

Ukraine

AGA Partners

Aminat Suleymanova, Ivan Kasynyuk & Irina Moroz

A. JURISDICTION AND CONFLICT OF LAW

1. SOURCES OF LAW

1.1 What is the primary source of law in relation to the breakdown of marriage and the welfare of children within the jurisdiction?

The provisions on the breakdown of marriage and welfare of children are mostly detailed in the chapters II-IV of the Family Code of Ukraine 2002. Child protection law in the Ukraine is based on the Constitution of Ukraine and on the Convention on the Rights of the Child. Some provisions on welfare in the Convention on the Rights of the Child have been codified in the Family Code of Ukraine and in the law on the protection of children.

Ukraine ratified the Convention on the Rights of the Child in 1991. International conventions (treaties) that have been ratified by the Supreme Council of Ukraine are a substantial part of the Ukrainian legislation.

1.2 Which are the main statutes governing matrimonial law in the jurisdiction?

Ukraine is a civil law jurisdiction. The overarching code of Ukrainian civil law is the Civil Code of Ukraine 2003, which is supplemented by the Family Code of Ukraine 2002. The Ukrainian courts rely upon the codes, and there is no formally recognised doctrine of precedent.

The Family Code of Ukraine 2002, determines matters relating to marriage, personal non-property and property rights, the duties of the married couple, the content of personal non-property and property rights, and the duties of parents and children, foster parents and adopted children and relatives.

2. JURISDICTION

2.1 What are the main jurisdictional requirements for the institution of proceedings in relation to divorce, property and children?

The Civil Procedural Code of Ukraine 2005 aims for the just and timely consideration and settlement of family cases in the courts of Ukraine for the protection of rights and the freedom and interests of the persons involved.

A separate chapter in the Civil Procedural Code defines the procedure for cases involving the participation of foreigners. Foreigners in family disputes have procedural rights and duties equal to those of natural persons of Ukraine.

The choice of jurisdiction, according to Ukrainian legislation, has some peculiarities where one of the spouses is not a Ukrainian national. In this

instance, the Ukrainian court has jurisdiction to consider disputes with a foreign element (if one of the party is a foreigner, stateless person or Ukrainian national living abroad) only in specific cases, namely:

- if the spouses invoked the jurisdiction of the Ukrainian courts by agreement;
- if the defendant spouse has residence, immovable or movable property in the territory of Ukraine;
- if the plaintiff has his residence in Ukraine in cases that concern payment of maintenance or establishment of fatherhood;
- if the ground for the claim took place in the territory of Ukraine (eg, a pre-nuptial agreement was concluded in the territory of Ukraine; or the spouses got married in the territory of Ukraine);
- in other cases foreseen by international agreements and the laws of Ukraine.

Ukrainian courts have exclusive jurisdiction over disputes that concern real estate located in the territory of Ukraine and over cases involving relationships between children and parents where both parties have residence in Ukraine.

In a case where both spouses are nationals of Ukraine, they may apply to a Ukrainian court irrespective of their place of residence.

3. DOMICILE AND HABITUAL RESIDENCE

3.1 Explain the concepts of domicile and habitual residence as they apply to the jurisdiction in relation to divorce, the finances and children
Ukrainian law follows the concept of domicile (residence), rather than habitual residence.

The term ‘residence’ is understood according to the Article 3 of Law of Ukraine on Freedom of Movement and Free Choice of Place of Residence in Ukraine adopted on 11 December 2003. The place of residence is the administrative unit, where an individual resides more than six months per year.

Ukrainian law has a requirement for registration of place of residence. As the general rule, claims in family/civil matters shall be brought to the court locally situated at the place of registration of residence. However, registration of the place of residence or temporary address of the person or the absence of such shall not be a condition or grounds for exercising the rights and freedoms provided for by the Constitution, laws or international agreements of Ukraine. Therefore, even if the person has no registration of place of residence, but resides in an administrative unit over six months per year it is considered that they reside at that administrative unit and it is possible to bring a claim at the place of their residence.

A claim to the Ukrainian court may be initiated, if:

Divorce

- the defendant spouse has their residence in the territory of Ukraine.

Finances

- the defendant spouse has their residence in the territory of Ukraine;
- the plaintiff spouse has their residence in Ukraine in cases involving payment of maintenance.

Children

- the defendant spouse has their residence in the territory of Ukraine;
- the plaintiff has their residence in Ukraine in the cases involving payment of maintenance or establishment of fatherhood;
- both parties have residence in Ukraine.

The procedural capacity and capability for foreigners in Ukraine are equal to Ukrainian citizens and determined according to Ukrainian legislation.

