THE "DE-INTERNATIONALISATION" OF THE NEW DIVORCE BY MUTUAL CONSENT?

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1. Extrajudicial divorce which has already been described as a small 'revolution' in Family Law could well have similar repercussions in international private international law, encouraging us to rethink and adapt the subject to extra judicial procedures.

2. After a long debate and an initial scare at the time of the Guinchard commission[1], extrajudicial divorce was finally enshrined in the Law on Modernizing the Justice System in the 21st century called, "J21"[2]. The size of this reform contrasts markedly with the way in which it was brought into our legal system (on the quiet, via a simple amendment) since French lawyers must now contend with an extreme version of court diversion which not only applies to the decree of divorce itself but its financial consequences and measures concerning parental authority as well. This new divorce by mutual consent, which is available to spouses under French law, is performed by a private agreement countersigned by the lawyers and filed in a notary's records.

3. Although the question of judge-free divorce by mutual consent has been a live topic in the Chancellery for several years, and despite the abundance of international and European instruments which apply in the matter, the legislator has shown complete indifference to the international dimension of a growing number of divorces in France, by refraining from making any international private law provision. There is not one line in the wording of the law itself, nor any rule regarding the international jurisdiction (of notaries) nor any mention of the conflict of law rules, not even to say that they still apply. The enacting decree itself, which appeared only a few days before the law came into force (1 January 2017[3]),only contains a few modest and incomplete provisions concerning certain extraterritorial aspects of this type of divorce in international situations.

4. The Chancellery, as if it had suddenly realized the problem posed by the impact of the reform on international private law, tried to overcome the problem with the Circular of 26 January 2017[4]. It states that this divorce is totally free of any rule of international jurisdiction (Sheet 6), and recommends applying French law to the substantive issue by a careful choice of law made by the parties (Sheet 4). This is reminiscent of the method applied for the conflict of authorities which involves dealing with issues of substantive law by determining the competent authority, here the notary, with whom the agreement is filed, who could not, according to the Circular, apply another law than French law to define, firstly, the terms for drawing up the lawyer's agreement, and, secondly, the rules to be respected when filing the agreement. The legislator therefore appears, if this is the correct way to analyse the new

[1] See this mission report filed in 2008 'The reasoned ambition of a calmed justice system'(« L'ambition raisonnée d'un justice apaisée »), then in 2013 The Delmas-Goyon report, 'The 21st-century judge, a civic player, a justice team" (Le juge du XXIème siècle, un citoyen acteur, une équipe de justice »).
[2] Law n 2016-1547 of 18 November 2016, of modernization of justice for the XXIst century (*The J21 Law*), declared to conform to the Constitution, Constitutional Council December 17, 2016, n° 2016-739 DC.
[3] Decree n°2016-1907 of 20 December 2016, Official Gazette of 29 December 2016.
[4] Circular of 26 January 2017, JUSC1638274C, Civ/02/17, C1/713-2016/3.11.1/SM/4.

law, to have carried out a sort of "de-internationalization"[5] of divorce by assimilating international divorces to purely domestic divorces.

5. Although the Circular may solve certain issues, it also significantly complicates matters by not offering any solution to cases where a foreign law could apply because the parties may not have chosen (or perhaps were unable to choose) French law. Besides, although the international aspect of the divorce may be, at least partly, eluded at the stages of the access to and of the decree of divorce in France, one cannot ignore the difficulties arising from these international aspects if the divorce and its consequences have to travel (namely when the spouses live in different countries, sometimes with children) without exposing them to serious setbacks later.

6. In these circumstances it is not surprising that international family law practitioners are mistrustful of a reform which they were also asked to apply immediately, from 1 January, especially since it increases their liability[6]. Therefore, confronted with this "de-internationalization" in the sense that the legislator totally ignored the international dimension of a certain number of situations (I) neither the lawyer nor the parties can afford to adopt a "head in the sand" attitude. Quite to the contrary, lawyers must not only "re-internationalize" the new divorce by mutual consent, but also, (and this may be even more difficult) make their clients understand that what was "sold" to them as modern advancement may not be suitable for their particular circumstances and they might be well advised to favour legal security over the expediency of the process (II).

I. THE "DE-INTERNATIONALISATION" BY THE LEGISLATOR

7. The new French divorce by mutual consent appears on the international stage as a very original legal character: the divorce is judge-free and contractualised, but it is nonetheless deposited with a "public authority", the notary.

The combination of these innovations inevitably has a strong impact in terms of international private law, with regards to determining the internationally competent authority (A), and the applicable law (B).

A- THE COURT DIVERSION AND THE DETERMINATION OF THE INTERNATIONALLY COMPETENT AUTHORITY

The suppression of the recourse to the judge is the reason for the French legislator's silence concerning the numerous rules of international jurisdiction which apply to the divorce decree and the effects of international divorces, because this court diversion has made them irrelevant. However, faced with this new risk, not of *forum shopping* but of *forum*

[5] On this expression see S. Henry, "The material objectives of international private law " "Les objectifs matériels du droit international privé" a thesis defended at the University of Harve Normandie in January 2017, n° 358, p. 262

[6] Cf *infra* n° 50.

registering[7], the legislator could have used the compulsory involvement of a public authority, the notary, to formulate specific rules of territorial attachment.

1) The legislator's approach

8. As a preliminary, we note that, by enacting a judge-free divorce, the French legislator has abandoned the rule, which is still very prevalent in a large number of Member states of the European Union[8], of the judicial monopoly on the dissolution of marriage. This monopoly formerly justified the refusal to pronounce religious divorces in France[9] and the refusal to recognise repudiations made on French territory[10]. The exception of international public policy could now be used to restrict the methods of marriage dissolution in confessional systems by either relying on the principle of gender equality[11], or secularism[12], assuming that the possibility of applying a foreign law to divorce is still accepted (see *infra* I, B 1°).

