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COHABITATION

COHABITATION IN ITALY
THE NEW LAW 76/2016

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QUESTIONS

A. Regulation of financial affairs during cohabitation – cohabitation agreements and their enforceability

1. Do cohabitation agreements exist in your jurisdiction? If so, what form do they take? What do they cover?
2. What is their legal status? Can they be enforced?

B. Financial impact of ending the relationship - division of property and maintenance for any children

Capital

3. Do cohabitants have any capital claims against one another as a result of their relationship in your jurisdiction? If so, what provision can be made by the courts and what does the court take into account?
4. Do cohabitants have any claims in respect of their interest in or contributions towards property in your jurisdiction? If so, what is the court's approach?

Income

5. Do cohabitants have any income claims against one another as a result of their relationship in your jurisdiction? If so, what provision can be made by the courts and what does the court take into account?
6. Is the parent with care of the child able to apply for financial support on behalf of the child? If so, how is that sum calculated?

C. Practical implications of ending the relationship – does a cohabitee have the right to remain in the home

7. What rights does a cohabitant with no legal interest in a property have to remain in that property after the breakdown of the relationship?

D. Other practical implications of ending the relationship - issues surrounding parental responsibility and arrangements for children

8. If the couple have children but are not married to one another, what is the legal position of the father in respect of important decisions relating to the child?
9. If the couple have children, how are matters relating to their care resolved?

PRESENTATION SUMMARY

1. INTRODUCTION:

LAW No. 219 OF 10 DECEMBER, 2012 ON THE OFFICIAL RECOGNITION OF CHILDREN BORN OUTSIDE OF MARRIAGE TO LEGITIMATE CHILDREN

2. THE END OF THE COHABITATION WITH CHILDREN:

RIGHTS AND DUTIES OF THE FORMERLY COHABITANTING PARENTS.

3. THE INNOVATIVE LAW No. 76 OF 2016:

THE REGULATION OF THE COHABITING - HETEROSEXUAL OR HOMOSEXUAL - PARTNERS WITHOUT CHILDREN

A. MUTUAL RIGHTS AND DUTIES OF THE DE FACTO COHABITANTS

B. FINANCIAL IMPACT FOR THE PARTNERS OF ENDING THE RELATIONSHIP

- **THE ALIMONY**
- **THE PARTICIPATION IN THE FAMILY BUSINESS**
- **THE DOMESTIC PARTNERSHIP AGREEMENT**
- **THE COHABITANTS' COMMUNITY OF PROPERTY REGIME**

1. INTRODUCTION: THE LAW ON THE OFFICIAL RECOGNITION OF CHILDREN BORN OUTSIDE OF MARRIAGE TO LEGITIMATE CHILDREN

QUESTION n. 8 If the couple have children but are not married to one another, what is the legal position of the father in respect of important decisions relating to the child?

Law No. 219 of 10 December 2012 has equated the position of children born inside and outside of marriage in every respect.

Article 337 bis through Article 337 octies of the Civil Code nowadays regulate, in the same manner, the rights and duties of the parents regardless of the birth of children inside or outside of marriage.

Therefore, the regime of custody of children, the child's staying period with each of his/her parents, the duty of maintenance of children, the use of the family home are regulated in an identical manner.

The only difference regards the form of action in court.

The separation and the divorce are, in fact, governed by an autonomous form of court action, whereas the termination of the cohabitation with children is regulated through chamber proceedings.

Today, both matters are under the jurisdiction of the ordinary courts and no longer under the Juvenile Court, once responsible for regulating the termination of the de facto cohabiting couples

with children. This guarantees, also on the merits, similarly taken measures intended to protect the children.

2. THE END OF THE COHABITATION WITH CHILDREN: RIGHTS AND DUTIES OF THE FORMERLY COHABITING PARENTS

QUESTION n. 9 *If the couple have children, how are matters relating to their care resolved?*

When the cohabitation of an unmarried couple with children terminates, the following shall be determined (pursuant to the agreement between the parties or to the court's ruling):

1. the regime of custody of children; the ordinary regime is, as mentioned above, that of joint custody under which all decisions and, in particular, the decisions of greater importance relating, for example, to school, health, religious education, transfer of residence etc. are taken jointly by the parents.
2. The child's staying period with each of his/her parents: depending on the age of the child, the Court establishes that the non-cohabiting parent may keep the child with him/her from a minimum of 6 to a maximum of 14 days / nights per month.

