Security Administration Act 1992 (reduction of expenditure on income support: certain maintenance orders to be enforceable by the Secretary of State)—

(a) in subsection (4)(a)—

(i) insert “or” at the end of sub-paragraph (ii);

- (ii) paragraph (iv) and the “or” immediately preceding it are repealed;
- (b) after that paragraph, but before the “and” immediately following it insert—  
“(aa) to apply for recognition and enforcement of the maintenance order under the Maintenance Regulation, to the extent permitted by Article 64 of that Regulation;”;
- (c) after subsection (8) insert—  
“(9) In this section “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Notes**

<sup>1</sup> Section 108 is prospectively repealed by sections 9(3)(b) and 58(1) of and Schedule 7 to the Welfare Reform Act 2009 (c.24). Subsection (4)(a)(iv) was inserted by article 5 and paragraph 24(c) of the Schedule to S.I.2001/3929, and amended by regulation 5 and paragraph 16 of the Schedule to S.I.2007/1655. Subsection (8) was substituted by section 57(1) of, and paragraph 2 of Schedule 7 to the Child Maintenance and Other Payments Act 2008 (c.6).

**Social Security Administration (Northern Ireland) Act 1992 (c.8)**

**15.**

In section 103<sup>1</sup> of the Social Security Administration Act (Northern Ireland) 1992 (reduction of expenditure on income support: certain maintenance orders to be enforceable by the Department)—

- (a) in subsection (4)(a)—
  - (i) insert “or” at the end of sub-paragraph (ii);
  - (ii) paragraph (iv) and the “or” immediately preceding it are repealed;
  - (b) after that paragraph, but before the “and” immediately following it insert—  
“(aa) to apply for recognition and enforcement of the maintenance order under the Maintenance Regulation, to the extent permitted by Article 64 of that Regulation;”;
  - (c) after subsection (8) insert—  
“(9) In this section “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Notes**

<sup>1</sup> Section 103 is prospectively repealed by sections 9(3)(b) and 34(1) of and Schedule 4 to the Welfare Reform Act (Northern Ireland) 2010 (c.13). Subsection (4)(a)(iv) was inserted by article 5 and paragraph 24(c) of the Schedule to S.I.2001/3929, and amended by regulation 5 and paragraph 16 of the Schedule to S.I.2007/1655. Subsection (8) was substituted by section 38(1) of, and paragraph 2 of Schedule 4 to the Child Maintenance Act (Northern Ireland) 2008 (c.10).

**Civil Partnership Act 2004 (c.33)**

**16.—**

- (1) The Civil Partnership Act 2004 is amended as follows.
- (2) In section 227 (Scottish ancillary and collateral orders)—
  - (a) in subsection (3), for “If” substitute “Subject to subsections (3A) and (3B), if”;
  - (b) in subsection (3), for “the application unless—” substitute—  
“the application.
  - (3A) The court may not entertain the application if—”;
  - (c) after the subsection (3A) so formed insert—  
“(3B) If the application or part of it relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance

Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(d) after subsection (5) insert—

“(6) In this section “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) In Schedule 5, in Part 9 (failure to maintain: financial provision (and interim orders)), in paragraph 39—

(a) in sub-paragraph (2) for the words from “unless” to the end substitute “unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;

(b) after sub-paragraph (4) insert—

“(5) In this paragraph, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(4) In Schedule 5, in Part 13 (consent orders and maintenance agreements), in paragraph 69—

(a) in sub-paragraph (1) at the beginning insert “Subject to sub-paragraph (1A),”;

(b) after that sub-paragraph, insert—

“(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) the requirement as to domicile or residence in sub-paragraph (1)(b) does not apply to the application or that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(c) after sub-paragraph (6) insert—

“(7) In this paragraph, “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(5) In Schedule 6, in Part 8 (financial relief in magistrates' courts: supplementary), in paragraph 47<sub>1</sub>—

47<sub>1</sub>—

(a) in sub-paragraph (1), after “Subject to” insert “sub-paragraph (1A) and to”;

(b) after that sub-paragraph insert—

“(1A) If an application or part of an application for an order under this Schedule relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, a magistrates' court may not entertain that application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(c) after sub-paragraph (4) insert—

“(5) In this paragraph “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the

Kingdom of Denmark.”.

(6) In Schedule 7, in Part 1 (financial relief in England and Wales after overseas dissolution etc of

a civil partnership)—

(a) in paragraph 7—

(i) in sub-paragraph (1), at the beginning insert “Subject to sub-paragraph (6),”;

(ii) after sub-paragraph (5) insert—

“(6) If an application or part of an application relates to a matter where jurisdiction falls to be determined by the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.

(7) In sub-paragraph (6) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”;

(b) in paragraph 8—

(i) in sub-paragraph (2), at the beginning insert “Subject to sub-paragraph (4),”;

(ii) after sub-paragraph (3) insert—

“(4) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in sub-paragraph (2) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule.

(5) In sub-paragraph (4) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(7) In Schedule 11, in Part 2 (circumstances in which the court may entertain application for financial

provision), in paragraph 2<sub>2</sub>—

(a) in sub-paragraph (1) for “sub-paragraph (4)” substitute “sub-paragraphs (3A) and (4)”;

(b) after sub-paragraph (3) insert—

“(3A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) those requirements are to be satisfied in respect of the application, or that part of it, instead of the requirements set out in sub-paragraph (2), and

(b) the condition mentioned in sub-paragraph (3)(c) does not apply.”;

(c) in sub-paragraph (4) the words from “or by virtue of Council Regulation” to “p 62)” are repealed;

(d) after that sub-paragraph insert—

“(5) In this paragraph “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(8) In Schedule 15, in Part 8 (failure to maintain: financial provision (and interim orders)), in

paragraph 34—

(a) in sub-paragraph (2), for the words from “unless” to the end substitute “unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;

(b) after sub-paragraph (4) insert—

“(5) In this paragraph “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(9) In Schedule 15, in Part 12 (consent orders and maintenance agreements), in paragraph 62—

(a) in sub-paragraph (1), at the beginning insert “Subject to sub-paragraph (1A),”;

(b) after sub-paragraph (1) insert—

“(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) the requirement as to domicile or residence in sub-paragraph (1)(b) does not apply to the application or to that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(c) after sub-paragraph (6) insert—

“(7) In this paragraph “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(10) In Schedule 17, in Part 1 (financial relief in Northern Ireland after overseas dissolution etc of

a civil partnership)—

(a) in paragraph 7—

(i) in sub-paragraph (1), at the beginning insert “Subject to sub-paragraph (6),”;

(ii) after sub-paragraph (5), insert—

“(6) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.

(7) In sub-paragraph (6) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”;

(b) in paragraph 8—

(i) in sub-paragraph (2), at the beginning insert “Subject to sub-paragraph (4),”;

(ii) after sub-paragraph (3) insert—

“(4) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in sub-paragraph (2) if to do so would be inconsistent with the jurisdictional requirements of

that Regulation and that Schedule.

(5) In sub-paragraph (4) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Notes**

<sup>1</sup> Paragraph 47(4) was inserted by article 2 of and paragraphs 21 and 23 of Schedule 1 to S.I.2006/1016.

<sup>2</sup> Paragraph 2(4) was amended by regulation 5 of and paragraph 18 of the Schedule to S.I.2007/1655.

**Maintenance and Affiliation Orders Act (Northern Ireland) 1966 (c. 35) (NI)**

**17.—**

(1) The Maintenance and Affiliation Orders Act (Northern Ireland) 1966 is amended as follows.

(2) Section 10 (orders to which this Part applies) is amended as follows.

(3) In subsection (5)<sup>1</sup>, after “an order” insert “, decision, settlement or instrument”.

(4) After subsection (5), insert—

“(6) For the purposes of this section—

(a) a maintenance decision which is enforceable by a court of summary jurisdiction by virtue of Section 1 of Chapter IV of the Maintenance Regulation and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court;

(b) a maintenance decision which is registered by a court of summary jurisdiction under the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court;

(c) an authentic instrument or court settlement which is enforceable by a court of summary jurisdiction by virtue of Article 48 of the Maintenance Regulation (application of provisions relating to maintenance decisions to authentic instruments and court settlements) and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 is to be deemed to be a maintenance order made by that court.

(7) In subsection (6) —

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“authentic instrument” and “court settlement” have the meanings given by Article 2 of the Maintenance Regulation;

“maintenance decision” means a decision within the meaning of the Maintenance Regulation.”.

(5) In section 13A<sup>2</sup> (variation etc, of orders registered in the High Court), in sub-paragraph (1),

after “section 10(5)” insert “or section 10(6)”.

**Notes**

<sup>1</sup> Section 10(5) was inserted by section 22(1) of and paragraph 5 of the Schedule to the Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18).

<sup>2</sup> Section 13A was inserted by Article 11 of and paragraph 2 of Schedule 1 to S.I.1993/1576 (N.I.6).

**Matrimonial Causes (Northern Ireland) Order 1978 (SI 1978/1045 (NI 15))**

**18.—**

(1) The Matrimonial Causes (Northern Ireland) Order 1978 is amended as follows.

(2) In Article 2<sup>1</sup> (interpretation), in paragraph (2), after the definition of “maintenance calculation”

insert—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) In Article 37 (alteration of agreements by the court, or by a court of summary jurisdiction, during lives of the parties)—

(a) in paragraph (1), for “paragraph (3)” substitute “paragraphs (1A) and (3)”;

(b) after that paragraph insert—

“(1A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 then—

(a) the requirement as to domicile or residence in paragraph (1) does not apply to the application or that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”.

(4) In Article 49 (jurisdiction of court), for paragraph (5), substitute—

“(5) The court shall not entertain an application for financial provision under Article 29 unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

#### Notes

<sup>1</sup> In Article 2, the definition of maintenance calculation was substituted by section 6 and paragraph 3 of Schedule

3 to the Child Support Pensions and Social Security Act (Northern Ireland) 2000 (c.4) (N.I.).

### **Domestic Proceedings (Northern Ireland) Order 1980 (SI 1980/563 (NI 5))**

#### **19.**

In the Domestic Proceedings (Northern Ireland) Order 1980, in Article 32 (jurisdiction)—

(a) in paragraph (1), after “Subject to” insert “paragraph (1A) and to”;

(b) after that paragraph, insert—

“(1A) If an application or part of an application for an order under this Order relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, a court of summary jurisdiction may not entertain that application or that part of it unless it has jurisdiction to do so by virtue of that Regulation and that Schedule.”;

(c) after paragraph (5), insert—

“(6) In this Article “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

### **Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981/1675 (NI 26))**

#### **20.—**

(1) The Magistrates' Courts (Northern Ireland) Order 1981 is amended as follows.

(2) In Article 86<sup>1</sup> (revocation, variation, etc of orders for periodical payment), after paragraph (1), insert—

“(1A) The power under paragraph (1) is not exercisable in relation to a maintenance order which falls to be enforced by a court of summary jurisdiction by virtue of—

(a) Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark and the Civil Jurisdiction and Judgments

(Maintenance) Regulations 2011;

(b) Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.”.

(3) Article 87<sup>2</sup> (remission of arrears and manner in which arrears to be paid) is amended as follows.

(4) After paragraph (1), insert—

“(1A) The power under paragraph (1) is not exercisable in relation to a maintenance order which falls to be enforced by a court of summary jurisdiction by virtue of—

(a) Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011;

(b) Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.”.

(5) In paragraph (7), in the definition of “non-Northern Ireland maintenance order”—

(a) the “or” at the end of sub-paragraph (b) is repealed;

(b) at the end of paragraph (c) insert—

“or

(d) a maintenance order which falls to be enforced by a magistrates' court by virtue of Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

(6) In Article 88<sup>3</sup> (nature of domestic proceedings), in paragraph (a), for the words from “Council

Regulation (EC) No 44/2001” to the end, substitute—

“Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.

(7) Article 98<sup>4</sup>, (enforcement of orders for periodical payment of money) is amended as follows.

(8) After paragraph (1), insert—

“(1A) The power in paragraph (1) is exercisable at any time after the expiration of 14 days, and before the expiration of 3 years, from the date of default, or the expiration of any longer limitation period under the law of the State of origin in relation to a maintenance order which falls to be enforced by a court of summary jurisdiction by virtue of Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”.

(9) After paragraph (11)(b) insert—

“(bb) maintenance orders which fall to be enforced by a court of summary jurisdiction by virtue of Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark, and the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011;”.

(10) After paragraph (12) insert—

“(13) Paragraph (12) is subject to—

(a) Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October between the European Community and the Kingdom of Denmark, and

(b) Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.”.

**Notes**

1 Article 86 was substituted by Article 7 of S.I.1993/1576 (N.I.6). It is modified by section 9 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (c.18), section 22 of the Maintenance Orders Act 1950 (c.37) and section 13 of the Maintenance and Affiliation Orders Act (Northern Ireland) 1966 (c.35) (N.I.).

2 Article 87 was substituted by Article 9(2) of S.I.1993/1576 (N.I.6). It was amended by Article 5 and paragraphs 13 and 14 of Schedule 3 to S.I.2001/3929 and by regulation 5 and paragraphs 22 and 23 of the Schedule to S.I.2007/1655.

3 Article 88 was amended by sections 15(4) and 36(6) of and Parts 1 and III of Schedule 12 to the Civil Jurisdiction and Judgments Act 1982 (c.27), by Article 5 of and paragraphs 13 and 15 of Schedule 3 to S.I.2001/3929 and by regulation 5 and paragraphs 22 and 24 of the Schedule to S.I.2007/1655.

4 Article 98 is modified by section 5(6A) of the Civil Jurisdiction and Judgments Act 1982 (c.27). Section 5(6A) was inserted by S.I.1993/1576 (N.I.6).

5 Article 98(11) was amended by sections 15(4) and 36(6) of, and Parts I and III of Schedule 12 to, the Civil Jurisdiction and Judgments Act 1982 (c.27), by Article 5 of and paragraph 16 of Schedule 3 to S.I.2001/3929, and by regulation 5 and paragraph 25 of the Schedule to S.I.2007/1655.

**Matrimonial and Family Proceedings (Northern Ireland) Order 1989 (SI 1989/677 (NI 4))**

**21.—**

(1) The Matrimonial and Family Proceedings (Northern Ireland) Order 1989 is amended as follows.

(2) In Article 19 (jurisdiction of the court)—

(a) in paragraph (1), for “paragraph (2)”, substitute “paragraphs (1A) and (2)”;

(b) after that paragraph insert—

“(1A) If an application or part of an application for an order under this Part relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, those requirements are to determine whether the court has jurisdiction to entertain the application or that part of it.”;

(c) in paragraph (2) the words from “or by virtue of the Council Regulation” to “commercial matters” are repealed;

(d) after that paragraph, insert—

“(3) “The Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) In Article 20 (duty of the court to consider whether Northern Ireland is the appropriate venue for the application) —

(a) at the beginning of paragraph (1), insert “Subject to paragraph (3),”;

(b) after paragraph (2), insert—

“(3) If the court has jurisdiction in relation to the application or part of it by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court may not dismiss the application or that part of it on the ground mentioned in paragraph (1) if to do so would be inconsistent with the jurisdictional requirements of that Regulation and that Schedule.

(4) “The Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Child Support (Northern Ireland) Order 1991 (SI 1991/2628 (NI 23))**

**22.**

In the Child Support (Northern Ireland) Order 1991, in Article 41 (jurisdiction), after paragraph

(3) insert—

“(4) The Department does not have jurisdiction under this Article if the exercise of jurisdiction would be contrary to the jurisdictional requirements of the Maintenance Regulation.

(5) In paragraph (4) “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2))**

**23.—**

(1) Schedule 1 to the Children (Northern Ireland) Order 1995 is amended as follows.

(2) In paragraph 12—

(a) in sub-paragraph (2) for “Where” substitute “Subject to sub-paragraph (2A), where”;

(b) after that sub-paragraph, insert—

“(2A) If an application or part of an application relates to a matter where jurisdiction falls to be determined by reference to the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011—

(a) the requirement as to domicile or residence in sub-paragraph (2) does not apply to the application or that part of it, but

(b) the court may not entertain the application or that part of it unless it has jurisdiction by virtue of that Regulation and that Schedule.

(2B) In sub-paragraph (2A), “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

(3) For paragraph 16 substitute—

**“16.—**

(1) Where jurisdiction in relation to the subject-matter of an application under paragraph 1 to this Schedule would fall to be determined by the jurisdictional requirements of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the court will not entertain the application unless it has jurisdiction by virtue of the Maintenance Regulation and the 2011 Regulations.

(2) In sub-paragraph (1), “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

**The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order**

**2001**

**24.—**

(1) The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order

2001 is amended as follows.

(2) In Article 1(3)(b) delete “and maintenance orders”.

- (3) In Article 2(1) delete “(b) concern maintenance as if they were maintenance orders”.
- (4) In Article 4 delete “or maintenance orders, as appropriate”.

## **The Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order**

**1993**

**25.—**

(1) The Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993

is amended as follows.

(2) In Schedule 1, references to the following Hague Convention countries are revoked—

- (a) Denmark;
- (b) Federal Republic of Germany;
- (c) Finland;
- (d) France;
- (e) Italy;
- (f) Luxembourg;
- (g) Netherlands;
- (h) Portugal;
- (i) Republic of Estonia;
- (j) Republic of Poland;
- (k) Slovakia;
- (l) Spain;
- (m) Sweden;
- (n) the Czech Republic.

