

WHEN THE COMMON JOURNEY COMES TO AN END – GETTING DIVORCED IN AUSTRIA

*Professor Dr. Marianne ROTH, LL.M. (Harvard)**

*Dr. Claudia REITH, LLB. oec.***

I. Introduction

Today divorce is recognised all over Europe and the numbers of divorces are consistently high. In Austria, the divorce rate has almost doubled in the last forty years. In 2001, the highest number of divorces (20.582) has been reached so far. In comparison, in the same year 34.213 marriages were concluded. Although the number of divorces has been declining since 2007, the probability that a marriage, which was concluded in 2013, will be divorced is around 40 per cent¹. These figures clearly demonstrate that divorce has become an increasingly important aspect of society and could therefore not have been disregarded from the legal perspective².

Until 1938 divorce was not a legally available option, rather it was only possible to obtain a decree of judicial separation (*Scheidung von Tisch und*

* Marianne Roth is professor of law at Salzburg University, Austria. In addition, she is practising as an arbitrator under institutional and ad hoc rules and has worked as a legal advisor and visiting professor for various institutions around the world. Contact: marianne.roth@sbg.ac.at

** Claudia Reith is senior scientist at the department of private law and civil procedure at the University of Salzburg. Contact: claudia.reith2@sbg.ac.at

¹ Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/ (last accessed 6 October 2014).

² Cf. Dimmel/Hagen, *Strukturen der Gesellschaft*, 2005, p. 120.

Bett)³. Such a decree, however, did not terminate the marriage and Catholics were unable to remarry⁴. The first divorce legislation was introduced in 1938 and was primarily based on fault⁵. In 1978 and 1999 the Austrian divorce law was reformed by widening divorce on the ground of irretrievable breakdown and concurrently diminishing divorce based on fault⁶. Further, divorce by consent was introduced⁷. The society's understanding of family and marriage has considerably changed in the last decades and divorce no longer constitutes the exception to the rule. Taking into account the fact that the breakdown of a marriage can be an extremely difficult situation, particularly if children are involved, it is of crucial importance to offer the parties effective regulatory procedures.

Against this background and having in mind that Austria has a long experience with the legal institution of divorce, which might serve as an example for other countries, this article explains the available procedures to obtain a divorce decree in Austria. Since these options differ depending upon which ground the divorce is based on, the grounds for divorce will be briefly described at the beginning. Further, the article deals with the procedure for dissolving partnerships of same-sex couples and the recognition and enforcement of foreign divorce decrees in Austria.

II. Grounds for divorce

In contrast to Germany for example, where divorce is strictly based on irretrievable breakdown, Austria provides for a variety of grounds for divorce, namely divorce by consent, divorce on the ground of fault, divorce on the ground of irretrievable breakdown and divorce based on other

³ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, p. 13., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014); Kerschner, *Familienrecht*, 5th edition, 2013, marg. No. 2/74.

⁴ Kerschner, *Familienrecht*, 5th edition, 2013, marg. No. 2/74.

⁵ Berka, *Scheidung und Scheidungsreform*, 2000, p. 65.

⁶ Kerschner, *Familienrecht*, 5th edition, 2013, marg. No. 2/74.

⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138.

grounds⁸. The table below shows that most frequently divorce is requested jointly by both spouses.

Total Number of Divorces 2013⁹	15,958
Divorce by consent	13,906
Divorce on the ground of fault	1,100
Divorce on the ground of irretrievable breakdown	840
Divorce based on other grounds	112

1.) Divorce by consent

Section 55a Austrian Marriage Act regulates divorce by consent¹⁰. In order to request a divorce based on consent four conditions must be fulfilled: Each spouse has to declare that an irretrievable breakdown has occurred¹¹. The “matrimonial partnership” must have ceased to exist for at least six months, whereby a separation is not necessarily required. If the spouses’ relationship is no longer determined by the so-called “matrimonial frame of mind”, it constitutes an indication for a breakdown¹². Thus, even if there is no physical separation due to the fact that the spouses are still sharing the

⁸ Sections 49 *et seq.* Austrian Marriage Act; see Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, chapter B., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014).

⁹ Statistik Austria, http://www.statistik.at/web_de/static/ehescheidungen_seit_2004_nach_paragraph_des_ehegesetzes_und_bundeslaendern_023621.pdf (last accessed 6 October 2014).

¹⁰ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, chapter B.III.1., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014).

¹¹ See Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 55a Austrian Marriage Act, marg. No. 3 *et seq.*

¹² Cf. Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 55a Austrian Marriage Act, marg. No. 5.

same dwelling, the “matrimonial partnership” may no longer exist. Further, both spouses must agree on the divorce and they have to conclude a written agreement on the consequences of the divorce. In the interest of an expeditious and easy procedure, divorce based on consent is heard in non-contentious proceedings¹³.

2.) Divorce on the ground of fault

Section 49 Austrian Marriage Act governs divorce based on the ground of fault in the form of a general clause with two standard examples¹⁴. Under the general clause a divorce may be requested, if one spouse has caused the irretrievable breakdown by a serious marital fault or through dishonourable or immoral behaviour to such an extent that reconciliation cannot be expected. Examples are adultery, the infliction of physical violence and severe mental cruelty. Irretrievable breakdown means the loss of the matrimonial community¹⁵. Case law has repeatedly ruled that it constitutes an irretrievable breakdown, if one spouse has once and for all lost its belief in the marriage due to the offending behaviour of the other spouse¹⁶.

3.) Divorce on the ground of irretrievable breakdown

Under section 55 para. 1 Austrian Marriage Act a spouse may obtain a divorce, if the “domestic community” (*häusliche Gemeinschaft*) has ceased to exist for a period of three years and the marriage has broken down irretrievably¹⁷. The period of three years runs from the termination of the

¹³ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138.