10. Granted, recent laws in two EU Member States (Portugal and Italy)[13]) both enact an extra-judicial divorce by mutual consent (before a civil officer). However, one, (the Portuguese law) provides for the supervision by the Public Prosecutor if the couple have children under the age of 18, which implies subsequent judicial control. The second, (the Italian law) only reserves this extra-judicial divorce for spouses who do not have any minor children or property to transfer. The new French divorce law is therefore certainly original by comparison within the European landscape.

In the first phase of the divorce, which is strictly contractual, only the spouses, represented by their respective lawyers, are involved. Of course, the lawyers are bound by their professional status to perform certain tasks as legal auxiliaries but they cannot be compared to public authorities and even less to "*public authorities holding a function which is equivalent to that of a judge*"[14]. Indeed, in this context, lawyers have a reinforced role as

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7 Le *forum registering*, or *forum enregistration* is the corollary, in the area of conflicts of authorities of *forum shopping* in the area of conflicts of jurisdictions i.e. the parties' choice of the place of registration of an instrument with an authority in order to obtain certain advantages.

8 See the information given on the national law of the Member states on the European Family Law e-portal.

9 cf. Supreme Court. Req. 29th May 1905, ep. *Levinçon*, *RCDIP* 1905, p. 518 : in this case, the application for a divorce made by the spouses under a religious law was held to be inadmissible as the judgement considered that French courts could not replace the confessional authorities of the country which the spouses were subject to. However the judgement has been criticised for not substituting the spouses' application for a religious divorce with a civil divorce.

10 cf. Paris District Court 16th January 1978, Dame *Ech Chabi R'Kia*, *JDI* 1979, p. 855, note Ph. Kahn ; Supreme Court civil division 1st, 15 June 1982, *Dame Moatty c/ Dame Zagha*, *RCDIP* 1983, p. 300, note J.-M. Bischoff.

11 cf. Supreme Court civil division 1st, 17 February. 2004, n° 02-15.766, *D*. 2004, p. 824 note P. Courbe.

12 cf. Paris District Court 7 April 1981, *JDI* 1982, p. 699, note M-L Niboyet.

13 On Portuguese law, see the information given on the European Family Law e-justice portal and on jafbase. fr. and for Italian law see the law of 12 September 2014, law 162/2014, *Gazetta Unfficiale* n° 261, 10 November 2014.

14 Cf. the definitions of "court" and of "judge" given by the regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (regulation Bruxelles II *A*), art. 2-1 and 2-2. *An even more precise definition of court is given in article 3-2 of the regulation n° 650/2012 of 4 July 2012 concerning successions which designates « any judicial authority and all other authorities and legal professionals …. which exercise judicial functions or act pursuant to a delegation of power by a judicial authority (…)provided that such other authorities and legal professionals offer guarantees (…)and provided that their decisions under the law of the Member State in which they operate, may be made the subject of an appeal or a review by a judicial authority and have a similar force and effect as a decision of a judicial authority on the same matter* » (emphasis added).

advisers[15] and to certify the authenticity of the writing and the parties' signature. But the content of the agreement countersigned by the lawyers remains the work of the parties.

12. With respect to the second phase, of filing the agreement, the Circular (Sheet 6) considers the question of the application of the rules of international jurisdiction to notaries before firmly excluding them for the reason that "*these rules only concern jurisdictions which are asked to hand down a judgement"* whereas notaries in the new divorce must merely deposit the agreement of divorce in their records after "a formal control".

13. This analysis appears to be correct in the light of the definition of "Court" and its corollary, "judgement" in EU instruments[16]. After the agreement is filed with the notary, the conditions of validity and recourse against the divorce agreement are subject to the same legal regime as a private contract and not that of a divorce judgement[17].

14. The agreement is also not an "authentic instrument"[18] as defined in EU regulations. It is clear that the French legislator did not wish to entrust notaries with the task of "authenticating" the content of the divorce agreement and that the deposit should not be considered to have an "authenticating" effect in French law[19]. The debates in Parliament underlined the intention to restrict the notary's role to simply registering the agreement[20]. The definition of "authentic instrument" in EU instruments is subject to a dual condition. Firstly that the instrument is *"formerly drawn up or registered as an authentic instrument in the Member State of origin"* and secondly that the authenticity of the instrument not only concerns the signature but also *"the content of the authentic instrument."*

15. The French legislator has therefore created a hybrid instrument: a private agreement which is enforceable, and which releases us from our international obligations ! However, this does not mean that the French State is violating its international commitments – since the rules of jurisdiction of such regulations do not apply to extrajudicial proceedings[21]-, and even less a violation of the Brussels II A regulation - since this type of divorce by private enforceable agreement is stipulated in article 46 of this Regulation[22] ! However, this legal solution is not totally unprecedented and can be compared to another private agreement which is enforceable in French law, the ratified extrajudicial settlement (*transaction extrajudiciaire homologuée*) . The French Supreme Court (*Cour de cassation*), in its latest case law on this subject, indeed considers that, as the judge's control during the approval is purely formal[23], the judge's decision is not open to appeal[24]. Therefore, the ratified settlement is not considered to be a jurisdictional instrument, despite the intervention of the judge. The enforceable nature of such settlement agreements[25], like the enforceable