(3) Schedule 2 is amended as follows—

(a) in paragraph 3(2), for section 3(1) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by that paragraph) substitute—

“(1) This section applies to an application made to a magistrates' court in England and Wales if—

(a) the application is an application for a maintenance order against a person residing in a Hague Convention country, and

(b) the court has jurisdiction to entertain the application by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;

(b) in paragraph 3(5), in section 3(6D) and (6E) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by that paragraph) for “under this section” substitute “pursuant to an application to which subsection (1) applies”;

(c) for paragraph 3(6) substitute—

“(6) For subsection (7)(a) substitute—

“(a) for subsection (1) there shall be substituted—

(1) This section applies where a complaint is made to a magistrates' court in Northern Ireland if—

(a) the complaint is a complaint for a maintenance order against a person residing in a Hague Convention country, and

(b) the court has jurisdiction to entertain the complaint by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.””;

- (d) paragraph 4 is omitted;
- (e) in paragraph 5, in section 5 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by that paragraph)—
  - (i) in subsection (1), after “enforcement of the order” insert “, and in relation to which the court has jurisdiction to entertain proceedings for revocation or variation of that order by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;
  - (ii) subsection (2) is omitted;
- (f) in paragraph 9—
  - (i) in section 9(1) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by paragraph 9(2)), paragraph (b) is omitted;
  - (ii) section 9(2) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by paragraph 9(4)) is omitted;
  - (iii) after section 9(8) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as substituted by paragraph 9(4)) insert—
    - “(8A) Where a registered order was made by a court in a Member State of the European Union which was a Hague Convention country before 18th June 2011, and that court varies the order on or after that date—
      - (a) subsection (8) does not apply;
      - (b) the prescribed officer of the registering court shall record the variation of the order against the original registration.”;
- (g) for paragraph 17 substitute—
  - “**17.**  
Subsections (5A) to (7) of section 17 are omitted.”;
- (h) in paragraph 21(2), after sub-paragraph (e) insert—
  - “(ea) after that definition insert—
    - “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.
- (4) In Schedule 3, Part 1 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 (as it has effect as set out in that Schedule) is amended as follows—
  - (a) in section 3—
    - (i) for subsection (1) substitute—
      - “(1) This section applies to an application made to a magistrates' court in England and Wales if—
        - (a) the application is an application for a maintenance order against a person residing in a Hague Convention country, and
        - (b) the court has jurisdiction to entertain the application by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;
      - (ii) in section 3(6D) and (6E) for “under this section” substitute “pursuant to an application to which subsection (1) applies”;
      - (iii) for subsection (7)(a) substitute—
        - “(a) for subsection (1) there shall be substituted—
          - “(2) This section applies where a complaint is made to a magistrates' court in Northern Ireland if—
            - (a) the complaint is a complaint for a maintenance order against a person residing in a Hague Convention country, and

- (b) the court has jurisdiction to entertain the complaint by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.””;
- (b) section 4 is omitted;
- (c) in section 5—
  - (i) in subsection (1), after “enforcement of the order” insert “, and in relation to which the court has jurisdiction to entertain proceedings for revocation or variation of that order by virtue of the Maintenance Regulation and Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011.”;
  - (ii) subsection (2) is omitted;
- (d) in section 9—
  - (i) in subsection (1), paragraph (b) is omitted;
  - (ii) subsection (2) is omitted;
  - (iii) after subsection (8) insert—
    - “(8A) Where a registered order was made by a court in a Member State of the European Union which was a Hague Convention country before 18th June 2011, and that court varies the order on or after that date—
    - (a) subsection (8) does not apply;
    - (b) the prescribed officer of the registering court shall record the variation of the order against the original registration.”;
- (e) in section 17, subsections (5) to (7A) are omitted;
- (f) in section 21(1), after the definition of “maintenance order” insert—
  - ““the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.

**26.—**

- (1) Despite paragraph 25(2), the countries listed in that paragraph are to continue to be Hague Convention countries for the purposes of Part 1 of the Act, as modified by Schedule 2 to the Hague Convention Countries Order, in relation to—
  - (a) proceedings for the establishment of a maintenance order under section 3 of the Act which are continuing on 18th June 2011 pursuant to an application made before that date, save that where a maintenance order is made in those proceedings on or after that date recognition and enforcement of that order may not be sought pursuant to section 3(6D) and (6E);
  - (b) proceedings under section 5 of the Act for the variation or revocation of a maintenance order to which that section applies where those proceedings are continuing on 18th June 2011 pursuant to an application made before that date, save that where an order is made in those proceedings on or after that date, section 5(8) does not apply;
  - (c) proceedings under section 6 of the Act for registration of a maintenance order which are continuing on 18th of June 2011 where the certified copy of the order has been received by the Lord Chancellor or the Secretary of State before that date;
  - (d) enforcement or variation of a registered order pursuant to section 8 or 9 of the Act;
  - (e) the cancellation of the registration, or the transfer, of a registered order pursuant to section 10 of the Act;
  - (f) steps taken by the Lord Chancellor or the Secretary of State pursuant to section 11 of the Act in relation to a registered order.

(2) In this paragraph—

(a) “the Act” means the Maintenance Orders (Reciprocal Enforcement) Act 1972, and references to particular provisions of the Act are to those provisions as modified by Schedule 2 to the Hague Convention Countries Order;

(b) “the Hague Convention Countries Order” means the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993;

(c) “registered order” has the meaning given in section 21(1) of the Act.

### **The Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1993** **27.**

The Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1993 is revoked.

### **28.—**

(1) Despite paragraph 27, Part 1 of the Act, as modified by Schedule 1 to the Republic of Ireland Order continues to have effect in relation to—

(a) proceedings for the establishment of a maintenance order under section 3 of the Act which are continuing on 18th June 2011 pursuant to an application made before that date, save that where a maintenance order is confirmed in those proceedings on or after that date, section 3(6C)(b) does not apply;

(b) proceedings for the variation or revocation of a maintenance order under section 5 of the Act which are continuing on pursuant to an application made before that date;

(c) proceedings for registration of a maintenance order under section 6 of the Act which are continuing on 18th June 2011, where the certified copy of the order has been received by the Lord Chancellor or the Secretary of State before that date;

(d) enforcement of a registered order pursuant to section 8 of the Act;

(e) the cancellation of the registration, or the transfer, of a registered order pursuant to section 10 of the Act;

(f) steps taken by the Lord Chancellor or the Secretary of State pursuant to section 11 of the Act in relation to a registered order.

(2) Despite paragraph 27, where a registered order has been varied or revoked by a court in the Republic of Ireland on or after 18th June 2011—

(a) section 9(2) of the Act applies;

(b) section 9(3) of the Act has effect as if for “shall register in the prescribed manner any order varying a registered order” there were substituted “shall record the variation of the order against the original registration.”.

(3) In this paragraph—

(a) “the Act” means the Maintenance Orders (Reciprocal Enforcement) Act 1972, and references to particular provisions of the Act are to those provisions as modified by Schedule 1 to the Republic of Ireland Order;

(b) “the Republic of Ireland Order” means the Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1993;

(c) “registered order” has the meaning given in section 21(1) of the Act.

### **The Armed Forces (Forfeitures and Deductions) Regulations 2009**

#### **29.—**

(1) The Armed Forces (Forfeitures and Deductions) Regulations 2009 are amended as follows.

(2) In Regulation 2, after the definition of the 2000 Council Regulation, insert—

““the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October

2005 between the European Community and the Kingdom of Denmark;”.

(3) In Regulation 8—

(a) after paragraph (2), insert—

“(2A) Subject to paragraph (5), if an external maintenance order is enforceable in the United Kingdom without prior registration by virtue of Section 1 of Chapter IV of the Maintenance Regulation, the Defence Council, or an officer authorised by them, may make an order authorising a deduction to be made from the pay of a relevant person and to be appropriated in or towards satisfaction of a payment which he is required to make under the maintenance order.”;

(b) in paragraph (5), after “paragraph”, insert “(2A) or”;

(c) in paragraph (10)(a)—

(i) in subparagraph (iii), delete “or”;

(ii) after subparagraph (iv) insert “or”; and

(iii) insert

“(v) Section 2 of Chapter IV of the Maintenance Regulation;”.

(4) In Regulation 9, in subparagraph (2)—

(a) after (a), delete “or”;

(b) after (b), insert “or”; and

(c) insert—

“(c) the Maintenance Regulation.”.

(5) In Regulation 11, at paragraph (2)(b), for “or 8(2)”, substitute “, 8(2) or 8(2A)”.

## **The Civil Legal Aid (Scotland) Regulations 2002**

### **30.**

In regulation 46 of the Civil Legal Aid (Scotland) Regulations 2002<sup>1</sup>—

(a) after paragraph (1)(b) insert—

“(c) application for legal aid is made in relation to proceedings in respect of which a sheriff court has jurisdiction, or an appeal in respect of which the Inner House of the Court of Session has jurisdiction, by virtue of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 by, or on behalf of, a person—

(i) who has made an application to the Scottish Ministers under Article 56 of the Maintenance Regulation; or

(ii) who, in a Member State other than the United Kingdom, benefited in connection with (as the case may be) the decision being made, the authentic instrument being established or the court settlement being approved or concluded, from either—

(aa) complete or partial legal aid or exemption from costs or expenses; or

(bb) free proceedings before an administrative authority listed in Annex X to the Maintenance Regulation.”;

(b) after paragraph (2) insert—

“(3) In the case of an application made in the circumstances referred to in paragraph (1)(c)(i), the Act is further modified in accordance with regulation 45(2)(a).

(4) In paragraph (1)(c), “the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark.”.

### **Notes**

<sup>1</sup> Regulation 46 has been amended by S.S.I. 2011/161.

**THE CIVIL JURISDICTION AND JUDGMENTS  
(MAINTENANCE) (RULES OF COURT) REGULATIONS 2011**

**SI 2011/1215**

*Made 5th May 2011*

*Laid before Parliament 5th May 2011*

*Coming into force 27th May 2011*

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to private international law<sup>1</sup>, makes the following Regulations in exercise of the powers conferred by section 2(2) of that Act.

**Notes**

<sup>1</sup> The European Communities (Designation)(No.2) Order 2008 (S.I.2008/1792).

**Citation, commencement and extent**

**1.—**

(1) These Regulations may be cited as the Civil Jurisdiction and Judgments (Maintenance) (Rules of Court) Regulations 2011, and shall come into force on 27th May 2011.

(2) Regulation 2 extends to England and Wales only.

(3) Regulations 3 to 7 extend to England and Wales, Scotland and Northern Ireland.

**Amendments to the Magistrates' Courts Act 1980**

**2.**

In section 65 of the Magistrates' Courts Act 1980<sup>1</sup> (meaning of family proceedings)—

(a) in subsection (1)—

(i) after paragraph (r) insert—

“(ra)

Council Regulation (EC) No 4/2009<sup>2</sup> including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark<sup>3</sup>”;

(ii) in paragraphs (i) and (ii) (following the words “it does not include—”), for “or registered” substitute “, registered or enforceable”;

(b) in subsection (2)(a), for “and (r)” substitute “, (r) and (ra)”;

(c) in subsection (2)(a) and (b), for “or registered” substitute “, registered or enforceable”.

**Notes**

<sup>1</sup> Relevant amendments to section 65 were made by S.I. 2001/3929, article 5 and Schedule 3 paragraphs 10 and 11, and by S.I. 2007/1655, regulation 5 and the Schedule, Part 1, paragraphs 8 and 9.

<sup>2</sup> OJ No. L7, 10.1.2009, p.1-79.

<sup>3</sup> OJ No. L299, 16.11.2005, p.62-67.

**Amendments to the Civil Jurisdiction and Judgments Act 1982**

**3.**

The Civil Jurisdiction and Judgments Act 1982<sup>1</sup> is amended as follows.

**Notes**

<sup>1</sup> Section 1 was amended by the Civil Jurisdiction and Judgments Act 1991 section 2, S.I. 1989/1346 article 3, S.I.1990/2591 articles 3 to 6, S.I. 2000/1824 articles 3, 4 and 9, S.I. 2001/3929 article 4, Schedule 2 Part I,

paragraph 1, S.I. 2007/1655 regulation 2, and by S.I. 2009/3131 regulations 2 and 3. Section 48 was amended by

the Civil Jurisdiction and Judgments Act 1991 section 3, Schedule 2, paragraph 23, and by S.I. 2001/3929 article 4, Schedule 2, Part V, paragraph 17. Section 50 was amended by the Civil Jurisdiction and Judgments Act 1991 section 3, Schedule 2, paragraph 25, the Constitutional Reform Act 2005 section 145, Schedule 17, Part 2, paragraph 23, S.I. 1990/2591 article 9, S.I. 2000/1824 article 7, S.I. 2001/3929 article 4, Schedule 2, Part V paragraph 18, and S.I. 2009/3131 regulations 2 and 24(a) and (b).

#### **4.—**

(1) Section 1 (interpretation of references to the Conventions and Contracting States) is amended as follows.

(2) In subsection (1) after the definition of “the Lugano Convention” insert—  
““the Maintenance Regulation” means the Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;”.

(3) In subsection (3) after the definition of “Brussels Contracting State” insert—  
““Maintenance Regulation State”, in any provision, in the application of that provision in relation to the Maintenance Regulation means a Member State;”.

#### **5.—**

(1) Section 48 (matters for which rules of court may provide) is amended as follows.

(2) In subsection (1), at the end insert “or the Maintenance Regulation”.

(3) In subsection (2), for the words from “certificate or judgment” to “may be enforced,” substitute—

“certificate or judgment—

(a) which has been registered in any court under any provision of this Act or the Regulation,

(b) which is enforceable in the United Kingdom by virtue of Section 1 of Chapter IV of the Maintenance Regulation, or

(c) which has been registered for the purposes of Section 2 of that Chapter, may be enforced.”.

(4) In subsection (3)—

(a) in the opening words, after “the Regulation” insert “, the Maintenance Regulation”;

(b) in paragraph (a) for “or Regulation State”, in both places, substitute “, Regulation State or Maintenance Regulation State”;

(c) in paragraph (b) for “or Regulation States” substitute “, Regulation States or Maintenance Regulation States”;

(d) in paragraph (e) for “or Regulation State” substitute “, Regulation State or Maintenance Regulation State”;

(e) in paragraph (g) for “or Regulation States” substitute “, Regulation States or Maintenance Regulation States”.

#### **6.**

In section 50 (interpretation: general) after the definition of “magistrates' court” insert—

““the Maintenance Regulation” has the meaning given by section 1(1);

“Maintenance Regulation State” has the meaning given by section 1(3);”.

### **Authentic instruments and court settlements**

#### **7.—**

(1) Section 48 of the Civil Jurisdiction and Judgments Act 1982 (matters for which rules of court may provide) applies in relation to authentic instruments and court settlements as if they were maintenance decisions to which the Maintenance Regulation applies.

(2) The reference in paragraph (1) to authentic instruments and court settlements is to those authentic instruments and court settlements which are to be recognised and enforceable in the same way as maintenance decisions by virtue of Article 48 of the Maintenance Regulation.

(3) In this regulation—

“the Maintenance Regulation” means Council Regulation (EC) No 4/2009 including as applied in relation to Denmark by virtue of the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark;

“authentic instrument” and “court settlement” have the meanings given in Article 2 of the Maintenance Regulation.

*Signed by authority of the Secretary of State*

*McNally*

Minister of State

Ministry of Justice

5th May 2011

**FAMILY LAW (SCOTLAND) ACT 1985 C. 37**

**ss. 8, 9, 11, 24, 25, and 26**

**8.— Orders for financial provision.**

(1) In an action for divorce, either party to the marriage [ and in an action for dissolution of a civil partnership, either partner] <sup>1</sup> may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum [...] <sup>2</sup> to him by the other party to the [action] <sup>3</sup> ;

[(aa) an order for the transfer of property to him by the other party to the [action] <sup>3</sup> ;

] <sup>4</sup>

(b) an order for the making of a periodical allowance to him by the other party to the [action] <sup>3</sup> ;

[(baa) a pension sharing order;

] <sup>5</sup>

[(bab) a pension compensation sharing order;

] <sup>6</sup>

[(ba) an order under section 12A(2) or (3) of this Act;

] <sup>7</sup>

[(bb) an order under section 12B(2);

] <sup>8</sup>

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—

(a) justified by the principles set out in section 9 of this Act; and

(b) reasonable having regard to the resources of the parties.

(3) An order under subsection (2) above is in this Act referred to as an “order for financial provision”.

[(4) The court shall not, in the same proceedings, make both a pension sharing

order and an order under section 12A(2) or (3) of this Act in relation to the same pension arrangement.

[...] <sup>10</sup>

(5) Where, as regards a pension arrangement, the parties to a marriage [or the partners in a civil partnership ] <sup>11</sup> have in effect a qualifying agreement which contains a term relating to pension sharing, the court shall not—

- (a) make an order under section 12A(2) or (3) of this Act; or
- (b) make a pension sharing order,

relating to the arrangement unless it also sets aside the agreement or term under section 16(1)(b) of this Act.

(6) The court shall not make a pension sharing order in relation to the rights of a person under a pension arrangement if there is in force an order under section 12A(2) or (3) of this Act which relates to benefits or future benefits to which he is entitled under the pension arrangement.

(7) In subsection (5) above—

- (a) “term relating to pension sharing” shall be construed in accordance with section 16(2A) of this Act; and
- (b) “qualifying agreement” has the same meaning as in section 28(3) of the Welfare Reform and Pensions Act 1999.

] <sup>9</sup>

[(8) The court shall not, in the same proceedings, make both a pension compensation sharing order and an order under section 12B(2) in relation to the same PPF compensation.

(9) The court shall not make a pension compensation sharing order in relation to rights to PPF compensation that—

- (a) derive from rights under a pension scheme which is subject to an order made under section 12A(2) or (3) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
- (b) derive from rights under a pension scheme which were at any time the subject of a pension sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons,
- (c) are or have been the subject of a pension compensation sharing order in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons, or
- (d) are the subject of an order made under section 12B(2) in relation to the marriage or (as the case may be) civil partnership or a previous one between the same persons.

(10) Where, as regards PPF compensation, the parties to a marriage or the partners in a civil partnership have in effect a qualifying agreement which contains a term relating to pension compensation sharing, the court shall not—

(a) make an order under section 12B(2); or

(b) make a pension compensation sharing order,

relating to the compensation unless it also sets aside the agreement or term under section 16(1)(b) of this Act.

(11) For the purposes of subsection (10)—

(a) the expression “term relating to pension compensation sharing” is to be construed by reference to section 16(2AA) of this Act; and

(b) a qualifying agreement is one to which section 110(1) of the Pensions Act 2008 relates.

