THE PITFALLS OF AN INTERNATIONAL DIVORCE

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The purpose of this article is to identify, understand and anticipate the pitfalls of divorce in an international context, in both contested and uncontested situations, especially in light of some recent reforms to French law, in particular the new divorce procedure that entered into effect in France on 1 January 2021.

"Divorce is wiser than marriage; there you know what you're doing"[1]

Although this statement may be true in a domestic French context, it is more debatable in an international context where the existence of a foreign element in divorce proceedings greatly complicates the process, to the point that the practitioner may no longer be sure what she is doing or what has to be done.

Very often, divorce proceedings will be split among several countries that may have to deal with different aspects of the proceedings at the same time: one will rule on the children, while the other will rule on the financial aspects. Even if one single court has jurisdiction over the entire divorce proceedings, there are often two, or even more, national laws that will apply to different issues.

This mosaic of jurisdictions and applicable laws means that a practitioner working on a contested divorce must be careful to choose, right at the outset of the proceedings, the most favorable court for his client's interests when there is a choice to be made (which is often the case in international matters). An analysis of the applicable jurisdictional and legislative parameters will thus serve as a reminder of the main rules that apply to these questions for a contested divorce (I).

This complexity now paradoxically arises even more forcefully in uncontested divorces after the divorce reform that entered into effect on 1 January 2017.[2] Lack of jurisdiction and the "privatization" of amicable divorces thus bring about a great many unresolved questions in an international context, even though the divorce reform of 1 January 2021 offers new avenues to explore (**II**).

I – Contested divorce in an international context: the impact of choice of venue

A – Jurisdiction and choice of venue

1. Jurisdiction over a divorce

For any practitioner of international family law, the first analysis of a new case should focus on determining which court has jurisdiction to hear the divorce proceedings (if the spouses have not already previously settled this question).

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[1] Quoting Sacha Guitry.

[2] French Law No. 2016-1547, 18 Nov. 2016, JO 19 Nov.

There are often many erroneous beliefs: for example, many spouses believe that if the marriage was performed in France or if a prenuptial agreement was signed in France, that is enough to give French courts jurisdiction over their divorce proceedings.

Obviously, these elements do not apply to the question of jurisdiction in the strictest sense, but they may nevertheless influence the overall procedural strategy.

Venue is a crucial choice since, within the European Union, the rule of *lis pendens* is defined strictly and identically in all applicable European regulations on jurisdiction over divorce proceedings (these regulations are detailed below), and the court where the case is first filed will be the court that has jurisdiction over the rest of the divorce proceedings.[3]

In an international context, when there is a situation in which two (or even more) countries may have jurisdiction over the proceedings, a practitioner's first duty is therefore to determine the tactical advantage of being in one country rather than another, and doing so very swiftly, at the risk of incurring professional liability.

It should be recalled that, in divorce proceedings, the jurisdiction of French courts must be assessed on the basis on Article 3 of EU Regulation (EC) No. 2201/2003, referred to as the "Brussels II bis" regulation.[4] This regulation provides for alternative jurisdictional criteria according to which French courts generally have jurisdiction if (1) there exists on French territory: (i) the habitual residence of the spouses; or (ii) the last habitual residence of the spouses, as long as one of them still resides there; or (iii) the habitual residence of the respondent; or (iv), in the event of a joint petition, the habitual residence of either spouse; or (v) the habitual residence of the petitioner if he or she has resided there for at least one year prior to filing the petition; or (vi) the habitual residence of the petitioner if he or she has resided there for at least six months immediately prior to filing the petition and he or she is French; or (2) the spouses both have French nationality.

When none of these rules can serve as a basis for the jurisdiction of French courts or the courts of a Member State, it will also be possible to base the jurisdiction of French courts on international rules of ordinary law, such as Articles 14 and 15 of the French Civil Code, provided, however, that their use does not result in bringing a national of an EU Member State before French courts, unless the person is a defendant of French nationality.[5]

But these jurisdictional rules are not the only rules to consider when analyzing the choice of venue, since the rules outlined above relate only to jurisdiction to grant the divorce and to rule on the causes of the divorce.