[15] See *infra* n° 46 et s.
[16] cf *supra* note 13
[17] See the Circular sheet fiche 2.
[18] Cf. Art. 2 -1, a, i) of the Regulation (EC) n°4/2009 of 18 December 2008 relating to maintenance obligations. The same definition is found in the Regulation (UE) n° 650/2012 of 4 July 2012 concerning successions and the regulation (UE) n° 2016/1103 of June 24 2016 concerning matrimonial regimes.
[19] With regards to the notion of authenticating deposit and the ambiguities of the J21 Law regarding this see Chr. Blanchard, 'The notary's function in judge-free divorce' 'La fonction du notaire dans le divorce déjudiciarisé', *Bull. du Cridon de Paris*, 15 Nov. 2016.
[20] Subject to a *prima facie* control of conformity with public policy, cf. *infra* n° 18 et n° 52.
[21] The freedom to use the extrajudicial route is expressly mentioned in the matrimonial regimes regulation in recital 39.
[22] Article 46 refers to "*agreements between the parties that are enforceable"* on the effects of these agreements *infra* n° 37
[23] Under the old article 1441-4 of the CPC.
[24] Cf. Cass. civ. 2ème, 1st September 2016, n° 15-22915.
[25] cf. art. 58 of the regulation (EC) n° 44/2001 of 22 December 2000 (Brussel 1 regulation) on jurisdiction, recognition and performance of judgements in civil and commercial matters.

nature of authentic instruments, can be recognised in another Member state and it has been held that drafting these instruments enable the rules of jurisdiction in the Brussels I Regulation in civil and commercial matters to be avoided, even though they are rules of exclusive jurisdiction[26].

16) One can see the paradox here: the parties have complete freedom to avoid the rules of international jurisdiction in European instruments when they use an extrajudicial process whereas, in judicial proceedings, the same agreement between the parties would not be a basis for jurisdiction on the divorce[27], nor even (except very restrictedly) on the matrimonial property regime[28], despite the undeniable advantages that such jurisdiction clauses could offer European citizens to protect their property relationships and reduce the legal hazards associated with their international mobility[29] .

2) <u>The alternative set aside</u>

17. However, the solution chosen by the Legislator was not ineluctable and another approach could have been chosen: drawing up rules of international jurisdiction, which would have applied, to the notary, who is the depository of the agreement.

18. A first option would have been to model these rules of "notarial" competence on the judicial jurisdiction rules in Brussels II A, also using the rules of extension of jurisdiction to the divorce consequences in the corresponding regulations. Even though such a solution would have had the merit of being very respectful of European instruments, it would have been rather inconvenient: very constraining for the parties, it would above all have compelled the notary to carry out extensive verifications, quite incompatible with the "flat rate" price of his/her intervention. Indeed, even if the Circular implies that this intervention should ultimately exceed the mere control of the agreement's conformity with the legal and regulatory provisions, and that the notary's control should extend to the respect of public policy, it is clear that the legislator did not wish to entrust the notary with missions which were previously performed by the judge.

19. Another option would have been to create specific, more flexible, rules to establish a connection between the parties and the notary responsible for filing the agreement. This type of solution was previously favoured for registering partnerships which had to be filed in the clerk's registry of the common residence or, if this was impossible, at the registry of the residence of one of the parties. This still applies today under the J21 law, for the registration,

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[26] See J.-B. Beraudo, *J-Cl Proc.* Civ. *Fasc*. 52-60, n° 35 : ' *authentic instrument received by notary in Amsterdam before whom the parties had concluded a long lease for land in Belgium was declared to be enforceable in Belgium (Rechtbank van eerste aanleg Tongres, 26 sept. 1980 : Rép. série D, I-50-B1), when a judgement relating to the same instrument handed down in Amsterdam would have contravened the rule of exclusive jurisdiction laid down by article 16.1 of the Brussels Convention in favour of the State where the building was located'* ; comp. with H. Gaudemet-Tallon, Jurisdiction and Enforcement of judgements in Europe in Civil and Commercial Matters (*Compétence et exécution des jugements en Europe, Matière Civile et Commerciale* , LGDJ- Lextenso, 5ème ed. , 2015, n° 471, p. 617.

[27] the freedom to conclude a jurisdiction clause in matrimonial matters is not always envisioned in the proposal to revise the Brussels II A Regulation. See the Commission's proposal published during the summer of 2016 2016, COM (2016) 411/2, 2016/0190 (CNS).

[28] see the very restrictive conditions for agreements for electing the law of the forum in article 7 of the Matrimonial Regimes regulation.

[29] For the need to anticipate in international private law see M.-L. Niboyet, "Legal optimisation in international civil relation" (De l'optimisation juridique dans les relations civiles internationales », *Liber amicorum, Mélanges en l'honneur du Professeur P. Mayer*, LGDJ-Lextenso, 2015, p. 629 et s.

before the civil officer, in accordance with the new article 515-3 of the Civil Code. Combined with a conflict of law rule similar to the rule in article 515-7 of the Civil Code, which designates the law of the competent authority and thus avoids the French public agent registering an instrument unknown under his or her national law, such a solution, respectful of the link between the *instrumentum* and the *negotium,* would have created a balance between, on the one hand, making the procedure simpler for the parties and reducing the control by the notary and, on the other hand, avoiding a proliferation of judge-free divorce tourism[30].

B- THE CONTRACTUALIZATION OF THE DIVORCE AND THE UNCERTAINTIES AS TO THE GOVERNING LAW

20) Before discussing the solutions proposed by the Circular of 26 January 2017 - the legality of which is, in our view, debatable, as we shall see -[31], the question arises of the application of the rules of conflict of laws in international instruments (European regulations and multilateral or bilateral conventions) to which France is a party, and which both the law and the decree are silent. One immediately thinks of the 'Rome III' Regulation[32] concerning the pronouncement of the divorce but this problem also concerns all the consequences of the divorce whether regarding the liquidation of the matrimonial regime, maintenance obligations between ex-spouses (i.e. the compensatory allowance "prestation compensatoire"), or for the children (for their maintenance and education) or questions relating to parental responsibility (exercising of parental authority, determination of the children's residence and organisation of their lives).