QUESTION n. 6: *Is the parent with care of the child able to apply for financial support on behalf of the child? If so, how is that sum calculated?*

3. The Parties or the Court, in the absence of an agreement, shall also decide on the amount of the economic contribution the non permanently cohabiting parent shall pay for his/her children's maintenance:
4. Such contribution shall be established proportionally to the income and assets of the parents, to the ownership of the family home as well as to any mortgage or rent payment due by one or both of the former partners.

QUESTION n. 7: *What rights does a cohabitant with no legal interest in a property have to remain in that property after the breakdown of the relationship?*

5. The parent predominantly cohabiting with the children shall be assigned the use of the family home, regardless of the ownership thereof. The family home shall remain at the disposal of the children also after their reaching the age of majority and until they become economically autonomous.
6. Should the parent cohabiting with the children (re)marry or engage into another cohabitation, he/she shall lose the dwelling right in the family home.

3. THE INNOVATIVE LAW No. 76 OF 2016: THE REGULATION OF THE COHABITING - HETEROSEXUAL OR HOMOSEXUAL - PARTNERS WITHOUT CHILDREN

The great news in Italy is of the past few months.

By enforcing Law No. 76 of 2016, the Parliament not only legally recognised the civil partnerships between persons of the same sex, but it also regulated the rights and duties of the cohabitants **both homosexual and heterosexual**.

Therefore, paragraphs 36 and following of Law No. 76 represent an **important innovation** that, given the great number of the so-called de facto couples in Italy as well, should be addressed considering its concrete influence on their daily lives.

In the first place, paragraph 36 of the Law defines the legal institution stating that: “**de facto partners**” means “**two persons that are major of age**” - heterosexual or homosexual - “**durably united by emotional ties as a couple and by a mutual moral and material support, not bound by blood, affinity, or adoption, by marriage or by a civil partnership**”.

Hence, the first observation is that the cohabitation is legally relevant only if put in place by two people enjoying the marital status of single. According to the wording of the law **the cohabitation should not, therefore, have any legal consequences when - or for the period in which - one or both cohabitants are separated and waiting for the divorce.**

As regards the determination of the cohabitation’s durability, the law says that: “... **reference to the vital records statement shall be made ...**”

In essence, the de facto cohabitation is established by a statement made **by each of the two partners before the registrar of the Vital Records’ Office in the place where the couple resides.**

Is it necessary that the de facto couple be registered with the vital records as mentioned above in order for the cohabitants to benefit from the rights that the law grants them? I think not. The durability of the cohabitation may be proved in Court with other documentary evidence as well, considering that the aforesaid statement **is deemed to be only a privileged source of evidence; it is by no means a constitutive declaration as in the case of the civil partnership.**

A. MUTUAL RIGHTS AND DUTIES OF THE DE FACTO COHABITANTS

The Law establishes a number of matters that have already been decided upon pursuant to the case law, including, for example:

- The de facto cohabiting partners have the same rights of the spouse in the situations provided for by the penitentiary rules.
- The cohabiting partners, as is the case for the relatives, are entitled to compensation for damages that arise from the unlawful acts of third parties which caused the death of one of the Parties of the domestic partnership agreement
- The cohabiting partners are entitled to succeed in the lease agreement in the event of death or termination of the cohabitation
- The cohabiting partners are entitled to succeed in the rankings for the allocation of housing units in the event that the belonging to a household is deemed a title or cause of preference in the rankings thereof
- In case of illness or hospitalization, the de facto cohabiting partners are entitled to mutual visits, assistance and access to personal information, according to the organisational rules of the hospital, the public or private health care service or facility structure, as provided for the spouses and the family members.
- Each de facto cohabiting partner may appoint the other as his representative with full or limited powers:

a) in case of illness involving mental incapacity, for decisions on matters regarding health;

b) in case of death, with regard to organ donation, the methods of treatment of the body and funeral celebrations.

