Family law in France: overview
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JURISDICTION AND CONFLICT OF LAW

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

In France, the primary sources of family law are codified. In relation to marriage, marital breakdown and the welfare of children (parental responsibility, child support, guardianship, and so on), the statutory provisions are codified in the French Civil Code (FCC). Some provisions can also be found in the French Code of Civil Procedure (FCCP).

Statutory provisions governing marriage are set in Articles 143 to 227 of the FCC.

Statutory provisions governing the breakdown of a marriage are provided in Articles 229 to 309 of the FCC. Article 309 of the FCC must no longer be used since the implementation of Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation). However, a pending case before the ECJ (C 372/16) questions the relevance of this Regulation for private/religious divorces, so this article may still remain relevant for future purposes.

Statutory provisions relating to the welfare of children and parental responsibility can be found in Articles 371 to 387 of the FCC.

Jurisdiction

Sources of international private law can be found in the FCC, but also in international conventions and in European instruments, which have increased in importance over the last ten years.

Residual jurisdiction, when not expressly excluded by an international instrument, lies on an exceptional basis with the French court in relation to any French citizen, as a defendant or a claimant. In accordance with Article 14 of the FCC, French nationals can file claims against foreign individuals or/and entities before the French courts. A French national can also be brought before a French court for obligations contracted by him in a foreign country (Article 15, FCC). These rules are seen as special privileges based on French citizenship and referred to as a "privilege of jurisdiction". The application of these rules by the court is not mandatory but rather discretionary.

Court system

The Family Court (Juge aux affaires familiales) is the principal court with jurisdiction in family matters. It has jurisdiction over:

- Parental responsibility.
- Divorce and post-divorce relationships.
- Family mediation.
- Maintenance obligations.
- Surname proceedings.
- Respective duties and rights of the spouses.
- Guardianship of minor children.
- Civil partnerships (Pacte Civil de Solidarité (PACS).

Since 1 January 2016, the Family Court also exercises jurisdiction over the consequences of divorce and in particular the winding-up of the matrimonial property regimes of the spouses. Article 267 of the FCC has been amended to allow the Family Court to rule on the liquidation and partition of the patrimonial interests of the spouses if there is a disagreement between them.

Since 1 January 2017, divorce by mutual consent, which is by way of contractual agreement, vests in the lawyers and the notaire. The Family Court is no longer involved in granting a divorce by mutual consent, except where:

- A minor child requests to be heard.
- One of the spouses is under a guardianship measure.

The divorce agreement is countersigned by both the lawyers of the parties and registered with a notaire.

The children’s judge (Juge des enfants) exercises a special jurisdiction over minor children in danger. This is usually referred to as care proceedings for minor children who have committed offences or when they are victims of abuse (see Question 2, Children). The Tribunal de Grande Instance has residual jurisdiction in matters of probate, some cases of civil partnerships constituted for ownerships purposes (Société Civile Immobilière (SCI) and in relation to the recognition of foreign orders.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Divorce

Jurisdiction is becoming increasingly harmonised at the EU level (see Question 1, Jurisdiction). In France, the Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation) is applicable to determine the jurisdiction of the French courts in relation to:

- Divorce.
- Legal separation.
- Nullity.
- Parental responsibility cases.
- Enforcement of family judgements.
The Brussels II Regulation seeks to facilitate the free movement of divorce, legal separation and custody judgments within the European Union by harmonising the jurisdiction as well as the recognition and enforcement provisions of the participating member states.

Articles 3 to 7 of the Brussels II Regulation apply to matters relating to divorce, legal separation or marriage annulment.

If the jurisdiction of the French courts is not established in accordance with the provisions set out in the Brussels II Regulation, Article 1070 of the French Code of Civil Procedure (FCCP) provides for alternative provisions. Under this article, the French court has jurisdiction in the following circumstances:

- The family was living in France and one of the spouses still lives in France.
- The spouse living with the children is habitually resident in France.
- The defendant resides in France.

These provisions are mirrored by the provisions of Article 3 of Brussels II Regulation. As a consequence, they can be used to establish the jurisdiction of the French Courts in cases where the Article 3 requirements of the Brussels II Regulation are not satisfied, except in relation to issues not yet governed by European instruments, such as the partition of matrimonial property regimes where the Regulation governing this issue is not yet in force.

If the requirements of Article 1070 of the FCCP are not met, the jurisdiction of the French court can still be established on the basis of the national privilege of jurisdiction provided by Articles 14 and 15 of the French Civil Code (FCC). In this case, the alternative jurisdiction of the French courts can be based on the sole French nationality of one of the spouses/parties in all the cases where the requirements of EU Regulations/Instruments are not met and give jurisdiction to the court of another EU member state.

For areas that are not covered by an EU Regulation on jurisdiction (for example, if the matter falls outside of the geographical scope of an existing Regulation), French domestic law applies.

**Property**

The statutory rules relating to matrimonial property and marriage contracts are set out in Articles 1387 to 1581 of the FCC. Those relating to succession/inheritance and probate are set out in articles 720 to 1100 of the FCC.

When granting a divorce, the French family judge also orders the partition of the matrimonial rights of the spouses and appoints a notaire to proceed with the partition. The new provision set out in Article 267 of the Civil Code now gives the Family courts the jurisdiction to rule any dispute in relation to the partition.

**Children**

Jurisdiction over matters of parental responsibility lies with the courts of the member state in which the child is habitually resident at the time the court is seized. The habitual residence of the child is the primary ground for jurisdiction.

Provision (12) of the Regulation provides:

“The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the member state of the child's habitual residence”.

According to the European Court of Justice, habitual residence is where a person's habitual centre of interests is found. The relevant issues taken into account are:

- The length and continuity of residence.
- Employment.
- Family.
- The reasons for relocating.
- The person’s intentions.

As an exception, Article 14 of the Regulation provides that where no court of an EU member state has jurisdiction pursuant to the Regulation, jurisdiction will be determined, in each member state, by the laws of that state.

Pursuant to Article 1070 of the FCCP, jurisdiction regarding parental responsibility issues lies with the place where the children of the family are habitually resident.

In case such provision does not confer jurisdiction to France and no other EU member state has jurisdiction pursuant to the Brussels II Regulation, Articles 14 and 15 of the FCC (national privilege of jurisdiction) can sometimes be used to confer jurisdiction to the French courts in relation to French children whose habitual residence is outside an EU member state.

**Domicile and habitual residence**

3. How do the concepts of domicile and habitual residence apply in relation to divorce, financial arrangements and children?

The notion of habitual residence, as referred to by the European instruments is an autonomous EU concept which is interpreted in accordance with the European instruments’ purposes and principles and in the light of the ECJ’s case law.

The concept of residence, which is often used in French statutory provisions, differs greatly from the EU notion of habitual residence. Likewise, the notion of domicile, also used in French statutory provisions, differs greatly from the notion of domicile often used in common law countries.

**Domicile**

There is no equivalent in French law to the common law concept of domicile.

Under French law, the domicile of a person is where their principal establishment is located. The notion of domicile, used for French civil procedural requirements, is described as either (Article 102, French Civil Code (FCC):

- The domicile of any French citizen for the exercise of their civil rights is the place where they have their principal establishment.
- The domicile of the defendant.

The concept of domicile is also used for tax purposes where it bears a slightly different meaning (domicile fiscal).

**Residence**

The notion of residence is often used in French family statutory provisions. For example, it will determine the jurisdiction of the local court over a family dispute which, pursuant to Article 1070 of the French Code of Civil Procedure (FCCP), lies with the local court of the place where "the family residence" is located. The concept of residence is also common in the international tax law context.

