

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

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B. DEVELOPMENTS IN FRENCH FAMILY AND ESTATES LAW

Introduction of non-judicial divorce in France: On January 1, 2017, the French legislature profoundly reformed family law in France by introducing non-judicial divorce by mutual consent.¹⁴⁴ The purpose of the new form of divorce is to refocus judges' activities on litigation, simplify proceedings, reduce court time, and ease the relations between separating spouses.¹⁴⁵

In mutual consent cases—when parties agree on the terms and conditions of the divorce—no judge will be required because there is no dispute to settle.¹⁴⁶ Non-judicial divorce is a private agreement signed by the spouses and countersigned by their respective attorneys (*avocats*).¹⁴⁷ The Attorneys' deed (*acte d'avocat*) enjoys a strong probative value because it provides proof of the writing and of the signature of the parties.¹⁴⁸ Moreover, by countersigning the agreement, the *avocats* certify having informed the spouses of the legal consequences of the agreement.¹⁴⁹

Safeguards have been introduced to prevent abuse.¹⁵⁰ First, in compliance with international commitments, spouses are not allowed to divorce by agreement when minors are involved and where the children request to be heard by a judge.¹⁵¹ Parents now have a duty to inform their children about the divorce and failure to comply with this requirement makes the agreement invalid.¹⁵²

Second, spouses have a fifteen-day cooling-off period before signing the agreement, and spouses that are protected by a procedure of guardianship cannot divorce by mutual consent.¹⁵³

When the divorce involves cross-border elements, *avocats* should raise international issues with their clients.¹⁵⁴ The agreement may therefore include provisions related to the applicable divorce law,¹⁵⁵ to the applicable

144. See Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Commission Regulation 1259/2010, 2010 O.J. (L 343) (EU).

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law to maintenance obligations,¹⁵⁶ and to the applicable law of matrimonial property regimes.¹⁵⁷

Once the spouses have agreed on the terms and conditions of divorce, the signed agreement is finally checked and registered by a *notaire*.¹⁵⁸ As with French judicial divorce, the dissolution of the marriage occurs between spouses the day the divorce's agreement is registered by the *notaire*, and between spouses and third parties the day the transcription on the public civil register is produced.¹⁵⁹

There remain some pending issues about the recognition of non-judicial divorces abroad. The divorce gets its force from a contract; thus, its recognition may be uncertain in jurisdictions where judicial divorce is a public policy rule or where the parties were not domiciled in France. French lawyers will need to work with their international counterparts to ensure the new form of divorce can be enforced outside France.

French forced heirship in an international context: On September 27, 2017,¹⁶⁰ the French Cassation Court ruled in two different cases that forced heirship is not a principle of French international public policy (*Ordre Public*).¹⁶¹ The facts are quite similar in both cases.¹⁶² In one, a French national died in California, where he was domiciled for a very long time, leaving his wife domiciled in California and his children from a previous marriage domiciled in France.¹⁶³ The deceased's estate consisted of assets located both in France and in the U.S., all included in a Californian trust.¹⁶⁴

According to the French common private international law rules, the law of California applied to the French movable assets as the law of the deceased's last domicile.¹⁶⁵ As a result, the surviving spouse inherited from the French movable assets and the children were deprived of their rights.¹⁶⁶ The children took the case to the French courts and claimed that the application of Californian law should have been refused because Californian

156. Commission Regulation 4/2009, Implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 2009 O.J. (L 7) (EC).

157. Commission Regulation 2016/1103, Implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, 2016 O.J. (L 183) (EU).

158. *See* Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle [Law 2016-1547 of November 18, 2016 on the Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016 at art. 44.

159. *Id.*

160. Cour de cassation [Cass.] [supreme court for judicial matters] 1^e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-17.198 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1^e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

161. *Id.*

162. *See id.*

163. Cour de cassation [Cass.] [supreme court for judicial matters] 1^e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

164. *Id.*

165. *Id.*

166. *Id.*

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law does not know the forced heirship concept which is an international public policy of France.¹⁶⁷

This issue has been debated among scholars and practitioners of French private international law for many years.¹⁶⁸ After more than fifteen years of judicial battle, the French Cassation Court held that a foreign succession law, which is applicable according to the French conflict of laws but does not recognize forced heirship, is not contrary to French international public policy.¹⁶⁹

The facts in both cases occurred before the introduction of the European regulation on successions (successions regulations), but the cases were decided in consideration of this European text.¹⁷⁰ The successions regulations harmonize the conflict of laws in Europe and provides for the unity of succession law by applying whether by the law of the deceased's habitual residence¹⁷¹ or the law of the deceased's nationality.¹⁷² The decisions also respect the party autonomy principle by ensuring that a foreign national owning assets in France can freely declare the national law applicable to future succession.¹⁷³ The rulings highlight the continuing importance of international and comparative law knowledge and cooperation between international lawyers.

C. THE CATALAN POLITICAL AND CONSTITUTIONAL CRISIS OF
2017

On October 27, 2017, the Catalan parliament (*Parlament*) made a unilateral declaration of independence, based on the results of an illegal October 1st referendum.¹⁷⁴ This prompted the Spanish government to intervene in the autonomous government of Catalonia.¹⁷⁵ The intervention, to restore the rule of law in Catalonia, was carried out in application of article 155 of the Spanish Constitution.¹⁷⁶ The intervention required a request by the Spanish government to the President of the Catalan autonomous community to rectify the situation.¹⁷⁷ He did not, and a majority vote of the Spanish Senate authorized the government to intervene.¹⁷⁸ The executive dismissed the Catalan President and his

167. *Id.*

168. *Id.*

169. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 27, 2017, Bull. civ. 1, No. 16-13.151 (Fr.).

170. Commission Regulation 650/2012, 2012 O.J. (L 201) (EU) (regulation on successions was introduced on Aug. 17, 2015).

171. *Id.* at art. 21

172. *Id.* at art 22.

173. *Id.*

174. S.T.C., Oct. 17, 2017, (No. 114/2017) (Spain).

175. *See id.*

176. C.E., § 155 Dec. 29, 1978 (Spain).

177. *Id.*

178. *See id.* The vote was actually over 2/3.