1) Identification of the applicable rules of conflict

21) The 'Rome III' Regulation does not expressly limit its scope of application to judicial divorces because article 1.1 of the Regulation simply states that it applies "*in situations involving a conflict of laws, to divorce and legal separation".*

22) However, there are certain provisions in the Regulation, which through their references to *"the law of the forum"* or the *"jurisdiction"* or the *"procedure"* raise doubts over its application to extrajudicial divorces[33]. Consequently, some writers have questioned the application of this regulation to private divorces[34].

23) The Circular, although deciding to apply the "Rome III" Regulation, ignores some of its provisions and especially article 5.1.d, thus excluding the choice of the "*law of the forum"*[35].

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[30] Cf. A. Devers, 'Extrajudicial divorce international private law' 'Le divorce sans juge en droit international privé » *Droit de la Famille* n°1, Janvier 2017, dossier 5

[31] Because the Circular goes beyond its purpose of interpreting the law, and creates law.

[32] Regulation (EU) n° 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[33] See art. 5.1.d) : choice of the 'law of the forum' ; art. 5.3 : choice of the '*law of the forum' (…) before the court in the course of the proceedings';* art. 10 '*application of the law of the forum* » ; art. 11 ' ***public policy of the form'***.

[34] P. MAYER, V. HEUZE, *Droit international privé*, LGDJ, 11ème édition, n°. 600, p. 420, propose, whilst questioning the advisability of the solution, a return to article 309 of the Civil Code which we stress is, in article subparagraph 3, still far too unsuitable for an extrajudicial divorce.

[35] Cf. Circular of 26 January 2017, sheet 4, page 1, last para.

We believe that this is open to criticism. Would it have not have been better to adapt the judicial provisions to judge-free divorces rather than rejecting them ? For instance, the *"law of the forum"* could have been broadly interpreted to mean the local law in i.e. the law of the place where the divorce agreement is filed, i.e. French law? This question is even more relevant because, as we shall see, the Circular appears to reserve access to this new extrajudicial divorce by mutual consent to facts which are governed by French law[36]. Likewise the notion of the *"public policy or the forum"* could become the *"local"* public policy.

24) The same difficulty arises for international instruments which lay down the rules of the conflict of laws which apply to the effects of the divorce[37]. The Circular refers to the application of these instruments on this point[38], without posing the question.

We consider that it is not the task of an ordinary Circular established *a posteriori* to fill in the gaps, to pronounce on the applicability of these instruments. This important question should have been considered and clearly solved by the legislator himself. And if he had considered the "Rome III" regulation to be inapplicable, he would have then had complete freedom to establish the most appropriate conflict of law rule.

He could have considered the possible application of a foreign law to this new type of divorce. On that respect the terms of the Circular are particularly puzzling. By stating that '*It is up to the spouses and the lawyers if the case has an international element (…), to check whether their divorce is <u>really subject</u>[39] to French law and to expressly state this in the divorce agreement*', **the Circular therefore appears to be making the application of French law to the *"principle of divorce"* and to *"each of its effects"*** *(methods of exercising parental authority from maintenance, contributions to the children's upkeep and education, the compensatory payment for a fall in living standards, liquidation of the matrimonial regime…)* »[40], **a condition for access to the new extrajudicial divorce… !**

Moreover this interpretation is encouraged by Sheet 6 of the Circular which states that '*Notaries (…) can receive any instrument from French or foreign parties whether they are domiciled in France or abroad **as soon as French law applies to their divorce**"*[41].

We consider that this reading of the law, as suggested by the Circular, can be criticised for several reasons.

25) Firstly one may wonder whether a real necessity exists for French law to be applied in order to "cast" international situations in the mould of this new divorce.

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[36] in support of the solution adopted in the Circular, it could be credited with wishing to re-establish the connection with France at the applicable law stage in the absence of any other filter at the notarial competence stage.

[37] Cf. Example for the compensatory maintenance payment and the contribution to the maintenance medication of the children, see the Protocol of the Hague of 23 November 2007 *on the law governing maintenance obligations* : articles 4.2, 4.3 et 13.

[38] Cf. Circular 26 January 2017, sheet 4, p. 2, 1st paragraph.

[39] Underlining by us.

[40] Cf. Circular of 26 January 2017, sheet 4 p. 1, 2nd paragraph.

[41] the clarity of the phrase is obscured by the ending '*…, Without prejudice to the effects which the rules of international private law applicable to the parties because of their nationality, could have **in another State** notably in terms of the recognition of the divorce and its consequences*'.

The question is raised concerning the pronouncement of the divorce because of the fine line which exists between "procedural law"[42] provisions governing the agreement and "substantive" law provisions i.e. the legal relations co-signed in the agreement. Amongst the compulsory provisions in the divorce agreement and stipulated by article 229-3 of the Civil Code, some of which are indisputably procedural provisions[43], appears the verification of the spouses' consent to the divorce and its consequences. This however is unquestionably a substantive provision[44]. The question is even more relevant with regards to "*the endorsement that the child's parents informed him/her of the right to be heard by the judge*"[45]. Should this be considered to be a "procedural" provision in the agreement, and therefore subject to the "contractual procedure" or should it be considered to be a substantive provision relating to parental responsibility ? The question is important notably concerning the assessment of the child's capacity for discernment which may be very variable from one law to another.

26) In any event, if one agrees to differentiate between the substantive and the procedural issues, there is nothing in our view which prevents opening up the new divorce to situations where the principle of the divorce, or certain of its effects could be subject to a foreign law, providing of course that such a law provides for divorce by mutual consent (even judicial) and to apply French law to certain provisions, either as the law of the place where the agreement is filed (procedural law) or as a law of public policy.