4. CONFLICT OF LAW/APPLICABLE LAW TO BE APPLIED**4.1 What happens when one party applies to stay proceedings in favour of a foreign jurisdiction? What factors will the local court take into account when determining forum issues?**

In deciding the issue of whether to stay the proceedings or close the proceedings for the reason that the Ukrainian court is not appropriate forum to determine the dispute, the Ukrainian court is governed by the requirements of Civil Procedural Code of Ukraine 2004 and Law of Ukraine on International Private Law 2005.

If an application to stay the proceedings was made before the court opened the proceedings the court shall refuse to open the proceedings on the basis of Article 75(2) of Law of Ukraine on International Private Law, stipulating that, the Ukrainian court shall refuse to open proceedings if a court or other jurisdictional authority of a foreign state considers the dispute between the same parties on the same subject and on the same grounds.

If an application to stay the proceedings was made after the court opened the proceedings, article 207 (1) (4) of Civil Procedural Code of Ukraine shall be applied. According to this article the court is obliged to leave the claim without consideration if a dispute between the same parties on the same subject and the same grounds is considered in another court.

For instance if a divorce application was filled first in a foreign jurisdiction and thereafter a application for the dissolution of the marriage was initiated in Ukraine between the same parties and on the same basis the Ukrainian court shall refuse to open the proceedings or leave the application without consideration.

Four elements must exist for the court to refuse to open the proceedings or leave the application without consideration in favour of a foreign court:

1. the dispute is between the same parties;
2. the dispute concerns the same subject;
3. the dispute is on the same grounds; and
4. the dispute is already under consideration in a foreign court.

B. PRE AND POST-NUPTIAL AGREEMENTS**5. VALIDITY OF PRE- AND POST-NUPTIAL AGREEMENTS****5.1 To what extent are pre- and post-nups binding within the jurisdiction? Could you provide a brief discussion of the most significant recent case law on this issue?**

Pre-nuptial agreements are valid and enforceable under Ukrainian legislation. A Ukrainian pre-nuptial agreement is described as a marriage

agreement and dealt with in chapter 10 of the Family Code of Ukraine. The nub of any agreement will be a clause to misapply or vary Article 60 of the Family Code, which creates the common joint property regime for spouses.

Therefore, there are three primary purposes of a marriage agreement:

- to regulate the division of common joint property arising from the marriage;
- to regulate or exclude the division of common joint property arising from any pre-marital cohabitation;
- to anchor governing jurisdiction and law.

The Family Code of Ukraine states that a marriage agreement may be concluded between the persons who applied for the registration of marriage, as well as between married couples. If it has been concluded before the registration of the marriage, it shall come into effect from the date of the state registration or the marriage. It shall not regulate the personal relations of a married couple, or personal relations between the married couple and children. A marriage agreement deals only with privity (property relationships) and specifies the rights and duties of the spouses. A marriage agreement may be cancelled on the demand of one of the parties only on the basis of a judicial decision or by the mutual consent of both spouses.

The formalities for executing the agreement are minimal. Both parties must attend before a Ukrainian notary public official and sign the agreement in front of them. If required by the circumstances, an agreement in Ukrainian and an official translation into the other language of any party must be signed in front of notary public official. No lawyers, translators or witnesses are required to be present or to sign the agreement. There is no obligation for legal advice or full and frank disclosure of assets or liabilities. There is also no obligation to show that either side has taken legal advice and no obligation at this point to show that no undue pressure has been put on either party. There is no assessment at this point of whether the agreement is arguably fair.

It is possible under the Family Code to include expenses for children in the main text of an agreement. This arrangement would make these expenses enforceable in most other jurisdictions which allow provision for children's maintenance within the body of such agreements.

The Ukrainian courts do not recognise the doctrine of precedent and rely only upon Ukrainian legislation (codes, laws). The judge deciding a case may take into account interpretations of law stated by the Supreme Court of Ukraine.

A Ukrainian pre-nuptial agreement can be challenged by the court on the basis that it places one spouse in an 'extremely unfavourable material position', under Article 93 Family Code of Ukraine. However, the question for the court is whether the spouse has, as a result of an agreement, been placed in a position significantly less favourable than the position they would have been in under the Family Code.

C. DIVORCE, NULLITY AND JUDICIAL SEPARATION

6. RECOGNITION OF FOREIGN MARRIAGES/DIVORCES

6.1 Summarise the position in your jurisdiction

Article 58 of the Law of Ukraine on International Private Law 2005 provides that a marriage between citizens of Ukraine, marriage between a citizen of Ukraine and a foreigner, marriage between a citizen of Ukraine and a stateless person, registered outside of Ukraine under the law of foreign country is valid in Ukraine, subject to the condition that the citizen of Ukraine complied with the requirements of the Family Code of Ukraine and concluded the marriage without the grounds of invalidity of marriage under Ukrainian law.

Marriage between foreigners, marriage between a foreigner and a stateless person and marriage between persons without citizenship, concluded under the law of a foreign country are valid in Ukraine.