] <sup>12</sup>

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1. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.14(2)(a) (December 5, 2005)
  2. Words repealed by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), s. 74, Sch. 8 para. 34(a), Sch. 9
  3. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.14(2)(b) (December 5, 2005)
  4. S. 8(1)(aa) inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40), s. 74, Sch. 8 para. 34(b)
  5. Added by Welfare Reform and Pensions Act 1999 c. 30 Pt III s.20(2) (November 11, 1999 for the purpose of making regulations; December 1, 2000 otherwise)
  6. Added by Pensions Act 2008 c. 30 Sch.7 para.2(a)(i) (April 6, 2011)
  7. Added by Pensions Act 1995 c. 26 Pt IV s.167(1) (July 15, 1996 for purposes specified in SI 1996/1843 art.3(a); August 19, 1996 otherwise, subject to savings specified in SI 1996/1843 art.4)
  8. Added by Pensions Act 2008 c. 30 Sch.7 para.2(a)(ii) (April 6, 2011)
  9. Added by Welfare Reform and Pensions Act 1999 c. 30 Sch.12(I) para.6 (December 1, 2000)
  10. Repealed by Pensions Act 2008 c. 30 Sch.11(4) para.1 (April 6, 2011)
  11. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.14(3) (December 5, 2005)
  12. Added by Pensions Act 2008 c. 30 Sch.7 para.2(c) (April 6, 2011)

## 9.— Principles to be applied.

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage [ or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership] <sup>1</sup> ;

(b) fair account should be taken of any economic advantage derived by either [person] <sup>2</sup> from contributions by the other, and of any economic disadvantage suffered by either [person] <sup>2</sup> in the interests of the other [person] <sup>2</sup> or of the family;

[(c) any economic burden of caring, should be shared fairly between the persons—

(i) after divorce, for a child of the marriage under the age of 16 years;

(ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family [ or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents] <sup>4</sup> .

] <sup>3</sup>

[(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from—

(i) the date of the decree of divorce, to the loss of that support on divorce;

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution.

] <sup>5</sup>

(e) a [person] <sup>6</sup> who at the time of the divorce [ or of the dissolution of the civil partnership,] <sup>7</sup> seems likely to suffer serious financial hardship as a result of the divorce [ or dissolution] <sup>7</sup> should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

“economic advantage” means advantage gained whether before or during the marriage [or civil partnership ] <sup>8</sup> and includes gains in capital, in income and in earning capacity , and “economic disadvantage” shall be construed accordingly;

“contributions” means contributions made whether before or during the marriage [ or civil partnership] <sup>8</sup> ; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(a) (December 5, 2005)

- 1.
2. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(b) (December 5, 2005)
3. Existing text renumbered as s.9(1)(c)(i) and s.9(1)(c)(ii) and words are substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(c) (December 5, 2005)
4. Words inserted by Human Fertilisation and Embryology Act 2008 c. 22 Sch.6(2) para.46 (April 6, 2009 for the purpose of enabling the exercise of any power to make orders, regulations or other instruments or other documents; September 1, 2009 otherwise)
5. Existing text renumbered as s.9(1)(d)(i), words substituted and s.9(1)(d)(ii) is added by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(d) (December 5, 2005)
6. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(e) (December 5, 2005)
7. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(2)(e) (December 5, 2005)
8. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.15(3) (December 5, 2005)

## 11.— Factors to be taken into account.

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either [person] <sup>1</sup> have been balanced by the economic advantages or disadvantages sustained by the other [person] <sup>1</sup>, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property [ or the partnership property] <sup>2</sup> or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

(b) any expenditure or loss of earning capacity caused by the need to care for the child;

(c) the need to provide suitable accommodation for the child;

(d) the age and health of the child;

(e) the educational, financial and other circumstances of the child;

(f) the availability and cost of suitable child-care facilities or services;

(g) the needs and resources of the [persons] <sup>3</sup>; and

(h) all the other circumstances of the case.

(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the [person] <sup>4</sup> who is claiming the financial provision;

(b) the duration and extent of the dependence of that [person prior to divorce or to the dissolution of the civil partnership] <sup>5</sup>;

(c) any intention of that [person] <sup>4</sup> to undertake a course of education or training;

(d) the needs and resources of the [persons] <sup>6</sup>; and

(e) all the other circumstances of the case.

(5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the [person] <sup>7</sup> who is claiming the financial provision;

(b) the duration of the marriage [ or of the civil partnership] <sup>8</sup> ;

(c) the standard of living of the [persons during the marriage or civil partnership] <sup>9</sup> ;

(d) the needs and resources of the [persons] <sup>10</sup> ; and

(e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the [person] <sup>11</sup> who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party [ to the marriage or as the case may be of either partner] <sup>12</sup> unless—

(a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or

(b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(2)(a) (December 5, 2005)

1.

2. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(2)(b) (December 5, 2005)

3. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(3) (December 5, 2005)

4. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(4)(a) (December 5, 2005)

5. Words substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(4)(b) (December 5, 2005)

6. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(4)(c) (December 5, 2005)

7. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(5)(a) (December 5, 2005)

8. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(5)(b) (December 5, 2005)

9. Words substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(5)(c) (December 5, 2005)

10. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(5)(d) (December 5, 2005)

11. Word substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(6) (December 5, 2005)

12. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.17(7) (December 5, 2005)

## 24.— Marriage not to affect property rights or legal capacity.

(1) Subject to the provisions of any enactment (including this Act), marriage [ or civil partnership] <sup>1</sup> shall not of itself affect—

(a) the respective rights of the parties to the marriage [, or as the case may be the partners in the civil partnership,] <sup>2</sup> in relation to their property;

(b) the legal capacity of [those parties or partners] <sup>3</sup> .

(2) Nothing in subsection (1) above affects the law of succession.

Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.27(a) (December 5, 2005)

- 1.
2. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.27(b) (December 5, 2005)
3. Words substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.27(c) (December 5, 2005)

## 25.— Presumption of equal shares in household goods.

(1) If any question arises (whether during or after a marriage [ or civil partnership] <sup>1</sup> ) as to the respective rights of ownership of the parties to a marriage [ or the partners in a civil partnership] <sup>2</sup> in any household goods obtained in prospect of or during the marriage [ or civil partnership] <sup>1</sup> other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question.

(2)

[For the purposes of subsection (1) above, the contrary shall not be treated as proved by reason only that while—

(a) the parties were married

(b) the partners were in civil partnership,

and living together the goods in question were purchased from a third party by either party alone or by both in unequal shares.

] <sup>3</sup>

(3) In this section “household goods” means any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial [ or civil partnership in any family] <sup>4</sup> home for the joint domestic purposes of the parties to the marriage [ or the partners] <sup>5</sup> , other than— (a) money or securities;

(b) any motor car, caravan or other road vehicle;

(c) any domestic animal.

Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.28(2)(a) (December 5, 2005)

- 1.

2. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.28(2)(b) (December 5, 2005)
3. Existing text renumbered as s.25(2)(a) and s.25(2)(b) is added by Civil Partnership Act 2004 c. 33 Sch.28(2) para.28(3) (December 5, 2005)
4. Words substituted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.28(4)(a) (December 5, 2005)
5. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.28(4)(b) (December 5, 2005)

## **26. Presumption of equal shares in money and property derived from housekeeping allowance.**

If any question arises (whether during or after a marriage [ or civil partnership] <sup>1</sup>) as to the right of a party to a marriage [ or as the case may be of a partner in a civil partnership] <sup>2</sup> to money derived from any allowance made by either party [ or partner] <sup>3</sup> for their joint household expenses or for similar purposes, or to any property acquired out such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to each party [ or partner] <sup>3</sup> in equal shares.

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1. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.29(a) (December 5, 2005)
  2. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.29(b) (December 5, 2005)
  3. Words inserted by Civil Partnership Act 2004 c. 33 Sch.28(2) para.29(c) (December 5, 2005)

**CROSS-BORDER MEDIATION (EU DIRECTIVE) REGULATIONS 2011**

**SI 2011/1133**

Made: 18 April 2011

Laid before Parliament: 27 April 2011

Coming into force: 20 May 2011

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to mediation<sup>1</sup>.

Accordingly, the Secretary of State makes the following Regulations in exercise of the powers conferred by that section.

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1. 1972 c.68. Section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1)(a) and the European Union (Amendment) Act 2008 (c.7) section 3(3), Schedule, Part 1. The Secretary of State is designated in relation to mediation by S.I. 2010/2690, article 2(1)(a).

**1.**

These Regulations may be cited as the Cross-Border Mediation (EU Directive) Regulations 2011.

**2.**

Subject to regulations 3 and 4, these Regulations come into force on 20 May 2011.

**3.**

These Regulations apply only where a mediation in relation to a relevant dispute starts on or after 20 May 2011.

**4.**

For the purposes of regulation 3, a mediation starts—

(a) except in relation to regulations 16 to 18, on the date of the agreement to mediate that is entered into by the parties and the mediator; and

(b) in relation to regulations 16 to 18, on the date mentioned in article 1(3) of the Cross-Border Mediation (Scotland) Regulations 2011.

**5.**

Part 1 of these Regulations, including this regulation, extends to the whole of the United Kingdom.

**6.**

Part 2 of these Regulations (Mediation Evidence) extends to England and Wales.

## **7.**

The remaining Parts of these Regulations have the same extent as the provisions that they amend.

## **8.**

In these Regulations—

(a) “Mediation Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters;

(b) “cross-border dispute” has the meaning given by article 2 of the Mediation Directive;

(c) “mediation” has the meaning given by article 3(a) of the Mediation Directive;

(d) “mediation administrator” means a person involved in the administration of the mediation process;

(e) “mediation evidence” means evidence arising out of or in connection with a mediation process;

(f) “mediation settlement” means the content of a mediation settlement agreement;

(g) “mediation settlement agreement” means a written agreement resulting from mediation of a relevant dispute;

(h) “mediator” has the meaning given by article 3(b) of the Mediation Directive; and

(i) “relevant dispute” means a cross-border dispute that is subject to the Mediation Directive.

## **9.**

Subject to regulation 10, a mediator or a mediation administrator has the right to withhold mediation evidence in civil and commercial judicial proceedings and arbitration.

## **10.**

A court may order that a mediator or a mediation administrator must give or disclose mediation evidence where—

(a) all parties to the mediation agree to the giving or disclosure of the mediation evidence;

(b) the giving or disclosure of the mediation evidence is necessary for overriding considerations of public policy, in accordance with article 7(1)(a) of the Mediation Directive; or

(c) the mediation evidence relates to the mediation settlement, and the giving or disclosure of the mediation settlement is necessary to implement or enforce the mediation settlement agreement.

### **Part 3 Extension of Time Limits in View of Mediation in Certain Cross-border Disputes - Amendments to Primary Legislation**

Amendments to the Prescription Act 1832

Amendments to the Equal Pay Act 1970

Amendments to the Prescription and Limitation (Scotland) Act 1973 Act

Amendments to the Sex Discrimination Act 1975

Amendments to the Limitation Act 1980

Amendments to the Foreign Limitation Periods Act 1984

Amendments to the Employment Rights Act 1996

Amendments to the Land Registration Act 2002

Amendments to the Equality Act 2010

**CROSS-BORDER MEDIATION (SCOTLAND) REGULATIONS 2011**

**SSI 2011/234**

Made: 21 March 2011

Coming into force: 6 April 2011

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 <sup>1</sup> and all other powers enabling them to do so.

In accordance with paragraph 2(2) of Schedule 2 to that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

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1. Section 2(2) was amended by paragraph 15(3) of Schedule 8 to the Scotland Act 1998 (c.46) ("the 1998 Act") (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) ("the 2006 Act")) and section 27(1)(a) of the 2006 Act and by Part 1 of the Schedule to the European Union (Amendment) Act 2008 (c.7). The functions conferred upon the Minister of the Crown under section 2(2) of the 1972 Act in so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

**1.—**

(1) These Regulations may be cited as the Cross-Border Mediation (Scotland) Regulations 2011 and come into force on 6th April 2011.

(2) They do not apply to disputes in relation to which mediation starts before 6th April 2011.

(3) For the purposes of paragraph (2), mediation starts on the date when all the parties to the dispute agree to participate in the mediation.

**2.—**

(1) In these Regulations—

"the Directive" means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters; and

"relevant cross-border dispute" means a cross-border dispute to which the Directive applies.

(2) Expressions used in the Directive have the same meaning for the purposes of these Regulations as in the Directive, unless the context otherwise requires.

**3.—**

(1) A mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation.

(2) Paragraph (1) does not apply—

(a) where all the parties to the mediation agree otherwise; or

(b) in the circumstances set out in paragraph (a) or (b) of Article 7.1 of the Directive.

#### 4.

The Prescription and Limitation (Scotland) Act 1973 is amended in accordance with regulations 5 and 6.

#### 5.—

(1) Section 14 (computation of prescriptive periods) <sup>1</sup> is amended as follows.

(2) After subsection (1) insert—

“(1A) The prescriptive period calculated in relation to a relevant cross-border dispute for the purposes of any provision of this Part of this Act is extended where the last day of the period would, apart from this subsection, fall—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(1B) Where subsection (1A) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(1C) For the purposes of subsections (1A) and (1B), a mediation ends on the date that any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.”.

(3) In subsection (2)—

(a) after ““In this section”” insert—

“—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;”

; and

(b) after ““1971”” insert—

“;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive—(a) which is about a right or obligation to which a prescriptive period applies by virtue of this Part of this Act; and

(b) to which the Directive applies.”.

1. Section 14 was amended by section 6(1) and paragraph 6 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1984 (c.45).

## 6.

After section 19D<sup>1</sup>, insert—

### **“19F Extension of limitation periods: cross-border mediation**

(1) The limitation period calculated in relation to a relevant cross-border dispute for the purposes of sections 17, 18, 18A or 18B of this Act is extended where the last day of the period would, apart from this subsection, fall—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(2) Where subsection (1) applies, the limitation period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(3) For the purpose of this section, mediation in relation to a relevant cross-

border dispute ends when any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(4) In this section—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive—(a) which is about a matter to which a limitation period applies by virtue of sections 17 to 18B; and

(b) to which the Directive applies.”.

1. A section 19D was inserted by section 171(3) of the Coroners and Justice Act 2009 (c. 25) and another by section 23(4) of the Arbitration (Scotland) Act 2010 (asp 1).

## 7.—

(1) Section 71 of the Civic Government (Scotland) Act 1982 <sup>1</sup> is amended in accordance with paragraphs (2) and (3).

(2) In subsection (2), after “shall” insert “subject to subsection (3) below”.

(3) After subsection (2), insert—

“(3) The one year period calculated in relation to a relevant cross-border dispute for the purposes of subsection (2) above is extended where it would, apart from this subsection, expire—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(4) Where subsection (3) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(5) For the purpose of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(6) In this section—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive which is about the recovery of property to which this section applies.”.

1. Section 71 applies to the disposal of lost and abandoned property under Part VI of the 1982 Act, and by virtue of sections 83 and 86E, to the disposal of certain property in possession of persons taken into police custody. Section 86E was inserted by section 6(4) of the Police (Property) Act 1997 (c.30).

## 8.—

(1) The Rent (Scotland) Act 1984 is amended in accordance with paragraphs (2) and (3).

(2) In section 37(3), at the beginning, insert ““Subject to section 37A(1) below””.

(3) After section 37 insert—

### **“37A.— Extension of time limits for recovery from landlord: cross-border mediation**

(1) The two year period calculated in relation to a relevant cross-border dispute for the purposes of section 37(3) above is extended where it would, apart from this subsection, expire—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(2) Where subsection (1) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(3) For the purpose of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure

ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(4) In this section—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive which is about an amount referred to in section 37(1) above.”.

## 9.—

(1) The Family Law (Scotland) Act 2006 is amended in accordance with paragraphs (2) to (4).

(2) In section 28(8), at the beginning, insert ““Subject to section 29A,””.

(3) In section 29(6), at the beginning, insert ““Subject to section 29A,””.

(4) After section 29 insert—

### **“29A.— Extension of time limits for applications under sections 28 and 29: cross-border mediation**

(1) This section applies to the calculation of—

(a) the one year period for the purposes of section 28(8) in relation to a relevant cross-border dispute; and

(b) the 6 month period for the purposes of section 29(6) in relation to a relevant cross-border dispute.

(2) A period referred to in subsection (1) is extended where it would, apart from this subsection, expire—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(3) Where subsection (2) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(4) For the purposes of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—

- (a) all of the parties reach an agreement in resolution of the dispute;
- (b) all of the parties agree to end the mediation;
- (c) a party withdraws from the mediation, which is the date on which—
  - (i) a party informs all of the other parties of that party's withdrawal,
  - (ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or
  - (iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or
- (d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(5) In this section—

“the Directive” means Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters;

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive which is about—(a) a sum which a court may order to be paid under section 28(2);

(b) a sum which a court may order to be paid under section 29(2); or

(c) property which a court may order to be transferred under section 29(2).”.

*FERGUS EWING*

Authorised to sign by the Scottish Ministers

St Andrew's House, Edinburgh

21st March 2011

**CIVIL LEGAL AID (SCOTLAND) AMENDMENT (NO. 2)  
REGULATIONS 2004  
SSI 2004/491), reg. 5**

**Amendment of the Civil Legal Aid (Scotland) Regulations 2002**

**5.**

After regulation 47 insert—

**“48.— Cross-border disputes**

(1) In this regulation—

“the Council Directive” means Council Directive 2003/8/EC of the European Council on improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, as corrected by a corrigendum published on 7th February 2003; and

“cross-border dispute” has the same meaning given by Article 2 of the Council Directive.

(2) These Regulations are modified to the extent provided in the following sub paragraphs in the case of a person resident outwith the United Kingdom in a Member State to which Article 1 of the Council Directive applies, who applies for legal aid for the purpose of pursuing by way of proceedings a cross-border dispute, namely—

(a) regulation 5 above is modified so as to provide that such an application for legal aid shall be in such form and completed and signed in such manner as is specified in terms of Article 16 of the Council Directive;

(b) paragraphs (1) and (4) of regulation 19 above are modified so as to provide that the Board is not required to notify its decision to grant, or as the case may be, refuse legal aid, or its grounds for refusing legal aid to that person's solicitor; and

(c) paragraph (2) of regulation 20 above is modified so as to provide that that person, or any solicitor acting for that person, is not required to intimate to any opponent an application for review of a decision by the Board to refuse legal aid.”.

