

CULTURAL SOCIOLOGY OF DIVORCE

AN ENCYCLOPEDIA

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International Divorce

The statistics division of the United Nations records an increase in the number of cross-border marriages of up to 300 percent since 2000 and has called for the harmonization of the rules of divorce. In order to limit the practice of forum shopping (*rectius*, malpractice) by spouses looking for the best jurisdiction or optimum law for their personal needs and to avoid the circumvention of the spouses' national law, various uniform conventions on divorce and separation have been adopted. Among contracting states, the conventions facilitate the recognition of foreign divorce and legal separation, although the actual proceedings and all decisions concerning the distribution of property and child custody remain governed by domestic laws. The conventions therefore appear useful primarily to introduce rules, highlight common problems for cross-border divorces, and subsequently present the rules for the mutual recognition of divorces and legal separations as set out by the Hague Convention and by recent regulations in the European Union (EU).

Contested Issues in International Divorces

Divorcing couples deal with financial settlements and, in the event of spouses who are also parents, with custody orders. This is always the case, regardless of the national or international nature of the marriage. However, issues and conflicts may increase consistently as a consequence of each party's country having different laws and cultural customs.

Financial agreements. Many countries and states around the world impose a legal obligation for the higher-earning spouse to sustain the other upon

divorce by paying so-called alimony, maintenance, or spousal support. The grounds, amount, and duration of the alimony depend on various factors, determined by national laws. The alimony obligation may be permanent (until death or remarriage or cohabitation of the recipient) or temporary (for the period necessary for the lower-earning spouse to become self-sufficient, taking into consideration age, health, and working conditions). Alimony may also be granted only after a determined number of years of marriage have passed, or it may serve as a reimbursement for expenses incurred during marriage, as compensation for noneconomic contributions to the relationship or opportunity costs (for example, the wife has renounced her career in order to stay home with the offspring), or as a way of maintaining the same lifestyle enjoyed prior to separation or divorce.

In lieu of alimony, the spouses may also agree on a financial settlement, with the higher earner paying the other a lump sum (once the family court judge has ensured that there is no undue influence, oppression, or violence occurring in connection with the private transaction).

Taking into consideration cross-border divorces, the applicable rules for financial agreements involve an analysis of conflicting laws, which is necessary to ascertain the applicable law and the appropriate jurisdiction and may lead to the application of the *lex situs* (establishing that all disputes regarding real estate are subject to the law where the property is situated), the *lex fori* (requiring the application of the law of the divorce court to all emerging issues), the law of the spouses' domicile at the time of the wedding or at the time of the acquisition of each asset, or the law of the most recent common domicile. In any case, the spouses can always opt for a specific jurisdiction by means of agreement.

Real estate and the family home. Marital property rules vary greatly across national jurisdictions. In some jurisdictions real estate must be divided equally, in others fairly, and in still others in accordance with the various contributions paid by each spouse to secure its acquisition.

Furthermore, the family property may be defined to include all immovable and movable assets or may exclude as being property personally held all acquisitions obtained by inheritance

or donation, as well as properties held by each spouse before marriage and properties acquired personally by a spouse after marriage. In addition, some jurisdictions guarantee to the custodial parent the right to live in the family home until the children attain the age of majority, provided that the beneficiary of the family home does not remarry or start a new cohabitation.

It is also possible for the real estate to be subject to a different law from that governing the overall proceedings, with the consequence that the court may not be familiar with the content or language of the rules it is required to apply.

Child custody. Child custody disputes are discussed before the same court competent for the overall divorce proceedings. The court must take into consideration the best interests of the child, in accordance with the United Nations Convention on the Rights of the Child and the Uniform Child Custody Jurisdiction and Enforcement Act. Thus, the court must evaluate the parents' wishes and the child's age and wishes, as well as existing relationships within the family and between the child and other siblings, relatives, schoolmates, and other persons in daily contact with the minor.