Foreign divorce is recognised in Ukraine on the basis of international multilateral or bilateral agreements ratified by the Supreme Council of Ukraine or under the principle of reciprocity.

The order of recognition of foreign divorce in Ukraine is provided in Articles 399-401 of Civil Procedural Code of Ukraine.

7. DIVORCE

7.1 Explain the grounds for divorce within the jurisdiction (please also deal with nullity and judicial separation if appropriate)

The Family Code of Ukraine envisages that if the spouses do not have children, they may get a divorce in bodies of civil state acts registration. If spouses have children they may get divorced only through court proceedings.

The formal grounds for divorce are breakdown of the marriage, breakdown of common housekeeping, failure of other spouse to perform marital rights and obligations, physical or moral harm toward other spouse or the children. In a case where one of the spouses does not give his or her consent to the dissolution of the marriage, the court will give a reconciliation period. After this period of time has elapsed, the court will grant a divorce if it is found that the further joint life of the spouses and continuance of their marriage is contradictory to the interests of either party and the interests of their children. The marriage is considered to be dissolved from the moment of registration of the divorce with the bodies civil state acts registration if the marriage was dissolved by the body of registration of civil status acts. If the marriage was dissolved by the court order the marriage is considered to be dissolved from the moment the court order entered into force.

Nullity of marriage

Upon the application of an interested person, the body of registration of civil status acts nullifies the marriage if:

- the marriage was registered with a person who at the same time remained in another registered marriage;

- the marriage was registered between people who are relatives in a 'straight line' relationship, as well as between siblings, brother and sister;
- the marriage was registered with a person who is recognised as 'incapable'.

The marriage shall be nullified by the Ukrainian court order if:

- the marriage was registered without the free will of the wife or husband (where a party to the marriage did not fully realise his/her actions and was unable to control it);
- the registered marriage was fictitious;

The marriage may be nullified by the Ukrainian court order if:

- the marriage was concluded with a person under the age of consent and legally not allowed to marry;
- the marriage was registered between an adopter and the adoptee in violation of the requirements of art. 26 (5) of the Family Code of Ukraine;
- the marriage was to a person with hidden serious illness or a disease which is dangerous for the other spouse and (or) their descendants;
- the marriage was registered between cousins; between aunt and uncle and nephew and niece;

Those who have the right to apply to the court for the nullity of the marriage are spouses, other people whose rights are affected by the registration of the marriage, parents, guardians, custodians, guardians of 'incapable' parties, the prosecutor and the custody and care body.

The marriage is considered to be nullified from the date of its state registration.

Judicial separation

Article 119 of the Family Code of Ukraine provides that upon the application of one or both spouses, the court may order a separate arrangement for the residence of the parties in cases where there is inability or unwillingness of a wife and (or) husband to live together. Before a court grants a judicial separation, there are many factors to be taken into account. These will include the current and future financial situations of both of the spouses, accommodation and property, and dependent children and their future needs and welfare.

Establishing a regime of judicial separation does not terminate the rights and responsibilities of the spouses as established by the Family Code of Ukraine or the rights and duties as are prescribed by a marriage agreement. However, the judicial separation of spouses has some peculiarities:

- (i) property acquired by one of the spouses during the period of judicial separation is considered to be separate personal property;
- (ii) a child born more than 10 months after the date of the judicial separation will not be considered to be the child of the husband.

Judicial separation ceases in the event of reconciliation of family relationships or by court order upon application of one of the spouses.

8. FINANCES/CAPITAL, PROPERTY

8.1 What powers does the court have to allocate financial resources and property on the breakdown of marriage?

The Family Code of Ukraine determines the procedure for the division of property acquired before, as well as during, the marriage between the spouses upon divorce.

A 'common joint property' regime is the default position for the property of spouses within Ukraine, established by Article 60 of the Family Code.

'Separate personal property', by contrast, are assets acquired prior to the marriage, or by gift or for personal money (Article 57). If separate personal property produces income during the marriage, that income will also be separate personal property.

However, if an increase in the value of one spouse's separate personal property has been due to the efforts or contribution of the other spouse, that separate personal property may be held as common joint property by the court and the other spouse will be entitled to a share of it.

Property acquired by a man and a woman who live together as a family, but who are not married (under a cohabitation regime), will be considered joint property, unless a written agreement (marriage agreement) between them provides otherwise.

The spouses may wish to vary this default regime in their agreement, re-designating present and future separate personal property and common joint property.