### UK-PAKISTAN JUDICIAL PROTOCOL ON CHILDREN MATTERS

The President of the Family Division and the Hon. Chief Justice of Pakistan in consultation with senior members of the family judiciary of the United Kingdom ("the UK") and the Islamic Republic of Pakistan ("Pakistan"), having met on 15th to 17th January 2003 in the Royal Courts of Justice in London, reach the following consensus:

Whereas:

- Desiring to protect the children of the UK and Pakistan from the harmful effects of wrongful removal or retention from one country to the other;
- Mindful that the UK and Pakistan share a common heritage of law and a commitment to the welfare of children;
- Desirous of promoting judicial cooperation, enhanced relations and the free flow of information between the judiciaries of the UK and Pakistan; and
- Recognising the importance of negotiation, mediation and conciliation in the resolution of family disputes;

It is agreed that:

1. In normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence.
2. If a child is removed from the UK to Pakistan, or from Pakistan to the UK, without the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence, the judge of the court of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.
3. If a child is taken from the UK to Pakistan, or from Pakistan to the UK, by a parent with visitation/access/contact rights with the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence or in consequence of an order from that court permitting the visit, and the child is retained in that country after the end of the visit without the consent or in breach of the court order, the judge of the court of the country in which the child has been retained shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.
4. The above principles shall apply without regard to the nationality, culture or religion of the parents or either parent and shall apply to children of mixed marriages.
5. In cases where the habitual/ordinary residence of the child is in dispute the court to which an application is made should decide the issue of habitual/ordinary residence before making any decision on the return or the general welfare of the child, and upon determination of the preliminary issue as to habitual/ordinary residence should then apply the general principles set out above.
6. These applications should be lodged by the applicant, listed by the court and decided expeditiously.
7. It is recommended that the respective governments of the UK and Pakistan give urgent consideration to identifying or establishing an administrative service to facilitate or oversee the resolution of child abduction cases (not covered by the 1980 Hague Convention on the Civil Aspects of International Child Abduction).
8. It is further recommended that the judiciaries, the legal practitioners and the non-governmental organisations in the UK and Pakistan use their best endeavours to advance the objects of this protocol.
9. It is agreed that the UK and Pakistan shall each nominate a judge of the superior court to work in liaison with each other to advance the objects of this protocol.

Dame Elizabeth Butler-Sloss, DBE  
President of the Family Division  
of the High Court of England and Wales

The Hon. Mr. Justice Sh. Riaz Ahmad

Chief Justice of the Supreme Court  
of Pakistan

**Supplemental Judicial Guidelines on UK-Pakistan Protocol**

UK-Pakistan Second Judicial Conference - Held at Islamabad on 22nd and 23rd September 2003

Agreed Guidelines

1. Raising public awareness of protocol, maintaining awareness and providing continuing education to judiciary and practitioners involved in family-child cases.
2. Securing access to justice to 'left behind' parents including knowledge of their rights and the opportunity to assert them.
3. To that end, instituting a system whereby the Judge in each Province of Pakistan is tasked with over-seeing the formation of a Committee to provide legal assistance to such parents.
4. Recognition of the importance of mediation within the extended family.
5. Recognition of the importance of liaison between Pakistan and the United Kingdom and, in particular, the importance of using the liaison Judges who need to know about all relevant cases which are pending or determined. The role of liaison Judge is to exchange orders by the Courts of respective countries in relation to the cases covered by the protocol for information. In case of breach of any such orders, further information is to be exchanged about those cases for appropriate steps to be taken by them in their respective functions. This role of the liaison Judge shall be given proper publicity.
6. Recognition of the importance of retaining judicial links between Pakistan and the United Kingdom, suggesting that Judges of both the countries should meet from time to time to discuss the working/implementation of the protocol, possibly through at least two Judges from each country meeting every two years. Also keeping in regular contact using, if appropriate, video link.
7. Recognition of the need to address the problems that arise upon relocation after the return of a child to the country of his habitual residence. In particular, recognition of the need to afford respect to any undertakings given to the Judge who ordered return or retention of a child.
8. Recommending the establishment of a Body in each country open to approach by an aggrieved person in United Kingdom - Pakistan seeking legal assistance in cases relating to wrongful and illegal removal of children.

Dame Elizabeth Butler-Sloss, DBE  
President of the Family Division  
of the High Court of England and Wales

The Hon. Mr. Justice Sh. Riaz Ahmad  
Chief Justice of Pakistan  
Supreme Court of Pakistan

The Hon. Lady Anne Smith  
Supreme Court of Scotland

The Hon. Mr. Justice Gillen  
Family Division of the High Court  
of Northern Ireland

**National section**

**SLOVAKIA**

**Dr Katarína Mikulová**

**Pan-European University, Bratislava**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Divorce is regulated by Family Act No. 36/2005 as amended. Only the court can decide on an application made by one of the spouses, whether the conditions for a divorce stated in the Family Act are fulfilled. There are no exceptions in the competence of the court to decide on a divorce. In the decision on the divorce of parents of a minor child, the court also regulates the rights and responsibilities towards the child for the time after the divorce.

Substantive applicable law:

Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov v znení neskorších predpisov – Family Act no. 36/2005 as amended

Procedural applicable law:

Zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov – Code of Civil Procedure no. 99/1963 as amended

Conflict of laws rules:

Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom v znení neskorších predpisov – Act on international private and procedural law no. 97/1963 as amended

There are no reform proposals in the legislative process nowadays.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

This situation is regulated by provision 38 of Act on international private and procedural law no. 97/1963 as amended or a bilateral international agreement if such an agreement was concluded, which states:

“(1) As for matrimonial matters (proceedings on cancellation of the matrimony by divorce, on invalidity of the matrimony and on determination of its existence or non-existence), jurisdiction of Slovak courts shall be given if at least one of the spouses is a Slovak citizen.

(2) If none of the spouses is Slovak citizen, the jurisdiction of Slovak courts shall be given if

a) at least one of the spouses has its residence in the Slovakia and if the decision may be recognised in domestic states of both participants; or if

b) at least one of the spouses has had its residence in the Slovakia for a longer period of time; or if

c) the spouses live in the Slovakia, as far as such invalidity of the matrimony is concerned that is to be proclaimed under Slovak law even without any application.”

The territorial and functional competent court is the District Court set according to the provision 88(1a) of the Code of Civil Procedure. In the case of divorce, annulment of the marriage or determination if there is a marriage or not, the court in the district where the married couple had their habitual residence in the Slovak republic, if one of them still resides there, has jurisdiction. If there is no such court,

the court in the district where the respondent's "general court" is has jurisdiction. If there is no such court either, the competent court is the court in the district where the applicant has "a general court".

According to the provision 85 (1) of the Code of Civil Procedure "the general court" of the Slovak citizen is the court in the district where the citizen has its residence or its habitual residence.

**3. Are there any other national legal instruments /procedures put in place for the application of Regulation Brussels IIbis?**

No, there are no such instruments in Slovak law.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Slovakia is not participating in the enhanced cooperation implemented by Regulation Rome III.

Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom v znení neskorších predpisov" – Act on international private and procedural law no. 97/1963 as amended – in relation to non EU Member states and Denmark

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

There isn't a possibility to designate the applicable law before the court before or during the course of proceedings according to Slovak legislation or other applicable EU legal provisions.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

No, because there isn't a possibility to sign such agreement about choice of law for divorce.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Maintenance is regulated primary by the Family Act no. 36/2005 as amended. Parents have a maintenance obligation towards their children. The spouses have the right to have the same standard of living until divorce. There is a special kind of maintenance for divorced spouses, which can be adjudicated by court only in case if the spouse after divorce objectively cannot take care of himself or herself and can only receive the maintenance for 3 years after divorce. In exceptional cases where a spouse cannot work because of health problems maintenance can be adjudicated

for a longer period. The maintenance obligation between spouses prevails over obligation between ascendants and descendants. There is also a special kind of maintenance for the unmarried mother, who has given birth to a child to secure equipment for this child and to pay costs connected with the pregnancy.

The maintenance for a minor child must be approved by the court, in other cases there can be an agreement made by the debtor and the creditor, if it should be an enforceable title, it must be made by a notary.

Substantive applicable law:

Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov v znení neskorších predpisov – Family Act no. 36/2005 as amended

Procedural applicable law:

Zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov – Code of Civil Procedure no. 99/1963 as amended

Zákon č. 233/1995 Z. z. o súdnych exekútoroch a exekučnej činnosti (Exekučný poriadok) a o zmene a doplnení niektorých zákonov v znení neskorších predpisov – Enforcement code of procedure no. 233/1995 as amended

Conflict of laws rules:

Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom v znení neskorších predpisov – Act on international private and procedural law no. 97/1963 as amended

There aren't any reform proposals in the legislative process nowadays.

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

According to the Enforcement code of procedure no. 233/1995 as amended the creditor can submit a proposal to any executor in Slovak republic. The creditor must have an enforceable title for maintenance (an agreement made by a notary or a court decision) and the debtor must firstly fail to fulfill his or her obligation. The executor asks a court for authorization for the execution. Then the executor will issue an execution order on the basis of which he or she provides the execution on salary or property.

The obligation to pay maintenance to children under 18 years prevails over other debts and must be paid preferentially. According to the special provision, the execution of such maintenance can be also provided as the execution of driving license in case when the debtor avoids the obligation.

## **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

In the case of maintenance for the child "Centrum pre medzinárodnoprávnu ochranu detí a mládeže" - The Centre for International Legal Protection of Children and Youth is designated and this organization was also reported to the Commission in accordance to Article 71(1d) of the Maintenance Regulation.

In the case of maintenance between spouses after divorce it is better to contact "Centrum právnej pomoci" – Legal aid centre, which is also a state organization for legal aid in cross-border disputes including maintenance disputes.

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

No, there are not.

## **C. Matrimonial property regimes in Europe**

**1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

The matrimonial property is governed by the Civil Code. Beginning with the day of marriage the spouses can possess things only in the regime of community property – property and profits received by husband and wife during marriage, with the exception of inheritances, specific gifts to one of the spouses, and property and profits clearly traceable to property owned before marriage, all of which is separate property.

There are some very limited possibilities to alter the scope of the community property by agreements between the spouses made by the notary, but the agreements can have consequences only to the future. The spouses cannot cancel the community property as such with the agreement.

There are only two reasons on basis of which the co-ownership between the spouses can be cancelled by the court. These are when at least one of the spouses has the license to establish a business or when there are other reasons according which it cannot be required to remain in the spouse co-ownership according to the morality.

Substantive provisions

Provisions no. 143 to 151 of the Civil Code – zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov – on undivided co-ownership between spouses

Provisions no. 703 to 705 of the Civil Code on joint lease of the flat between spouses

Procedural provisions

Zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov – Code of Civil Procedure no. 99/1963 as amended

Conflict of laws rules:

Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom v znení neskorších predpisov – Act on international private and procedural law no. 97/1963 as amended

There are no reform proposals in the legislative process currently.

**2. Which conflict of laws rules apply in matrimonial property disputes?**

Applicable rule is the provision no. 21 Act on international private and procedural law no. 97/1963 as amended according to it matrimonial personal and property relations shall be governed by the law of the state whose citizens they are. This relationship shall be governed by Slovak law if the spouses are citizens of different states. Contractual relations of matrimonial property relations shall be considered according to that law that is applicable to the property relationships of spouses at the moment when the agreement was made.

### **3. Which are the property consequences of registered partnerships?**

In Slovak legal order, only man and woman can get married. No registered partnership for same sex couples is enacted.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

Directive No 2008/52/EC was transposed through an amendment to the "zákon č. 420/2004 Z. z. o mediácii a o doplnení niektorých zákonov v znení neskorších predpisov" – Mediation act no. 420/2004 as amended, which regulates the status of mediators, their registration and education, the beginning and the end of mediation.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive No 2003/8/EC was transposed by amendment to "zákon č. 327/2005 Z. z. o poskytovaní právnej pomoci osobám v materiálnej núdzi a o zmene a doplnení zákona č. 586/2003 Z. z. o advokácii a o zmene a doplnení zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov v znení zákona č. 8/2005 Z. z. v znení neskorších predpisov" – Act no. 327/2005 about legal aid for persons who are unable to pay for it because of their financial and property situation as amended.

There is a special central institution created, named Legal Aid Centre – Centrum právnej pomoci, which is dealing with the applications in cross-border disputes in civil, commercial, labor and family cases.

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

International agreements on private international law according to the list on the website of the Ministry of foreign affairs of the Slovak republic:

- a. Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
- b. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

- c. Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- d. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- e. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- f. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- g. Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- h. European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- i. European Convention on the Exercise of Children's Rights

Bilateral international agreements on private international law are according to the list on the website of the Ministry of foreign affairs of the Slovak republic concluded with the following States:

Afghanistan, Albania, Algeria, Australia, Bahamas, Belgium, Bosnia and Herzegovina, Bulgaria, Czech republic, China, Fiji, France, Croatia, Italy, Yemen, Republic of South Africa, Canada, Kenya, PDR of Korea, Cuba, Cyprus, Lesotho, Hungary, FYROM, New Zealand, Poland, Portugal, Austria, Romania, Russian federation, Greece, Slovenia, Serbia, Syria, Spain, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, Vietnam.

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

- European Judicial Network in Civil and Commercial Matters
  - Information on divorce:
    - [http://ec.europa.eu/civiljustice/divorce/divorce\\_svk\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_svk_en.htm)
  - Information on maintenance obligations:
    - [http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_svk\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_svk_en.htm)
  - Information on parental responsibility:
    - [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_svk\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_svk_en.htm)
- European Judicial Atlas in Civil and Commercial Matters
  - Parental responsibility
    - [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)
  - Maintenance obligations
    - [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)
- The Centre for International Legal Protection of Children and Youth – information only in Slovak language
  - <http://www.cipc.sk/>

- Ministry of Labour, Social Affairs and Family of the Slovak Republic  
<http://www.employment.gov.sk/en.html>
- Ministry of Justice of the Slovak Republic  
<http://www.justice.gov.sk/Stranky/default.aspx>
- Ministry of Foreign Affairs of the Slovak Republic  
<http://www.foreign.gov.sk/en/home>

**5. Please provide information on accessing and applying foreign family law in your country.**

According to the provision 53 Act on international private and procedural law no. 97/1963 as amended in order to find out the content of foreign law, the court shall take all necessary measures. This is in accordance with the principle “iura novit curia” which is applied by Slovak courts also in cases with a foreign element that means the party to a dispute is not obliged to submit a content of foreign law to the court. If there is a need, the court should ask the Ministry of Justice of the Slovak republic for information for this purpose or in case of any doubts, the Ministry of Justice can give a statement on the content of foreign law.

The Slovak republic is also a party to the European Convention on Information on Foreign Law and to the Additional Protocol to the European Convention on Information on Foreign Law. Competent authorities of the contracting parties to these instruments can ask the Ministry of Justice of the Slovak republic for information on Slovak law.

## II. NATIONAL JURISPRUDENCE

### Regulation Brussels IIbis in matters of cross-border divorce

- Decision of the Supreme Court of the Slovak republic No. 2Ndc 15/2010 on jurisdiction according to Regulation Brussels IIbis and on territorial competence of the particular district court in case of divorce
- Decision of the Supreme Court of the Slovak republic No. 3Cdo 326/2008 on jurisdiction of the court when the child has moved legally to another Member State of the EU
- Decision of the Supreme Court of the Slovak republic No. 5Cdo 91/2009 on transfer of court jurisdiction according to the Article 15 of the Regulation Brussels IIbis

### Maintenance Regulation

There are only three decisions of District courts applying the Maintenance Regulation in accessible databases:

- Decision of the District court in Liptovský Mikuláš No. 6P/25/2011 from 17.10.2011 concerning the cancellation of maintenance for an adult child, in which the court decided that it has no jurisdiction according to the Maintenance Regulation  
<http://www.justice.gov.sk/Stranky/Sudne-rozhodnutia/Sudne-rozhodnutie-detail.aspx?PorCis=867346AA-A338-47A8-8D77-BF7CD7EFFE24&PojCislo=109368>
- Decision of the District court in Žiar nad Hronom No. 10P/438/2011 from 21.1.2012 concerning the increase of maintenance for a minor child, in which the court decided that it has no jurisdiction according to the Maintenance Regulation  
<http://www.justice.gov.sk/Stranky/Sudne-rozhodnutia/Sudne-rozhodnutie-detail.aspx?PorCis=A9EA9DEC-2281-499D-836E-0F5153D2F667&PojCislo=195774>
- Decision of the District court in Martin No. 23P/148/2011 from 20.2.2012 concerning maintenance for a minor child, in which the court decided that it has jurisdiction according to the Maintenance Regulation  
<http://www.justice.gov.sk/Stranky/Sudne-rozhodnutia/Sudne-rozhodnutie-detail.aspx?PorCis=CBB6E7E7-EEA2-4505-A3C6-57EEA6ED710F&PojCislo=261362>

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

HAŤAPKA, M.: K problému spätnej účinnosti európskych nariadení v oblasti právomoci súdov a vzájomného uznávania a výkonu rozsudkov v civilných veciach. *Justičná revue*, 57, 2005, č. 1, s. 87 – 95.

Júdová, E.: Personálne kritériá aplikácie nariadení ES o právomoci v cezhraničných veciach. *Bulletin slovenskej advokácie*, 16, 2010, č. 4, s. 26 - 30.

JANČO, M.: Perspektívy európskeho súkromného práva. *Justičná revue*, 61, 2009, č. 2, s. 169 – 185.

#### Regulation Rome III: Cross-border divorce – applicable law

As long as the Slovak republic is not participating in the enhanced cooperation, there isn't any special attention paid to this Regulation in the literature.

#### Maintenance Regulation: Cross-border maintenance – jurisdiction, applicable law, recognition and enforcement

HAŤAPKA, M.: Cezhraničné výživné v Európskej únii po novom – dopad na slovenskú justičnú prax; *Justičná revue*, 63, 2011, č. 5, s. 653 – 681.