¹⁴ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, chapter B.III.2., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014).

¹⁵ Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 49 Austrian Marriage Act, marg. No. 2.

¹⁶ See e.g. Judgement of the Austrian Supreme Court 07.02.1990, 3 Ob 503/90, *EFSlg.* 63.384.

¹⁷ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, chapter B.III.3., Austrian National Report available at

“domestic community” and begins anew in the event of reconciliation¹⁸. Section 55 para. 1 last sentence Austrian Marriage Act emphasises the fact that the breakdown must be irretrievable: Thus, even if the spouses have separated for a period of three years the judge has to dismiss the divorce suit, if he or she reaches the conclusion that there is a reasonable prospect of restoring the matrimonial community.

Moreover, at the request of the respondent the divorce must not be granted, if the irretrievable breakdown was entirely or predominately caused by the petitioner and the divorce would result in greater hardship for the respondent than would a dismissal of the request for the petitioner¹⁹. However, if the “domestic community” has already been dissolved for a period of six years, the judge has to render a divorce decree irrespective of any hardship or prospect of restoration²⁰. Therefore, in order to rely on the ground of irretrievable breakdown for obtaining a divorce, the marriage must have been in existence for at least three respectively for at least six years, depending on the specific paragraph, which has been invoked²¹.

4.) Divorce based on other grounds

Besides divorce on irretrievable breakdown, which is mainly indicated by a certain period of separation, the Austrian Marriage Act further distinguishes between specific grounds, which may have caused the irretrievable breakdown²². Under sections 50-52 Austrian Marriage Act a

<http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November).

¹⁸ Judgement of the Higher Regional Court Vienna, 19.02.1986, 13 R 183/85, *EFSI*g. 51.619; Judgement of the Regional Court Vienna, 17.09.1999, 43 R 685/99z, *EFSI*g.90.302.

¹⁹ Section 55 para. 2 Austrian Marriage Act.

²⁰ Section 55 para. 3 Austrian Marriage Act; Deixler-Hübner/Nademleinsky, *Scheidung kompakt*, 4th edition, 2013, p. 45; Hinteregger, *Familienrecht*, 6th edition, 2013, p. 99.

²¹ Section 55 para. 1 or para. 3 Austrian Marriage Act.

²² Sections 50-52 Austrian Marriage Act; Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Grounds for Divorce*, vol. I, 2003, chapter B.III.3., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014).

spouse can request a divorce, if the marriage has broken down to such an extent that a restoration cannot be expected due to the other spouse's mental disturbance, mental illness, or serious infectious or repulsive illness²³. Only serious and chronic diseases, such as leprosy, psoriasis, or certain venereal diseases are considered to be a ground for divorce under the Marriage Act²⁴. Whether AIDS still qualifies as such a serious and chronic illness, is disputed in view of the currently available antiretroviral medication, which renders patients uninfected²⁵. Examples for "mental disturbances" are hysteria²⁶, drug addiction²⁷, and general mental problems on a lower level (depression, confusion, etc.)²⁸. It is worth mentioning that not the mental disturbance itself, but rather the resulting behaviour, which cannot be regarded as fault, constitutes a ground for divorce²⁹. Schizophrenia falls in the category of "mental illnesses".

To obtain a divorce under sections 50-52 Austrian Marriage Act no period of separation nor a particular duration of the marriage is required. However, the respondent, who is confronted with a claim for divorce on the ground of an existing mental or physical defect, may plead hardship and claim that the divorce is not ethically justifiable. Whether this defence will

²³ Kerschner, *Familienrecht*, 5th edition, 2013, marg. No. 2/84.

²⁴ Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 52 Austrian Marriage Act, marg. No. 2.

²⁵ The Judgement of the Austrian Supreme Court 03.09.2008, 3 Ob 91/08s still regards AIDS as a ground for marital dissolution under the Marriage Act; contrary Roth, *Aufhebung der Ehe aufgrund einer schon vor der Ehe vorliegenden HIV-Infektion eines Ehegatten – Eine kritische Reflexion der österreichischen Rechtslage*, in: Bächler/Müller-Chen (eds.), *Private Law, national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, 2011, p. 1435 *et seq.*, 1439 *et seq.*, 1446 *et seq.* with further references.

²⁶ See e.g. Judgement of the Austrian Supreme Court 24.05.1989, 1 Ob 582/89.

²⁷ See e.g. Judgement of the Austrian Supreme Court 30.07.1992, 7 Ob 576/92, *EFSlg.* 69.233.

²⁸ Prevailing case law, e.g. Judgement of the Austrian Supreme Court 30.07.1992, 7 Ob 576/92, *EFSlg.* 69.233.

²⁹ Koziol/Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th edition, 2006, p. 489 *et seq.*

be granted or not, depends on the particular circumstances, namely on the duration of the marriage, the age of the spouses, and the cause of the sickness³⁰.

III. Divorce proceedings: from the request to the divorce decree

Depending upon the envisaged type of divorce, the procedure to be followed might differ considerably. Besides the standard civil procedure, the Austrian legal system provides for so-called non-contentious proceedings. The Austrian legislator has specifically assigned certain matters to non-contentious procedures, including consensual divorce³¹. Hence, divorce on the ground of mutual consent is heard in non-contentious proceedings, whereas divorce on all other grounds takes place in contentious proceedings. Before explaining the two procedures in detail, some general procedural issues, such as the jurisdiction in divorce matters, need to be clarified. When explaining the two procedures, particular emphasis will be put on their similarities and the differences.