The court has a wide range of powers to share a spouse's common joint property. The court has the power:

- (i) to share common joint property between the wife and husband;
- (ii) to award indivisible items to one spouse unless otherwise agreed between the parties;
- (iii) to award assets relating to professional occupations (eg, musical instruments; office, medical, photography equipment etc.) to the spouse who used them in their professional activities. The cost of these things is taken into account when awarding other property to the other spouse;
- (iv) to award the other spouse a lump-sum as compensation instead of their share in the joint common property, including a house, apartment and land. However, the court may exercise this power only with the consent of that spouse, except in cases foreseen by the Civil Code of Ukraine. The awarding of monetary compensation is possible only if the second spouse makes an advance deposit of the respective sum of money into the court account;
- (v) to recognise that some or all items of separate personal property are common joint property or recognise that some or all items of common joint property are separate personal property if the appropriate circumstances are proven.

8.2 Explain and illustrate with reference to recent cases the court's thinking on division of assets

The court practice in division of assets is generalised in the Decree of the

Plenum of Supreme Council of Ukraine dated 21 of December 2011 No.11.

The division of a spouse's assets is carried out in accordance with Articles 69-72 of Family Code of Ukraine and Article 372 of the Civil Code of Ukraine. The value of property subject to division is determined by agreement between the spouses, or is based on its actual value at the time of the hearing.

If the marriage agreement has modified the statutory regime of joint property, then a court must proceed and divide the property according to the terms of any such agreement.

In resolving disputes between spouses it is necessary for the court to decide on the amount of property which has been jointly acquired and find out the source and time of its acquisition. Joint assets of spouses that are subject to division may include any kind of property, except those excluded from civil turnover, regardless of whose the property was purchased in.

Property owned by a spouse can be designated as joint property by signing the parties signing a marriage agreement or recognised as such by the court on the grounds that during the marriage the value of this property has significantly increased due to the efforts of financial investment of the other spouse, or both.

Under the general rule of Article 70 of the Family Code of Ukraine, during the division of the spouses' joint property, the wife's and husband's shares in the assets are equal unless otherwise provided for by agreement between them or under a marriage agreement.

In resolving any dispute over the division of property the court may deviate from equality of shares in circumstances that are of essential importance, particularly if one party did not care about the material support of the family, hid, destroyed or damaged joint property or spent property to the detriment of his family.

A spouse's share in the joint assets may be increased if children or disabled adult children are living with him/her.

9. FINANCES/MAINTENANCE

9.1 Explain the operation of maintenance for spouses on an ongoing basis after the breakdown of marriage

Under Article 76 of the Family Code of Ukraine, divorce does not release spouses from maintenance obligations that originated during marriage. A former spouse is obliged to support the other in certain circumstances described in Article 75 of the Family Code of Ukraine if that spouse became disabled during the marriage or within a year from the date of the marriage breakdown; if the spouse is pregnant; raising a child under the age of three or caring for a disabled child; is set to reach pension age within five years; or in other certain cases listed in the Family Code.

9.2 Is it common for maintenance to be awarded?

Article 77 of the Family Code of Ukraine provides that spouses are free to decide the manner of maintenance.

If the parties have not reached an agreement, maintenance may be

imposed by the court order with a certain percentage of the total net income and/or a fixed sum of money. Alimonies are to be paid on a monthly basis. The court has the discretion to increase or decrease these sums to reflect other relevant circumstances. In certain circumstances, where the spouse responsible for the alimony leaves the territory of Ukraine, they may be obliged to pay alimonies in advance.

9.3 Explain and illustrate with reference to recent cases the court's thinking on maintenance

The Supreme Court of Ukraine has interpreted the provisions of the Family and Civil code of Ukraine on the maintenance of spouses and decided that divorce does not release a former spouse from their obligations in relation to maintenance and a cohabitant spouse has the right to maintenance where they are unable to work during cohabitation.

10. CHILD MAINTENANCE

10.1 On what basis is child maintenance calculated within the jurisdiction?

According to the Family Code of Ukraine, after the breakdown of the marriage, a parent is required to pay child support (alimonies). Maintenance can also be paid under a support agreement. The Family Code of Ukraine states that child support is to be imposed by the court allowing a certain part of the total net income for one child or it could be fixed in money.

Pursuant to Article 182 of the Family Code of Ukraine, the court has the discretion to increase or decrease the level of alimony to reflect other relevant circumstances, such as the health and welfare of a child; the health and welfare of the spouse responsible for paying the alimony; the availability of other family members, presence of legally incapable wife (or husband) and/or children from a new marriage, and other circumstances which may be relevant for the court.

The Family Code of Ukraine provides that alimonies should not be decreased lower than 30 per cent of the minimum level of wage for one child. The minimum level of wage will be revised every year according to the law of Ukraine on State Budget upon the establishment of a minimum living wage.

11. RECIPROCAL ENFORCEMENT OF FINANCIAL ORDERS

11.1 Summarise the position in your jurisdiction

A common and acknowledged method of enforcing foreign court orders is according to international bilateral and multilateral treaties which exist between Ukraine and other countries.