This concept of residence differs from the notion of habitual residence as referred to by European instruments. The French Supreme Court (Cour de Cassation) defined the concept of habitual residence for the purpose Article 3 of the Brussels II Regulation (Civ. 1st, 14 December 2005, No. 05-10.951) as the place where a person has fixed the permanent or habitual centre of their interests. Although the notion of habitual residence in EU instruments must be interpreted as an EU autonomous concept, each EU member state has a different interpretation of this concept. This has triggered the proposal for amending the Brussels
II Regulation to provide certainty and coherence in the application of the jurisdictional criteria by EU member states’ courts.

The ECJ has given a definition of habitual residence in case C-523/07 of 2 April 2009 in relation to Article 8(1) of the Brussel II Regulation as the place which reflects some degree of integration by the child in a social and family environment.

**Conflict of law**

4. **What procedure applies for a party applying for stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?**

**Procedure**

When a party applies to stay proceedings in favour of a foreign jurisdiction, the *prior tempore* rule generally applies. In other words, France considers that if it is the court first seized it will have jurisdiction over the matter in dispute. Equally, if France is second seized in the same cause of action, French courts will often stay the case, this is known as *lis pendens* of actions.

The *lis pendens* process differs greatly when it involves another EU member state and when it involves a non-EU member state.

Most EU Regulations applying to family matters provide for a compulsory stay. As such, the Brussel II Regulation provides for a compulsory stay for the court seized second when the same cause of action is pending between two EU member states. For the purpose of this Regulation, divorce and judicial separation are regarded as being the same causes of action.

A French court will be first seized at the time of the lodging of the request for divorce (*requête en divorce*), which is the initial application filed for a divorce. In the case of two divorce applications lodged on the same day in two different member states, the French Supreme Court has stated that the exact hour of seizure must be analysed so as to determine which court is the first seized (*Civ. 1ère, 11 June 2008, No. 06-20.042*).

When a party applies for a stay of proceedings with a non-EU member state, alongside the *prior tempore* rule, it must also be established that the foreign judgment given by the foreign court will be recognised in France.

In France, the requirements for recognition and enforcement of a foreign judgment are now limited to:

- A strong link with the issue and the foreign country (also known as the concept of *indirect jurisdiction*).
- Compliance with French international public policy.
- Absence of fraud.

Generally speaking, French law does not apply a forum *conveniens* approach. However, some EU Regulations have referred to it indirectly and therefore, in exceptional circumstances, and as framed by the EU Regulations, this concept can be applied.

**PRE- AND POST-NUPITAL AGREEMENTS**

**Validity of pre- and post-nuptial agreements**

5. **To what extent are pre- and post-nuptial agreements binding?**

There is no similar concept in French law to the Anglo-Saxon pre-nuptial or post-nuptial agreement, under which parties can contractually, and in advance, organise all the financial consequences of their divorce, together with the administration and allocation of assets both during the marriage and in the case of divorce.

However, French law has a long-established tradition of recognising the validity and enforceability of post-nuptial and pre-nuptial agreements, the aim of which is to specify the matrimonial arrangements agreed between the parties. French law recognises, in that respect, the freedom of the spouses to create a marriage contract (*contrat de mariage*), with the sole condition that it conforms to public policy. This right is often referred to in the French Civil Code (FCC) as the principle of the "freedom of matrimonial agreements" (*Article 1387, FCC*). The parties can, therefore, insert special clauses into these types of arrangements in relation to the administration or the winding-up of the matrimonial estate during their lifetime, either in the event of divorce or on death.

The provisions of a pre-nuptial or post-nuptial agreement, the aim of which is to specify the matrimonial arrangements agreed between the parties, will, under certain conditions, be recognised and enforced in France. Under the HCCH Convention on the Law Applicable to Matrimonial Property Regimes 1978, future spouses can choose the applicable law governing their matrimonial arrangements, provided one spouse has sufficient connecting factors with the chosen applicable law (nationality, habitual residence or the first state in which they will reside after marriage) (*Article 3 of the Convention*).

The separation of property regime (*Articles 1536 and following, FCC*) is often recommended for international pre-nuptial agreements, as it is very close to the English regime and is often recognised in other countries. Additionally, it is the regime that affords the maximum protection to the parties for their personal assets. It is often advised for couples where one of the parties is wealthy and wants to protect their own assets from the other spouse if the marriage breaks down.

French marriage contracts (*contrat de mariage*) are often recognised and enforced in other civil law jurisdictions. With respect to common law jurisdictions, they are often given weight as a determining factor in the exercise of the discretionary power of the judge.

**DIVORCE, NULLITY AND JUDICIAL SEPARATION**

**Recognition of foreign marriages/divorces**

6. **Are foreign marriages/divorces/civil partnerships recognised?**

**Marriages**

A foreign marriage is valid in France provided that:

- The essential conditions of a valid marriage have been fulfilled under the national law of each spouse.
- The conditions conform to French public policy.
- The marriage was conducted according to the law of the foreign jurisdiction (*lex fori*).

For immigration purposes, French law has set strict conditions in France for recognising the validity of a marriage entered abroad between a French citizen and a foreigner. If the married couple wishes to live in France, certain conditions must be fulfilled so that the local French consulate registers the marriage (*Articles 143 to 164, French Civil Code (FCC)*). To be considered valid, the marriage must meet additional requirements:

- Age (that is, capacity as defined by the law of the nationality of each party).
- Consent (that is, the marriage must be consensual) (*Article 146-1, FCC*).
- Impediments to marriage, and so on (that is, there must be no impediments to marriage).

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Additionally, the marriage must be conducted correctly (that is, in accordance with the formalities prescribed for validity purposes) in the relevant country (Article 171-1, FCC).

France has recently recognised same sex marriages (Articles 202-1 and 2, FCC). The French Supreme Court (Cour de Cassation) also validated a same sex marriage between a French national and a Moroccan national, even though Moroccan law strictly forbids this type of union and despite the fact that France and Morocco are bound by the Franco-Moroccan Convention of 1981 (Civ. Ist, 28 January 2015, No. 13-50.059).

**Divorces/annulment**

Traditionally, France recognises foreign divorces (see Civ, 28 February 1860, Bulky, S. 1860. 1. 210, D.P. 1860. 1. 57 and Civ, 9 May 1900, de Wrede, S. 1901. 1.185, Clunet 1900. 613). A foreign divorce is presumed to be valid in France until its validity is challenged as not meeting the conditions of recognition of a foreign judgment in France (see Question 15). Additionally, if a divorce is awarded in an EU member state, the Brussels II Regulation applies. Article 21.1 of the Brussels II Regulation states that a divorce granted in one member state will be recognised in the other member states without any special procedure required. Article 22 provides for the grounds of non-recognition for judgments relating to divorce, legal separation and marriage annulment.

The French courts frequently have to deal with repudiations (Islamic religious divorces) pronounced in Morocco or Algeria. In 2004, the French Supreme Court ruled that these religious divorces should not be recognised in France when one of the spouses is resident in France, because it is contrary to the principle of equality between men and women as provided by the corpus of the European Convention on Human Rights and additional protocols.

Recently, the French Supreme Court had to deal with a religious divorce awarded by a court (as opposed to a religious entity) and ruled that such divorce could not be presumed per se to be non-enforceable in France (Civ. 18 January 2017 pourvoi No. 16-11630). The ECI is currently seized of this matter. The Advocate General has previously advised that religious divorces pronounced by private entities do not come within the scope of the Council Regulation of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Case C372/16, Soha Sahyouni c/ Raja Mamisch).