The court decision may provide for shared or joint custody (with both parents entitled to equal rights and equal time spent with the child), sole custody (one parent having custody rights, to the exclusion of the other, who is entitled only to a right of visitation), split custody (in the event that siblings are ordered to live separately, one with each parent), birdnesting custody (the parents maintain the family home, where the child lives permanently, and alternate living there with the child), or third-parent custody (granted in favor of grandparents, relatives, or other persons close to the minor and considered by the court more suitable than the parents themselves to bring up the child).

Child custody across international borders. In the event that the noncustodial parent fails to comply with the custody order, two scenarios may arise: The noncustodial parent fails to visit the child, or the noncustodial parent does not return the child at the required time. Both cases show a lack of parental responsibility but lead to much different results. The enforceability of contact or visiting orders relies mainly upon severe consequences in

the case of noncompliance, which can end with the court's suspension or discharge of the right of visitation and the withdrawal of parental responsibility. In the event of failure to return children across borders, it is fundamental that the custodial parent refer to the competent authority and avoid acting unilaterally. The Hague Convention on International Child Abduction (1980) promotes international cooperation in the field by providing a quick and prompt remedy: the return order, which the custodial parent should request from the central authority of the place where the child is thought to be, accompanied by adequate proof that the child was habitually residing in the state of the applicant and that there was a breach of a custody agreement and a wrongful removal without any prior consent given to the abductor. The return order does not involve any custody decision; it simply requests the abductor to return the child immediately to the jurisdiction entitled to decide on custody and visitation issues. As of 2010, 87 nations had agreed to be bound by the convention, permitting widespread enforceability of its provisions.

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) establishes and improves the mutual recognition and enforcement of relocation orders internationally. It sets out uniform rules to detect the competent jurisdiction for child protection (usually the country of habitual residence of the child, with the exception of the country to which the child has been abducted, for any urgent matter), in order to avoid any conflicting decisions and to prevent the relitigation of identical custody proceedings in different states. The convention also provides for a system of cooperation among contracting states, in order to facilitate the exchange of information and the effective collaboration among police departments in charge of locating the abducted child.

Child support. Child support is an obligation of a parent (usually the noncustodial parent) to provide financial assistance for his or her child or children in order to ensure an adequate standard of living, education, and medical care.

The right to child support is internationally recognized as a human right for all minors. In fact,



The Hague Convention on International Child Abduction (1980) was intended to promote international cooperation in returning abducted children back to a custodial parent. However, some countries are not parties to the convention, particularly Muslim countries and those with Confucian-based state family registration systems. Japan is a well-known haven for child abduction, particularly if the abducting parent is a Japanese national. Japanese courts will not enforce foreign custody orders to return children.

the 1989 United Nations Convention on the Rights of the Child states that children have a fundamental right to develop and grow up free from hunger, want, neglect, and abuse, asserting the complementary parental duty to bring up children. The implementation of the convention is left to national governments, which must ensure its actual application through their own laws and regulations.

Rulings on child support obligations can vary considerably, given that some countries have fixed mathematical formulas for its calculation, some rely on case-by-case decisions, and some give the judge limited discretion within fixed parameters, taking into account an evaluation of both parents' income, the number and age of children, basic expenses, and educational fees. Child support orders are generally adjustable following changes in circumstances if recognized by the court as capable of modifying previous financial obligations. However, the child support obliga-

tion is never discharged as a result of the obligor filing for bankruptcy.

The duration of the ordered payment is also subject to diverse terms: It may last until the child reaches the age of maturity, until graduation from high school or college, or until the child becomes self-sufficient. The payment ceases, in any case, upon the child's marriage or emancipation.

Enforcing child support orders across borders.

In the event that the obligor falls in arrears, it is necessary to enforce the payment of child support. Some jurisdictions provide national offices or agencies for the child or the custodial parent to refer to, which are entitled to act *in executivis* against the obliged parent. Some jurisdictions allow the beneficiary of the payment to commence injunction proceedings against the debtor, and some provide deterrent sanctions for missed payments, such as withholding income, deducting

earnings at their source, revoking a passport or license (such as a driver's, professional, occupational, or recreational license), seizing assets, placing liens on property, offsetting tax refunds, or even imprisonment.