27) The challenge is considerable because the Circular's strict interpretation of the "Rome III" Regulation which prevents the Parties from choosing French law as the "local law" creates situations where the parties will be unable to choose French law to apply to their divorce even though they have grounds for seising a French judge with their divorce under the *"Brussels II A"* Regulation. For instance, this would apply to a mixed couple, where only one of the spouses had their habitual residence in France[46], and where the spouses' habitual place of residence was not in France or had been in France, but over a year[47]ago.

Likewise with respect to parental responsibility, the parties will not be allowed to choose the applicable law under the Hague Convention of 1996[48]. Article 16-2 of this Convention states that when the child's habitual place of residence is in another party state, it is the law of this State which will apply. Is access to the new divorce law to be considered to be barred in these circumstances ?

Lastly the same question is raised concerning the contribution to the children's upkeep and education, as the choices of law are only authorised for maintenance obligations for children "*for the requirements of particular* ***proceedings***"[49] and in favour of the local law.

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[42] which could be described as 'contractual procedure' in the new divorce'
[43] Article 229-3, 1° and 2° of the Civil Code.
[44] Article 229-3, 3° of the Civil Code.
[45] Article 229-3, 6° of the Civil Code.
[46] Based on article 3.1.a, 4th indent of the Brussels 2 A Regulation the spouses can make a joint application to the courts of a Member state were only one of them has an habitual residence.
[47] Cf. Article 5.1.a and 5.1.b of the Rome III Regulation.
[48] The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children articles 15 to 22.
[49] Article 7 of the Hague Protocol of 23 November 2007.

The difficulty would also arise regarding the law applicable to the matrimonial regime if this regime was subject to a foreign law, either by the effect of the contract of marriage or if no choice was made, by applying the rules of the conflict of laws.

28) In our opinion the French legislator cannot restrict access to extrajudicial divorce by mutual consent, without creating a denial of justice and in such circumstances, therefore must open the way for judicial divorce by mutual consent on a joint application under articles 230 site and the following articles of the Civil Code.

We consider that to force the spouses to have recourse to a contentious divorce such as an "accepted" divorce[50], would be a completely unjustified discrimination regarding access to divorce, each time an equivalent provision for an amicable divorce, whether judicial or not, exists in the applicable foreign law.

2) The impact of the available laws

29) If one considers that this reform changes nothing regarding the applicable conflict of law rule, one must then consider the consequences of not respecting the applicable law especially regarding the unavailability of the laws in question. More precisely, could this unavailability be a reason for invalidating the agreement in certain cases?

The question of availability is raised firstly with regards to the position of the judge. Recent case law shows that not all conflict of law rules are subject to the same procedural regime.

30) Let's start with the law, which applies to the pronouncement of the divorce. Before the Rome III Regulation there was no doubt that, the judge had to raise the issue and apply the applicable law even if the parties had not raised it[51]. Although the Rome III Regulation now permits the parties to choose the law which applies to their divorce, the fact that this choice is limited to a small number of laws with a close connection to the parties illustrates that the conflict rule applicable to the pronouncement of the divorce is not fully available, and opens a debate on the judge's obligations[52]. For instance, the law which applies to parental responsibility is totally unavailable as the parties have no choice (except indirectly if they can accept the extension of the jurisdiction for the divorce, via the judge having jurisdiction applying his own law under article 15 of the Hague Convention of 1996). The same applies to the law of the maintenance obligations for minor children. Although the Hague Protocol provides the possibility of procedural agreement for a specific procedure, this freedom does not go as far as allowing a choice of applicable law outside court proceedings. Conversely, the issue of maintenance obligations between spouses and ex-spouses (the choice of law authorised by the Protocol) is dealt with quite differently because Supreme Court's recent case law establishes that the judge seized does not have to automatically raise the non-respect of the conflict rule which, in this case, designated Moroccan law[53]. The same applies for law which applies to matrimonial regimes. Therefore, all the conflict rules which apply to the financial and economic consequences of the divorce (at least between the spouses) can

[50] Translator's note : where the spouses agree on the principle of the divorce but not its consequences
[51] Supreme Court of Appeal 1ère civ., 4 June 2009, n° 08-11872.
[52] Cf. M-l. Niboyet, I Rein-Lescasteyres et L. Dimitrov, *Droit international privé, exercices pratiques*, LGDJ Lextenso, 2ème ed. 2015, p.49
[53] Cf. Supreme Court Civil 11 May 2016, n° 15-10818

nowadays be considered to be available at least to a certain extent because we shall see that a control continues to exist when implementing the chosen law.

31) As these different cases only concern the function of the judge and therefore by extension a judicial procedure, one may legitimately wonder whether the new extrajudicial divorce by mutual consent grants the parties even more freedom concerning the applicable conflict rule than before. This is even more important because the problem of the binding nature of conflict rules on the parties was considered from the angle of a procedural agreement i.e. an agreement which allows the parties to bind the judge on the choice of applicable law (providing of course this law was available) and therefore, again, within a judicial framework. This question is totally unprecedented in a discipline which is conceived entirely for judicial proceedings and we shall have to wait for the first challenges to the new private divorce agreements countersigned by lawyers to obtain the start of a reply.

32) However this question is only pertinent if there is penalty for non-compliance with the applicable law. What could such penalty be?

Let's rule out the possibility of implicating the lawyer's liability, to which we shall return to later.