The enforcement proceedings available in each case depend on the terms of the treaty or other arrangements that are in place between Ukraine and the other country concerned.

The Civil Procedure Code of Ukraine 2005 defines the order of enforcement of foreign financial orders in Articles 390-398.

In Ukraine, the judgment of an international court shall be enforced during a period of three years from the moment the judgment comes into

force. An exception to this rule is periodical payments, which may be enforced and collected during the whole period of sanction.

The principle of reciprocal enforcement of foreign court orders may be applied only if there are no international bilateral and multilateral treaties between Ukraine and the foreign country. The principle of reciprocal enforcement of foreign court orders including financial orders is rather new in Ukraine and Article 390 of the Civil Procedural Code of Ukraine stipulates if the recognition and enforcement of foreign court order depends on the principle of reciprocity, it is believed that it exists, unless proven otherwise. The principle of reciprocity has only been applied in few court cases.

There is no special procedure for the enforcement of court orders, including financial orders, on the principle of reciprocity as there is no list of countries whose court orders will be enforced in Ukraine in accordance with the principle of reciprocity. The general interpretation of the principle of reciprocity under Ukrainian law means that if Ukrainian court orders are enforced in a particular foreign country, the court orders of that foreign country shall be enforced in Ukraine.

12. FINANCIAL RELIEF AFTER FOREIGN DIVORCE PROCEEDINGS

12.1 What powers are available to make orders following a foreign divorce?

Under Ukrainian law there is no special procedure allowing the receipt of financial relief after a foreign divorce. After a foreign divorce, either spouse may apply to the Ukrainian court to settle financial matters (eg, property division, child alimony, maintenance obligations between spouses) if the Ukrainian courts have jurisdiction to consider such matters on the general basis provided by the Civil Procedural Code of Ukraine and the Law of Ukraine on International Private Law.

D. CHILDREN

13. CUSTODY/PARENTAL RESPONSIBILITY

13.1 Briefly explain the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage

The breakdown of a marriage does not influence the scope of parental rights and obligations toward the child provided by the Family Code of Ukraine. Even after the breakdown of a marriage, the parents have equal rights to participate in the child's upbringing. The parents retain the full scope of personal non-property and property rights and obligations towards the child. After the breakdown of the marriage each of the parents is obliged to contribute towards the child's maintenance until they attain the age of majority (18 years in Ukraine) and in some circumstances maintain the child after the age of 23 years old. Under Ukrainian legislation the parents are also obliged to share additional expenses for the child, which may include medical treatment and other costs for the improvement of the child's health and development of the child's skills etc.

The parent who does not live with the child has a right to personal

communication with the child. The parent with whom the child lives has no right to prevent the parent who lives separately from participating in the upbringing of the child and communicating with the child unless such communication negatively affects the normal development of the child.

The parents have the right to enter into an agreement dealing with the implementation of parental rights and responsibilities of the parent who lives separately. The agreement shall be in writing and notarised.

13.2 Briefly explain the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage

The place of residence of child after breakdown of marriage

The place of residence of a child under the age of 10 is determined by the parents' mutual consent. The place of residence of a child who has reached 10 years is agreed by the mutual parents' consent and the child. If the parents live separately, the place of residence of a child who has reached 14 years of age is determined by the child.

If the parents cannot reach an agreement about the child's place of residence the dispute may be solved by custodian bodies or by the court. The following circumstances are taken into account when considering such a dispute: the parents' attitude towards their parental obligations, the personal feelings of the child towards each of the parents, the child's age, state of health, the financial conditions of each of the parents (ownership of personal apartments), steady income, the living conditions of each parent, the current marital status of each parent and the presence of other children etc. Custodian bodies or the court are unlikely to allow the child to live with a parent who has no independent income, is abusing alcohol or drugs or who, by his/her immoral behaviour, may harm the development of child.

Visitation order

If the parent with whom the child lives prevents the parent who lives separately from involvement with the child and the child's upbringing and, in particular, avoids the enforcement of the decision of custodian bodies, the other parent may apply to the court for a visiting order.

In such a case the court determines the level of participation of the other parent in the child's upbringing: periodic and systematic access, the ability to spend vacations together, visiting a child at his/her place of residence, places and times for communication etc.

In a case of non-enforcement of a visiting order by the person with whom child lives, the court, upon the application of the other parent, may order the child to live with the parent who lives separately.

14. INTERNATIONAL ABDUCTION

14.1 Summarise the position in your jurisdiction

In 2006, the Supreme Council of Ukraine passed the Act of Ukraine on Accession of Ukraine to the Convention on the Civil Aspects of International Child Abduction. The Convention is applied between Ukraine and countries

that have accepted Ukrainian accession to this convention.

The Convention is enforced and executed in Ukraine according to the Order of Execution in Ukraine of the Convention on the Civil Aspects of International Child Abduction, adopted by the Decree of the Cabinet of Ministers of Ukraine on 10 June 2006 No 952.