It is also possible to recover missed child support payments or to enforce financial agreements across states by appealing to the local child support enforcement agency (competent within the United States) or to the creditor's embassy within the country where the obligor resides (in order to serve the obligor an injunction in accordance with the 1965 Hague Convention on Serving of Documents Abroad or the applicable treaty governing the serving of documents between the two countries involved in the case). Withholding of income between states is also possible if the obligor's employer is known; this measure is available via national registries entitled to receive cases, to check on accuracy and completeness of information, to respond to foreign inquiries, and to refer to the local competent office.

Cultural diversity. Divorcing internationally requires practitioners and courts to deal with cultural differences in order to understand the various religious, ethnic, cultural, and racial backgrounds of the parties and to provide ex-spouses with the optimal remedies to meet their expectations.

The issues for intercultural divorces may range from organizing the custody and visiting schedule in accordance with the different religious holidays, for a mixed couple, to addressing cases in which one spouse comes from a country stigmatizing divorce or providing for repudiation or polygamy as alternatives to divorce. Intercultural divorces may also lead to cases of the return order not being issued by the country where an abducted child has been taken, given that local laws may consider offspring the responsibility or even the property of one or the other parent (usually in regard to religion) and may not provide for reciprocity in the application of international agreements.

Thus, although most of the issues of international divorce concern determinations of applicable jurisdiction for each specific case, there are cases in which the rules and provisions of a jurisdiction may not apply in other countries or jurisdictions, if the latter do not accept the supremacy of the foreign jurisdiction and/or international law.

Forum Shopping and Divorce Mills

The initial and most essential phase of every international divorce will be to determine the competent court and jurisdiction and applicable law. Cases of forum shopping should be detected and avoided when the choice of law is pursued to the detriment of one spouse or of the children.

Divorce mills (for example, Haiti and Guam) are also often considered by international couples who are continuously moving and changing domicile. In such cases, a divorce mill jurisdiction may eliminate the need to meet lengthy residency requirements and will provide easy, affordable, and quick procedures for the applicants. However, these jurisdictions are often chosen by non-residents specifically to bypass mandatory rules on property division—that is, to avoid having to compensate a spouse. Given that a divorce mill jurisdiction is responding to the request of only one spouse (provided he or she meets the short residency requirements), severe damage and losses for the other spouse can result.

The Hague Convention of 1970

In 1902, the first Hague Convention on divorce and separation was adopted, and the Hague Convention on the Recognition of Divorces and Legal Separations, signed on June 1, 1970, was integrated into the original convention and entered into force on August 24, 1975. Several states have signed the convention, including Australia, the People's Republic of China, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Moldova, the Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland, and the United Kingdom.

Each state, upon signing the convention, may move to full ratification or append reservations, declarations, or notifications. For example, China has declared that the convention applies exclusively to Hong Kong; some states (Cyprus, the Czech Republic, Italy, Luxembourg, Slovakia, and Moldova) have reserved the right to refuse recognition of a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were both citizens of that same state; some other states (such as the United Kingdom) have made reservations to Article 24, retaining the right not to apply the convention to a divorce or legal separation arising prior to the date when the

convention entered into force. The convention is open for signature by the states represented at the Eleventh Session of the Hague Conference on Private International Law, by actual member states of the said Hague Conference, and by the members of the United Nations or a specialized agency of the United Nations. Accession to the convention is also available to a party to the International Court of Justice, taking effect solely between the acceding state and those contracting states accepting the accession.

Scope. The convention applies to contracting states, with the exclusion of European member states (which are subject to the direct application of EU Regulation 1347/2000). Article 2 lists the various cases in which the automatic recognition of divorce or legal separation occurs within a contracting state. The convention applies (and divorce or legal separation are therefore automatically recognized) if, at the date of the institution of the proceeding in the state of the divorce or legal separation:

- the respondent had his or her habitual residence there;
- the applicant had his or her habitual residence there, provided that the applicant resided there for more than one year prior to the divorce or separation proceeding or the spouses last habitually resided there together;
- both spouses were nationals of that state;
- the applicant was a national of that state, provided that he or she had his habitual residence there or had habitually resided there for a continuous period of at least one year, within the two years preceding the institution of the proceedings;
- the applicant was a national of that state and he or she was present there at the time of institution of the proceedings, if the spouses last habitually resided together in a state whose law, at the date of the institution of the proceedings, did not provide for divorce. (This rule does not apply to legal separations.)