**Civil partnerships**

In French law, civil partnerships are governed by the law of the place where the partnership was registered (Article 515-7, FCC). The connection to the place of registration ensures the validity of a civil partnership registered abroad and guarantees the recognition of its effects. However, the law of the place of registration does not govern all the effects attached to the civil partnership and some issues are excluded from its scope (for example, property issues, maintenance obligations, adoption, legal capacity of partners).

**Divorce**

7. What are the grounds for divorce?

**Divorce**

The Divorce Act 2004 establishes the grounds for divorce, which are:

- Mutual consent.
- The acceptance of the principle of marital breakdown.
- Fault.
- Breakdown of communal life.

A divorce by mutual consent is a divorce where the spouses contractually agree to the divorce and all its consequences (financial, partition of property, name, gifts and children, if applicable). The law of 18 November 2016, which entered into force on 1 January 2017, provides that “the spouses can agree mutually to their divorce by act under private signature countersigned by lawyers, put down to the rank of the minutes of a notaire” (Article 229-1, French Civil Code (FCC)). These divorces are now dealt with outside the courts. The parties’ lawyers are in charge of drafting the divorce agreement which, once signed by the parties and countersigned by their respective lawyers, is registered with a notaire and becomes final. A divorce by mutual consent always remains an option for spouses during the course of any divorce proceedings pending before the court and commenced on different grounds (Article 230, FCC).

Alongside divorce by mutual consent, French law provides a ground for divorce whereby the spouses agree on the principle of marital breakdown and sign a notice of acceptance of the divorce (procès verbal d’acceptation) before a judge (Article 233, FCC). The notice of acceptance can be signed at any of the procedural stages of the divorce process.

Fault remains a ground for divorce. Fault is defined as a series of actions which rendered the continuing of married life intolerable (Article 242, FCC). If the spouses reconciled after the occurrence of a fault which would have constituted a cause for divorce, the reconciliation is considered as a discretionary bar to the divorce. If both spouses are found to have committed faults which are serious enough to have rendered married life intolerable, the divorce will be granted for the reciprocal tort/faults of both spouses. The judge exercises full discretion in deciding whether the faults alleged are serious enough to establish that the marriage has irretrievably broken down. Therefore, if the faults are not considered serious enough, the judge will refuse to decree the divorce.

The final ground for divorce is the irretrievable breakdown of communal life evidenced by a two-year separation period between the spouses (Article 237, FCC). The consent of the defendant to a divorce proceeding alleging the two-year separation ground is not required and the defendant cannot oppose the decreeing of the divorce.

**Nullity**

An annulment can be pronounced when the essential conditions for the formation of marriage are not met. Therefore, a marriage can be annulled if the consent of one of the spouses was defective (Article 180, FCC), notably in the case of:

- An error of person (an error concerning their identity).
- An error concerning substantial characteristics of the person (in that case, the error must meet both a subjective criterion (the error must have been a determining factor of the party’s consent) and an objective criterion (the error must be “sociologically determining”).
- Duress.

A marriage can also be annulled due to a lack of authorisation on the part of the legal representative (in the case of a minor, for example) (Article 182, FCC). An annulment on the basis of lack of consent or lack of authorisation on the part of the legal representative can only be sought by one of the spouses, the Public Prosecutor or by the parties whose authorisation was required.

In addition, nullity can be pronounced on several grounds that concern public policy, such as the non-respect of the minimum age to marry, bigamy, incest, absence of one of the spouses, and so on. Nullity can also be pronounced due to lack of matrimonial intention (Article 146, FCC). This is generally used to invalidate marriages concluded only for immigration purposes. Nullity can then be sought by the spouses themselves, the Public Prosecutor or any person who has an interest in the action (Article 184, FCC). The consequences of annulment (retroactive dissolution of a
marriage) do not apply to the children of former spouses, who are treated as divorcees' children. Parents continue to exercise joint parental responsibility. If one spouse entered into the marriage in good faith, they may benefit from the rules of putative marriage, maintaining the benefits of the effects of the marriage (for example, to be able to obtain a compensatory benefit as in divorce cases).

**Judicial separation**

Judicial separation (séparation de corps) is governed by Articles 296 to 308 of the FCC. Most of these provisions refer to the statutory provisions applicable to divorce.

Judicial separation only ends the obligation of cohabitation (Article 299, FCC) and provides for a partition of community property. It will terminate if the spouses resume cohabitation (Article 305, FCC) or it is converted into a divorce.

Under private international law, the rules of Regulation (EU) 1259/2010 of December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation) apply to legal separation.

**Finances/capital and property**

8. What powers do the courts have to allocate financial resources and property upon the breakdown of marriage?

The French Civil Code provides for a compensatory benefit (prestation compensatoire). This is a capital payment that must be made in the way of a lump sum or a series of lump sums payable over a maximum of eight years or a property transfer order, for ownership or usufruct, use or dwelling. In exceptional circumstances, lifetime maintenance can be ordered for a spouse who, because of age or health, is prevented from providing for their own needs. The compensatory benefit aims to compensate financially, and as far as possible, for the disparity created by the breakdown of marriage in the respective standards of living of each spouse. In principle, any spouse is entitled to financial compensation regardless of allegations of wrongdoing. However, in some cases, the judge now has discretion to refuse this compensation based on circumstances and equity.

If the spouses are in agreement in relation to the compensatory benefit or in the case of divorce by mutual consent, they have complete freedom to organise the modalities and the payment of the compensatory benefit (for example, a longer period for a maintenance payment or revision clauses).

Compensatory benefit as a maintenance obligation falls within the scope of the 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 (Maintenance Regulation) and the Protocol of 23 November 2007 on the law applicable to maintenance obligations.

This compensatory benefit, which is payable to the benefit of one of the spouses on divorce, must be distinguished from interim financial measures which take place during the course of the divorce process for example, interim spousal support (devoir de secours). In this case, the assets are allocated to each spouse in accordance with their matrimonial property rights (régime matrimonial).

9. Which factors are relevant to the exercise of the court's powers?

The modalities and amount set as a compensatory benefit are always subject to the judge's discretion. In exercising their discretion, the judge gives regard to the following criteria (Article 27, French Civil Code (FCC)):

- The duration of the marriage.
- The ages and their states of health.
- Their professional qualifications and occupations.
- The time spent or to be spent on educating the children, or for favouring their spouse's career to the detriment of their own.
- The estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime.
- Their existing and foreseeable rights.
- Their respective situations as to retirement pensions.

The foreseeable assets of the spouses after the winding-up of the matrimonial regime are only one of the factors taken into consideration by the judges. Often the exact matrimonial property rights of the spouses are not known at the time of decreeing the divorce.

To assess the amount due as a compensatory benefit, the judge will take into account the income or reasonable income the parties ought to receive from their estate and/or properties, as well as their work and needs. The judge may also take into consideration any other elements put forward by the spouses that the judge deems relevant. In a case from the Court of Appeal in Paris dated 7 July 2015 (No. 14/00780), the judges considered that the assets held in a discretionary and irrevocable trust, with the husband as the settlor and the sole beneficiary, did not belong to the husband as personal property, but as the sole beneficiary of the trust he will benefit from a reasonable and foreseeable income in the future.

10. What is the court's current position on the division of assets?

During a marriage, the matrimonial regime of a couple generally determines the powers of the spouses, either individually, or jointly to administer their assets and the rights of third parties (generally creditors) in relation to their estate. Various matrimonial regimes exist in France and amongst the most common are:

- Community of assets.
- Separation of property.
- Universal community.
- Participation.