2. Jurisdiction over the financial consequences of divorce

In general, financial and property concerns will motivate you to choose one country over another to handle the divorce proceedings.

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[3] Subject to new difficulties brought about by the new divorce reform that entered into effect on 1 January 2021 on the filing date to be used, cf. section II – C below.

[4] Council Reg. (EC) No. 2201/2003 of 27 Nov. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.

[5] See Council Reg. (EC) No. 2201/2003 of 27 Nov. 2003, Art. 6 and 7.

For divorce practitioners facing an international situation, before doing anything else, it will be necessary to do an exercise of qualification in order to understand the applicable rules in the foreign country that may handle the divorce proceedings.

In this respect, it should be recalled that in countries that follow the civil law tradition, these issues cover liquidation of the matrimonial regime and spousal support or other forms of payment (whether the payment is in the form of a periodic installment or a lump sum) that one spouse may pay to the other spouse in need (in France, this is the duty to assist at the provisional measures stage, then compensatory allowance).

In countries that follow the common law tradition, this distinction does not necessarily exist and division of the spouses' property will be done according to criteria that may or may not fall in the category of maintenance obligations, depending on the circumstances. However, in the "van den Boogaard"[6] decision, the European Union Court of Justice provided some clarification about these different categories when it held that, if an allowance is intended to provide for the maintenance of a spouse in need or if the needs and resources of each of the spouses are taken into consideration in determining the amount of the allowance, the decision relates to a maintenance obligation. On the other hand, when an allowance is only intended to divide property between the spouses, the decision relates to the matrimonial property regime (Recitals 21 and 22).

This distinction was recently taken up by English courts, notably in a decision on the issue of the validity of a foreign prenuptial agreement. In a very didactic manner, the English judge stated that, if a payment or transfer of property is ordered in England to provide for the needs of one of the spouses, while taking into account the resources and needs of each spouse, the decision involves an issue of "maintenance." Conversely, if the same payment or transfer is ordered solely as part of dividing the spouses' property, this provision affects the property rights of each spouse due to the marital relationship (this provision can therefore be categorized as a matter of the spouses' matrimonial property regime).[7]

In France, divorce courts generally have the authority to liquidate spouses' matrimonial property regimes, since this authority has now been made official by the new European regulation on matrimonial property regimes, which was adopted on 24 June 2016 and entered into force on 29 January 2019.[8]

Thus, with respect to issues related to maintenance obligations between spouses (which include both maintenance obligations under the duty of support and compensatory allowances[9]), the

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[6] ECJ, 27 Feb. 1997, Case C-220/95, Antonius van den Boogaard.

[7] High Court, Family Division, DB v PB [2016], 22 Dec. 2016, EWHC 3431 (Fam).

[8] Council Reg. (EU) No. 2016/1103, 24 Jun. 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Article 5 provides that a court that has jurisdiction over a divorce also has jurisdiction to rule on liquidation of the matrimonial property regime, although there are some exceptions to this jurisdiction (see Art. 5(2)).

[9] ECJ, 6 Mar. 1980, Case C-120/79, Louise de Cavel: the European Court of Justice, ruling at the time on the Brussels Convention, decided that compensatory allowances should be considered to fall in the category of maintenance obligations.

European regulation on maintenance obligations,[10] which entered into force on 18 June 2011, provides that French courts have jurisdiction if the defendant or the creditor spouse habitually resides in France or if French courts have jurisdiction to handle the divorce proceedings, as long as such jurisdiction is not based solely on the nationality of one of the parties.

In practice, French courts that have jurisdiction over divorce proceedings will also have authority over the financial consequences of the divorce, except for maintenance issues when jurisdiction over the divorce is based on Articles 14 and 15 of the French Civil Code (for example, when a French man married to an American woman and residing in the United States wishes to initiate divorce proceedings in France, which, in practice, greatly reduces the attractiveness of bringing the matter before French courts).