#### Matrimonial property regimes and property consequences of registered partnerships

SYROVÝ, I.: Zúženie rozsahu bezpodielového spoluvlastníctva manželov; *Justičná revue*, 64, 2012, č. 1, s. 87 – 92.

MODLITBOVÁ, A.: Zrušenie spoločného nájmu bytu manželmi po rozvode manželstva. *Justičná revue*, 53, 2001, č. 5, s. 580 - 587.

Fuchsová, J.: Zrušenie práva spoločného nájmu a vyporiadanie bezpodielového spoluvlastníctva manželov, *Bulletin slovenskej advokácie*, 3, 2006,

KERECMAN, P.: Podnik živnostníka a vyporiadanie bezpodielového spoluvlastníctva manželov. *Justičná revue*, 60, 2008, č. 5, s. 728 – 742.

Valko, E.: Aký je vzťah obchodného podielu k BSM?, *Bulletin slovenskej advokácie*, 14, 2008, č. 3, s. 6 – 9.

Fuchsová, J., Kerecman, P.: Vyporiadanie hodnoty členského podielu v konaní o zrušení spoločného nájmu družstevného bytu manželov, *Bulletin slovenskej advokácie*, 14, 2008, č. 3, s. 14 – 20.

JAKUBČO, J.: Vyporiadanie bezpodielového spoluvlastníctva manželov v rámci konkurzného konania. *Justičná revue*, 59, 2007, č. 6 – 7, s. 885 – 895.

#### General publications on private international law and European private law

There are no monographies, which would concern certain topic of private international law. However, there are some actual publications generally concerning private

international law and application of European private law regulation in the Slovak republic:

Európske medzinárodné právo súkromné: materiály a texty / Elena Júdová. - 1. vyd. - Banská Bystrica : Univerzita Mateja Bela, 2009. - 163 s. ; 21 cm. - ISBN 9788080838119.

Medzinárodné právo súkromné / Natália Štefanková, Peter Lysina a kolektív. - 1. vyd. - Praha : C. H. Beck, 2011. - xxvii, 622 s. ; 23 cm. - (Beckova edícia právnické učebnice). - ISBN 9788074003516.

Pramene medzinárodného práva súkromného a procesného – Legal sources of private international law / Miloš Haňapka, Bea Verschraegen [eds.]. - 1. vyd. - Bratislava : Bratislavská vysoká škola práva ; Žilina : Eurokódex, 2010. - 648 s. ; 30 cm. - ISBN 9788089447176.

Základy medzinárodného práva súkromného / Poredoš František, Ďuriš Michal, Lysina Peter. - 1. vyd. - [S.l.] : PRAF UK, 2005. - 244 s. - ISBN 8071601934.

Zákon o medzinárodnom práve súkromnom a procesnom : komentár / Peter Lysina ... [et al.]. - 1. vyd. - V Prahe : C.H. Beck, 2012. - xvi, 585 s. ; 23 cm. - (Beckova edícia Komentované zákony). - ISBN 9788074004155).

**National section**

# **SLOVENIA**

**Bojana Jovin Hrastnik**

**State Attorney**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

##### **CURRENT SOURCE OF LAW:**

##### **a. substantive law:**

**The Marriage and Family Relations Act**<sup>175</sup> regulates marriage relations between parents, children and other persons, adoption, foster care and protection of children and persons who are not able to take care of their rights and benefits.

With regard to marriage, the Marriage and Family Relations Act regulates conditions for it, legal consequences of marriage, as well as divorce and annulment of marriage. Only partners of different sex may marry. The Act also regulates partnership between partners of different sex, who have not married, but live together in a relationship similar to marriage. In Slovenia, it is not possible to register such partnership. Nevertheless, such partnership has, under certain conditions, the same legal consequences as marriage.

On the other side, a partnership between partners of same sex has to be registered in order to produce legal consequences. **The Registration of a Same-sex Civil Partnership Act**<sup>176</sup> regulates registration of, as well as legal consequences and termination of a same-sex civil partnership.

##### **b. procedural law:**

**The Civil Procedure Act**<sup>177</sup>

**The Marriage and Family Relations Act**

##### **c. conflict of law rules:**

**The Private International Law and Procedure Act**<sup>178</sup>

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<sup>175</sup> "Zakon o zakonski zvezi in družinskih razmerjih"; applies from 1 January, 1977; Official Journal of the Republic of Slovenia, Nr. 96/2004 (officially consolidated text ZZZDR-UPB1); available (in Slovenian) at: <http://www.uradni-list.si/1/objava.jsp?urlid=200469&stevilka=3093>

Further changes: OJ Nr. 101/2007 and Nr. 90/2011. Unofficial consolidated text:

[http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=2A106172F0A8C373C12575010045E9AA&db=urad\\_prec\\_bes&mandat=VI&tip=doc](http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=2A106172F0A8C373C12575010045E9AA&db=urad_prec_bes&mandat=VI&tip=doc)

<sup>176</sup> "Zakon o registraciji istospolne partnerske skupnosti"; applies from 23 July, 2006; Official Journal of the Republic of Slovenia, Nr. 65/2005; available at:

<http://www.uradni-list.si/1/objava.jsp?urlid=200565&stevilka=2840>

Changes: OJ Nr. 55/2009. Unofficial consolidated text:

[http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=8F978E624BD5C600C12579FE00288B17&db=urad\\_prec\\_bes&tip=doc](http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=8F978E624BD5C600C12579FE00288B17&db=urad_prec_bes&tip=doc)

<sup>177</sup> "Zakon o pravnem postopku"; applies from 14 July, 1999; Official Journal of the Republic of Slovenia, Nr. 73/2007 (officially consolidated text ZPP-UPB3); available (in Slovenian) at: <http://www.uradni-list.si/1/objava.jsp?urlid=200773&stevilka=3965>

Further changes: OJ Nr. 45/2008 (Arbitration Act), 111/2008, 57/2009, 12/2010, 50/2010, 107/2010. Unofficial consolidated text:

[http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=95F3C4928ABD9F0DC1257871002CA723&db=urad\\_prec\\_bes&mandat=VI](http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=95F3C4928ABD9F0DC1257871002CA723&db=urad_prec_bes&mandat=VI)

## **REFORM PROPOSALS:**

The reform of family law is under way. Extensive changes and additions<sup>179</sup> to current legislation on family matters were presented in 2009, in the Proposal for the Family Act. The Act has been adopted by the National Assembly in June 2011, but then subsequently rejected in the legislative referendum in March 2012. A new proposal for the Family Act has not been prepared, yet.

Among other things, the Proposal for the Family Act included provisions on a partnership between partners of same sex (now regulated in another Act and not in the Marriage and Family Relations Act). It was proposed to put such partnership on an equal footing with partnership between partners of different sex.

### **2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

**The Private International Law and Procedure Act** determines:

In case the defendant is not domiciled in Slovenia, jurisdiction lies with the courts of Slovenia:

- if both spouses are nationals of Slovenia (regardless of their domicile), or
- if the plaintiff is a national of Slovenia and is domiciled in Slovenia, or
- if spouses were last domiciled in Slovenia and the plaintiff resides in Slovenia at the time of bringing an action before the court (Article 68).

Jurisdiction also lies with the courts of Slovenia in case spouses, who are not nationals of Slovenia, were last domiciled in Slovenia, under the condition, that the defendant agrees with jurisdiction of the Slovenian courts and the law of the state, whose nationals the spouses are, does not oppose to that (Article 69). Jurisdiction also lies with the courts of Slovenia in case the plaintiff is a national of Slovenia and the law of the state, whose courts would have jurisdiction, does not provide for divorce (Article 70).

### **3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

There are no national legal instruments / procedures put in place for the application of Regulation Brussels IIbis.

### **4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

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<sup>178</sup> "Zakon o mednarodnem zasebnem pravu in postopku"; applies from 28 July, 1999; Official Journal of the Republic of Slovenia, Nr. 56/1999; available (in Slovenian) at:

<http://www.uradni-list.si/1/objava.jsp?urlid=199956&stevilka=2651>

Further changes: OJ Nr. 45/2008 (Arbitration Act). Unofficial consolidated text:

<http://www.dz->

[rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=EE5800F37DFD5E80C12574430028B56C&db=urad\\_prec\\_bes&mandat=VI&tip=doc](rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=EE5800F37DFD5E80C12574430028B56C&db=urad_prec_bes&mandat=VI&tip=doc)

<sup>179</sup> It is therefore not possible to present proposed changes and additions systematically, here.

Yes, the Republic of Slovenia participates in the enhanced cooperation implemented by Regulation Rome III.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

Before Regulation Rome III has started to apply, **the Private International Law and Procedure Act** determined rules on applicable law in cross-border divorce cases. It did not provide for the possibility of choice of law in these cases (see Article 37). Parties were only allowed to choose law when concluding contracts and the validity of that choice was subject to the rules of the chosen law (Article 19).

**The Civil Procedure Act** determines rules on prorogation of jurisdiction (and on formal requirements applicable to such agreements), but it does not include any rule on choice of law agreements.

Therefore, no rules on designating the applicable law during the course of proceedings exist.

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

See the answer to question A 5.

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

**CURRENT SOURCE OF LAW:**

**a. substantive law:**

**The Marriage and Family Relations Act** regulates maintenance for spouses. An unemployed married person, who is not accountable for his/her unemployment and can not provide a basic subsistence, has the right to be supported by the spouse, in case the spouse is able to support him/her. After the divorce, the unemployed person, who is not accountable for his/her unemployment and can not provide a basic subsistence, may claim maintenance from the former spouse, if conditions for maintenance were fulfilled at the time of divorce and still exist at the time of bringing an action before the court.

**b. procedural law:**

**The Civil Procedure Act**

**The Marriage and Family Relations Act**

**REFORM PROPOSALS:**

See answer to question A 1 for more details on the reform in the field of family law. No major changes were planned in the field of maintenance for spouses.

**2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

**The Enforcement and Securing of Civil Claims Act**<sup>180</sup> regulates enforcement. In general, the enforcement proceedings are initiated upon the proposal of the creditor. The enforceable instruments are enforceable judgements and court settlements, as well as enforceable notary deeds (when divorcing, spouses may conclude an agreement on maintenance before the notary). In case the enforcement proceedings relate to claims on money, the court may allow sale of debtor's movable property, sale of immovable property, transfer of claims on money, realisation of other property rights, sale of a share of a partner in a company and transfer of cash from the bank account. The means of enforcement are determined according to the creditor's proposal. Maintenance claims have certain priority in enforcement proceedings (with regard to other claims enforced at the same time; with regard to the amount of debtor's income that may be seized etc.). Initially, the creditor has to bear the costs of proceedings (but is entitled to claim refund from the debtor). Legal aid may be granted to parties according to the conditions determined in **the Free Legal Aid Act**. Parties do not need to be represented by a lawyer in the enforcement proceedings.

**3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Central Authority designated to facilitate the application of the Maintenance Regulation is the Ministry of labour, family and social affairs.

Contact details:

Ministrstvo za delo, družino in socialne zadeve  
Kotnikova 28  
SI - 1000 Ljubljana  
Tel. ++386 1 369 77 00  
e-mail: gp.mdds@gov.si

**4. Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

There are no national legal instruments / procedures put in place for the application of Maintenance Regulation.

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<sup>180</sup> "Zakon o izvršbi in zavarovanju"; applies from 15 October, 1998; Official Journal of the Republic of Slovenia, Nr. 3/2007 (officially consolidated text ZIZ-UPB4); available (in Slovenian) at: <http://www.uradni-list.si/1/objava.jsp?urlid=20073&stevilka=98>  
Further changes: OJ Nr. 93/2007, 28/2009, 47/2009 (corr. 48/2009), 51/2010, 26/2011.  
Unofficial consolidated text:  
[http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=9CD46380D62D9936C12578770027677C&db=urad\\_prec\\_bes&mandat=VI&tip=doc](http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=9CD46380D62D9936C12578770027677C&db=urad_prec_bes&mandat=VI&tip=doc)

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

#### CURRENT SOURCE OF LAW:

##### a. substantive law:

**The Marriage and Family Relations Act** regulates rights in property arising out of a matrimonial relationship. Property, which has belonged to one of the spouses before the wedding, remains his / her individual property. Property gained (by work) in matrimonial relationship is a common property belonging to spouses. In case of divorce (or annulment of marriage), common property is divided. It may also be divided within matrimonial relationship upon the proposal of one of the spouses. It is presumed that spouses have equal shares in common property, but they may prove that shares are different. Partnership between partners of different sex has, under certain conditions, the same legal consequences as marriage. These conditions are: the partnership exists for a longer time and there are no circumstances which would cause the invalidity of marriage.

##### b. procedural law:

**The Civil Procedure Act**

**The Non-litigious Civil Procedure Act**<sup>181</sup>

**The Marriage and Family Relations Act**

##### c. conflict of law rules:

**The Private International Law and Procedure Act**

#### REFORM PROPOSALS:

See answer to question A 1 for more details on the reform in the field of family law. The Proposal for the Family Act included provisions on contractual arrangements between the spouses. The general matrimonial property regime defined by law which is now a principle (i.e. property gained in matrimonial relationship is a common property) would then only be applicable in case spouses did not conclude a contract, regulating their rights in property differently.

### 2. Which conflict of laws rules apply in matrimonial property disputes?

**The Private International Law and Procedure Act** determines:

In case the defendant is not domiciled in Slovenia, jurisdiction in matrimonial property disputes lies with the courts of Slovenia, if assets are located in Slovenia. In case the major part of the assets is located in Slovenia, the Slovenian court may decide on the assets located abroad, but only within the proceedings of deciding on the assets located in Slovenia and under the condition the defendant agrees with jurisdiction of the Slovenian court. On this basis, jurisdiction lies with the courts of Slovenia regardless the question if the spouses are still married or they have already been divorced (or the marriage has been annulled, Article 67).

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<sup>181</sup> "Zakon o nepravdnem postopku"; applies from 1 October, 1986; Official Journal of the Socialist Republic of Slovenia, Nr. 30/1986 (corr. 20/1988); changes OJ of the Republic of Slovenia, Nr. 87/2002, 131/2003, 87/2008.

Matrimonial property disputes (between spouses as well as after the divorce or marriage annulment) are governed by the law of the state of the spouses' nationality. In case they are nationals of different states, the law of the state of their domicile applies. In case they do not have common nationality nor domicile in the same state, the law of the state of their last common domicile applies. If it is not possible to determine the law applicable in this way, the law which is most closely connected with the relationship in question applies (Articles 38 and 40). Contractual property disputes between spouses (as well as after the divorce or marriage annulment) are governed by the law which at the time of concluding the contract was applicable to matrimonial personal and property relations. If that law enables choice of law, the law that has been chosen by the spouses applies (Articles 39 and 40).

### 3. Which are the property consequences of registered partnerships?

A partnership between partners of different sex can not be registered; nevertheless, it has, under certain conditions, the same legal consequences as marriage. These conditions are: the partnership exists for a longer time and there are no circumstances which would cause the invalidity of marriage (Article 12 of the Marriage and Family Relations Act).

Only partners of same sex can register a partnership. **The Registration of a Same-sex Civil Partnership Act** regulates, among other things, rights in property arising out of a registered same-sex civil partnership. Partners, who have registered their partnership, have a right to gain common property. They also have a right to maintenance and a right to inheritance (Article 8 of the Registration of a Same-sex Civil Partnership Act).

## D. Horizontal issues

### 1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

**The Mediation in Civil and Commercial Matters Act**<sup>182</sup> transposes the Directive 2008/52/EC to Slovenian law. The Act has been prepared on the basis of the UNCITRAL Model Law on International Commercial Conciliation, taking into consideration also the requirements of the Directive and the experience gained in court-annexed mediation in Slovenian courts. The Act contains only basic principles and rules on mediation procedure and leaves the rest to self-regulation. It applies to all mediation processes, cross-border and internal.

**The Act on Alternative Dispute Resolution in Judicial Matters**<sup>183</sup> contains specific provisions on mediation offered by courts to parties in judicial proceedings. It imposes obligation to all first instance courts as well as to courts of appeal to offer mediation to parties in civil, commercial, family and labour disputes. Drawing inspiration from the Article 5/1 of the Directive 2008/52/EC, the Act on ADR in Judicial Matters introduces a special information session on mediation.

### 2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

**The Free Legal Aid Act**<sup>184</sup> transposes the Directive 2003/8/EC to Slovenian law. It applies to all cases, cross-border and internal and determines the scope of legal aid and the conditions for granting legal aid. The Act refers to all judicial proceedings and alternative dispute resolution proceedings which take place in the Republic of Slovenia. Legal aid may be granted for legal counselling, legal representation and other legal services; it may also be granted with relation to the costs of proceedings. It may also be granted for proceedings before international courts and arbitral tribunals, in case it is not granted under rules of procedure of such courts or arbitral tribunals.

### 3. Is your country a contracting party to any bilateral or international instruments on family law?

Slovenia is a contracting party to the following international and bilateral instruments, which relate to family law:<sup>185</sup>

#### 1. Multilateral instruments:

<sup>182</sup> "Zakon o mediaciji v civilnih in gospodarskih zadevah"; applies from 21 June, 2008; Official Journal of the Republic of Slovenia, Nr. 56/2008; available (in Slovenian) at: <http://www.uradni-list.si/1/objava.jsp?urlid=200856&stevilka=2339>

<sup>183</sup> "Zakon o alternativnem reševanju sodnih sporov"; applies from 15 June, 2010; Official Journal of the Republic of Slovenia, Nr. 97/2009; available (in Slovenian) at: <http://www.uradni-list.si/1/objava.jsp?urlid=200997&stevilka=4248>

<sup>184</sup> "Zakon o brezplačni pravni pomoči"; applies from 11 September, 2001; Official Journal of the Republic of Slovenia, Nr. 96/2004 (officially consolidated text); available at: <http://www.uradni-list.si/1/objava.jsp?urlid=200496&stevilka=4235>  
Further changes: OJ Nr. 23/2008, 47/2009 (corr. 48/2009).