In France, the matrimonial regime of a couple is determined either by a contract entered by the spouses or in the absence of contract, by the virtue of the law. When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.

This allocation of assets is determined by the matrimonial regime chosen by the spouse and is independent from the cause of the dissolution of their marriage.

Therefore if the marriage is dissolved by divorce, the allocation of assets as determined by their matrimonial regime will be combined with the divorcing financial rights of the spouse (prestation compensatoire). Except for in the case of agreement, the parties will have one year from the date of their divorce being granted to liquidate their matrimonial regime with the assistance of the notary appointed by the divorce judge.

Provided that the matrimonial regime chosen or its provisions are not contrary to public policy, it will be enforceable against third parties, if necessary, and the divorce judge will have no discretion in applying its terms.
If future spouses reside and marry in France and have not entered a pre-nuptial agreement, they will be deemed to have opted implicitly for the community of assets regime (le régime de la communauté d’acquisition). For this reason, the community of assets is the default regime and is called the legal regime (régime légal).

The community of assets regime is based on a division of the personal assets of each spouse and the community assets. Community assets are deemed to belong equally to each spouse who have an equal right to administer them, regardless of the name appearing on the title deed or the financial contribution made by each spouse to the assets. The community assets comprise acquisitions made by the spouses together or separately during the marriage, and deriving both from their personal activity and from savings made from the fruits of their personal property. Therefore, all assets that have been bought, acquired and created during the marriage by one or both spouses are considered community assets, including:

- Company shares.
- Jewellery (except gifts).
- Life insurance.
- The home bought in one spouse’s sole name.
- Work income and benefits (except pension funds).
- Income from assets owned by one of the spouses (rents from flats, products and dividends from shares even if owned before marriage).

The only assets which are considered to belong personally to each spouse and are therefore excluded from the community property, are assets given to them individually before their marriage and/or inherited and the growth as opposed to the income generated on those acquired personally (for example, the gain in value of shares). On the winding up of the matrimonial regime, each spouse will receive the property which belongs to them personally as defined above, plus half of the value of the community property. There may be additional financial compensation due to the spouse who has invested personal money into the community assets (such as money received by inheritance) to buy a house during the marriage. Similarly a spouse may have to pay financial compensation to the community assets if life insurance was contracted for the benefit of a third party in some circumstances. The financial compensation will be equivalent to the sum invested, plus any capital gain on the investment made.

If the parties entered a pre-nuptial agreement or a contrat de mariage before marriage, they may opt for one of the other commonly known regimes, such as separation of property, universal community or participation. Alternatively, they may simply amend one of the regimes by inserting special clauses in relation to the administration or the winding-up of the matrimonial estate during their lifetime in the event of a divorce or on death.

The separation of property regime is often recommended when there is an international pre-nuptial agreement in place, as it is very close to the English system and often well-known in other countries. Furthermore, it is the regime which affords the maximum protection to the parties with respect to their personal assets. It is often recommended to couples if one of the parties is wealthy and wants to protect their own assets from the other spouse in case the marriage breaks down. In the French separation of property regime (la séparation de bien), the assets acquired, given or inherited during the marriage remain in the name of the spouse who acquired, benefited from or inherited them. Each spouse retains full ownership of their separate property. If a house is bought in the sole name of one of the spouses, that spouse will have complete administration and benefit from it regardless of the financial contribution made by the other. On the day of the winding-up of the regime, the other spouse will have no right or share in the asset. For both parties to benefit, the asset must be acquired in both names. If the other spouse contributed to the purchase, or by financial participation increased the value of the asset belonging to the other spouse, they will be entitled to financial compensation, calculated as in a community regime (the sum invested plus any capital gain on the investment made). Therefore, if a husband invested 30% of the purchase price of a house bought by his wife in her sole name, he will be entitled to 30% of the actual value of the house on the winding-up of the regime. If the property has gone up in value, he will also be entitled to 30% of the gain. If this compensation is not agreed between the spouses, judges will tend to qualify the initial investment made by the husband as a gift to the wife to avoid the payment of financial compensation to the husband, especially when the house bought was the matrimonial home.

**Finances/maintenance**

**11. How does ongoing spousal maintenance operate following marital breakdown?**

Amongst the primary duties of the spouses, Article 212 of the French Civil Code (FCC) provides for an obligation to financially support each other and contribute to family expenses. If one spouse fails to respect this obligation during the marriage, the family judge orders a maintenance obligation covering spousal maintenance and a contribution to family expenses to be paid for the benefit of the other spouse (contribution aux charges du mariage).

As an interim measure during the course of divorce proceedings, the family judge often orders interim spousal support (devoir de secours) for the benefit of the spouse who cannot financially cover their own needs. Whether this interim spousal support must also be based on the lifestyle enjoyed by the spouses during the marriage is often debated and local courts do not adopt a homogenous approach in this respect.

The interim support can be reviewed at any time during the course of the divorce process if there is a change of circumstances which affects the respective needs and income of each spouse.

The interim spousal support is ruled on at the conciliation hearing and, unless a change of circumstances justifies that it is no longer necessary, it will only cease once the divorce decree has been finalised.

Once the divorce has been finalised, the compensatory benefit (which usually takes the form of a lump sum payment) will replace the existing interim support.

When the debtor does not have the financial capacity to make a lump sum payment, the compensatory benefit can be made payable over eight years. In exceptional circumstances, lifetime periodical payments can be ordered instead of lump sum payment if justified by the health or the age of the creditor (see Question 8 to 10). In any event, the payments made for interim spousal support during the course of the divorce are never deducted from the compensatory benefit payments.

**12. Is it common for maintenance to be awarded upon marital breakdown?**

As of 2013, compensatory benefits are ordered in only 19% of divorce cases. Nine out of ten of these compensatory benefits are paid as a lump sum payments. In 2013, the average amount of the compensatory benefit was EUR25,000.
13. What is the court’s current position on maintenance upon marital breakdown?

France does not consider marriage to be an economical partnership designed to enrich one of the spouses. The legal default regime in France is a community of property regime whereby on divorce, most of the assets created and/or purchased during marriage will be divided equally between the spouses.

However, if the parties have elected a separation of property regime, each party on divorce will be allocated the assets titled in their name and financed by them. French case law suggests that the compensatory benefit should not, as a result, negate the effect of the matrimonial regime freely chosen by the spouses.

The French Supreme Court also ruled that the payment of the compensatory benefit could not be altered from the time of the winding-up of the matrimonial regime of the parties (1st Civil Chamber of the Cour de cassation, 7 December 2016).

Child support

14. What financial claims are available to parents on behalf of children within or outside of the marriage?

The French Civil Code (FCC) imposes a duty on both parents (married or not) to contribute to the upbringing of their children.

The family judge has exclusive jurisdiction to rule on child support during the course of the divorce proceedings or separately if unmarried parents are separating. In these later proceedings, the parties can be litigants in person.

Child support is payable in various ways, but often takes the form of a monthly maintenance payment. This payment is index linked to the living costs of the place where the child primarily resides.

Under Article 373-2-2 of the FCC:

- It is payable to the parent with whom the child is primarily residing or in case of alternate residence, to the parent whose income justifies receiving a monthly support in order to cover the child’s daily needs.
- Child support can also, in all or in part, take the form of direct contribution to the costs and expenses incurred on behalf of the child, such as the payment of school fees. It can also take the form of a right of use/usufruct of a home.