1.) General procedural issues

Section 46 para. 1 Austrian Marriage Act states that a marriage can only be dissolved by a judicial decision³². According to sections 49 para. 2 No. 2a and 104a Austrian Jurisdiction Act district courts (*Bezirksgerichte*) have exclusive jurisdiction over all types of divorce proceedings³³. Usually, the claim³⁴ must be submitted at the district court, in the jurisdiction of which the spouses are or were habitually resident. Lacking a joint habitual

³⁰ Section 54 Austrian Marriage Act.

³¹ Neumayr, *Außerstreitverfahren*, 2014, p. 1 *et seq.*

³² Stabentheiner, in: Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd edition, 2002, section 46 Austrian Marriage Act, marg. No. 1.

³³ Roth, *Zivilprozessrecht*, 2012, p. 93.

³⁴ Non-contentious proceedings are not initiated by a claim, but a joint request. Further, in non-contentious proceedings the spouses are not opponents, but both are petitioners. For practical reasons reference is made only to the terminology used in contentious proceedings in this section, although the explanations under III. 1. apply to both procedures.

residence, the claim must be filed at the district court where the respondent habitually resides, or if he or she has no residence in Austria, the district court where the claimant has its habitual residence is competent. If neither the claimant nor the respondent are habitually resident in Austria, but the international jurisdiction of Austria is affirmed, the district court “Inner City of Vienna (*Innere Stadt Wien*) is competent³⁵.

In divorce matters choice of forum clauses are generally permitted. Hence, the parties may agree on another locally competent district court than the one prescribed by law³⁶. In cross-border cases the competent court is determined primarily pursuant to the Brussels IIa Regulation³⁷. If the Brussels IIa Regulation is, however, not applicable, the jurisdiction has to be assessed according to section 76 para. 2 Austrian Jurisdiction Act. This provision sets forth that Austrian courts are competent, if one of the spouses is either Austrian or habitually resides in Austria. According to Austrian case law habitual residence is interpreted as the habitual abode, where the person lives for about 6 months per year and where the centre of its life is. Hence, no subjective criterion such as the intention of a party is used to define habitual residence according to Austrian national law³⁸.

Matters falling within the exclusive jurisdiction of district courts do not necessarily require legal representation. Therefore, in divorce proceedings spouses do not have to be represented by a lawyer pursuant to section 27 para. 2 Austrian Code of Civil Procedure. If a spouse wishes to be represented, he or she can appoint a lawyer, but nobody else than a lawyer (*relative Anwaltslast*). In appeal proceedings legal representation is mandatory (*absolute Anwaltslast*). If necessary, the spouses may apply for

³⁵ Section 76 para. 1 Austrian Jurisdiction Act; Kodek/Mayr, *Zivilprozessrecht*, 2nd edition, 2013, marg. No. 239.

³⁶ Deixler-Hübner/Nademleinsky, *Scheidung kompakt*, 4th edition, 2013, p. 45.

³⁷ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No.1347/2000.

³⁸ Rechberger/Simotta, *Zivilprozessrecht*, 8th edition, 2010, marg. No. 234; Judgement of the Austrian Supreme Court 24.07.1957, RS0046577; Judgement of the Austrian Supreme Court 24.10.2013, 6 Ob 180/13h.

legal aid, which is generally available to parties, who are unable to bear the costs of legal proceedings without endangering their livelihood³⁹.

Divorce officially breaks the marriage, when the decision was delivered to both parties and neither party decided to appeal against the decision, which means that the decision is final and binding and has the effect of *res judicata*. A remarriage is allowed after the legally binding dissolution of the former marriage⁴⁰.

2.) Contentious divorce proceedings

i.) Principles guiding contentious divorce proceedings

In Austria court proceedings are generally open to the public in order to allow public scrutiny of the justice⁴¹. In exceptional cases the public can be excluded, if legitimate interests need to be protected. Divorce proceedings deal with matters of private nature and are therefore confidential⁴². Each party may, however, appoint three persons of its trust, which are then permitted to attend the proceedings⁴³. Besides other principles, civil procedure in Austria is governed by the principle of party control, which means that the party by withdrawing, acknowledging or waiving the divorce suit or reaching a settlement may terminate the proceedings. This principle is considerably restricted in divorce proceedings. Hence, the above mentioned options are not available to the parties in divorce proceedings, except for the withdrawal of the divorces suit without, however, waiving the claim. Further, divorce proceedings are determined by the “principle of cooperation” (*Kooperationsmaxime*), which means that it is up to the parties

³⁹ Sections 63 *et seq.* Austrian Code of Civil Procedure; see Roth, *Litigation in Austria. Are Costs and Fees Worth It?*, in: Reisman (ed.), *Cost and Fee Allocation in Civil Procedure – A Comparative Study*, 2012, p. 76.

⁴⁰ Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 8 Austrian Marriage Act, marg. No. 2.

⁴¹ See Roth, *Zivilprozessrecht*, 2012, p. 32.

⁴² Section 460 No. 3 Austrian Code of Civil Procedure.

⁴³ Section 174 para. 1 Austrian Code of Civil Procedure.

to prove their claims and defences, whereas the judge has to ascertain the truth without gathering evidence *ex officio*⁴⁴.

Having regard to the principle of *favour matrimonii*, the judge has to make an attempt to reach a reconciliation between the spouses at the beginning and, if appropriate, in the course of the divorce proceedings.⁴⁵ Also for this purpose it is required that both spouses attend the oral hearing in person⁴⁶. As a consequence the divorce suit is considered to be withdrawn, if the claimant fails to appear⁴⁷. If both parties do not come to a hearing, the proceeding is suspended for at least three months and will only be continued after this period upon request⁴⁸. If the judge comes to the conclusion that reconciliation is not possible, but an amicable settlement may be reached, he or she has to recommend mediation or other forms of alternative dispute resolution⁴⁹. Further, the judge has to assess whether a party – who is not represented by a lawyer – is aware of the consequences of the divorce. For this purpose the judge may inform the unrepresented party about respective counselling centres and, if necessary, has to postpone the hearing to enable the party to inform itself at these centres⁵⁰.