<sup>185</sup> Source: the webpage of the Ministry of Labour, Family and Social Affairs, [http://www.mddsz.gov.si/si/zakonodaja\\_in\\_dokumenti/veljavni\\_predpisi/](http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/)

The Hague Conference on Private International Law:

- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

The Council of Europe:

- European Convention on the Exercise of Children's Rights

The United Nations:

- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10 December 1962

## 2. Bilateral instruments:

Slovenia is a contracting party to the following bilateral agreements which include provisions on judicial cooperation in civil matters<sup>186</sup>: Algeria, Austria, Belgium, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, FYR Macedonia, France, Greece, Hungary, Iraq, Ireland, Italy, Mongolia, Poland, Romania, Russian Federation, Slovakia, Turkey and United Kingdom.

Some of these agreements have been concluded before entering the European Union, with the states, which are now also EU Member States (these agreements have therefore been superseded by EU instruments which relate to the same matters).

## 4. **Are there any databases or online tools providing information on family law matters available in your country?**

The following databases are available:

a. The Ministry of Justice and Public Administration:

<http://www.mpju.gov.si/>

- The Ministry of Labour, Family and Social Affairs:

<http://www.mddsz.gov.si/>

- The Courts:

<http://www.sodisce.si/>

- The Association of Centres for Social Work:

<http://www.scsd.si/>

- The European Judicial Network in Civil and Commercial Matters:

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<sup>186</sup> Source: the webpage of the Ministry of Justice and Public Administration, [http://www.mpju.gov.si/si/zakonodaja\\_in\\_dokumenti/mednarodne\\_pogodbe\\_s\\_podrocja\\_pravosodja/bilateralni\\_sporazumi/](http://www.mpju.gov.si/si/zakonodaja_in_dokumenti/mednarodne_pogodbe_s_podrocja_pravosodja/bilateralni_sporazumi/)

- Information on divorce:  
[http://ec.europa.eu/civiljustice/divorce/divorce\\_sl\\_n\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_sl_n_en.htm)
- Information on maintenance obligations:  
[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_sl\\_n\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_sl_n_en.htm)
- Information on parental responsibility  
[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_sl\\_n\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_sl_n_en.htm)
- The European Judicial Atlas in Civil and Commercial Matters
  - Matrimonial matters and matters of parental responsibility  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)
  - Maintenance obligations  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

**5. Please provide information on accessing and applying foreign family law in your country.**

**The Civil Procedure Act** determines that parties have to state facts and provide evidence for their statements (Article 7(1)). The court that has to know the law; it also has the duty to find out the content of foreign law. **The Private International Law and Procedure Act** determines that the court (or other competent body) has to find out the content of foreign law *ex officio* (Article 12(1)). The court (or other body) may require information on the content of foreign law from the Ministry of Justice, or, it may check the content of foreign law in another appropriate manner (Article 12(2)). In court proceedings, parties may present authentic instruments or other instruments on the content of foreign law, drawn up by competent foreign body (but parties are not required to do so; Article 12(3)). If it is absolutely impossible to find out the content of foreign law, Slovenian law applies (Article 12(4)).

In practise, courts usually contact the Ministry of Justice when foreign law has to be applied. There are different ways for the ministry to get information on the foreign law. In case the European Convention on Information on Foreign Law applies, information is sought in a manner described in the convention. Bilateral instruments may also include specific provisions on accessing foreign law. In the rest of the cases, diplomatic channels are used to seek information.

The European Judicial Network and the contact points existing within the network are also contacted when appropriate.

### III. NATIONAL JURISPRUDENCE

#### Regulation Brussels IIbis in matters of cross-border divorce

Koper Court of Appeal, decision I Cp 759/2006 (6 June 2006):

Divorce and parental responsibility/ jurisdiction / transfer to a court better placed  
(Regulation Brussels IIbis, Articles 8, 12, 15)

Maribor Court of Appeal, decision III Cp 1643/2007 (27 August 2007):

Divorce / jurisdiction / the concept of "habitual residence"  
(Regulation Brussels IIbis, Articles 3 and 6)

Koper Court of Appeal, decision Cp 431/2008 (7 May 2008):

Divorce / jurisdiction / the concept of "habitual residence"  
(Regulation Brussels IIbis, Articles 3, 5 and 6)

Koper Court of Appeal, decision Cp 141/2010 (24 February 2010):

Divorce / jurisdiction / the concept of "habitual residence"  
(Regulation Brussels IIbis, Article 3)

#### Maintenance Regulation

- no national jurisprudence -

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

Dežman Mušič, A: Prost pretok sodnih odločb. *Podjetje in delo*: revija za gospodarsko, delovno in socialno pravo, 2008, str. 1356-1367.

Mežnar, Š. Priznavanje in izvršitev odločb družinskega prava v EU. *Podjetje in delo*: revija za gospodarsko, delovno in socialno pravo, 2005, št. 6-7, str. 1513-1529.

Možina, D. Evropsko civilno procesno pravo. *Podjetje in delo*: revija za gospodarsko, delovno in socialno pravo, 2003, št. 6-7, str. 1107-1121.

#### Regulation Rome III: Cross-border divorce - applicable law

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#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

Novak, B. Novosti v evropskem družinskem pravu – nova ureditev v preživninskih zadevah. *Pravni letopis*, 2011, str. 153-176.

#### Matrimonial property regimes and property consequences of registered partnerships

Novak, B. Pravna ureditev istospolne partnerske skupnosti – nova slovenska pravna ureditev. *Pravnik*: revija za pravno teorijo in prakso, 2007, letn. 62, št. 6-8, str. 313-341.

Zupančič, K. et al. *Reforma družinskega prava: predlog novih predpisov s komentarjem*. Ljubljana: Uradni list Republike Slovenije, 2009. ISBN 978-961-204-430-5.

Žnidaršič, V. Človekove pravice in premoženjska razmerja med zakoncema. *Pravne razsežnosti človekovih pravic*: 2006, str. 73-79.

Žnidaršič, V. *Premoženjska razmerja med zakoncema*. Ljubljana: Bonex, 2002. ISBN 961-6019-27-9.

Žnidaršič, V. *Premoženjski režim zakoncev – raziskovalno poročilo*. Ljubljana: Pravna fakulteta, 2005.

Žnidaršič, V. Property relations between spouses. *Slovenian law review*, 2004, Vol. 1, No. 1/2, str. 153-166.

Žnidaršič Skubic, V. Premoženske pravice zakoncev v kontekstu človekovih pravic in temeljnih svoboščin. *Pravnik: revija za pravno teorijo in prakso*, 2006, letn. 61, št. 4-5, str. 223-242.

Žnidaršič Skubic, V. Premoženski režim med zakoncema – *ius cogens* ali stvar izbire?. *Podjetje in delo: revija za gospodarsko, delovno in socialno pravo*, 2005, št. 6-7, str. 1474-1481.

Žnidaršič Skubic, V. Dedovanje v istospolni partnerski skupnosti. *Podjetje in delo: revija za gospodarsko, delovno in socialno pravo*, 2008, št. 7, str. 1526-1535.

Žnidaršič Skubic, V. Zunajzakonska skupnost – nekateri aktualni problemi, *Podjetje in delo: revija za gospodarsko, delovno in socialno pravo*, 2007, št. 1, str. 192-222.

**National section**

**SPAIN**

**Dr Carmen Azcárraga Monzonís**

**Assistant Professor of Private International Law,  
University of Valencia**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

Cross-border marital breakdown is currently regulated in different instruments. The international jurisdiction regime is established for every situation (divorce, annulment and legal separation) for most of the cases in Regulation Brussels IIbis.

The recognition regime is established in Regulation Brussels IIbis for decisions rendered within the EU, international conventions when applicable and domestic rules included in the former Civil Procedure Act of 1881 (*Ley de Enjuiciamiento Civil of 1881* –LEC 1881-) when no international provisions are available (Articles 952 ff LEC 1881).

Applicable law rules have been traditionally embodied until the entry into force of Regulation Rome III in domestic rules –Art. 107 Civil Code (CC), deeply amended in 2003-, where a distinction was done between annulment, on the one hand, and divorce and legal separation, on the other hand.

The choice-of-law rule on annulment can be found in paragraph 1 of Art. 107 CC – and no changes are considered after the entry into force of Regulation Rome III because this instrument does not cover annulment-. Under this provision, the law governing this matter and its effects shall be determined in accordance with the law governing the celebration of the marriage. This means that the applicable law would depend on the ground alleged for annulment, which can be related either with a problem of consent of the spouses, or of capacity of the spouses or of form of the marriage.

Concerning divorce and legal separation, under paragraph 2 of Art. 107 CC, separation and divorce was governed, firstly, by the common national law of the spouses at the time of lodging the claim; in the absence of a common nationality, by the law of the common habitual residence of the spouses at such moment and, in the absence thereof, by the law of the last common habitual residence of the spouses if one of them is still a resident in such State. However, this was a general rule and it is important to stress that Spanish substantive law had to be applied in any case if the following requirements were met in the relevant situation: in case one of the spouses was Spanish or had his/her habitual residence in Spain and:

a) None of the laws mentioned above applied,  
or b) both spouses, or one with the consent of the other, requested jointly,  
or c) the laws mentioned in the first paragraph of this provision did not allow separation or divorce or did it in a manner which was discriminatory or contrary to public policy.

As to substantive provisions, marital breakdown is regulated in Articles 73 ff CC. And from the procedural perspective, provisions on matrimonial procedures are established in Articles 769 ff Civil Procedure Act of 2000 (*Ley de Enjuiciamiento Civil 1/2000*).

There are currently no reform proposals or political decisions for a future reform.

Translations into English of the Spanish Civil Code and of the Civil Procedure Act of 2000 are available at:

**2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?**

In case no court of a Member State has jurisdiction under Regulation Brussels IIbis, international jurisdiction of Spanish courts in cross-border divorce cases shall be established in accordance with the Spanish Act of the Judiciary of 1985 (*Ley Orgánica del Poder Judicial* –LOPJ-). In particular, Article 22 LOPJ contains the grounds of jurisdiction of Spanish courts in civil matters distinguishing exclusive grounds of jurisdiction, general grounds of jurisdiction and special grounds of jurisdiction.

Given that divorce (annulment and legal separation) cases are not object of an exclusive ground of jurisdiction, the other available possibilities to justify the competence of Spanish courts may be, firstly, explicit or implicit submission to Spanish courts (party autonomy) or domicile of the defendant in Spain (Art. 22.2 LOPJ); and, secondly –in absence of the previous criteria- the special grounds of jurisdiction provided for these matters (although they coincide with the European rules). Under Article 22.3 LOPJ, Spanish courts shall have jurisdiction to hear cases on personal and economic relationships between spouses, annulment of marriage, separation and divorce, in case both spouses have habitual residence in Spain when lodging the claim or the plaintiff is Spanish and is habitually residing in Spain, as well as in case both spouses are Spanish regardless of the place of residence provided that they start proceedings jointly or one with the consent of the other.

**3. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?**

In 2006, the Act 19/2006 of 5 June (*Ley 19/2006, de 5 de junio, por el que se amplían los medios de tutela de los derechos de propiedad intelectual e industrial y se establecen normas procesales para facilitar la aplicación de diversos reglamentos comunitarios* -BOE No 134 of 6 June 2006-) amended the Civil Procedure Act of 2000 (*Ley de Enjuiciamiento Civil 1/2000*) through adding two Final Dispositions aimed at “facilitating the application of different European instruments”. It covered in particular Regulation 2201/2003 and Regulation 805/2004 on the European Enforcement Order for uncontested claims.

The Act is available (in Spanish) at:

<http://www.boe.es/boe/dias/2006/06/06/pdfs/A21230-21238.pdf>

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Yes, Spain is participating in the enhanced cooperation implemented by Regulation Rome III.

**5. Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

The domestic regime on the law applicable to divorce matters does not include the possibility to choose the law governing these cases, so the availability of party autonomy in this scope will be a novelty introduced by the European legislator. Concerning the possibility of choosing the applicable law during the course of the proceedings, the Spanish Civil Procedure Act of 2000 (*Ley de Enjuiciamiento Civil 1/2000*) does not establish any specific rule to this end neither for divorce or any other matter where party autonomy is allowed. However, it can be understood that the existing legal regime does not prevent to support a flexible and positive opinion in this regard.

A translation into English of the Spanish Civil Procedure Act is available at:  
<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

**6. Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

Besides the formal requirements established in Article 7 Regulation Rome III, the legislation of a particular Member State may establish additional formal requirements for this type of agreements. For instance, as stated in Recital 19, in those cases where the choice of law agreement is inserted in a marriage contract. This is actually the case for the Spanish legislation, where it is mandatory that marriage contracts adopt the form of a notarial deed (Article 1327 Civil Code). Hence, in case the choice of law is contained in this kind of agreements, it will also be affected by this formal requirement.

A translation into English of the Spanish Civil Code is available at:  
<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

## **B. Cross-border maintenance**

**1. What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

The current source of law for maintenance of spouses after divorce in cross-border cases is Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations as a consequence of the application of the *De Cave!* doctrine of the European Court of Justice. However, it is important to stress that under substantive Spanish law, this kind of claims between former spouses have a different nature in accordance with Articles 97 ff Civil Code –CC– (the so-called "*pensión por desequilibrio*"). On the other hand, general rules on maintenance claims are established in Articles 142 ff CC.

As to international conventions in force in Spain dealing with maintenance claims, the Lugano Convention of 2007 and The Hague Convention of 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations shall be taken into account in the relationships with the Contracting States which are not EU Member States. There are also some bilateral conventions signed by Spain covering maintenance claims.

As regards the regime of recognition for foreign decisions rendered outside EU and in countries with which no international convention is available, the domestic system is embodied in the former Civil Procedure Act of 1881 (*Ley de Enjuiciamiento Civil of 1881* –LEC 1881-), Articles 952 ff LEC 1881.

There are currently no reform proposals or political decisions for a future reform.

A translation into English of the Spanish Civil Code is available at:

<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

## **2. Please describe the national enforcement procedure applicable in the case of maintenance claims.**

In accordance with the Spanish Civil Procedure Act of 2000 (*Ley de Enjuiciamiento Civil 1/2000* –LEC-), foreign enforcement titles can entail enforcement effects in Spain under international treaties and other legal provisions on international judicial cooperation deemed applicable (Article 523.1 LEC). Once established, the enforcement of foreign judgements and enforcement titles shall be carried out in Spain in accordance with the provisions herein, unless otherwise provided in the international treaties in force in Spain (Article 523.2 LEC).

Under Article 549 LEC, enforcement shall only be dispatched at the request of a party, in the form of a claim, in which the following shall be specified:

1. The title on which the enforcement creditor bases his claim.
2. The enforcement protection sought, in connection with the enforcement title submitted, specifying, as appropriate, the amount claimed in accordance with Article 575 herein.
3. The debtors' assets subject to attachment the claimant may know about and, as appropriate, if he considers them to be sufficient for the purposes of the enforcement.
4. As appropriate, the measures of location and investigation requested pursuant to Article 590 herein.
5. The person or persons, specifying their identification details, against whom the dispatch of the enforcement is sought, due to the said person or persons appearing in the title as debtors or being subject to the enforcement in accordance with Articles 538 to 544 herein.

The documents to be attached to the enforcement claim are listed in Article 550 LEC. Basically, the enforcement title, the power of attorney, documents evidencing the debt and other documents required by law for the dispatch of the enforcement or others the creditor may consider useful or convenient for a more appropriate execution of the enforcement.

Once the enforcement claim has been lodged and provided that the procedural rules and requirements are met, that the enforcement claim does not contain any formal irregularity and the enforcement sought is in line with the nature and content of the title, the Court shall issue a court order containing the general order of enforcement and dispatch. No appeal of any nature may be lodged against the court order authorising and dispatching the enforcement, notwithstanding the objection that may be filed by the enforcement debtor. A direct appeal for judicial review without suspensive effects against the order issued by the Court Clerk may be lodged before the court that issued the general enforcement order (Article 551 LEC).

In case the court considers that the rules and requirements established by law to dispatch the enforcement have not been complied with, it shall issue a court order rejecting the dispatch of the enforcement. A direct appeal may be lodged against the court order rejecting the dispatch of the enforcement, only by the creditor, who may also, at his discretion, attempt a revision prior to the remedy of appeal. Once the court order rejecting the dispatch of the enforcement has become final, the creditor may only assert his rights in the relevant ordinary proceedings, provided the latter are not prevented by the *res judicata* effect of the final judgement or decision on which the enforcement claim was based (Article 552 LEC).

A translation into English of the Spanish Civil Procedure Act is available at: <http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

### **3. Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

The Spanish Central Authority designated to facilitate the application of the Maintenance Regulation is the Subdepartment of International Legal Cooperation (Subdirección de Cooperación Jurídica Internacional) of the Ministry of Justice. Contact details:

María Isabel Fernández Collado  
Jefe de Servicio de Pensiones Alimenticias Internacionales  
Ministerio de Justicia  
c/ San Bernardo, 62  
28071 Madrid (España)  
Phone number: 00 34 91 3902295/94  
Fax. 00 34 91 3904457  
E-mail address: isabel.hernandez@mjusticia.es

### **4. Are there any other national legal instruments/procedures put in place for the application of the Maintenance Regulation?**

No.

## **C. Matrimonial property regimes in Europe**

### **1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?**

Matrimonial property regimes are nowadays governed in Spain by domestic rules. Concerning international jurisdiction, the Spanish Act of the Judiciary of 1985 (*Ley Orgánica del Poder Judicial* –LOPJ–) regulates the grounds of jurisdiction of Spanish courts in civil matters in Article 22 LOPJ.

As regards applicable law, the Civil Code of 1889 (*Código Civil* -CC-) establishes the choice-of-law rules on this matter in Articles 9.2 and 9.3 CC.

When it comes to recognition of foreign decisions, the Spanish domestic regime is established in the former Civil Procedure Act of 1881 (*Ley de Enjuiciamiento Civil de 1881* –LEC 1881-), Articles 952 ff LEC 1881.