We are left with the possibility of the invalidity of the agreement. But on what grounds? It clearly emerges from the Circular that the legislator took considerable pains to ensure that divorces concluded before lawyers and then filed in the records of a notary were not easily challenged. One only has to read the Circular's position on a possible cancellation clause in the agreement to be convinced of this : it would be declared to be null and void as contrary to public policy. Likewise "an action for cancellation based on the sufficiently serious non-performance of one party (…) does not appear to be able to be valid because it would also call the principle of the divorce into question". The possibility of a mistake in law has been raised[54]. However for a mistake in law to be a reason for invalidity it must affect the contracting party itself or the purpose of the undertaking (Article 1132 Civil Code). This appears to be difficult to apply to the law chosen by the parties and is, in any event, unsuitable to the pronouncement of the divorce[55]. Lastly, remains the possibility of a conflict with public policy. However, we do not think that this can be envisioned regarding the application of an unavailable law. How can a judge decide that an agreement is invalid because of the nonapplication of a conflict rule which he, himself, would not have been obliged to apply? Conversely, the question is much more pertinent with regards to an unavailable right, to that respect the Circular has the merit of reiterating that although these private divorce agreements countersigned by lawyers are contracts, they are atypical contracts[56] .

33) We could consider the question from the point of view of the protection of the weaker party. For instance, in maintenance matters, article 8-5 of the Hague Protocol enables the

[54] Cf A. Devers, aforementioned article

[55] Cf. F. Chénédé, « Divorce and contract at the crossroads of reform » « Divorce et contrat à la croisée des réformes », *AJ famille*, 2017, p.26.

[56] : Cf Fiche 2 : «*the case law has an extensive appreciation of public policy in family matters, notably family public policy, parental authority (it is not possible to waive or abandoned one's rights outside the cases stipulated by law) and maintenance obligation (which is unavailable and cannot be waived)*».

judge to control the balance of the spouses' agreement. However, this only occurs in exceptional circumstances, in the presence of a choice of law and a lack of sufficient information to the parties on the implications of this choice, when it would clearly have unreasonable or unfair consequences for either of them. Here again the reserve of public policy continues to play a role (article 13 of the protocol) as the Supreme Court recently reiterated when it invited the first instance judges to investigate whether the effects of the applicable law (German law) were clearly contrary to French public[57] .

34) We can already identify the role for lawyers to ensure that the agreement is sufficiently balanced to avoid such a snag. However this is not all, because lawyers must also reintroduce the international dimension into this extrajudicial divorce. Failing to do so, spouses would have serious problems if they wanted to have their divorce recognised and enforced abroad.

II. THE "REINTERNATIONALISATION" OF THE AGREEMENT BY THOSE INVOLVED

35) In cases with an international aspect, it will be insufficient to check that the divorce agreement will be effective in France and therefore, as far as possible, not open to attack before our courts. Lawyers will also have to ensure that the divorce and its consequences can "travel" beyond our borders and especially to States where the parties have an attachment. Lawyers must therefore solicit the assistance of their colleagues abroad to obtain information on the risks of the refusal to recognise or enforce the agreement in each of the countries concerned. It will therefore be necessary to decide, in the light of the difficulties which this international diagnosis could "reveal" whether the new extrajudicial divorce by mutual consent is the most suitable in the circumstances and, in the affirmative, to comply with a certain number of precautions when drafting the agreement to ensure that it is effective, including abroad.

A. THE PITFALLS OF THE INTERNATIONAL CIRCULATION OF THE AGREEMENT

36) The question of the recognition and the effectiveness of the agreement in the new French divorce by mutual consent countersigned by lawyers which is neither a court judgement or an authentic instrument[58], but an ordinary agreement, will be raised in specific terms which varies according to the applicable international convention or European regulation or when no international instrument covers the question.

1) The circulation of the agreement inside the European Union : having to factor in the fragmentation of instruments

37) Concerning the pronouncement of the divorce, the enacting decree for the "J21" law stipulates that the notary with whom the agreement is deposited will issue the certificate

[57] Cf. Supreme Court of Appeal, Civ. 8 July 2015 n° 14-17880.
[58] Cf. Circular of 26 January 2017 sheet 6, page 3, para. 7.

which is stipulated in article 39 of the "Brussels II A" Regulation in order to enable the dissolution of the marriage to be recognised in the European Union[59]. Although the legislator did not consider the question of the international circulation of the new divorce or even its effects, the enacting decree of the 'JXXI' law[60], as explained by the Circular, appears to have found a lifeline in article 46 of the "Brussels 2 a" Regulation.

Article 46 states that "d*ocuments that have been formally drawn up or registered as authentic instruments are enforceable in one Member state and also agreements between the parties that are enforceable in the Member state in which they were concluded shall be recognised and declared to be enforceable under the same conditions as judgements"*. Although the agreement which is countersigned by lawyers and filed in the notary's records is not an "authentic instrument" it is an *"agreement between the parties enforceable"* in France. Therefore the particularly broad wording of article 46 has opened a breach which the decree, and then the Circular have exploited so that the new divorce is recognised inside the European Union[61].

39) However this provision of the Brussels 2 A regulation, which is isolated because it is not found in any other instrument, cannot work miracles. It is only applicable inside the European Union (excluding Denmark and soon the United Kingdom) and only for the pronouncement of the divorce and parental responsibility and, in this last area with a lot less effectiveness than before because immediately enforceable visiting and accommodation rights can no longer be invoked[62]. The Circular, which noted this flaw, proposes an alternative which is totally opposite to the goal of the law: the recourse to a simplified exequatur procedure in the requested State or the application by the parties to the French family affairs Judge "*for approval of an agreement on the terms and conditions for exercising parental authority"* based on article 1143 of the Civil Procedure Code[63]. Thus, in both these cases, we will be back in courts, either in France or abroad.

39) Furthermore it cannot be excluded, with respect to parental responsibility that our new procedure which is based on the "exemption" of the judge's intervention for a child with discernment, could be considered to be contrary to the conception of international public policy of some Member states, such as Germany where it is extremely important for the judge to hear the child, even at a very young age.