3. Jurisdiction over matters relating to children

In addition to the financial consequences of the divorce, the other issue that is obviously a catalyst of disagreements between spouses is that of the children. On this issue also, it may be preferable to bring the case before one court rather than another.

Within the European Union, under Article 8 of the "Brussels II bis" regulation, the courts of the child's habitual residence will have jurisdiction over any issue relating to parental responsibility and also, pursuant to Article 3(d) of the regulation on maintenance obligations, over the issue of child support. The possibility of forum shopping within the European Union with regard to issues of parental responsibility is, therefore, generally more limited.

On the other hand, when the child does not habitually reside within the European Union, French courts may have jurisdiction to rule on issues of parental responsibility based on the jurisdictional privilege provided in Articles 14 and 15 of the French Civil Code. Filing in French court, rather than the court of the child's place of residence, may therefore be more attractive, provided of course that the future French decision will be recognized in the country of residence, which is not always the case, as we will discuss below.

This overview of the rules that apply to divorces shows that, in a case with foreign elements, it will often be possible to file divorce proceedings in several different courts, which may then be able to decide all the issues or only some of them.

B - Applicable law and choice of venue

This analysis of jurisdictional rules should, therefore, be followed by a consideration of the applicable conflict of laws rules in order to determine which jurisdiction is most favorable in a given situation.

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[10] Council Reg. (EC) No. 4/2009, 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, see in particular Art. 3 on general jurisdictional rules.

We will briefly go over how French courts apply French law to matters of parental responsibility, pursuant to Article 15, paragraph 1, of The Hague convention of 1996,[11] which provides that the law applicable to issues of parental authority is the law of the forum.

1. Law applicable to the divorce

With respect to which national law applies to a divorce, the applicable conflict of laws rule in France is provided by Regulation (EU) No. 1259/2010, which institutes rules regarding which law should be applied to matrimonial matters.[12]

Unless the parties have made a choice, Article 8 of this regulation provides for the application of the law: a) of the spouses' habitual residence at the time the court is seized; or, failing that, b) of the spouses' last habitual residence, provided that this residence did not end more than one year before the court was seized and that one of the spouses still resides in that State at the time the court is seized; or, failing that, c) of the nationality of both spouses at the time the court is seized; or, failing that, d) of the State of the court that was seized.

In practice, the law that applies to the divorce will rarely be an issue because the cause of the divorce is not generally the point that generates the most disagreements between spouses.

2. Law applicable to the financial consequences of the divorce

In order to compare with France, it will often be necessary to determine which law French courts will apply to the financial consequences of the divorce, which will not necessarily be French law.

With respect to the law that applies to the spouses' matrimonial property regime, French courts apply The Hague Convention of 1978 on the law applicable to matrimonial property regimes for spouses married prior to 29 January 2019.[13] If the spouses did not make a choice before or during the marriage, the applicable law is that of the first common habitual residence of the spouses after the marriage.

For spouses married after 29 January 2019, to whom the new regulation cited above on matrimonial property regimes applies when they have not made another choice, the conflict of laws rule seems in appearance to be similar, since this regulation also provides that it is the law of the first common habitual residence of the spouses that will apply (Art. 26).

However, contrary to The Hague Convention, this is a rebuttable presumption, since one of the spouses can request the application of another law if he or she shows that the spouses had their last common residence in another State for a significantly longer period and that both spouses relied on the law of that State to organize and plan their property relations. In other words, this provision may precipitate many disputes between spouses, considering how important it is to determine the spouses' matrimonial property regime in the event of a divorce.

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[11] The Hague Convention, 19 Oct. 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
[12] Council Reg. (EU) No. 1259/2010, 20 Dec. 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJEU 29 Dec., No. L 343.
[13] The Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. For spouses married before 1 September 1992, rules of ordinary law are applicable and lead, in principle, to application of the law of the spouses' first habitual residence after marriage.

With regard to maintenance obligations between spouses, French courts apply the conflict of laws rule provided by The Hague Protocol on the law applicable to maintenance obligations.[14] In principle, it is the law of the habitual residence of the maintenance creditor that will apply (Protocol, Art. 3). But under Article 5, either spouse has the option of contesting the application of this law if the law of a State, in particular the State of the spouses' last common habitual residence, has a closer connection to the marriage.