⁴⁴ Section 460 No. 4 Austrian Code of Civil Procedure; Roth, *Zivilprozessrecht*, 2012, p. 94.

⁴⁵ Section 460 No. 7 Austrian Code of Civil Procedure; Kodek/Mayr, *Zivilprozessrecht*, 2nd edition, 2013, marg. No. 999; Simotta, in: Fasching/Konecny (eds.), *Zivilprozessgesetze*, 2nd edition, 2004, section 460 Austrian Code of Civil Procedure, marg. No. 92.

⁴⁶ Section 460 No. 1 Austrian Code of Civil Procedure.

⁴⁷ Section 460 No. 5 Austrian Code of Civil Procedure. The possibility of a default decree (*Versäumungsurteil*) does not exist in matrimonial proceedings. Roth, *Zivilprozessrecht*, 2012, p. 94.

⁴⁸ Section 170 Austrian Code of Civil Procedure; Kodek/Mayr, *Zivilprozessrecht*, 2nd edition, 2013, marg. No. 429 *et seq.*; Simotta, in: Fasching/Konecny (eds.), *Zivilprozessgesetze*, 2nd edition, 2002, section 170 Austrian Code of Civil Procedure, marg. No. 1.

⁴⁹ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 121; Kodek/Mayr, *Zivilprozessrecht*, 2nd edition, 2013, marg. No. 999.

⁵⁰ Section 460 No. 6 Austrian Code of Civil Procedure; Simotta, in: Fasching/Konecny, *Zivilprozessgesetze*, 2nd edition, 2004, section 460 Austrian Code of Civil Procedure, marg. No. 90.

ii.) The divorce suit and means of defence

Section 460 Austrian Code of Civil Procedure lays down the rules for divorce in contentious proceedings⁵¹. The divorce suit can either be filed in a written form or it can be brought forward orally at the so-called *Amtstag*, which is a day – usually the Tuesday – held once a week at the district courts in order to give persons, who are not represented by a lawyer, the possibility to place claims or other requests, e.g. for legal aid, on the record and ask simple questions of law⁵². It should be noted that under Austrian law spouses are not obliged to respect a so-called *cooling-off period* before they can file a divorce suit. Concurrently with the divorce suit documents such as the marriage certificate, proof of citizenship, certificate of registration and the birth certificate of children born during the marriage should be submitted.⁵³ Moreover, if the divorce is based on fault the petitioner has to observe a deadline: The suit has to be submitted within a period of six months after gaining knowledge of the ground, otherwise the suit will be dismissed as unfounded. If a spouse becomes aware of the ground after ten years, it can no longer be invoked (absolute deadline)⁵⁴. It should be noted that the district court responsible for the divorce proceedings is also competent to decide upon claims arising from the marital relationship between the spouses, e.g. maintenance claims or claims relating to the marital home⁵⁵. If, however, the claim does not result from the matrimonial relationship, the judge has to decide whether the consolidation of claims is economically reasonable⁵⁶.

After the divorce suit has been filed, the court informs the respondent about the case by sending him or her the divorce suit together with the

⁵¹ Roth, *Zivilprozessrecht*, 2012, p. 93.

⁵² Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 118.

⁵³ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 118.

⁵⁴ Kerschner, *Familienrecht*, 5th edition, 2013, marg. No. 2/82.

⁵⁵ Sections 76a and 100 Austrian Jurisdiction Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 117.

⁵⁶ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 119.

summons⁵⁷. Various means of defence are at the respondent's disposal: The respondent wishing to uphold the marriage may request the dismissal of the suit, because he or she contests the ground for divorce, or it may raise objections against the suit, e.g. that the other party has forgiven the respondent or that the suit is time-barred⁵⁸. Further, the respondent might argue that the divorce is morally unjustifiable, because e.g. the respondent's misconduct was caused by the claimant's prior culpable behaviour⁵⁹. As a second option the respondent may request the determination of the applicant's contributory or sole fault concerning the ground for divorce. Further, the respondent may submit a counter-claim, if it wishes to obtain the divorce, but is of the view that the applicant has caused the breakdown of the marriage. The judge will then decide upon the claim and the counter-claim in a single judgement.

iii.) The taking of evidence and options during ongoing divorce proceedings

If no settlement can be reached during the preparatory hearing, the judge – after having decided on possible procedural objections and discussed the case with the parties in terms of the underlying facts and the applicable law – announces the further programme. If appropriate, the judge can immediately start taking evidence. After having opened the evidentiary proceeding new facts and evidence can only be submitted, if they were not available at an earlier point in time and the judge is convinced that the party is not trying to delay the proceedings with its submission⁶⁰.

The Austrian Code of Civil Procedure provides five types of evidentiary means, namely documents, witnesses, experts, judicial inspections and testimony of the parties⁶¹. In general, documents, such as letters, photos or hotel bills have the strongest conclusiveness. The burden of

⁵⁷ Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 121.

⁵⁸ See section 56 Austrian Marriage Act.

⁵⁹ Section 49 last sentence Austrian Marriage Act.

⁶⁰ Section 178 para. 2 Austrian Code of Civil Procedure.

⁶¹ Roth, *Zivilprozessrecht*, 2012, p. 46 *et seq.*

proof lies with the claimant, who wants to convince the judge of the ground for divorce. If the respondent contests the ground for divorce, it has to offer evidence for its submission. The duration of the proceedings largely depends on the quantity of evidentiary means the parties wish to present. In almost three-quarters of all cases the duration of the proceedings is less than three months⁶². The judge evaluates the presented evidence and assesses whether an allegation is true or not. The required standard of proof is utmost probability, which approximates certainty. As soon as all evidence has been taken, the judge closes the oral hearing. The judgement can either be pronounced orally or delivered in writing. Due to the fact that a divorce constitutes a highly sensitive family matter, the parties may apply for a shortened judgement, which does not contain any reasons for the decision⁶³.