The application forms on child return and access to children and a list of necessary documents are provided at the Decree of the Cabinet of Ministers of Ukraine No 952.

The Competent authority in Ukraine to deal with the Convention is the Ministry of Justice of Ukraine. Upon receipt of an application for the return of a child, the Ministry of Justice will firstly take measures to obtain the agreement of the other parent to return the child voluntarily. If the other parent refuses to return the child voluntarily, the Ministry of Justice of Ukraine, on behalf of the parent, can initiate court proceedings concerning the child's return.

The parents are also free to initiate proceedings regarding the return of the child directly in a Ukrainian court without involving the Ministry of Justice of Ukraine under Article 29 of the Convention.

All the actions and services of the Ministry of Justice of Ukraine, including court representation, are free of charge. However, it is always advisable to have a private lawyer to assist with the case and represent the parent's interests in the court.

15. LEAVE TO REMOVE/APPLICATIONS TO TAKE A CHILD OUT OF THE JURISDICTION

15.1 Summarise the position in your jurisdiction

The general rules for removing a child outside the border of Ukraine are provided in the Law of Ukraine On the Procedure for Leaving and Entering Ukraine by Ukrainian Citizens adopted on 21 January 1994.

Under Ukrainian law, citizens who have not reached the age of 16 can only travel outside of Ukraine with the consent of both parents (adoptive parents) or guardians and accompanied by them, or by persons authorised by them.

Otherwise, travelling outside of Ukraine where a Ukrainian citizen has not attained the age of 16, is not accompanied by one parent or accompanied by persons who are authorised by a parent is only possible with the notarised consent of the other parent or both parents, indicating the state of destination and the corresponding length of stay in this state.

A departure from Ukraine without notarised consent from the other parent is possible when:

- the other parent is a foreigner or a stateless person, and this is confirmed on the child's birth certificate;
- the passport for travelling abroad or the child's travel document shows evidence of permanent residence outside Ukraine or evidence of consular registration in Ukrainian embassies abroad. (Ukrainian nationals who live abroad can rely on consular registration and the registration mark of the Ukrainian embassy of 'permanent residence abroad' or 'consular

registration' in the child's passport or travel document).

The child may travel abroad without the notarised consent of the other parent in a case where they are able to show at the points of crossing of state borders, an original document or notarised copy of one of the following:

- the death certificate of the other parent;
- a court order demonstrating the termination of the parental rights of the other parent;
- a court order recognising that the other parent has 'disappeared';
- a court order recognising the other parent as incapable;
- a court order granting permission to travel outside Ukraine for a citizen who has not reached the age of 16 and is without the consent and support of the other parent;
- a certificate of birth issued by the bodies of civil status acts registration, specifying that the record about the father was made on the basis of first paragraph of Article 135 of the Family Code of Ukraine.

15.2 Under what circumstances may a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

If the other parent refuses to give notarised consent for removing a child abroad, the only way to gain permission to take the child abroad is through an application to a Ukrainian court.

While applying to a Ukrainian court, the parent shall prove that the travel is in the best interests of the child (eg, travel to relatives, for rest, tourism, education, improvement of health). It is necessary to indicate the aim of travel, and the duration of travel, as proof of a present invitation for travelling, hotel booking, tickets booking etc. The court gives permission for travel specifically to some period of time and this permission relates to specific travel.

If the applicant wishes to obtain permission to remove a child abroad without the consent of the other parent for numerous trips, it is recommended that the applicant ask the court to allow the making of a travel document to remove a child from Ukraine without the consent of the other parent and to allow for a parent temporary trips abroad with a child without the consent and accompaniment of the other parent.

Upon consideration of an application, the court issues an order and may grant permission to take the child abroad without the consent of the other parent. To deny such a claim, the respondent must provide reasonable evidence to demonstrate that a trip abroad does not meet the child's interests, the child's stay with one parent harms the child, and/or that the other parent does not participate in proper upbringing of the child and child support.

However, in practice, these circumstances are rarely proven and as a general rule, permission is granted to take the child abroad.

E. SURROGACY AND ADOPTION

16. VALIDITY OF SURROGACY AGREEMENTS

16.1 Briefly summarise the position in your jurisdiction

Assisted reproductive technologies and surrogacy in particular, are legally

recognised in Ukraine by law and are regulated by the Family Code of Ukraine 2002, the decree of the Ministry of Health Care of Ukraine No. 771 adopted on 23 December 2008 On the Approval of the Instruction about the Order of Assisted Reproductive Technologies Application. As a rule, in practice, in order to settle the arrangements for the surrogacy, the parties conclude a surrogacy agreement which presents their consent to the surrogacy arrangement. Ukrainian law is silent as to the necessity of signing such a surrogacy agreement, its form, content and the party's rights and responsibilities under such agreement. Therefore the parties may upon their own discretion decide whether to sign the surrogacy agreement and the terms on which they would like to do so.