In practice, an analysis of decisions on this issue demonstrates that French courts do not apply Article 5 literally and that they almost systematically use criteria that allow them to justify applying French law rather than a foreign law. Certainly, French family court judges prefer to apply the rules they know, even if it sometimes means circumventing the meaning of The Hague Protocol and thus stripping Article 5 of any meaning, which is obviously regrettable.

Only by taking these conflict of laws rules into account will it be possible to determine whether, in terms of the financial consequences of divorce, it is preferable for one of the spouses to file for divorce in French court rather than in a foreign court.

For example, French courts are often considered to be more favorable to a wealthy spouse than English courts. But, depending on the given circumstances of a couple, this assumption may be wrong.

Along these lines, let us consider the case of two French spouses who got married without a prenuptial agreement had their first conjugal domicile in France. They have resided in England for several years and one of the spouses decided to become a British citizen and the children also have British citizenship. With regard to their matrimonial property regime, they will be considered to have gotten married under the French community of acquired assets regime, provided that they have resided in England for less than ten years. In addition, despite the reluctance of French courts for the reasons outlined above, when it comes to applying a law other than French law to maintenance obligations, it is possible that in such a situation, where one of the spouses and the children have become British citizens, French courts will agree to apply English law to spousal maintenance obligations.

In such a situation, it is not at all certain that the financial consequences of divorce would be more favorable before French courts, especially since French proceedings generally take much longer than English proceedings and may easily last for several years, which may also result in the payment of spousal support, where applicable, as part of the duty of support for several years also.

II – Uncontested divorce in an international context: the impact of lack of jurisdiction

A - Enforcement of uncontested divorces: reduced circulation of decisions

Since 1 January 2017, uncontested divorces are no longer validated by a judge and are made official by a signed, private instrument that is countersigned by the parties' lawyers and filed in the minutes of a notary. However, the notary does not replace the judge and, in reality, verification by an external and independent third party has completely disappeared. Uncontested divorce has become

[14] The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

a simple contract where the parties merely have the obligation of each being represented by independent counsel.

This reform has implications in an international context which French lawmakers have decided to ignore, even though the number of divorces with a foreign element is statistically very significant.

In the first place, the new texts do not in any way provide for means of obtaining the various certificates provided by European regulations, except for the certificate in Article 39 of the "Brussels II bis" regulation. Thus, notaries cannot deliver the certificates under Article 41 on visitation rights or the certificates under Article 20 provided by the regulation on maintenance obligations.

Furthermore, the circular[15] specifies on this topic that "the creditor spouse seeking recovery of a maintenance obligation provided by the divorce agreement must, in the absence of a bilateral accord providing for a simplified exequatur procedure relating to a legal instrument, seek the validation of this agreement by the foreign court or in any other manner seek the incorporation of the agreement into a court decision if such validation proves to be impossible due to rules of international jurisdiction or because the national law does not provide for a validation mechanism."

It thus involves completely disregarding all the advances made since the Brussels Convention of 1968 on European law and the free movement of judgments within the European Union on maintenance obligations! If French courts are to be relieved of their burden, French legislators here expressly acknowledge that the work must be done by the courts of other Member States (sic)…

In practice, the lack of free movement of the divorce agreement on maintenance obligations is very problematic and means that the new uncontested divorce procedure will be very unattractive in an international context.

B - International recognition of uncontested divorces: an increased risk of post-divorce litigation abroad

Above all, this reform means that uncontested divorces may not be recognized in many foreign countries, which thus significantly multiplies the risks of post-divorce litigation.

In countries with a common law tradition, for example, such divorces may be considered the equivalent of a "post-nuptial agreement" (marriage contract done during the marriage) and not a judgment of divorce, since neither the French courts nor any other administrative or governmental authority or civil registrar, independent from the parties, will have been involved in the process.