If the spouses wish to reconsider the divorce during ongoing divorce proceedings, they may suspend it by mutual agreement for a minimum duration of three months⁶⁴. Within these three months neither the parties nor the judge can take any actions with regard to the suspended proceedings. If reconciliation could not be reached, each party may request the continuation of the proceedings after the expiration of the three months⁶⁵. Further, during contentious divorce proceedings the spouses may file a joint request for divorce by consent with the same court⁶⁶. This results in the suspension of the contentious proceedings. If the spouses are divorced on the ground of mutual consent, the divorce suit is considered to be withdrawn. If, on the other hand, the spouses withdraw their joint request for divorce by consent or the court dismisses the request the suspended proceedings are only resumed, if one spouse requests so⁶⁷.

⁶² Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/ (last accessed 6 October 2014).

⁶³ Section 460 No. 8a Austrian Code of Civil Procedure.

⁶⁴ Section 168 Austrian Code of Civil Procedure; Roth, *Zivilprozessrecht*, 2012, p. 78.

⁶⁵ Section 168 Austrian Code of Civil Procedure.

⁶⁶ Sections 114a para. 3 Austrian Jurisdiction Act, 460 No. 10 Austrian Code of Civil Procedure.

⁶⁷ Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2nd edition, 1990, marg. No. 2364; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 145.

iv.) Legal costs and review proceedings

The judgement will also contain a decision on the question of who bears the incurred costs⁶⁸. Generally, the legal costs comprise court's and attorney's fees as well as cash expenditures, e.g. travel and accommodation costs of the witnesses. The court's and attorney's fees are dependent upon the amount in dispute. A divorce suit is currently valued with EUR 4.360,-- and the claimant is required to pay a flat fee of EUR 297,-- for the proceedings at first instance⁶⁹. Also pre-procedural costs (*vorprozessuale Kosten*) might be reimbursed. According to case law such pre-procedural costs might include costs for a detective, if they had become necessary to prove the misconduct of one spouse.

The basic rule of cost and fee allocation sets forth that the loser has to pay all fees and costs of the parties as long as these costs were reasonable and necessary. In divorce proceedings the costs must be borne according to the fault of one or both spouses that has been determined in the judgement. If solely the respondent was responsible for the divorce, it has to pay all the costs. The judge may also come to the conclusion that both spouses were equally responsible or it may grant the divorce without deciding upon one's fault. In this case every party has to bear its own costs⁷⁰. If the divorce is granted under section 55 Austrian Civil Code (divorce on the ground of irretrievable breakdown), the person who has caused the irretrievable breakdown has to reimburse the other party all its costs⁷¹.

Each party has the possibility to appeal against the divorce decree⁷². In general, review proceedings in divorce matters can be initiated regardless of the amount in dispute. It should be noted that the parties are not allowed to

⁶⁸ For a general overview of legal costs in Austria see Roth, *Litigation in Austria. Are Costs and Fees Worth It?*, in: Reisman (ed.), *Cost and Fee Allocation in Civil Procedure – A Comparative Study*, 2012, p. 69 *et seq.*

⁶⁹ Section 16 para. 2 Court Fees Act (*Gerichtsgebührengesetz*); section 10 para. 4a Attorneys' Tariff Act (*Rechtsanwaltstarifgesetz*).

⁷⁰ Section 45a para. 1 Austrian Code of Civil Procedure.

⁷¹ Section 45a para. 2 Austrian Code of Civil Procedure.

⁷² Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 135a.

submit new claims, defences, facts or evidence due to the *Neuerungsverbot* (prohibition of putting forward new material in review proceedings). Reasons for appeal are formal (e.g. procedural errors such as the violation of the right to be heard) as well as substantive defects (e.g. incorrect application of the law) concerning the proceedings at first instance. The submission of an appeal necessarily requires the representation by a lawyer, who has to file the appeal at the district court within four weeks after the delivery of the written divorce decree⁷³. The appeal suspends the validity as well as the enforceability of the judgement. The appellate court, which is in divorce matters, the regional court, may affirm, modify or set aside the decision. Against the judgement of the regional court a revision (second appeal) can be filed with the Austrian Supreme Court, if the legal issue is of significant importance. Until the judgement gains legal force, the claimant may withdraw the divorce suit, hence, this is also possible during review proceedings⁷⁴. If one of the spouses dies during the divorce proceedings, the proceedings are declared terminated⁷⁵. The decision becomes legally binding after four weeks of the written delivery of the judgement to both ex-spouses, if they did not waive their right to appeal earlier⁷⁶.

3.) Non-contentious divorce proceedings

Divorce by consent is heard in non-contentious proceedings under sections 93-96 Austrian Non-contentious Proceedings Act. Spouses seeking divorce by consent must file a joint request for divorce (*gemeinsamer Scheidungsantrag*) under section 55a para. 1 Austrian Marriage Act. If one spouse does not agree with the request, it has to be dismissed. Generally, the procedure is determined by the principle of unanimity: If one spouse fails to act – e.g. he or she fails to appear at the hearing – the request is considered to be withdrawn⁷⁷. Similarly to the divorce suit in contentious proceedings,

⁷³ Roth, *Zivilprozessrecht*, 2012, p. 11.

⁷⁴ Section 483a para. 1 Austrian Code of Civil Procedure.

⁷⁵ Section 460 No. 8 Austrian Code of Civil Procedure; Roth, *Zivilprozessrecht*, 2012, p. 94.