More rarely, and if justified by the financial situation of the debtor, it can be payable by way of a lump sum payment to an accredited organisation which in turn will allocate the child a yearly amount to cover their needs or by way of allocating income-producing assets for the benefit of the child (Article 373-2-3, FCC).

15. On what basis is child maintenance calculated?

Child support is based on the parents’ income and financial resources and the child’s needs.

Depending on the type of residence in place in relation to the child, the contribution of each parent will vary according to the amount of time the child effectively resides with his mother or his father.

In most cases of shared residence, meaning that each parent spends an equal amount of time with the child, no child support will be ordered even if the parents’ income and resources are not the same.

Every year, the French Ministry of Justice publishes an indicative chart to calculate child support as well as a calculation simulator depending on the number of children in the family and the type of residence arrangement in place (shared residence, classic visitation rights or limited visitation rights). This chart only applies to debtors whose monthly income and resources are limited to EUR5,000 or less. The chart is not compulsory and judges have full discretion when ruling on child support.

Apart from in rare circumstances and depending on the practice of each local court, the child will not benefit from a similar lifestyle in each of his or her parents’ house. Often the child support allocated is solely deemed to cover the child’s basic needs.

If both parents reside in France, child support is taxable as an income for the creditor and deductible from income tax for the debtor.

16. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

In France, child support does not cease when the child reaches majority (18 years old).

Instead, it is payable until the child is in a position to cover their own needs and has completed, where applicable, secondary or tertiary/university education (Article 373-2-5 French Civil Code (FCC)).

In certain circumstances, child support can be paid directly to non-minor children.

The non-payment of child support in France is a criminal offence.

17. Can a child make a claim direct against their parents?

An adult child can make a financial claim for child support against one or both of his parents if they are not in a position to cover their own needs and are pursuing secondary or tertiary education.

However, courts require the adult child to be serious in their educational ambitions and the lack of involvement or success in their studies will justify the parents being discharged of their duty to support the adult child.

Reciprocal enforcement of financial orders

18. What is the legal position on the reciprocal enforcement of financial orders?

Maintenance obligations

The Council Regulation No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) will apply to all EU financial orders relating to maintenance obligations. Regarding the recognition and the enforcement of such orders, there are three possibilities:

- The financial order was made in an EU member state applying Hague protocol dated 23 November 2007 on the Law Applicable to Maintenance Obligations (as in France). If the order is enforceable in the EU state where it was made, it will be enforceable in France without an exequatur or a declaration of enforceability.
- The ECJ recently ruled that in these circumstances, a party seeking the enforcement of a maintenance decision in another member state can either do so by seizing the competent authority of the state that has made the decision (via the cooperation of the central authorities) or proceed directly by
seizing the competent authority in the member state of enforcement (ECJ, 9 February 2017, No. C-283/16).

- The financial order was made in an EU member state not applying the 2007 Hague Protocol (such as the United Kingdom and Denmark). No special procedure will be required to recognise the order in France, but its enforcement will be subject to a declaration of enforceability. Recognition may nevertheless be denied if:
  - the recognition is manifestly contrary to public policy in the member state in which recognition is sought;
  - it was given in default of appearance, and the defendant was not served with the document which instituted the proceedings, or with an equivalent document in sufficient time and in such a way as to enable the defendant to arrange for their defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for them to do so;
  - the decision is irreconcilable with a decision given in a dispute between the same parties in the member state in which recognition is sought; or
  - it is irreconcilable with an earlier decision given in another member state or in a third state in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfills the conditions necessary for its recognition in the member state in which recognition is sought.

- The financial order was made by a non-EU court. Unless provided for by an international treaty (for example, the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations) an exequatur (judgment on enforcement made by the Tribunal de Grande Instance) will be required (see below, Matrimonial regimes).

Matrimonial regimes

These orders are expressly excluded from the Maintenance Regulation's scope while the Council Regulation No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes will not apply before 29 January 2019.

Unless otherwise provided for by an international treaty, a procedure of exequatur will be required. In this capacity, the French judge will verify that the three following criteria are met:

- The foreign judge had jurisdiction to issue the order.
- The foreign decision is not contrary to French international public policy.
- The foreign decision is not affected by fraud in relation to the applicable law.

Other

If the foreign financial order does not deal with maintenance obligations or with matrimonial regime issues, a procedure of recognition and enforcement can be introduced on two grounds:

- Unless provided otherwise by an international treaty, on the basis of an exequatur before the Tribunal de Grande Instance meeting the criteria for recognition as set out above.
- On the basis of the Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) for all EU member States court orders.

Financial relief after foreign divorce proceedings

19. What powers are available to the court to make orders following a foreign divorce?

The foreign origin of the divorce order is not in itself an element that will allow the French Judge to claim discretionary powers.

However, as indicated in relation to the recognition of foreign divorces, French courts will often refuse to recognise a religious divorce granted by another jurisdiction. In this scenario, a spouse may, under certain conditions, be eligible to apply for a divorce in France and request the application of French law to the divorce and also to all maintenance obligations.

Provided that a foreign divorce order is recognised in France, French law provides several ways to modify or complete the financial provisions attached or encompassed in the divorce order.

With regard to the compensatory benefit (prestation compensatoire):

- A party can seek a judicial review of the compensatory benefit on the basis of Article 595 of the French Code of Civil Procedure (FCCP) if the foreign order was fraudulently obtained (by hiding assets or revenues for instance).
- If the foreign divorce proceedings have awarded one spouse a compensatory benefit in the form of periodical payments and if the situation considered by the foreign judge has been modified since, then on the basis of Article 275 of the French Civil Code (FCC), the debtor can seek a modification, reduction or suppression of the payments they had been ordered to make.

With regard to the matrimonial regime, a spouse can apply to the French judge to wind up the matrimonial regime if the winding-up did not occur or was not dealt with in the foreign divorce proceedings.

CHILDREN

Custody/parental responsibility

20. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

The French Civil Code (FCC) states that the separation of the parents does not affect the rules and principles governing the exercise of parental responsibility (Article 373-2, FCC). Therefore, separated parents, whether formerly married or not, continue to exercise joint parental responsibility over their children, which is the general principle provided for by Article 372 of the FCC. However, the family judge may, in exceptional circumstances (for example, physical abuse and gross negligence) and in the light of the best interests of the child, grant exclusive and sole exercise of parental responsibility to one of the parents.

In France, when a couple separates (married or not), an order is made with respect to parental responsibility and access (residency and contact) together with child support.

In the case of divorce, the family judge will rule on the matter of parental responsibility, residence, contact and child support. In the case of unmarried parents or partners of a Pacs (French civil partnership), it is theoretically possible for them to separate without any court order being made in relation to their children. Sometimes parents manage the above matters by way of a private agreement made between them.

However, these private agreements are not enforceable per se and if one of the parents refuses to comply with the agreement, the other parent will have to apply to court to obtain an order in relation to the following:
• Parental responsibility and access (residency and contact).
• Leave to remove the child from the French territory on a permanent basis.
• Child support.
• Forensic expertise (expertise medico-psychologique) to carry out an investigation in relation to the parents and the children of the family.
• Welfare reports (enquête sociale) to assess the situation of the family.
• A ban to travel that is preventing a child from leaving the French territory without the written authorisation of both parents (interdiction de sortie du territoire) (Articles 373-2-6, FCC).
• Specific issues such as school enrolment, holidays in a foreign country and important medical decisions.

Orders made in relation to a child are always amendable and can be varied if there is a change of circumstances and it is in the best interest of the child.

21. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

The Law of 4 March 2002 (No. 2002-405) has set as a primary principle that in the case of separation of the parents, a shared/alternate residence order (résidence alternée) can be made in favour of both parents when the circumstances permit it (Article 372-2-9, French Civil Code (FCC)).

In most shared residence cases, the child will reside with each parent on an alternate week basis. However, French case law stated that a shared residence order does not necessarily imply that the child will spend an equal amount of time at the home of each of his parents (Civ. Tre, 25 April 2007).

The judge will have particular regard to:
• The age of the child.
• The distance between the parent’s homes.
• The availability of both parents.
• The parents’ capacity to communicate.
• Conflict between the parents.
• The opinion of the child.

In the light of these criteria, the family judge will often order that the primary residence of the child is with one of his parents and will grant the other parent contact rights (that is, day and overnight stays with the non-resident parent).

This contact will range from one weekend every two weeks (often Friday after school until Sunday evening or Monday morning and half of the school holidays) to more extended contact such as weekends every two weeks (as defined above), plus an overnight stay during the week (on Tuesday night or Wednesday night).

Following a survey in 2012, only 21% of divorced couples had a shared residence order in place for children above six years old. This percentage falls to only 15% for children below six years old.

In 73% of cases, the mother has a residence order made in her favour. Contact rights can be denied to the non-resident parent, but only if it is justified by serious grounds. In practice, this is rarely seen.

The judge can also decide that the non-resident parent’s visitation rights will be exercised in a contact centre and order that certain conditions are met separately before contact and visits can take place (Articles 373-2 and 373-9, FCC).

When ruling on parental responsibility matters, the family judge will have regard to (Articles 373-2 and 373-11, FCC):
• The agreements entered by the parents or the existing status qua
• The wishes and feelings of the minor child.
• The age of the child.
• The ability of each of the parents to fulfill his or her responsibilities and to respect the rights of the other parent.
• Forensic expertise or any expertise having regard especially to the age of the child.
• Any welfare reports.
• Violence or psychological pressure exercised or existing between the parents.

If the parents agree on parental responsibility matters, the family judge will make an order mirroring their agreement unless it does not sufficiently protect the best interests of the child or one of the parent's consent to the agreement was not given freely (Articles 373-2 and 373-7, FCC).

French law does not recognise the right of a minor child to be a party to a proceeding relating to them and to parental responsibility matters concerning them. However, children have a right to be heard in all proceedings concerning them and can be assisted by an appointed legal aid lawyer for this purpose.

Article 388-1 of the FCC provides that in any proceedings where a child is involved, the child “capable of discernment” can be heard at the judge’s discretion, either directly by the judge or by a person appointed by the judge to the same effect. However, when a child capable of discernment requests to be heard, such a hearing cannot be refused by the judge.

There are no specific rules as to how the child should be heard but the judge must always mention that the child’s views were taken into consideration before making the order (Civ. Tre, 20 November 1996; No. 93-1993).

Parents have an obligation to inform the child of their right to be heard in all proceedings relating to them.

International abduction

22. What is the legal position on international abduction?

France has ratified the HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention) and also applies the Brussels II Regulation.

Both texts set up a mechanism requiring the courts of any contracting states to order the immediate return of a child wrongfully abducted to his or her country of residence (Article 12, Hague Child Abduction Convention and Article 11, Brussels II Regulation).

Abducting a child is also a criminal offence under French law. Articles 227-5 (where there is a court order) and 227-7 (where there is no court order) of the French Criminal Code provide that a parent who abducts a child from “the hands” of their main carer (more often the parent with whom the child lives) faces criminal charges (one year of imprisonment and a fine of EUR15,000).

This sentence is aggravated when the child has been kept for more than five days in a place unknown to the other parent or when the child has been wrongfully retained outside of the French territory (Article 227-4, French Criminal Code). In such cases, the abducting parent faces three years of imprisonment and a fine of EUR45,000.
Hague Child Abduction Convention

The Hague Child Abduction Convention came into effect in France in 1983.

The French central authority is the Bureau de coopération internationale civile et commercial and it is part of the French Ministry of Justice. When the central authority receives a request from another central authority, it immediately advises the general prosecutor of the jurisdiction of the Appellate Court where the abducting parent is resident. An inquiry begins and the police or the Gendarmerie (civil police force) asks the abducting parent if they agree to bring the child back. If they do not agree to do so, the general prosecutor requests the prosecutor of the local court to file an emergency petition for return.

Normally, the “left behind” parent has no obligation to retain a lawyer, whereas this is strongly recommended if the abducting parent raises exceptions for defence. The hearing takes place relatively quickly (delays differ from one court to another) and the abducting parent will appear, generally assisted by a lawyer. France does not have an automatic system of assistance by a specialised lawyer. French case law is, in broad terms, in accordance with the guide of good practice of the Hague Child Abduction Convention. However, difficulties sometimes arise when the enforcement of the order is refused by the abducting parent.

France and European member states

When Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation) entered into force, the process to order an immediate return framed around six weeks should have greatly sped up. However, in most cases the six-week time frame envisaged under Article 11 of the Regulation is unfortunately not respected.

Article 11 of the Brussels II Regulation (which grants the court of habitual residence jurisdiction to order return, even if the court of “refuge” has overturned the return on the ground of Article 13b) is generally respected by French judges, who have benefited from extensive training in European law.

Bilateral conventions

France is linked to many foreign states by bilateral conventions on judicial co-operation. Some work and some do not. The 1981 Franco-Moroccan Convention has had good results for children abducted to France and the system is not so different from the Hague Child Abduction Convention. However, it appears to be more difficult to retrieve children illegally removed to Morocco, though this largely depends on the court with jurisdiction in Morocco.

The Franco-Egyptian Convention requests that an order is already standing, but Egypt rarely sends back any child. Some conventions or agreements exist only “on paper”, such as the agreement signed with Algeria, Tunisia or Lebanon. No child has ever been sent back on this basis, though in the past some parents have benefited from some limited access.

France and other states not linked by any convention

As France has an efficient body of rules to domesticate foreign orders, it is possible to obtain an order to the effect that children brought to France in violation of a residence order are returned to their habitual place of residence in an expeditious manner.

The criminal path

When the “left behind” parent has no idea where the abducted child is, or if the country of refuge is not a signatory to any convention, it is possible, under French criminal law, to obtain an international warrant for arrest. Under these circumstances, if the abducting parent tries to move from the place of refuge, they may be arrested, which sometimes leads to the return of the child (Articles 227-5, 227-7 and 227-9, FCC).

Leave to remove/applications to take a child out of the jurisdiction

23. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

General legal position

Under Article 373-2 of the French Civil Code (FCC), the separation of the parents has no influence on the rules of devolution of the exercise of parental responsibility. Both the father and mother maintain personal relations with the child and respect those of the other parent. If one of the parents changes residence, modifying the terms of exercise of parental responsibility, the other parent must be notified.

In case of a disagreement between them, the parent seeking to relocate with the child must apply for a leave to remove (Article 373-2, 3rd para, FCC). Relocating without the agreement of the other parent or authorisation from the Family judge to relocate will otherwise be deemed international child abduction (see Question 22).

The family judge will rule according to the welfare and best interests of the child.

Factors taken into account to permit relocation

The French Supreme Court (Cour de cassation) stated the child’s best interest is the most important principle in all proceedings relating to child (Article 3-1, United Nations Convention on the Rights of the Child 1989, and Article 371-1, FCC).

The child’s best interests trigger the right of the child to have personal relations with his mother and father (Article 373-2, paragraph 2; FCC).