Substantive rules on matrimonial property regimes are established in Articles 1315 ff CC, under which the spouses can agree upon the legal regime (Article 1315 CC) but in case they do not do it or the agreement is not valid, community of property prevails (Article 1316 CC). However, please note that this is the so-called “civil common regime” because this matter receives a different treatment in some regions.

There are currently no reform proposals or political decisions for a future reform.

A translation into English of the Spanish Civil Code is available at:

<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

## **2. Which conflict of laws rules apply in matrimonial property disputes?**

The choice-of-law rules on matrimonial property regime can be found in Articles 9.2 and 9.3 Civil Code of 1889 (*Código Civil* -CC-). The distinction between these two provisions relies on the existence or not of a matrimonial agreement between the spouses.

On the one hand, in accordance with Article 9.2 CC, the effects of marriage shall be governed by the common personal law –national law under Article 9.1 CC- of the spouses at the time of the celebration of the marriage; in the absence thereof, by the personal law –national law- or the law of the place of residence of any of them, chosen by both in an authentic instrument issued prior to the marriage ceremony; in the absence of such election, by the law of the place of habitual residence common to both immediately after the ceremony and, in the absence of such residence, by the law of the place of the marriage ceremony. A second paragraph of this provision refers to Article 107 CC when it comes to determining the law governing annulment of marriage, legal separation and divorce matters.

On the other hand, Article 9.3 CC establishes that marriage agreements stipulating, amending or replacing the property regime of the marriage shall be valid if so considered by either the law governing the effects of the marriage (therefore it refers to the previous paragraph 2), or the law of the nationality or habitual residence of either party at the time of concluding such agreement. Please note that marriage agreements shall adopt in Spain the form of a notarial deed (Article 1327 CC).

A translation into English of the Spanish Civil Code is available at:

<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

## **3. Which are the property consequences of registered partnerships?**

The main problem concerning registered partnerships in Spain from the legal perspective is that this family law institution is regulated differently depending on the Spanish autonomous region (*Comunidades Autónomas*). Nowadays there is no state legislation on registered partnerships –although some scattered provisions have granted rights to these couples in matters such as surrogacy in rentals or widow pensions- but 15 regional Acts (there are 17 autonomous regions in Spain).

Despite sharing some features (for instance, they all cover both heterosexual and same-sex couples and none of them deal with international aspects), they also present important divergences (most of them require registration to create a valid partnership, but in some regions registration has just a declarative nature; some of them equate these couples with marriages whereas others do not grant them the same legal regime).

As to property consequences, every regional Act on registered partnerships contains provisions which deal with this issue and they all establish a basic principle: party autonomy. On the basis of this principle, the members of the couple can conclude an agreement –mainly in writing but sometimes oral agreements are also accepted– setting up the terms and conditions of their relationship and the mutual rights and duties during its existence and at the moment of its extinction. Some Acts provide that these agreements shall be considered null and void if contrary to law or discriminate one of the members or entail consequences seriously damaging one of them. Whereas this agreement can adopt any form –public or private– in some regional Acts, most of them require the form of a notarial deed.

In case of lack of agreement, as a general rule regional Acts foresee that each member shall contribute to the family needs proportionally, either according to their financial resources or with personal work.

Regional Acts also foresee provisions about the property consequences of the extinction of the relationship as a consequence of different situations: separation, marriage, death. Parties can usually agree upon the property consequences after extinction and furthermore in those cases where this was due to a cause different than the death of one of the parties, many Acts establish the possibility to apply for a pension or an economic compensation in case of unjust enrichment of one of them (for instance, because the other worked as a housekeeper).

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive on mediation in civil and commercial matters of 2008 was firstly implemented in Spain through the Royal Decree-Law 5/2012 of 2012 (in order to put an end to late transposition), which was converted into an Act very recently: Mediation Act 5/2012 of 6 July (MA) (*Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles*).

It covers domestic and cross-border mediation and provides the same regime for both unless some provisions particularly focused on international mediation. As stated in Article 2 MA, this Act shall be applied to mediation procedures in civil and commercial matters including cross-border conflicts provided that they do not affect rights and obligations not available for the parties under the relevant applicable law. If no explicit or implicit submission to this Act is made, it shall be applied in case one of the parties at least is domiciled in Spain and the mediation procedure takes place in Spanish territory.

Although it is the first state legislation about mediation in civil and commercial matters ever adopted in Spain, this matter was already regulated by a number of scattered state provisions (in divorce matters, labour mediation, consumer mediation...) and since 2001 by a set of Mediation Acts of regional scope which were adopted as a consequence of the legislative competence of the *Comunidades Autónomas* in this matter (13 regional Acts out of 17 autonomous regions).

The Mediation Act of 2012 is available (in Spanish) at:

<http://www.boe.es/boe/dias/2012/07/07/pdfs/BOE-A-2012-9112.pdf>

## **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

In 2005, the Spanish Act 1/1996 on Free Legal Aid (*Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita*) was amended by the Act 16/2005 (*Ley 16/2005, de 18 de julio, por la que se modifica la Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita*) in order to transpose the Directive No 2003/8/EC and regulate the particularities of cross-border disputes in civil and commercial matters within the European Union.

Traditionally, the right to free legal aid was granted in Spain to foreigners residing in our country lawfully but the Spanish Constitutional Court ruled the unconstitutionality of this requirement and it is currently granted to foreigners living in Spain regardless of their administrative situation.

However, in cross-border disputes (as defined in the Directive: a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced –Article 2.1-) free legal aid is only granted to third-country nationals residing lawfully in a Member State as established in the Directive.

The Act 16/2005 amending the Act on Free Legal Aid to transpose the Directive is available (in Spanish) at:

<http://www.boe.es/boe/dias/2005/07/19/pdfs/A25558-25563.pdf>

## **3. Is your country a contracting party to any bilateral or international instruments on family law?**

### **1. Multilateral conventions**

#### **a) Hague Conference on Private International Law**

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

b) Council of Europe

- European Convention of 29 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention of 27 November 2008 on the Adoption of Children

c) International Commission on Civil Status (CIEC)

- Convention of 4 September 1958 on International Exchange of Information relating to Civil Status
- Convention of 4 September 1958 on Changes of Surnames and Forenames
- Convention of 14 September 1961 Extending the competence of Authorities Empowered to Receive Declarations Acknowledging Natural Children
- Convention of 12 September 1962 on the Establishment of Maternal Descent of Natural Children
- Convention of 10 September 1964 to Facilitate the Celebration of Marriages Abroad
- Convention of 10 September 1964 on Decisions Concerning the Rectification of Civil Status Records
- Convention of 14 September 1966 Relating to the Establishment of Death in Certain Cases
- Convention of 8 September 1976 on the Issue of Multilingual Extracts from Civil Status Records
- Convention of 15 September 1977 on the Exception of Certain Records and Documents
- Convention of 5 September 1980 on the Law Applicable to Surnames and Forenames
- Convention of 5 September 1980 on the Issue of a Certificate of Legal Capacity to Marry
- Convention of 8 September 1982 on the Issue of a Certificate of Differing Surnames
- Convention of 10 September 1998 on the Issue of a Life Certificate
- Convention of 14 September 1999 on the Issue of a Certificate of Nationality
- Convention of 12 September 2000 on the Recognition of Decisions Recording a Sex Reassignment

2. Bilateral conventions

Spain has concluded bilateral agreements in civil matters with many countries although they cover different matters and they deal with different issues. Some of them have a broader material scope whereas others focus on one matter (adoption, maintenance...). Moreover, some of them cover international jurisdiction and/or applicable law and/or recognition and enforcement of foreign decisions, but many cover only recognition and enforcement of foreign decisions or judicial cooperation including service of documents and taking of evidence.

Some including judicial cooperation in civil matters: Algeria, Austria, Bolivia, Brazil, Bulgaria, China, Colombia, Czech Republic, Dominican Republic, El Salvador, France, Germany, Israel, Italy, Mauritania, Mexico, Morocco, Philippines, Portugal, Romania, Russian Federation, Saudi Arabia, Switzerland, Thailand, Tunisia, Vietnam.

**4. Are there any databases or online tools providing information on family law matters available in your country?**

European Judicial Network in civil and commercial matters  
[http://ec.europa.eu/civiljustice/homepage/homepage\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/homepage/homepage_spa_en.htm)

- Divorce

[http://ec.europa.eu/civiljustice/divorce/divorce\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_spa_en.htm)

- Parental responsibility

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_spa_en.htm)

- Maintenance claims

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_spa_en.htm)

European Judicial Atlas in Civil Matters

- Parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

- Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

Legislation translated into English (Ministry of Justice)

<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

Pórtico Legal (family section)

[http://www.porticolegal.com/int/int\\_Familia.html](http://www.porticolegal.com/int/int_Familia.html)

Noticias jurídicas

<http://noticias.juridicas.com/>

## **5. Please provide information on accessing and applying foreign family law in your country.**

Despite the mandatory nature of choice-of-law rules (Article 12.6 Civil Code), foreign law, when applicable, must be evidenced by the parties as established in Articles 281.2 and 282 Civil Procedure Act of 2000 (LEC).

- Article 281.2 LEC: "Object and need of proof. 1. [...] 2. Custom and foreign law shall also be object of proof. [...] Foreign law shall be proved as regards its content and validity; the court may make use of all means of inquiry deemed necessary for its implementation". Therefore, the parties must prove both the content and the validity of foreign law, and in practice it has also been required to evidence how it is implemented by the authorities of the country of origin.

- Article 282 LEC: "The evidence shall be examined at the request of the party [...]".

The role of judges in this regard has been considered as supportive. Case law of the Supreme Court has required a prior diligence of the parties in trying to evidence the relevant foreign law to ground the intervention of judges through the Ministry of Justice. Otherwise, they are not allowed to apply foreign law *ex officio*, and Spanish law is usually applied instead (some courts have also dismissed the claim as a consequence of the lack of proof).

Concerning the available means of proof, the Spanish LEC does not contain any special provision on this issue so that the general rules of Article 299 LEC should be applied. Among the different means listed, documentary evidence stands out from the rest in practice (Article 299.2 –public documents- and 3 –private documents- LEC), as well as the use of experts' opinions (Article 299.4 LEC).

On the other hand, Spain is a party in several international instruments on the ascertainment of foreign law both multilateral and bilateral. As regards multilateral conventions, Spain is a party to two of them: European Convention of 7 June 1968 on Information on Foreign Law and Inter-American Convention of 8 May 1979 on

Proof of and Information on Foreign Law. Spain has also concluded a significant number of bilateral agreements on legal cooperation in civil matters that include within their scope of application the commitment to provide information on the content of the respective legal systems, such as the ones negotiated with Bulgaria, Russian Federation, Mexican United States, Algeria, Brazil, China, Morocco...

Translations into English of the Spanish Civil Code and of the Civil Procedure Act of 2000 are available at:

<http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>

## II. NATIONAL JURISPRUDENCE

In Spain, the number of private international cases heard by Spanish courts is still small if compared with other fields of law. Nevertheless, private international cases have increased in the last years and a significant number of judgments are rendered every year in every judicial instance, from courts of first instance to Supreme Court. It is interesting to mention that the University of Valencia is in charge of making yearly a collection of Spanish case law in this field of law ("Spanish Judicial Decisions in Private International Law") which is published in English at Spanish Yearbook of International Law:

<http://dialnet.unirioja.es/servlet/revista?codigo=1366>

Some recent judicial decisions on divorce, maintenance and parental responsibility can be mentioned as examples.

### Regulation Brussels IIbis in matters of cross-border divorce

- Judgement n. 246/2012 of Audiencia Provincial de Barcelona (Court of Appeal of regional scope of Barcelona), 3 April 2012. International jurisdiction of Spanish courts in divorce matters established by Regulation Brussels IIbis. Law applicable to international divorce determined under Article 107.2 CC (domestic regime prior to entry into force of Regulation Rome III). Maintenance claim regulated by Regulation 44/2001.
- Judgment n. 158/2010 of Audiencia Provincial de Zaragoza (Court of Appeal of regional scope of Zaragoza), 16 March 2010. International jurisdiction of Spanish courts in divorce matters established by Regulation Brussels IIbis.

### Maintenance Regulation

(mostly still covered by Regulation 44/2001; some decisions already mention Regulation 4/2009 but warning that at that moment it had not entered into force yet)

- Judgment n. 429/2011 of Audiencia Provincial of Santa Cruz de Tenerife (Court of Appeal of regional scope of Santa Cruz de Tenerife), 7 October 2011. Law applicable to international maintenance claim, governed by Spanish Law under The Hague Protocol of 2007.
- Order n. 64/2010 of Audiencia Provincial of Madrid (Court of Appeal of regional scope of Madrid), 26 February 2010. International jurisdiction of Spanish courts in maintenance claim.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

BORRÁS RODRÍGUEZ, A.: "De "Bruselas II" a "Bruselas II bis"... ¿o a "Bruselas II plus?", in VARGAS GÓMEZ-URRUTIA, M. and SALINAS DE FRÍAS, A. (coords): *Soberanía del Estado y derecho internacional: homenaje al profesor Juan Antonio Carrillo Salcedo*, Vol. 1, 2005, pp. 239-258

CARO GÁNDARA, R.: "De la desconfianza recíproca al reconocimiento mutuo, una laboriosa transición: el Reglamento Bruselas II bis como banco de pruebas", *Diario La Ley*, Nº 7641, 2011.

ESPLUGUES MOTA, C. and IGLESIAS BUHIGUES, J.L.: *Derecho internacional privado*, Tirant Lo Blanch, Valencia, 2011, pp. 337-355.

FONT I SEGURA, A.: "El progresivo avance del Derecho comunitario en materia de familia: Un viaje inconcluso de Bruselas II a Bruselas II bis", *Revista española de derecho internacional*, Vol. 56, Nº 1, 2004, pp. 273-300.

PALAO MORENO, G.: "Crisis matrimoniales internacionales: cinco elementos a tomar en cuenta", in ALVENTOSA DEL RÍO, J. and MOLINER NAVARRO, R.M. (coords.): *Estudios jurídicos en homenaje al profesor Enrique Lalaguna Domínguez*, Vol. 2, 2008, pp. 1611-1632.

QUIÑONES ESCÁMEZ, A.: "¿Cuándo se aplica el Reglamento Bruselas II bis? El TJCE se pronuncia sobre su ámbito de aplicación", *Revista de Derecho Comunitario Europeo*, Año nº 12, Nº 30, 2008, pp. 457-482.

RODRÍGUEZ PINEAU, E.: "Algunas cuestiones sobre la aplicación del reglamento CE 2201/2003 en España", *Anuario español de derecho internacional privado*, Nº. 4, 2004, pp. 261-286.

#### Regulation Rome III: Cross-border divorce - applicable law

ADAM MUÑOZ, M<sup>a</sup> D.: "Algunas reflexiones sobre la ley aplicable a la separación judicial y al divorcio en el Derecho internacional privado español", Vol. 56, Nº. 2, 2008, pp. 191-216.

ÁLVAREZ DE TOLEDO QUINTANA, L.: "El pacto de elección de lex separationis y lex divorcii en el Reglamento 1259/2010, del Consejo, de 20 de diciembre de 2010", *Diario La Ley*, Nº 7613, 2011.

CAMPUZANO DÍAZ, B.: "El Reglamento (UE) n.º 1259/2010, de 20 de diciembre de 2010, por el que se establece una cooperación reforzada en el ámbito de la ley aplicable al divorcio y a la separación judicial", *Revista de Derecho Comunitario Europeo*, Año nº 15, Nº 39, 2011, pp. 561-587.

CARRASCOSA GONZÁLEZ, J.: "La ley aplicable a la separación judicial y al divorcio en defecto de elección de ley por los cónyuges. Análisis del artículo 8 del Reglamento 1259/2010 de 20 de diciembre", *Cuadernos de Derecho Transnacional*, vol. 4, nº 1, pp. 52-85.

VELÁZQUEZ SÁNCHEZ, M<sup>a</sup> M.: "La unificación de normas de conflicto de leyes en materia de crisis matrimoniales: el nuevo Reglamento (UE) Nº 1259/2010", *Revista General de Derecho Europeo*, Nº. 24, 2011.

## Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

ÁLVAREZ GONZÁLEZ, S.: "El Reglamento 4/2009/CE sobre obligaciones alimenticias: cuestiones escogidas", *Diario La Ley*, Nº 7230, 2009.

LACUEVA BERTOLACCI, R.: "La ejecución de las resoluciones de alimentos previstas en el Reglamento (CE) núm. 4/2009 del Consejo", *Diario La Ley*, Nº 7747 and 7748, 2011.

GARAU SOBRINO, F.: "Las fuentes españolas en materia de obligaciones alimenticias. ¿Hacia un Derecho internacional privado extravagante?", *Cuadernos de Derecho Transnacional*, Vol. 3, Nº 2, pp. 130-144.

RODRÍGUEZ VÁZQUEZ, M<sup>a</sup> Á.: "La regulación del Reglamento 4/2009 en materia de obligaciones de alimentos: competencia judicial internacional, ley aplicable y reconocimiento y ejecución de sentencias", *Revista electrónica de estudios internacionales*, Nº. 19, 2010.

## Matrimonial property regimes and property consequences of registered partnerships

### a) Matrimonial property regimes

AÑOVEROS TERRADAS, B.: "Los pactos prematrimoniales en previsión de ruptura en el derecho internacional privado", *Anuario español de derecho internacional privado*, núm. 10, 2010, pp. 441-469.

CARRILLO POZO, L.F.: "Eficacia en España de las resoluciones extranjeras en materia de efectos económicos del matrimonio", *Cuadernos de derecho transnacional*, vol. 4, núm. 1, 2012, pp. 86-121.

NAGY, C.I.: "El derecho aplicable a los aspectos patrimoniales del matrimonio: la ley rectora del matrimonio empieza donde el amor acaba", *Anuario español de derecho internacional privado*, núm. 10, 2010, pp. 511-529.

RODRÍGUEZ PINEAU, E.: *Régimen económico matrimonial. Aspectos internacionales*, Comares, Granada 2002.