⁷⁶ Deixler-Hübner/Nademleinsky, *Scheidung kompakt*, 4th edition, 2013, p. 48.

⁷⁷ Cf. Deixler-Hübner, in: Rechberger (ed.), *Kommentar zum Außerstreitgesetz*, 2nd edition, 2012, section 94 Austrian Non-Contentious Proceedings Act, marg. No. 2.

the request must be accompanied by a marriage certificate, proof of citizenship, certificate of registration and the birth certificate of children born during the marriage⁷⁸. For the divorce based on consent the parties have to pay a total amount of EUR 558,-- comprising EUR 279,-- for the proceedings at first instance and EUR 279,-- for the agreement on the consequences of the divorce⁷⁹.

As has been already mentioned above, legal representation is neither required in contentious nor in non-contentious proceedings. Additionally, it should be noted that a double representation of both parties by the same lawyer in non-contentious proceedings is no longer permissible. In contrast, this issue will not arise in contentious proceedings, which are by their nature adversarial⁸⁰. Also in non-contentious proceedings the judge has to inform an unrepresented party about the consequences of the divorce and has to refer the party to respective counselling centres⁸¹. If the party is given the possibility to obtain advice, the next hearing should be scheduled within 6 weeks⁸².

In order to validly request a divorce by mutual consent, the matrimonial partnership must have been dissolved for at least six months⁸³. Further, the spouses must reach a written agreement with regard to the consequences of the divorce covering the following matters: the principal place of residence or custody of the children⁸⁴; contact with the children (visiting times, etc.)⁸⁵:

⁷⁸ Cf. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 140.

⁷⁹ Tariff Item 12a Court Fees Act.

⁸⁰ Fucik/Kloiber, *Außerstreitgesetz*, 2005, section 93 Austrian Non-Contentious Proceedings Act, marg. No. 2.

⁸¹ Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 55a Austrian Marriage Act, marg. No. 27.

⁸² Deixler-Hübner, in: Rechberger (ed.), *Kommentar zum Außerstreitgesetz*, 2nd edition, 2012, section 95 Austrian Non-Contentious Proceedings Act, marg. No. 4.

⁸³ Stabentheiner, in: Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd edition, 2002, section 55a Austrian Marriage Act, marg. No. 1.

⁸⁴ See section 179 General Austrian Civil Code; Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Parental Responsibilities*, vol. III, 2005, see in particular p. 275 *et seq.*, p. 299 *et seq.*, p. 501 *et seq.*, Austrian National

maintenance of the children⁸⁶; settling of matrimonial property⁸⁷, which will include the necessary arrangements in the event that one spouse works in gainful employment of the other⁸⁸; division of the matrimonial property (dwellings, cars, etc.) and savings⁸⁹ and maintenance of a spouse⁹⁰. The listed matters must be covered, unless a final court order already exists concerning one issue or another (e.g. custody)⁹¹. The agreement on the consequences of the divorce constitutes a legal act and is therefore subject to the rules of contract law⁹². Before the parties conclude the agreement on the consequences of the divorce, they have to certify that they have taken prior advice from a qualified person in terms of the children's specific needs

Report available at <http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf> (last accessed 14 November 2014).

⁸⁵ Section 186 General Austrian Civil Code.

⁸⁶ Section 231 General Austrian Civil Code.

⁸⁷ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Property Relations Between Spouses*, vol. IV, 2009, see in particular p. 495 *et seq.*, p. 981 *et seq.*, Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Property.pdf> (last accessed 14 November 2014); Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138.

⁸⁸ See section 98 General Austrian Civil Code. Some authors are of the opinion that agreements on compensation under section 98 General Austrian Civil Code do not fall under section 55a para. 2 Austrian Marriage Act; Weitzenböck, in: Schwimann/Kodek (eds.), *ABGB Praxiskommentar*, vol. I, 4th edition, 2011, section 55a Austrian Marriage Act, marg. No. 17; Stabentheiner, in: Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, 3rd edition, 2002, section 55a Austrian Marriage Act, marg. No. 14. In contrast Aicher, *Ehescheidung und Scheidungsfolgen*, in: Floretta (ed.), *Das neue Ehe- und Kindschaftsrecht*, 1979, p. 113; Mänhardt, *Die Scheidung im Einvernehmen*, in: Ostheim (ed.), *Schwerpunkte der Familienrechtsreform 1977/1978*, 1979, p. 133.

⁸⁹ Section 81 *et seq.* Austrian Marriage Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138.

⁹⁰ Roth, in: Boele-Woelki/Braat/Curry-Sumner (eds.), *European Family Law in Action, Maintenance Between Former Spouses*, vol. II, 2003, chapter C., Austrian National Report available at <http://ceflonline.net/wp-content/uploads/Austria-Divorce.pdf> (last accessed 14 November 2014).

⁹¹ Section 55a para. 3 Austrian Marriage Act.

⁹² Koziol/Welser, *Grundriss des Bürgerlichen Rechts*, vol. I, 13th edition, 2006, p. 516 *et seq.*

resulting from the divorce⁹³. Hence, they are obliged to consult child psychologists, child psychiatrists or family counselling centres to obtain respective information⁹⁴. Parties in non-contentious proceedings are only the spouses⁹⁵. Oral hearings are prescribed by law, in practice, however, these hearings are limited to examining the parties and recording their agreement. If the parties do not submit an agreement on the consequences of the divorce, the judge has to instruct them to conclude one. As long as the parties have not reached an agreement, they may not waive their right to withdraw the request or their right to appeal. As in contentious proceedings, the judge may suggest mediation in non-contentious proceedings. However, mediation cannot be court-ordered, since it is based on the principle of voluntariness.