By habitual residence, the convention means the permanent address, which may also include

domicile. The scope of the convention is therefore extremely broad, since it may even include nationals of a noncontracting state permanently residing in a contracting state. This is not merely a theoretical example, but an increasingly concrete one, as revealed by the growing data on international marriages.

Refusal of recognition. The convention establishes whether or not a judgment for divorce or legal separation is enforceable in another country: The recognition of the foreign judgment occurs automatically, provided that the respective proceedings were commenced in compliance with the rules on jurisdiction, as listed above for Article 2.

By default, the state being requested to give legal recognition may legitimately refuse it. In particular, a refusal is issued if the spouses are both nationals of states not providing for divorce and are filing divorce in another state's court in order to circumvent their own domestic jurisdiction.

Another ground for refusal is that the applicant did not take adequate steps to give the other spouse notice of the proceedings, with the result that the respondent was in default.

Refusal also occurs if there is a breach of national public policy. Specifically, the infringement may derive from the grounds for divorce or separation (for example, fault), if those grounds are expressly banned by the state in which recognition is sought.

Refusal is also declared in the event that recognition of the divorce or separation would be incompatible with a prior decision taken on the matrimonial status of the spouses within the state where recognition is requested.

By contrast, refusal on the grounds that the domestic law of the state where recognition is sought does not allow divorce or separation upon the same facts (provided that these facts do not violate public policy) is not permitted. Refusal is also not possible for the reason that the private international law of the state in which recognition is requested refers to a different law from that which has governed the proceedings.

Jurisdiction and applicable law. The convention simply outlines the possible consequences for the case in point, as a benchmark for predicting

whether a divorce (or legal separation) will or will not be recognized elsewhere.

Therefore, the convention has no direct impact on the choice of the jurisdiction or on the applicable law to divorce or legal separation proceedings. Such elements are governed by the private international laws of the states involved. It is therefore necessary for the claimant to examine in detail the various possibilities with regard to all available jurisdictions and their laws in order to file for divorce (or legal separation), since they may lead to vast variations in the final judgment. In particular, the applicant, while forum shopping, should compare possible different results with regard to child custody, maintenance, or alimony.

The Hague Convention deals with the recognition of divorce and legal separation declared by a judicial or religious court, as well as resulting from a legislative or administrative decree. It does not apply to ancillary or temporary orders that may be issued during proceedings.

Once the application of the convention is ascertained, provided that the jurisdictional rules were respected and there is no ground for refusal, the recognition operates automatically. In such a case, ex-spouses have the right to immediate recognition of their divorce and its subsequent registration on the civil status registers.

Operating limits of the Hague Convention in the EU. On the grounds that Europe is supposed to accord the maximum and most effective protection to its citizens and residents, its legislation prevails over the Hague Convention as well as over the private international rules laid down by the domestic laws of each member state.

Therefore, in the case of a marriage breakdown between two nationals or residents of different member states of the EU, jurisdiction and recognition are determined solely by EU Regulation 1347/2000 (*Brussels II*), as replaced by EC Regulation 2201/2003 (*Brussels II-bis*). It must be pointed out that the European Regulation (otherwise the Hague Convention) governs both the initial phase of proceedings, determining the rules for a court's jurisdiction, and the final phase, accelerating the recognition of the decree among member states (Denmark excluded). Furthermore, its scope extends over divorce and legal separation, to include the case of annulment of marriage.

EU Regulation 1259/2010 (in effect since June 21, 2012) provides for the jurisdiction's designation. In the absence of a choice by the parties, the applicable law depends on the habitual residence or the nationality of the spouses.