40) With respect to maintenance obligations (the compensatory maintenance payment and contribution to the children's upkeep and education) article 48 of the European regulation n°4/2009[64] provides for the recognition and the enforcement of '*court settlements"*, and "*authentic instruments"* but not ordinary "*enforceable agreements"*. Thus, apart from asking the notary to draft and deposit a real authentic instrument on these matters in parallel to filing the divorce agreement, the parties face serious difficulties of performance inside the European Union. Again, faced with this finding, the Circular surprisingly recommends that

[59] With the exception of Denmark which is not a Member state of the "Brussels2 A" regulation».
[60] Cf. New article 509-3 of the New Civil Procedure Code.
[61] Cf. Circular, sheet 10 page 1, para. 3.
[62] In point of fact, it will not be possible for the parties to obtain the article 41 certificate (whose issuance requires a decision in the state of origin) from the notary (as they were able to do from the judge).
[63] Cf. The Circular of 26 January 2017 sheet 10 page 2, para. 3-7
[64] Regulation (CE) n° 4/2009 of the Council of 18 December 2008 *on jurisdiction, the applicable law, recognition and the performance of judgements and co-operation in maintenance obligation matters.*

the parties '***request the approval of the agreement by the foreign judge or to incorporate the agreement into this judge's judgement in any other way'***. If the consequences of this solution were not so serious they would raise a smile when remembering the legislator's goal of courts diversion and simplification … unless one considers that this simply discharges French courts at the citizen's expense, who will have to duplicate or multiply the proceedings.

41) Finally the problem would be even greater with respect to agreements on the liquidation of the matrimonial regime. The new European regulation on matrimonial regimes which will come into force on 19 January 2019 does not provide for the *'recognition'* of authentic instruments but simply gives them *'evidentiary'* effect in the other Member states, when the agreements co-signed in these documents are not contested before the courts having jurisdiction under the regulation[65]. In other words the fact of benefiting from an authentic liquidating instrument appended to the divorce agreement will not protect the parties against agreements co-signed in this document being challenged abroad. The judicial approval which through its *res judicata* authority, prevented disputes both in France and in the States where the decision was recognized, is now desperately lacking…

2) <u>The application of the agreement outside the European Union: difficulties which are exacerbated even further</u>

42) The tricky question of the circulation of our new divorce becomes a real 'headache' outside the European area.

43) Firstly it will almost never happen that an international convention, whether multilateral or bilateral, allows the recognition and enforcement of such a divorce (or its consequences) which precedes neither from a judicial judgement or even an authentic instrument[66].

44) The uncertainty would be even greater outside a conventional framework because the parties would have to check the rules of international private law of each country in which they wish their agreement to apply. Although the Paris District Court has been very favourable to accepting foreign administrative divorces[67], it would be illusory to hope that all the States in the world will apply its case law!

45) Furthermore, the recognition of the divorce, although pronounced in accordance with the local law procedures, might be conditional on the existence of a connection factor with the State of origin, either by the nationality or the domicile of the spouses (or their

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[65] Article 58 of the above mentioned Regulation (EU) 2016/1103.

[66] For example, see Article 13 of the Franco Moroccan Convention of 10 August 1981 and articles 16 and 23 of the Franco Moroccan convention of 5 October 1957. However these provisions have not prevented repudiations pronounced in Morocco before a Cadi (a religious authority who is not strictly speaking a judge) to be compared to divorce judgements in France.

[67] The Paris District Court 10 May 1990, *RCDIP* 1991 p 391 note H. MUIR WATT which compared the dissolution of the marriage resulting from an ordinary declaration of the spouses at the Thai consulate in London to a divorce judgement also see Paris District Court 17 October 1991, *RCDIP* 1992 p 509 where the same solution was adopted for a declaration of divorce recorded at the Town Hall of Tokyo.

residence). The greatest care has therefore have to be taken and spouses without this kind of attachment to France would be strongly advised not to use this new divorce. Although there is no rule of jurisdiction which applies to the extrajudicial divorce, they would risk having a divorce which was ineffective in the countries with which they have connections….. with a whole raft of associated prejudicial consequences: the impossibility of remarrying in the foreign country concerned and in the event of remarriage (in France for example), the impossibility for its effects to be recognised in this country.

B. THE LAWYER'S ROLE : REINTEGRATE THE INTERNATIONAL PERSPECTIVE

46) It will therefore require a great deal of pedagogy to explain, in understandable terms for the layman, the risks inherent to this new type of divorce in terms of recognition and enforcement abroad for the spouses, and therefore to make them aware of their interest in favouring legal security over the apparent simplicity and unquestionable speed of the extrajudicial divorce by mutual consent.

47) Indeed, apart from the few cases where the witness hearing of the couple's children is itself a condition for the recognition of the divorce and its consequences, in which case one would usefully have recourse to mutual judicial consent via an application to hear the children, lawyers must obviously not exploit the children by using their status as witnesses as a means of remaining inside the judicial framework. Therefore, if the parties wish to have an agreement approved by a judge, they will have to make a unilateral application followed by a joint petition for an accepted divorce. It is a good bet that this practice which has been quite rare, will be revived thanks to international divorce agreements.