VAQUERO LÓPEZ, C.: "Los regímenes matrimoniales en un espacio de libertad, seguridad y justicia: apuntes sobre la codificación comunitaria de las normas sobre competencia judicial internacional, conflicto de leyes y reconocimiento y ejecución de decisiones judiciales", *Anuario español de derecho internacional privado*, núm. 6, 2006, pp.195-208.

### b) Property consequences of registered partnerships

BERROCAL LANZAROT, A.I.: "Uniones o parejas de hecho. Los efectos patrimoniales constante y al cese o ruptura de la convivencia", in HERRERA CAMPOS, R. and BARRIENTOS RUIZ, M.A. (coords.): *Derecho y familia en el siglo XXI: el derecho de familia ante los grandes retos del siglo XXI*, Vol. 2, 2011, pp. 619-646.

CARRILLO CARRILLO, B.: "Ley aplicable a las parejas de hecho en Derecho Internacional Privado Español", *Mundialización y familia*, 200, pp. 385-451.

GONZÁLEZ BEILFUSS, C.: "Parejas de hecho, parejas registradas y matrimonios de personas del mismo sexo en el derecho internacional privado europeo", in NAVAS

NAVARRO, S. (coord.): *Matrimonio homosexual y adopción: perspectiva nacional e internacional*, 2006, pp. 99-112.

LECIÑENA IBARRA, A.: "Hacia un contractualismo regulador en el marco de un régimen legal dispositivo como vía para poner fin a la anomia general en la ordenación de las parejas de hecho", *Revista de derecho privado*, Año nº 95, Mes 11-12, 2011, pp. 59-98.

MESA MARRERO, C.: *Las uniones de hecho: análisis de las relaciones económicas y sus efectos*, Aranzadi, 2006 (3rd ed.).

POUS DE LA FLOR, M.P.: "Crisis de parejas: consecuencias patrimoniales por ruptura de las uniones de hecho", *Revista crítica de derecho inmobiliario*, Año nº 85, Nº 712, 2009, pp. 805-832.

**National section**

**SWEDEN**

**Michael Hellner**

**Professor of Private International Law and International Procedure,  
Stockholm University**

## I. NATIONAL LEGISLATION

### A. Cross-border divorce: jurisdiction, recognition and applicable law

#### 1. What is the current source of law for divorce, annulment, legal separation? Are there any reform proposals?

The right to divorce is regulated in Chapter 5 of the Marriage Code (1987:230). Swedish law has not contained rules on annulment and legal separation since 1973 when the system of fault based divorce was abandoned.

The rules on divorce procedure can be found in Chapter 14 of the Marriage Code.

The code is available in Swedish at <http://www.notisum.se/pub/Doc.aspx?url=/rnp/sls/lag/19870230.htm> and Chapters 5 and 14 are available in English at <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf>. Note that the English translation does not reflect the changes brought about through Act (2009:253) amending the Marriage Code and introducing same sex marriages.

There are no reform proposals concerning the right to divorce.

#### 2. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 7 of the Regulation), which court is competent for hearing a cross-border divorce case, according to domestic jurisdiction rules?

If no court of a Member State has jurisdiction according to the Brussels IIbis Regulation, the courts of another Nordic State may still have jurisdiction according to the 1931 Nordic Convention Containing Private International Law Rules on Marriage, Adoption and Guardianship. The rules of the Nordic Convention mirror those of the Brussels IIbis Regulation. If neither the Nordic Convention nor the Brussels IIbis Regulation apply, we turn to autonomous national PIL rules.

Chapter 3 Section 2 of Act (1904:26 p. 1) on certain international legal relationships concerning marriage and guardianship reads as follows (in translation by the author):

*3 § Swedish courts shall have jurisdiction to decide matrimonial cases, if*

- (1) both spouses are Swedish citizens,*
- (2) the applicant is a Swedish citizen and has habitual residence within the realm or has previously had habitual residence here after the age of eighteen,*
- (3) the applicant is not a Swedish citizen but has had habitual residence within the realm for at least one year,*
- (4) the respondent is habitually resident within the realm,*
- (5) the case concerns the invalidity of a marriage performed by a Swedish authority, or*
- (6) if in any other case than referred to in (1) to (5) there are special reasons to try the case in the realm, provided that one of the spouses is a Swedish citizen or the applicant is unable to have the case tried in the State of his or her citizenship or habitual residence.*

The Brussels IIbis Regulation has rendered much of Section 3 obsolete; however, (2), (5) and (6) could still be applied against a respondent who is neither habitually resident in a Member State nor a national of one, or in the case of the United Kingdom or Ireland, domiciled there (Article 6).

**3. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

Act (2008:450) with rules complementing the Brussels II Regulation (replacing Act [2001:394] with rules complementing the Brussels II Regulation), available at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20080450.htm>, contains *inter alia* certain procedural rules concerning the exequatur procedure and interim measures. Government Ordinance (2005:97) with rules complementing the Brussels II Regulation, available at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20050097.htm>, contains rules concerning the Swedish central authority. None of the two statutes have been translated into English.

In addition, Government Ordinance (2006:467) on the enforcement of judgments on parental responsibility, available at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20060467.htm>, stipulates that Chapter 21 of the Parental Code is applicable also to a foreign judgment that has been declared enforceable according to the Brussels II Regulation. Chapter 21 of the Parental Code concerns the enforcement of judgments, decisions or agreements concerning custody, residence or access to children. There is presently no up-to-date translation into English of Chapter 21. The Parental Code in Swedish can be found at <http://www.notisum.se/pub/Doc.aspx?url=/rnp/sls/lag/19490381.htm>. A fact sheet in English from the Ministry of Justice on the rules on custody and enforcement can be found at <http://www.sweden.gov.se/content/1/c6/06/87/31/f36b184c.pdf>.

**4. Is your country participating in the enhanced cooperation implemented by Regulation Rome III? If not, which conflict of laws rules apply in cross-border divorce cases?**

Sweden does not participate in the Rome III Regulation.

The rules applicable to divorce are in an intra-Nordic case the ones contained in Ordinance on Certain International Legal Relationships in respect of Marriage, Adoption and Guardianship (1931:429), which implements the 1931 Nordic Convention Containing Private International Law Rules on Marriage, Adoption and Guardianship. The law applicable to the right to divorce or legal separation is the *lex fori* (Section 9).

In a non-Nordic case Act (1904:26 p. 1) on certain international legal relationships concerning marriage and guardianship applies. According to Chapter 3 Section 4 Swedish law applies. If both spouses are foreign nationals and none of them are habitually resident in Sweden since at least one year, the court may not grant a divorce against the will of one of the parties if this is not possible according to the law of a country in which one of the spouses is a national. In other cases in which both spouses are foreign nationals and one of the parties claim that there is no right to divorce in the country of which he or she is a national, the court may not grant a divorce if there are special reasons not to do so.

5. **Is it possible for the spouses to designate the applicable law before the court during the course of the proceedings (Article 5(3) of the Rome III Regulation)?**

No.

6. **Are there any formal requirements applicable to the spouses' agreement on the choice of applicable law (Article 7(2) to (4) of the Rome III Regulation)?**

N/a.

## **B. Cross-border maintenance**

1. **What is the current source of law for maintenance of spouses after divorce? Are there any reform proposals?**

Maintenance of spouses after divorce is regulated in Chapter 6 of the Marriage Code. Chapter 14 of the Code contains procedural provisions relating to claims for maintenance by a spouse when the claim is brought in conjunction with divorce proceedings. Chapter 6 is available in English at <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf>.

2. **Please describe the national enforcement procedure applicable in the case of maintenance claims.**

Maintenance claims are enforced according to the rules in the Enforcement Code (1981:774), available in Swedish at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/19810774.htm> and in English at <http://www.sweden.gov.se/sb/d/5806/a/62385>. Maintenance claims are generally treated as any other claim but the Code contains certain rules particular to maintenance.

Firstly, written agreements concerning maintenance to a spouse of former spouse or a minor child, the authenticity of which has been certified by two witnesses shall be enforced as an enforceable judgment, see Chapter 3 Section 19 of the Enforcement Code. Secondly, maintenance paid to children or former spouses not living with the debtor take priority over other debts in salary garnishment, Chapter 7 Section 14 of the Enforcement Code.

3. **Which is the Central Authority designated to facilitate the application of the Maintenance Regulation (Chapter VII of the Regulation)?**

According to Government Ordinance (2011:704) with rules complementing the EU Maintenance Regulation the Swedish Social Insurance Agency is the Central Authority according to the Regulation.

4. **Are there any other national legal instruments / procedures put in place for the application of the Maintenance Regulation?**

Act (2011:603) with rules complementing the EU Maintenance Regulation contains rules on the exequatur procedure and enforcement of judgments according to the Maintenance Regulation.

Government Ordinance (2011:704) with rules complementing the EU Maintenance Regulation contains miscellaneous provisions, *inter alia* on the matter of Central Authority.

## C. Matrimonial property regimes in Europe

### 1. What is the current source of law on matrimonial property regimes? Are there any proposals to reform?

The rules on matrimonial property regimes are contained in Chapter 7 of the Marriage Code (1987:230). Upon marriage each spouse continues to own his or her property and to dispose of it alone, regardless of time and manner of acquisition. All debts remain individual. Upon dissolution of the marriage each spouse has a claim to the other spouses marital property equal to half the added value of both spouses marital property after deduction for debts. It is possible to agree that some or all property shall remain the individual property of the spouse in the form of a written marriage contract that can be entered into at any time and registered with the Tax Authority.

There are no current plans for reform.

### 2. Which conflict of laws rules apply in matrimonial property disputes?

The law applicable to married people's property is regulated in the Act (1990:272) on Certain International Questions relating to the Property of Married and Unmarried Couples, available at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/19900272.htm>.

Section 3 of the Act permits married people or couples contemplating marriage to conclude a written agreement providing that their matrimonial property regime is to be governed by the law of a country of which one of them is a habitual resident or a national at the time the agreement is concluded.

If the spouses have not entered into a valid choice-of-law agreement, Section 4 of the Act states that the applicable law is the law of the country in which they take up habitual residence after marriage. If both spouses subsequently take up habitual residence in another country, and live there for at least two years, the law of that country will be applied instead. But if both spouses have already been habitually resident in that state during the marriage, or if both of them are nationals of that state, the law of that state will be applied from the moment they take up habitual residence there.

Section 5 of the Act states that a choice-of-law agreement is valid if it is consistent with the law applicable to the spouses' property when the transaction takes place. If the choice-of-law agreement is concluded before the wedding, it is valid if it is consistent with the law that becomes applicable when the spouses marry. A choice-of-law agreement is valid as to form if it satisfies the formal requirements of the

law in the state in which it is concluded or in which the spouses are habitually resident.

For Nordic cases there are special rules laid down in the Ordinance on Certain International Legal Relationships in respect of Marriage, Adoption and Guardianship (1931:429).

### **3. Which are the property consequences of registered partnerships?**

The same as for marriages, see Chapter 3 Section 1 of the Registered Partnership Act (1994:117). The Act was repealed after the introduction of same sex marriages in 2009. However, partnerships entered into before 1 May 2009 continue to be valid and subject to the rules of the Act. The parties can easily transform their partnership into a marriage by simple registration with the Tax Authority.

## **D. Horizontal issues**

### **1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The main piece of implementation legislation is the Act (2011:860) on Mediation in Certain Private Law Disputes, available in Swedish at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/20110860.htm>.

### **2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The main piece of implementation legislation consists of Sections 22a – 22d of the Legal Aid Act (1996:1619). The Sections were added through Act (2004:738) amending the Legal Aid Act and went into force 1 November 2004. The Legal Aid Act is available in Swedish at <http://www.notisum.se/Pub/Doc.aspx?url=/rnp/sls/lag/19961619.htm>. The Act has not been translated to English but there is an official information brochure in English available at: [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

### **3. Is your country a contracting party to any bilateral or international instruments on family law?**

#### *Nordic Conventions*

- 1931 Nordic Convention Containing Private International Law Rules on Marriage, Adoption and Guardianship,
- 1962 Nordic Convention on the Recovery of Maintenance,
- The 1979 Act on the Recognition of Nordic Decisions on Parentage is based upon an informal agreement between the Nordic countries leading to parallel acts – a Nordic speciality.

#### *Hague Conventions*

- 1958 Hague Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children
- 1970 Hague Convention on the Recognition of Divorces and Legal Separations,
- 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations,
- 1980 Hague Convention on the Civil Aspects of International Child Abduction,
- 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions,
- 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children [Bill has been passed by Parliament and Ratification is expected to take place and come into effect by 1 January 2013],
- 2007 Hague Protocol on the Law Applicable to Maintenance Obligations [unilateral application through EU Maintenance Regulation].

#### *UN Conventions*

- 1956 UN Convention on the Recovery Abroad of Maintenance,

#### *Council of Europe Conventions*

- 1975 European Convention on the Legal Status of Children born out of Wedlock
- 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,

#### *EU/EFTA*

- 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

#### *Bilateral*

- 1936 Convention between Sweden and Switzerland on the Recognition and Enforcement of Judgments in the Area of Civil Law

#### **4. Are there any databases or online tools providing information on family law matters available in your country?**

##### *European Judicial Network in Civil and Commercial Matters*

Information on divorce:

[http://ec.europa.eu/civiljustice/divorce/divorce\\_swe\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_swe_en.htm)

Information on maintenance obligations:

[http://ec.europa.eu/civiljustice/maintenance\\_claim/maintenance\\_claim\\_swe\\_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_swe_en.htm)

Information on parental responsibility:

[http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_swe\\_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_swe_en.htm)

##### *European Judicial Atlas in Civil and Commercial Matters*

Matrimonial matters and matters of parental responsibility

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_jmm\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_jmm_information_en.htm)

Maintenance obligations

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/mo\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_information_en.htm)

##### *Swedish Government Offices*

Links to English translations of Statutes and Information Brochures in English

<http://www.sweden.gov.se/sb/d/3288/a/19570>

**5. Please provide information on accessing and applying foreign family law in your country.**

If the case is dispositive, i.e. such that the parties may agree, the court will largely leave the pleading and proving of foreign law to the parties. The areas of family law that can be considered dispositive are maintenance and matrimonial property regimes. If the case is indispositive, the principle of 'iuria novit curia' applies and it is the responsibility of the court to make the parties aware of the possibility of the applicability of foreign law and finding out its content. The areas of family law that can be considered indispositive are marriage and divorce, parentage, adoption and parental responsibility.

Even in an indispositive case the court may ask the parties to assist in finding out the content of foreign law, Chapter 35 Section 2 of the Code on Procedure (1942:740).

Sweden is a party to the 1968 European Convention on Information on Foreign Law and the 1978 Additional Protocol and the Central Authority is the Ministry of Justice.

Another source of information is the European Judicial Network. The Swedish contact point is a civil servant at the Ministry of Justice.

## II. NATIONAL JURISPRUDENCE

Only published judgments have been included in the list; these are judgments with precedential value from the Supreme Court or the Courts of Appeal. There will of course be several other cases in which courts – district courts or courts of appeal – have applied the Regulations. Sometimes such non-precedential cases will be available electronically and sometimes not. For example, there are many cases from the Svea court of appeal applying the exequatur procedure foreseen in the Maintenance Regulation for decisions given in the Member States before the date of application of the Regulation, but none of them have precedential value.

### Regulation Brussels IIbis in matters of cross-border divorce

NJA 2008 s. 71 (Supreme Court, 28.1.2008), available at <https://lagen.nu/dom/nja/2008s71> (Articles 6 and 7: relationship between them – the case was referred to and decided by the ECJ as case C-68/07 Sundelind Lopez).

### Maintenance Regulation

No published judgments yet.

### III. NATIONAL BIBLIOGRAPHY

#### Regulation Brussels IIbis: Cross-border divorce – jurisdiction and recognition

- M. Hellner, Sverige, EU och den internationella privaträtten, Svensk Juristtidning 2011 s. 388-412.
- M. Jänträ-Jareborg, EU:s internationella familje- och successionsrätt – mot harmonisering eller fragmentarisering, Europarättslig tidskrift 2010 s. 673-689.
- M. Jänträ-Jareborg, Harmonisering, samordning och ömsesidigt förtroende inom Europeiska unionen - utvecklingen inom familjerätt. Europeiska unionen och familjerätt: de första tio åren av svenskt medlemskap, Svensk Juristtidning 2005 s. 804-844.
- D. Hanqvist, Vin och vatten – erkännande av "religiös" rätt, Svensk Juristtidning 2003 s. 981-996.
- M. Jänträ-Jareborg, Mot en europeisk (internationell) familjerätt – om EU-samarbetets utvidgning till familjerätten, Juridisk Tidskrift 2001/02 s. 48-75.

#### Regulation Rome III: Cross-border divorce - applicable law

#### Maintenance Regulation: Cross-border maintenance - jurisdiction, applicable law, recognition and enforcement

- M. Hellner, Sverige, EU och den internationella privaträtten, Svensk Juristtidning 2011 s. 388-412.
- M. Hellner, Nya regler om underhållsbidrag över gränserna från Haagkonferensen för internationell privaträtt, Ny Juridik 1:08 s. 25-56.

#### Matrimonial property regimes and property consequences of registered partnerships

[only work on Swedish private international law]

- L. Pålsson, Svensk rättspraxis i internationell familje- och arvsrätt, 2 uppl., Norstedts Juridik 2006, pp. 79-88.
- U. Bergquist, Internationell arvs- och bodelningsrätt: en kommentar, Norstedts Juridik 2003.
- M. Jänträ-Jareborg, "Rights of Property Upon Divorce in Swedish Conflict of Laws, With Special Reference to Party Choice of Law", in: N. Lowe & G. Douglas (eds.), *Families Across Frontiers*. The Hague & Boston & London; Martinus Nijhoff Publishers, 1996, pp. 12.
- M. Jänträ-Jareborg, Egendomsförhållanden i internationella äktenskap: om frihet att avtala om tillämplig lag samt om lagvalsfrihetens risker för make och borgenär, Svensk Juristtidning 1994 s. 433-463.
- M. Jänträ-Jareborg, "Matrimonial Property and Maintenance to Spouse in Swedish Conflict of Law", in: *International Family Law: A Scandinavian Approach*, pp. 9-29.