The Hague Convention and Other Law

The Hague Convention defers to domestic law in the event that the domestic rules of law provide more favorably for the recognition of divorce or separation. Moreover, the Hague Convention does not affect other conventions or bilateral agreements that may be signed by a contracting state, provided that there is no incompatibility with the terms of the Hague Convention itself. In any case, the contracting state should avoid entering conventions that may be incompatible with the Hague Convention. Bilateral agreements on the mutual recognition of divorce or legal separation may be contracted either between two states that have not ratified the 1970 Hague Convention or between a contracting state and a noncontracting one. Information regarding such bilateral agreements or conventions is available from the foreign ministry of each state.

Conclusion

The widespread freedom of movement between many states, the expanding knowledge of foreign languages, and the decreased costs of transfers abroad have led to an increased number of mixed, or international, marriages. In addition, couples frequently give birth in a third country, one not the national state of either parent but solely of the newborn. It is obvious that in such circumstances, each family member relies on a different domestic rule; the resulting conflict of laws may create an impasse detrimental to everybody. To avoid such a situation, the Hague Conventions, the United Nations Convention, and other existing agreements aim at facilitating and speeding up divorce proceedings and the subsequent enforcement of divorce decisions. These instruments attempt to shorten the time for investigating jurisdictional issues (at the date of commencement of the proceedings) and to accelerate the recognition phase once the court has issued its decision.

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See Also: Abduction and Kidnapping of Children; Child Support; Europe; Law: Comparative Perspectives; Separation: Legal.

Further Readings

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Internet as a Cause of Divorce

It is estimated that more than 1 billion people around the world have access to the Internet—roughly 15 percent of the world population as of 2012—with a range from 11 percent of Africans to 78 percent of North Americans having access. The proliferation of the Internet since the 1990s has exposed both the benefits and hazards of round-the-clock access to information, including the impact of the Internet on divorce. Recent reports suggest that approximately one-third of divorces are initiated after the discovery of cybercheating. Based on population proliferation and cultural norms, the Internet plays a larger role in divorce in North America than it does on other continents. The Internet's infrastructure explosion (advanced hand-held technologies such as smart phones, iPads with cameras and other tablets) and Web-based social networking sites (from Facebook to other chat rooms) have dramatically changed the ability to seek out extramarital rela-

tionships or engage in forms of sexual exploration that jeopardize the marital relationship.

There is still no agreed-upon definition of Internet infidelity, because it often blurs the lines between fantasy and reality. In general, Internet infidelity includes an emotional and/or sexual relationship that forms online. Internet infidelity is viewed by men and women as just as detrimental to a marriage as off-line infidelity. Although men and women tend to be bothered by different aspects of Internet infidelity, both view the Internet relationship as a real threat to the primary relationship and as a betrayal of marriage commitments. The Internet is usually not the sole cause of divorce; rather, it tends to be a symptom of deeper problems within a marriage. However, Al Cooper identified three features of the Internet that make it particularly relevant to the dissolution of marriages: accessibility, affordability, and anonymity; approximation was later added to this list.

The Four A's of Internet Infidelity

It is estimated that one-third of the adult American population owns a smart phone and 60 percent connect to the Internet via a broadband connection. Fast and nearly constant access to the Internet means that making a connection with someone and maintaining contact can happen throughout the day, in the office, in transit, and at home. Individuals can maintain contact with individuals in distant places and not worry about time zones, postage, and even language barriers (thanks to translation software).

The Internet offers an inexpensive method to acquire sexually explicit material. In addition to home Internet service, Internet access can be maintained through wireless hot spots, often free of charge. Free Web sites that connect adults interested in extramarital sexual conversations, chats via Webcam, or the sharing of sexually explicit photographs bypass the former path of paying for a prostitute or expensive 1-900 numbers.

Perhaps the most significant of the four A's of Internet infidelity that lead to divorce is the inherently anonymous nature of the Internet. Individuals who are interested in experimenting with alternative personalities, interests, and desires are able to craft multiple personas online, even changing genders. For example, in one study, more than 60