It is not possible to convert divorce proceedings on the ground of mutual consent into proceedings based on other grounds⁹⁶. In non-contentious proceedings the court decides by way of order (*Beschluss*), which has to be reasoned⁹⁷. The parties may apply for a decision, which does not contain any reasons as to the divorce. The parties can appeal against the decision of the district court with a so-called *Rekurs* within 14 days⁹⁸. Against the decision of the regional court a party can file a *Revisionsrekurs*, which is the second and last possibility of an appeal. Until the decision enters into effect, a party may withdraw its request. After the party waived its right to appeal, it may no longer withdraw the request⁹⁹. The marriage is dissolved when the decision becomes final. Generally, the parties equally bear the legal costs resulting from the divorce proceedings. If, however, one party has undertaken a greater procedural effort, then the costs will be borne proportionally.

⁹³ Section 95 para. 1a Austrian Non-Contentious Proceedings Act.

⁹⁴ Neumayr, *Außerstreitverfahren*, 2014, p. 69.

⁹⁵ Section 93 para. 2 Austrian Non-Contentious Proceedings Act.

⁹⁶ Section 42 paras. 1 and 4 Austrian Jurisdiction Act.

⁹⁷ Deixler-Hübner, in: Rechberger (ed.), *Kommentar zum Außerstreitgesetz*, 2nd edition, 2012, section 96 Austrian Non-Contentious Proceedings Act, marg. No. 3.

⁹⁸ Mayr/Fucik, *Verfahren außer Streitsachen*, 2013, marg. No. 242,270.

⁹⁹ Judgement of the Austrian Supreme Court 12.12.2002, 6 Ob 259/02k.

4.) Mediation – creating a win-win situation for both spouses

Although a marriage can only be dissolved by judicial decision, mediation – understood as a complementary assistance during the separation phase to reach an agreement on some consequences of the divorce – is gaining importance in Austria¹⁰⁰. Mediation being a voluntary and out-of-court process can support the parties in finding an acceptable solution for both and to maintain a proper basis for further discussion, which is of particular essence, if children are involved. As already mentioned above, spouses are not obliged to turn to alternative dispute resolution, rather the judge may invite them to do so.

Mediation is governed by the Federal Law on Mediation in Civil Matters (Austrian Mediation Act), which entered into force on 1 May 2004. In mediation a professionally trained neutral third person (mediator) encourages communication between the parties with the aim of enabling the parties themselves to reach a solution¹⁰¹. It is therefore not the task of the mediator to offer advice or to propose a solution, rather the mediator has to facilitate the communication between the parties. However, the mediator is allowed to offer non-binding advice, if this seems to be appropriate in the case at hand. The hourly rate for family mediation is EUR 182,--, depending on the income of the parties and the number of joint children, the whole amount or a certain percentage will be covered by the state. The Federal Minister of Justice maintains a list of mediators, which is electronically available¹⁰². Negotiations with a mediator, who is registered in the list, suspend the statute of limitations and other deadlines. In cross-border cases the law implementing the EU Directive, namely the Austrian EU-Mediation-Act (*EU-Mediations-Gesetz*) applies¹⁰³.

¹⁰⁰ Cf. Hinteregger, *Familienrecht*, 6th edition, 2013, p. 102; for a general overview of mediation in Austria see Roth/Stegner, *Mediation in Austria*, in: Roth/Geistlinger (eds.), *Yearbook on International Arbitration*, vol. III, 2013, p. 367 *et seq.*

¹⁰¹ Section 1 Austrian Mediation Act.

¹⁰² Bundesministerium für Justiz, <http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/docs/home> (last accessed 6 October 2014).

¹⁰³ Section 1 para. 1 Austrian EU-Mediation-Act.

If the parties reach a solution in the mediation, the settlement does not automatically constitute an enforceable title. The settlement – which is qualified as a civil law contract under Austrian law – has to be recorded in the form of a notarial deed or a court settlement to be enforceable¹⁰⁴. Mediation constitutes a highly efficient problem-solving model, because it allows to discuss the needs and wishes of both spouses and to find a solution which suits them best.

IV. Dissolution of registered partnerships

The Austrian Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), which entered into force in 2010, enables same-sex couples to register their partnership at the competent district authority¹⁰⁵. Although the institution of marriage is still exclusively available for heterosexual couples, the registered partnership comes close to a marriage and establishes a long-term relationship with mutual rights and obligations similar to a marriage¹⁰⁶. Moreover, the Austrian Registered Partnership Act was drafted along the lines of the Austrian Marriage Act. Thus, it comes as no surprise that the grounds for dissolving a registered partnership as set forth in the Austrian Registered Partnership Act are identical to the grounds for divorce as provided for in the Austrian Marriage Act¹⁰⁷. Further, section 43 para. 1 No. 2 and 25 Austrian Registered Partnership Act stipulates that the rules governing the divorce proceedings of heterosexual couples shall apply to the dissolution of registered partnerships respectively. Accordingly, the dissolution of registered partnerships falls in the jurisdiction of district courts and will either be heard in contentious or non-contentious proceedings

¹⁰⁴ Section 3 Austrian Notaries Act; section 433a Austrian Code of Civil Procedure.

¹⁰⁵ Curry-Summer, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in: Boele-Woelki/Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd edition, 2012, p. 77.

¹⁰⁶ Sections 7 *et seq.* Austrian Registered Partnership Act.

¹⁰⁷ Faffelberger, *Familienrecht*, 2010, p. 30 *et seq.*; Hinteregger, *Familienrecht*, 6th edition, 2013, p. 150; Gitschthaler, in: Gitschthaler/Höllwerth (eds.), *Ehe- und Partnerschaftsrecht*, section 15 Austrian Registered Partnership Act, 2011, marg. No. 1 *et seq.*

depending upon the ground the request for dissolution is based on¹⁰⁸. Until 2013, 1.892 same-sex couples have been registered, 77 out of them were dissolved again by the courts¹⁰⁹.