The content of this agreement shall not contradict the provisions of the Family Code of Ukraine, or other acts of civil legislation.

It is necessary to point out some requirements for the successful conclusion of surrogacy agreements which are necessary to secure its validity under Ukrainian law:

- The surrogacy agreement should be concluded prior to the conception of the embryo and its transference to the surrogate mother. A surrogacy agreement concluded after the child's conception may be considered as an agreement on the transfer of a child and may be invalidated;
- A person cannot be the subject of a civil agreement, therefore the wording of the subject of the surrogacy agreement cannot provide for the transfer of a child or the transfer/relinquishment of parental rights;
- Assisted reproductive technologies may be used only by spouses who have registered their marriage, consequently the surrogacy agreement shall be concluded only by the spouses who have registered their marriage (art. 123 of the Family Code of Ukraine 2002);
- The surrogate mother shall be an adult capable woman who has her own healthy child, who has entered into the agreement freely and has no medical contraindications. The surrogate mother shall be objectively informed concerning the procedure of surrogacy treatment.

Special attention shall be paid to the wording of the surrogacy agreement in relation to payments. The payments cannot be made for the transfer of a child or the transfer or deprivation of the parental rights of the surrogate mother, as this will conflict with Ukrainian legislation. At the same time, Ukrainian law does not prohibit the provision of special remuneration to the surrogate mother for the rendering of services of pregnancy and childbirth and/or compensation of all reasonable expenses connected with the rendering of such services, in particular costs for loss of salary, medical treatment, medicines, clothes, housing etc. A surrogacy agreement is usually made in simple written form.

17. ADOPTION

17.1 Briefly explain the legal position in relation to adoption in your jurisdiction. Is adoption available to individuals, cohabiting couples (both heterosexual and same-sex)?

Adoption procedure is regulated in Ukraine by Articles 207-242 of Family

Code of Ukraine and Decree of the Cabinet of Ministers of Ukraine dated 8 October 2008 No. 905 On Approval of the Procedure of the Adoption and Supervision the Rights of Adopted Children.

An adoption can be made only by court order. The adopter of the child must be a capable person over the age of 21 years, unless the adopter is a relative of the child.

The adopter may be a person who is at least 15 years older than the child. In the case of an adoption of an adult person, the age difference cannot be less than 18 years.

Adopters may be spouses. However, adopters may not be a person of the same sex. Legislation also establishes the possibility of one spouse adopting a child if the other spouse does not want to become an adoptive parent. In this case, the second spouse gives notarised consent to the adoption of the child. With such a legal construction the other spouse only agrees to the adoption, and does not acquire the legal status of the adoptive parent or the rights and obligations of the adopter.

Individuals who are not married, but who cohabit may adopt a child if the court allows them to do so. A child may be adopted by a single man or woman if the child has only a mother or a father who will lose their legal connection with the child due to adoption. The number of children who may be adopted by an adoptive parent is not limited.

The procedure of adoption is rather complicated and strictly regulated by law.

F. COHABITATION

18. COHABITATION

18.1 What legislation (if any) governs division of property for unmarried couples on the breakdown of the relationship?

Ukrainian law recognises cohabitation and allocates property rights to cohabitating couples. Article 74 of the Family Code of Ukraine provides that if a woman and man live as a family but are not married to each other or to any other person, property acquired during their cohabitation belongs to them as joint property, unless otherwise provided for by written agreement between them. The provisions of Chapter 8 of the Family Code apply to the property that is the subject of joint ownership by the cohabitating couple.

These provisions mean that property acquired during cohabitation belongs to the couple as common joint property. Although, in each case, the fact of cohabitation must be proven if the matter regarding division of property is put before the court. The fact of cohabitation may be established if it is proven that parties lived together, have common housekeeping, and were registered at the same place, rent an apartment together etc. According to Ukrainian law, a cohabitating couple may conclude an agreement to exclude the joint property regime and to agree a different property regime and to regulate the order of disposition of the property.

This makes it all the more important that cohabitating spouses follow the suggested alternative of Article 74, and designate separate personal property and common joint property in any agreement.

G. FAMILY DISPUTE RESOLUTION

19. MEDIATION, COLLABORATIVE LAW AND ARBITRATION

19.1 Briefly summarise the non-court-based processes available in your jurisdiction and the current status of agreements reached under the auspices of mediation, collaborative law and arbitration

Arbitration

The non-court-based processes for the settlement of disputes which are generally available in Ukraine are mediation and arbitration.

The availability of arbitration in family disputes is very limited in Ukraine.