48) The challenge will be even greater because the public perceives the new extrajudicial divorce by mutual consent as an advance intended to make their lives easier and simpler. It will be insufficient to advise the parties to continue to apply to a judge. They shall have to be persuaded to do so by making a unilateral application i.e. as in contentious proceedings before switching to an accepted divorce petition procedure. One small consolation: filing a divorce petition to obtain a more favourable jurisdiction, which often compromises the chances of a calm dialogue, can now be done with a lighter heart because the benefit from forum shopping can now be combined with the need for a divorce judgement which will not be challenged abroad. However the problem of the comparison of time limits remains. Compared to the very quick new extrajudicial divorce by mutual consent (about 15 days between the agreement and the recording of the divorce if it is filed straight after the agreement is signed, once the 15 day period of reflection on receipt of the recorded delivery letter with the agreement has lapsed), the average time limit for the parties appearing before a conciliation judge is 4 months. Then, in the best of cases, there is another 4 months between the petition and the divorce judgement for an initial pre-trial review and pleadings hearing. Therefore for clients in a hurry, the argument of speed and simplicity remains an argument of weight especially when an agreement has been reached.

49) Therefore how to prevent the lawyer who advises the "rocky road" instead of the "smooth path" being perceived at best as unnecessarily fussy and at worst as trying to string out the proceedings to increase his or her bill ? And yet the mixed couple who wish to enforce a visiting and accommodation right abroad would be better protected by an accepted divorce giving them access to the article 41 certificate under the Brussel II A

Regulation, than by a new mutual consent divorce where no immediately enforceable accommodation and visiting right certificate is issued.[68] Likewise, the ex-spouse wishing to have the divorce recognised in Switzerland so that Swiss courts can share out her husband's retirement pension would be better off obtaining a divorce judgement rather than run the risk of the divorce not being recognised and therefore a refusal to divide up the pension, under the exclusive jurisdiction which Switzerland now gives to its courts in this matter.

50) In addition to this difficult duty of advising one's clients, the lawyer must also be able to anticipate the future. Apart from situations where the international dimension has already been established, one must be able to identify the situations which could be affected by international elements in the future and which could, therefore, pose a threat to the effectiveness of the agreement. For instance one should consider asking a senior corporate executive who has just agreed upon on a compensatory maintenance payment to his ex-wife in the form of an annuity whether he aspires to an international career in the future. To the foreign housewife who lives in France one should ask whether she is considering returning to her country of origin in the future. These are all intrusive but essential questions for assessing the risks which threaten the effectiveness of the agreement in the long-term.

51) One should also bear in mind that this measurement of risk must not only take the risk for the lawyer's own client into account, but also the risk for the other party, as the effectiveness of the agreement for both parties is a guarantee that it will not be called into question, apart of course from the risk of a potential action against the lawyer by his or her client's ex-spouse.

52) From now on, the lawyer will be working without the safety net of a judge, when performing the tricky analysis of the conflict rules which apply and which influence the decision whether to choose this method of divorce. In this respect, we can only advise the lawyer to expressly choose French law whenever this is possible, and when there is uncertainty about the availability of the laws in question[69]. The lawyer must also ensure that public policy is respected, if necessary with the support of the notary to whom the Chancellery has given, in the Circular, the responsibility (or the duty?) in his capacity as a public officer, of alerting the lawyers about possible difficulties (Sheet 6). If and when it is possible to choose a law, the lawyer's liability will be increased twofold: vis-a-vis his or her own client because of the lack of a judge to control the choice of law, but also increased by the lawyer's responsibility to the other party, who must not be cheated by the agreement if the lawyer wants to avoid his/her own client being exposed to difficulties of circulation or the risk of the review, including abroad, later. Take the example where the parties choose German law as the law which applies to the maintenance obligations, and then one of the parties waives any compensatory maintenance payment despite a condition of need. Would there not be a risk of the other party having maintenance pronounced by another jurisdiction which considered itself to have a sufficient connection with the dispute, for example an English court in a "Part III" procedure [70]

[68] Cf. *supra* n° 38
[69] Cf supra
[70] Matrimonial and Family Proceeding Act 1984 "Part III" - Financial Relief in England and Wales After Overseas Divorce etc., § 12 applications for financial relief after overseas divorce

53) Lastly one needs to be extremely careful when creating bridges ("*passerelle*") towards mutual consent agreements following petitions to the court. Whereas the filing of a joint application by mutual consent which substituted the previous unilateral petition, meant that the first petition application was only withdrawn after the second had been filed, without any risk of an untimely referral to a foreign court in the meantime, one now has to be extremely careful about the practice of notaries. The recommendations from the Higher Notarial Board (Conseil Supérieur du Notariat) state that no divorce agreement should be filed without proof that no other judicial proceedings have been brought. If notaries follow this recommendation a party would be obliged to withdraw proceedings before the divorce agreement was filed. He or she would therefore be dangerously exposed to the risk of a referral to a more favourable foreign court by the other party. In these circumstances, the judicial route and the accepted request divorce petition should be favoured. If, conversely the notaries were satisfied with an agreement by the parties in the document to withdraw all ongoing legal proceedings after the filing of the agreement, the current practice of the bridge ("*passerelle*") could continue, subject to possible difficulties of recognition and enforcement abroad.

To end on a more optimistic but also more innovative note, it should be stressed that lawyers can "re-internationalise" this new extrajudicial divorce by mutual consent through the lawyers' nationality. As has been stated[71] , if each spouse must be assisted by a lawyer there is nothing which requires such lawyers to belong to the same bar or even to be registered with a French bar. One could therefore imagine one of the spouses in a mixed couple being represented by a lawyer at a foreign bar with the common goal of reaching an agreement which is also a real cultural compromise midway between the two legal cultures. After international marriage contracts, where several lawyers of different nationalities are involved and where legal concepts from different countries are used[72], are we going to see new really international divorce agreements resulting from the greater freedom offered by the new extrajudicial divorce?

[71] Cf. A. Devers above article

[72] on the practice of "prenups" SeeI. Rein-Lescasteyres, A. Amos et N. Bennett, "Franco-English entente cordial a bilingual approach" (« L'entente cordiale franco-anglaise : une approche bilingue »), *Personnes et famille*, n° 1, p. 7.