V. Recognition and enforcement of foreign divorce decrees

The Brussels IIa Regulation¹¹⁰ sets *inter alia* forth the rules for the recognition and enforcement of judgements in matrimonial matters including divorce decrees within the member states of the European Union¹¹¹. It prescribes an automatic recognition of all judgements issued in one member state without any intermediary procedure being required¹¹². However, the scope of application of the regulation is restricted to ‘positive decisions’; judgements refusing a request must not be recognized¹¹³. Besides, the recognition of a judgement may be denied, if a ground for refusal exists pursuant to Art 22 Brussels IIa Regulation¹¹⁴.

¹⁰⁸ For further information reference can thus be made to the explanations above under section III.

¹⁰⁹ Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/gleichgeschlechtliche_partnerschaften_eintragung_und_aufloesung/partnerschaftsbegrue ndungen/index.html; http://www.statistik.at/web_de/statistiken/bevoelkerung/gleichgeschlechtliche_partnerschaften_eintragung_und_aufloesung/partnerschaftsaufloe sungen/index.html (last accessed 11 October 2014).

¹¹⁰ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

¹¹¹ Roth, *Zivilprozessrecht*, 2012, p. 162 *et seq.*

¹¹² Art 21 para. 1 Brussels IIa Regulation; Roth, *Zivilprozessrecht*, 2012, p. 167; Mayr, *Europäisches Zivilprozessrecht*, 2011, marg. No. IV/56.

¹¹³ Mayr, *Europäisches Zivilprozessrecht*, 2011, marg. No. IV/56; Nademleinsky/Neumayr, *Internationales Familienrecht*, 2007, marg. No. 05.55.

¹¹⁴ These grounds are: Recognition is manifestly contrary to the public policy of the Member State in which recognition is sought; Respondent was not served with the document that instituted the proceedings in sufficient time to arrange for his or her defense unless it is determined that the respondent has accepted the judgement unequivocally; Recognition is irreconcilable with a judgement given in proceedings between the same parties in the Member State in which recognition is sought; or it is irreconcilable with an earlier judgement given in another Member State or in a non-

The recognition of foreign decisions rendered outside the European Union is primarily governed by international treaties according to section 100 Austrian Non-contentious Proceedings Act. In absence of such international treaties sections 97-99 Austrian Non-contentious Proceedings Act regulate the recognition of foreign decisions¹¹⁵. Foreign divorce decrees are automatically recognized, if they are legally binding and no ground for refusal exists¹¹⁶. If, however, the petitioner shows sufficient legal interest in having an explicit decision recognizing the divorce decree, separate proceedings are held¹¹⁷. Further, it should be noted that the refusal grounds contained in the Brussels IIa Regulation and the Austrian Non-contentious Proceedings Act are similarly drafted. Both stipulate for instance that the recognition of a foreign divorce decree may be denied, if it violates the Austrian public policy and is therefore contrary to the fundamental principles of the Austrian legal system¹¹⁸. The Austrian Supreme Court has ruled that the repudiation of a wife pursuant to Islamic law (*talaq*) violates the national public order¹¹⁹.

VI. Conclusion

Divorce is certainly a complex process. Besides managing daily routine, facing psychological and financial challenges, the involved persons have to deal with awkward legal issues. Nonetheless, around 1.330 requests

Member State between the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

¹¹⁵ Neumayr, *Außerstreitverfahren*, 2014, p. 69.

¹¹⁶ Section 97 para. 1 Austrian Non-contentious Proceedings Act; Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138. These grounds comprise: violation of the Austrian public order; the right to be heard was not granted to one of the spouses; incompatibility with a decision rendered in Austria or a previously rendered decision which fulfils the conditions for recognition in Austria; the authority was not competent to issue a decision according to Austrian law.

¹¹⁷ Section 98 Austrian Non-contentious Proceedings Act.

¹¹⁸ Nademleinsky/Neumayr, *Internationales Familienrecht*, 2007, marg. No. 05.75.

¹¹⁹ Prevailing case law, e.g. Judgement of the Austrian Supreme Court of 31.08.2006, 6 Ob189/06x.

for divorce are filed at Austrian district courts monthly. However, 75 per cent of the initiated proceedings take less than three months¹²⁰. This fortunate finding is due to the fact that around 87 per cent of the divorce petitions are based on consent and settled in non-contentious proceedings¹²¹, which generally are simpler, faster and cheaper than the form-stricter contentious proceedings¹²².

Spouses seeking divorce by consent are not opponents, but petitioners pursuing the same aim. Correspondingly non-contentious proceedings are commenced upon a joint request by both spouses. In such proceedings there is no room for accusations, they rather create an atmosphere for open, problem-oriented talks. Having this in mind non-contentious divorce proceedings are clearly less unsettling for the parties than contentious proceedings, which are initiated by one spouse against the other.

In order to obtain a divorce by consent, spouses are required to reach an agreement not only concerning the divorce as such, but also concerning the consequences of the divorce. This leaves a considerable leeway to the parties to organise their financial and child related matters following the divorce according to their needs. A jointly negotiated agreement is definitely more satisfactory for the parties than an authoritative decision by a judge and will therefore enjoy a greater level of acceptance.

All in all, the prevailing legal situation in Austria suggests that spouses seeking divorce turn to non-contentious proceedings. In this way they may mitigate possible damages, be they of financial or personal nature, and maintain a relationship of appreciation and respect.

¹²⁰ Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/ (last accessed 6 October 2014).

¹²¹ Statistik Austria, http://www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/ (last accessed 6 October 2014).

¹²² Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft*, 11th edition, 2013, marg. No. 138.