In this respect, this reform, which was partly based on a goal of diversion from the courts, as is found in other countries, particularly in neighboring European countries, in reality, goes far beyond what other countries, where similar reforms have been put in place, provide. In fact, the diversion from the courts often remains limited when there are minor children or when a check will be done by a civil registrar, public prosecutor or notary.

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[15] Circular presenting provisions on uncontested divorce and inheritance under Law No. 2016-1547 of 18 November 2016 on modernizing the justice system in the 21st century and under Decree No. 2016-1907 of 28 December on divorce provided by Article 229-1 of the French Civil Code and various provisions on inheritance, Form 10, "La circulation transfrontière des conventions de divorce."

By comparison, in France, the new divorce by mutual consent simply provides for a private signed instrument that is countersigned by each of the parties' lawyers, and the notary does not have to check the content or balance of the agreement.

One of the spouses may therefore be strongly tempted to file suit again in a foreign court in the hope of obtaining a new financial compensation from the divorce if, for example, the other party moved to that country and, several years later, his or her financial situation improved.

But it would have been so simple to leave the parties the option of an uncontested divorce according to the old rules when there is a foreign element, which can be defined as one of the spouses having foreign nationality or habitually residing abroad.

This option was not considered, which is symptomatic of lawmakers' ignorance of certain realities of divorce in an international context and the difficulties involved.

In reality, this shortsightedness has forced practitioners and parties to engage in long judicial proceedings so that the divorce and their agreement are sanctioned by a decision that will be fully recognized on an international level, rather than taking the risk of opting for a divorce by mutual consent that may not be recognized abroad.

C – Simplified adjudication of uncontested divorces with the new divorce procedure that entered into force on 1 January 2021

The divorce procedure reform that entered into force on 1 January 2021[16] will at least have the merit of making the situation easier for practitioners of private international law who, thanks to the new procedure, will be able to have their agreements validated within the framework of Article 233 of the French Civil Code for divorces in which the spouses agree on the principle of divorce.

Indeed, it is now possible to refer the matter to the court through a simple or joint request when both spouses have already accepted the principle of divorce beforehand. It will suffice to also attach an agreement governing the consequences of the divorce, which the judge will validate by granting the spouses' divorce on the basis of Article 233 of the Civil Code.

This reform also abolishes the conciliation phase that preceded the joint petition to the court in cases where both spouses were in agreement about getting a divorce.

Thus, the measure continues the spirit of previous reforms by encouraging the use of a contractual procedure, even in the context of a contested divorce.

This new option makes it possible to accelerate divorce proceedings for spouses who agree on the principle of divorce, since the judge will only need to rule on the effects of the divorce, as the acceptance of the principle of divorce cannot be withdrawn.

Thus, the difficulties related to the internationalization of the family which were not taken into account when the uncontested divorce procedure was initiated will finally and permanently be resolved, by French legislators themselves who are no longer so deaf (?) to the complaints of a portion of the profession regarding the need to grant apparent adjudication of international divorces in order to enable their cross-border circulation.

[16] Law No. 2019-222 of 23 March 2019 on 2018-2022 planning and judicial reform.

Nevertheless, it is regrettable that this reform incidentally created other concerns for practitioners with regard to international divorce litigation.

Among the notable problems specific to international litigation, are thus the impossibility of establishing a particular date on which the case was referred to the court in an international context. In fact, it will henceforth be necessary to serve divorce papers before one can file them in family court, and the court will be seized by the most diligent party who submits a copy of the document initiating proceedings to the clerk. From then on, the date on which the document was sent to the authority responsible for service will be considered the date on which the court was seized.

But who is "the authority responsible for service"? Is it the French bailiff, the originating entity, who must send the papers to the designated authority to complete the formalities of service in the destination State, the receiving entity? Or is it the latter? French lawmakers have not yet answered this question.

In conclusion, it may be regrettable that, although this divorce reform has singularly contributed to improving the free movement of international divorces, all the difficulties related to undertaking an international divorce have not yet been resolved, as evidenced by the persistent uncertainty over how to determine the date on which the court was seized in an international context.

Doubtless there will continue to be pitfalls in international divorces.