Under Ukrainian law the parties are not allowed to refer matters to an arbitral tribunal for settlement if the dispute concerns immovable property; disputes where one party is non-resident or disputes that arise from family relations (with the exception of disputes that arise from a marriage agreement).

So, the parties may only refer to arbitration disputes that arise from a marriage agreement where both parties are residents of Ukraine and the disputes do not concern immovable property.

Mediation

There is no legal basis for mediation in Ukraine. However, there are a number of mediation centres that may assist parties in resolving their dispute. Mediation is a sphere that is rapidly developing in Ukraine and a number of laws are discussed nowadays in Ukraine that attempt to provide legal regulation for mediation.

There is no legal regulation of agreements reached under the auspices of mediation, collaborative law or arbitration in Ukraine.

In order to be enforceable and binding upon the parties, any agreement reached between the parties in the course of mediation or arbitration must meet the special and general requirements of the Family Code of Ukraine (2004) and/or the Civil Code of Ukraine (2004) which apply to agreements of this specific type..

19.2 What is the statutory basis (if any), for mediation, collaborative law and arbitration in your jurisdiction? In particular, are the parties required to attempt a family dispute resolution in advance of the institution of proceedings?

Currently there is no legal basis for mediation and collaborative law in Ukraine. The legal basis for arbitration in Ukraine is the Law of Ukraine on Arbitral Courts adopted on 11 May, 2004. However, as described above, the availability of arbitration in family disputes is very limited.

There is no requirement that the parties must attempt dispute resolution before issuing court proceedings.

The parties are free to try prejudicial dispute resolution. Prejudicial dispute resolution does not affect their right to apply directly to the court at any time and any stage.

H. OTHER**20. CIVIL PARTNERSHIP/SAME-SEX MARRIAGE****20.1 What is the status of civil partnership/same-sex marriage within the jurisdiction?****20.2 What legislation governs civil partnership/same sex marriage?**

According to Article 21 of the Family Code of Ukraine, the family is defined as a 'union between a man and a woman who live together, who are connected by common everyday life and who have mutual rights and duties'. There is no legal allowance for same-sex marriage/civil partnership in Ukrainian legislation.

21. CONTROVERSIAL AREAS/RAPIDLY DEVELOPING AREAS OF LAW**21.1 Is there a particular area of the law within the jurisdiction that is currently undergoing major change?**

Recent changes of importance in the area of Family Law in Ukraine concerns the application of assisted reproductive technologies.

The Supreme Council of Ukraine has recently adopted changes to the Family Code of Ukraine, allowing an application for surrogacy treatment to be made only by a married couple (a man and a woman).

The Supreme Council of Ukraine is currently actively discussing new amendments regarding the application of ART, in particular, an upper age limit of 51 years on the age of a woman who can apply for ART. Furthermore, there is a restriction on the availability of surrogacy treatment for foreigners, in particular, it is proposed that surrogacy treatment should only be available to the citizens of Ukraine and foreigners – citizens of the countries in which this method of assisted reproductive technology is not prohibited by law, and in cases where foreigners live in a state other than the state of their citizenship – by the law of the state of their residence. A proposed obligatory precondition for making an application for surrogacy is a genetic connection of the child to at least one of the future parents and an absence of direct genetic connection of the child with the surrogate mother.

It is probable that these discussed amendments (albeit with some corrections) will be adopted in law.

Recent changes also mean that the minimum age of marriage is now 18 years for both men and women.

21.2 Which areas of law are most out-of-step? Which areas would you most like to see reformed/changed?

Ukrainian family law is one of most innovative and advanced within Europe. Nevertheless, there are some areas which need to be reformed.

The execution of court orders for children or alimony payable by the other spouse still needs to be reformed and innovated. In practice the enforcement of court alimony orders is at a very low level.

The other area of family law which needs to be reformed is surrogacy. The legal framework in Ukraine is rather developed compared with most European countries, however, some issues still need to be addressed. The

majority of difficulties arise after the child's birth and especially when the foreign parents encounter problems in getting the child abroad to their home. Surrogacy is allowed only in 15 countries; all other countries forbid surrogacy, and some even make the practice a crime or only allow surrogacy under certain conditions. For these reasons, the parents often encounter problems in getting their surrogate born child abroad and in having their paternity recognised in the country of their residence.

The most common gaps in Ukrainian surrogacy legislation, which need reform, include:

- (i) To provide obligatory legal advice to parents regarding the legal status of their surrogate-born child in Ukraine as well as in the country of the parents' residence, the possibility to recognise their paternity in the country of their residence;
- (ii) To provide legal regulation for surrogacy agreements: to define in law the subject of such agreements and address the issue of payments under the surrogacy agreement and, the order of execution of the agreement.

Ukraine needs to adopt a law preventing domestic violence and creating a social network to counteract domestic violence. A draft of such a law is now being debated at the Supreme Council of Ukraine.