The courts will also take into account the following factors:

• The need of stability for the child in terms of everyday care (and the parent’s ability to provide for it).
• Education (for example, the judge considers whether the children will be registered in a French school or at an international school, the dates of school breaks and the feasibility of the trips back and forth).
• Social environment (preserving the social environment of the child).
• Communication between the parents (to avoid tension).

In practice, when a shared/alternate residence order is in place between the parents, relocation is very rarely granted (CA Versailles, 16 July 2009, No. 09-04620).

In the past decade, the French Supreme Court (Cour de cassation) has strengthened its control on the conditions of relocation in light of the child’s best interests, and relocation has become harder to obtain from lower courts.

Contrary to some other countries, relocation proceedings do not differ from proceedings in relation to other parental responsibility matters. As such, they can be heard on emergency basis. Furthermore, these proceedings rarely trigger extensive and in-depth social/welfare reports prior to granting a relocation.

Finally, the court will also have regard to whether the new jurisdiction will enforce and/or domesticate the French order without varying it.

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SURROGACY AND ADOPTION

Surrogacy agreements

24. What is the legal position on surrogacy agreements?

Since 1991, the French Supreme Court (Cour de Cassation) has ruled (and since confirmed) that surrogacy agreements are strictly prohibited in France. These agreements are considered to be contrary to the principle of the inalienability of the human body. This prohibition has also been confirmed by the 1994 bioethics law and is now outlined in Article 16-7 of the French Civil Code (FCC), which provides that surrogacy agreements are null and void. Entering a surrogacy agreement also triggers criminal charges. There are no exceptions to this rule, which is for public policy reasons (Article 16-9, FCC).

In spite of this legal prohibition, many French couples recourse to surrogacy agreements abroad.

For many years, the French Supreme Court, when confronted with a child born by a surrogate mother abort, has refused to pronounce the adoption of the child by the non-biological parent and to transcribe the foreign birth certificate of the child on the French Etat Civil registry (Civ. 1st, 17 December 2007, No. 07- 20-468; Civ. 1st, 6 April 2011, No. 10-17-130, No. 10-18-053, No. 09-66.486; Civ. 1st, 13 September 2013, No. 12-18-315 and No. 12- 30-138; Civ. 1st, 19 March 2014, No. 13-50.005).

Despite the doctrine's criticisms, considering that this solution was contrary to the child's superior interests protected by the provisions of Article 3 of the UN Convention on the Rights of the Child and to the right to respect for one's private and family life set out in Article 8 of the European Convention on Human Rights (ECHR), the legislative and then the judicial authorities have upheld this position and the prohibition was again confirmed by the French Supreme Court (Civ.1st, 19 March 2014, No. 13-50.005).

However, on the 26 June 2014, France was condemned on two occasions by the European Court of Human Rights (ECHR), (ECHR, Mennesson v. France, No. 65912/11; ECHR Labassé v. France, No. 65941/11) for the non-recognition of parenthood between French nationals and children born to a surrogate mother. The ECHR condemned the French government on the grounds of Article 8 of the ECHR (the right to family life), but only with respect to the child. The ECHR refused to condemn the French prohibition of surrogacy agreements. The French government accepted the condemnation and did not pursue the case before the Grand Chamber of the ECHR.

On 3 July 2015, the French Supreme Court ruled that despite surrogacy being contrary to French public policy and consequently still prohibited in France, the foreign birth certificate of the child will be transcribed on the French Etat Civil registry as long as it is accurate.

On 5 July 2017, the French Supreme Court ruled that the biological mother or the intended parent (non-biological) have the right to adopt the child of their spouse.

If surrogacy agreements continue to be illegal on French territory, but are entered into abroad by French parents, the child will still have the possibility according to French law to have two legal filiations (via adoption and French nationality).

Adoption

25. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

France is also a signatory of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

The conditions of adoption are ruled by the national law of the adopting parent, or, in the case of an adoption by a married couple, to the law governing the effects of their union (which is their common national law if they have the same nationality, or the law of their domicile if they are of different nationalities). However, an adoption can never be granted if the law of the common nationality of the spouses prohibits it. In addition, the adoption of a foreign minor is not possible if the law of the nationality of the minor child prohibits adoption, unless the minor child is born and habitually resident in France (Articles 370-3 and 2, FCC). In any event, the consent of the minor's legal representative is required for adoption.

French law prohibits adoption in favour of a single adopting parent. Adoption is only open to prospective parents as a couple and they must be over 28 years old.

A married couple can jointly adopt a child (whose legal filiation will then be established with both spouses) if the couple has been married for at least two years. If one of the spouses is the biological parent of the child, the other spouse can adopt the child without the need to satisfy the age requirement. Since 2013, married same-sex couples can also adopt a child.

In the case of a non-married, cohabiting couple, adoption is only open to one member of the couple and the legal filiation of the child will only be established with one of the intended parents. A similar solution applies to partners who have entered a civil partnership (Pacte Civil de Solidarité (PACS)).

In any event, the adopting parent(s) must be 15 years older than the adopted child, unless the adopted child is the biological child of one of the spouses (the age difference is then lowered to ten years).

Prior to the adoption, the parents must obtain approval from the President of the Conseil General, unless the adopted child is the biological child of one of the spouses. This is the case whether the applicant(s) (prospective parent(s)) are French national(s) or foreigner(s) residing in France.

France provides for two different types of adoptions:

- Plenary adoption (adoption pliénère).
- Simple adoption (adoption simple).

In the case of plenary adoption, the child enters the family of the adopting parent and all links with their family of origin are severed. The child is considered to be the child of the adopting parent and a new birth certificate is established with the surname of the adopting parent as if they were the biological parent of the child. Once ordered by the court, the plenary adoption is final and definite. Simple adoption is a lighter form of adoption and is also opened to adult children. The adoptee maintains links (sometimes contact, use of the surname, inheritance rights, and a financial obligation to support) with their family of origin as well as with the family of their adopting parent. Simple adoption can be revoked (Articles 370 to 374, FCC).

Adoptions made abroad are considered in France as plenary adoptions if they are definite and the child has severed links with their family of origin. Failing these conditions, the adoptions will be regarded as simple adoptions (Articles 370 to 375, FCC).
26. What legislation (if any) governs division of property for unmarried couples upon the breakdown of the relationship?

The French Civil Code (FCC) defines cohabitation as a relationship between two unmarried persons living in a de facto union (union de fait), that is, living together as a couple with a certain level of stability and continuity in the relationship (Articles 515 to 518, FCC).

The assets acquired, given or inherited during the cohabitation remain in the name of the cohabitant who acquired, benefited from or inherited them. Each cohabitant retains full ownership of their separate property. If a house is bought in the sole name of one of the cohabitants, that cohabitant will have the complete administration of and benefit from it, regardless of the financial contribution made by the other.

Unmarried cohabitants’ occupation rights in the family home in France are determined by reference to ordinary property law and the non-owning partner will have limited, if any, property rights. The other cohabitant will have no right or share in the asset acquired solely by their partner even if the asset acquired constitutes the family home. For both to benefit, the asset must be in both their names.

Generally, financial claims between cohabitants have little chance of success. No maintenance claim or compensatory benefit claim are possible in the case of the breakdown of cohabitation. If cohabitation has been very long and one of the cohabitants establishes that the other has financially benefited from their help during cohabitation, a claim may be possible for financial compensation.

27. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

Conciliation
Conciliation with the family judge, as the first stage of the divorce process, is compulsory when one of the spouses files a request for divorce (requête en divorce), that is, a contested divorce. The conciliation takes place during the first hearing, referred to as the “non-conciliation hearing”. During this hearing, the judge reviews whether the parties are in complete or partial agreement with respect to the issues offered to him. It rarely concludes in the reconciliation of the parties but the points of agreement are noted in the Order and the points of debate are trialled before the family judge with the assistance of the respective lawyers of the parties.

Mediation
Mediation can either be entered on a contractual basis (the parties decide to try to settle the dispute out of court with the assistance of a mediator) or it can be judicially ordered (the mediator is designated by the judge).

Both contractual and judicial mediations are governed by the same fundamental principles, which are the neutrality of the mediator and the confidentiality of the process.

If an agreement is reached by the participants, it will be made into an order by the family judge.

In family matters, mediation is never compulsory and the family judge can only encourage the parties to meet for an information session with a mediator. However, the French government has recently introduced in 11 family courts an experimental scheme of compulsory mediation with respect to disputes regarding the modalities of exercise of parental responsibility between the parents and child support.

Collaborative law
Collaborative law has been developing in France quite rapidly over the last ten years. It is based on the contractual engagement of the parties, assisted by their respective collaborative lawyers to reach a global solution out of court.

The parties can be assisted by a neutral third party or expert to reach the best agreement answering their needs and priorities (such as a notaire, child psychologist or financial expert).

All the participants to the collaborative process are subjected to a confidentiality clause and must withdraw from assisting the parties if the negotiation fails.

As in all family matters, if an agreement is reached, this agreement will be retained within the provisions of an order given by the family judge.

Many family lawyers in France are trained as collaborative lawyers and they are often used to assist the divorcing spouses.

In 2006, France introduced a new type of proceedings (procédure participative), inspired by the collaborative process but which differs greatly as it is not in itself an alternative dispute resolution (ADR).

Arbitration
Arbitration is prohibited in family matters by Article 2060 of the FCC. However, although not used in practice, it may be used to resolve disputes in relation to the partition of matrimonial property rights or in inheritance cases.

28. What is the statutory basis (if any) for mediation, collaborative law and arbitration?

Conciliation
Provisions in relation to conciliation are provided in Articles 252 to 252-4 of the French Civil Code (FCC) and in Articles 1108 to 1113 of the French Code of Civil Procedure (FCCP).

Mediation
Within the course of divorce proceedings, the family judge can suggest family mediation to the parties and, with their consent, designate a family mediator (Article 255, FCC). The judge can also order the spouses to meet with a family mediator, who will give them information on the purpose and the process of mediation. The court’s decision to order the spouses to meet with a mediator cannot be subject to an appeal (Articles 1071 and 3, FCCP).

A similar system is in place in relation to disputes arising in relation to the modalities of exercise of parental responsibility (Article 373-2-10, FCC).

Compulsory mediation in relation to parental responsibility and child support disputes is in force as of 2017 to 2019 as a probation scheme in 11 family courts.

Collaborative law
There is no statutory basis for collaborative law, but it is recognised as a valid and efficient scheme by family practitioners and the judiciary.
CIVIL PARTNERSHIP/SAME-SEX MARRIAGE

29. What is the status of civil partnerships/same-sex marriages? What legislation governs civil partnerships/same-sex marriages?

The French Civil Code (FCC) defines civil partnerships (Pacte Civil de Solidarité) (PACS), as “a contract entered into by two adults, of different sexes or of a same sex, to organise their common life” (Article 515-1, FCC).

If the parties conclude a PACS after 1 January 2007 (following an amendment to the PACS provisions by the law dated 23 June 2006), they will be deemed to have implicitly adopted a separation of property regime as a default regime.

The partners of a PACS can opt for a “joint ownership regime” either at the time they enter the PACS or later on by amending their partnership agreement. In such cases, most of the assets acquired during the partnership will be considered as jointly-owned assets and each partner, regardless of their financial contribution to these assets, will be allocated half the value of the jointly owned assets at the time of the dissolution of the partnership. However, there are limited exceptions to the principle of joint ownership. For example, the income earned by one of the partners will be considered as their personal property if it is not reinvested into an asset.

PACS also provides for a duty of mutual and material assistance between the partners. Although in theory this is not impossible, a maintenance obligation following the dissolution of the partnership is rarely provided for in the PACS.

Since Law No. 2013-404 of 17 May 2013 came into force, opening marriage to same-sex couples, Articles 202-1 and 202-2 of the FCC applies to same-sex marriage. Two same-sex persons can enter a marriage if the law of the nationality of one of the future spouses or the law of the place of domicile or habitual residence of at least one of them permits it.

MEDIA ACCESS AND TRANSPARENCY

30. What is the position regarding media access to and press reporting of family law cases?

Family law cases are heard in private courts.

The press do not have access to family hearings and cases cannot be reported with the full names of the individuals concerned. Cases which are reported comprise initials only.

CONTROVERSIAL AREAS AND REFORM

31. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

The impact of the new divorce by mutual consent on international relations

The recently instituted divorce “without a Judge” (formerly divorce by mutual consent) leaves many questions unanswered, especially regarding its recognition and enforcement abroad.

Even if the issues surrounding recognition and enforcement at a European level were clarified, the situation is radically different outside of the EU.

Lawyers currently have no option but to opt for the route of a contested divorce (which guarantees that a court order will be made to decree the divorce) when the divorce requires recognition outside of EU member states, even if the parties are in full agreement on all the aspects of their separation.

Although the French Ministry of Justice is fully aware of this difficulty, no solution has yet been provided.

The European Regulation on Matrimonial Regime (2016/1103)

This Regulation, applicable as of 23 January 2019, defines the Matrimonial Regime as a “set of rules relating to the economic relations of the spouses between them vis-à-vis third parties”.

The Regulation aims to determine which court will have jurisdiction and which law will be applicable in matters of matrimonial property regimes and the property consequences of registered partnerships. It will also facilitate the recognition and enforcement of decisions in cross-border situations on these matters. The Regulation will establish clear rules on applicable law in the case of divorce or death, bringing greater legal certainty and putting an end to parallel and possibly conflicting proceedings in various member states.

Legislative proposals

Further to a favourable opinion of the French National Consultative Ethics Committee dated 27 June 2017, the French Government has announced that it will present to the Parliament a law proposal giving homosexual married women the right to recourse to medically assisted reproduction methods. Currently, the right to conceive using medically assisted reproduction is only granted to heterosexual couples who are unable to conceive naturally.

ONLINE RESOURCES

Ministry of Justice (Ministère de la Justice)
W www.justice.gouv.fr
Description. This is the official website of the Ministry of Justice.

Legifrance
W www.legifrance.gouv.fr
Description. Legifrance is a French government entity responsible for publishing legal texts online.

JaFBase
W www.jafbase.fr
Description. This website contains international conventions that France is a party to.
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Areas of practice. Family law; international family law; private client, collaborative law.

Non-professional qualifications, PhD in Paris in collaboration with the London School of Economics and graduated both in Paris (Master of Law, Paris II Assas) and in London (LLM King’s College, London).

Languages. French (native language), English (fluent)

Professional associations/memberships. Founding member of the IDFP (French Family Law Institute); Founding member and President of the AFDPC (French association of collaborative lawyers); Affiliated member of Resolution (UK); Fellow and Governor of International Academy of Family Lawyers (IAFL); member of the scientific committee of EIMA; Head of the Paris Bar Commission of ADR in international family matters; Professor at the Paris Bar school.

Publications


• International pre-nuptial and post-nuptial agreements, Jordans, 2011.


• French correspondent for the International Family Law Journal.