With regard to this latest provision, it is herein stressed that the powers given to the cohabiting partner are not legally recognised to the spouse.

B. FINANCIAL IMPACT FOR THE PARTNERS OF ENDING THE RELATIONSHIP

- ALIMONY

QUESTION n. 5: Do cohabitants have any income claims against one another as a result of their relationship in your jurisdiction? If so, what provision can be made by the courts and what does the court take into account?

In addition to these rights that are not “innovative”, so to speak, but have only been given legal effect, **there are also entirely innovative rights that bear a significant social economic impact.**

In fact, Law No. 76 establishes, for the first time, that the termination of the cohabitation may give **a right to alimony** to the economically weaker partner.

Precisely, paragraph 65 of the Law provides that: **“In case of termination of the de facto cohabitation, the Judge shall establish that the cohabitant be entitled to receive from the other partner the alimony, should the former be in need and not able to provide for himself/herself.”**

The duration of this obligation shall be **“for a period proportional to the duration of their cohabitation.”**

The amount due shall be determined by the Civil Court by taking into consideration the state of need of the applicant and the economic capacity of the party called to provide for the alimony - Article 438 of the Civil Code.

The alimony differs from maintenance, prescribed, for example, for the separated or divorced spouse because it is not intended to keep the same standard of living enjoyed during the marriage but, as provided by Article 438 of the Civil Code: **“It shall not exceed the elementary needs for the life of the partner benefiting from the alimony** (board, lodging and medical care) **however, considering of the partner’s social status.”**

Paragraph 65 also provides that **“In determining the ranking of the obliged parties under Article 433 of the Civil Code, the alimony obligation of the partner referred to in this paragraph shall be fulfilled with priority over the brothers and the sisters”.**

Therefore, with regard to alimony, the priority over the former partners as required by Article 433 of the Civil Code stands with: the children, including those adopted, and, in absence thereof, with the direct descendants, the parents and, in absence thereof, with the direct ascendants, the adopters; **Hence, the partner is obliged to provide for alimony, unless their children or the partner’s children or the former partner’s parents have done so, however, with priority over the former partner’s brothers/sisters.**

In conclusion, I underline that anyone, whose marital status is single, having or having had, prior to the enactment of Law No. 76 of 2016, a de facto cohabitation characterised **“...by couple emotional ties and by a mutual moral and material assistance”** may find itself in a position to demand alimony or to have to provide alimony for his/her former partner **for a time period proportional to their cohabitation period.**

QUESTION n. 3: Do cohabitants have any capital claims against one another as a result of their relationship in your jurisdiction? If so, what provision can be made by the courts and what does the court take into account?

Apart from the right to alimony as mentioned above, **no other** right of an economic nature is provided for by this law in favour of the cohabitants.

- **PARTICIPATION IN THE FAMILY BUSINESS**

Only in case one of the partners provides his/her work in the other partner's enterprise, the Law's paragraph 46 shall apply, thus integrating the provision of Article 230 bis of the Civil Code, which rules in favour of the spouses **"The de facto cohabiting partner who permanently provides his/her work for the other partner's business shall be entitled to a share in the profits of the family business and to the assets purchased with the profits as well as to the increases in the business, including the start-up, in proportion to the work provided. The right to participation shall not apply if the cohabiting partners have a business or employment relationship."**

QUESTION n. 4: Do cohabitants have any claims in respect of their interest in or contributions towards property in your jurisdiction? If so, what is the court's approach?

Obviously, if one of the partners, for instance, paid with his/her own money the restructuring works for the family house owned by the other partner, if he/she bought the furniture to decorate it, if he/she worked with or for the other partner, he/she shall have all the rights established by the Civil Code related to the relevant civil law provisions applicable regardless of the emotional ties between the parties.

QUESTION: Does a cohabitee - in a relationship without children- have the right to remain in the home

If the cohabitants have not had children at the end of their relationship, the partner who is not the owner of the family home has no right to obtain the use or to receive a portion of the property, unless, of course, he/she has contributed to the purchase thereof.

But there is another element of significant innovation laid down in paragraph 42 of Law No. 76 of 2016 on civil and domestic partnerships.

Such provision states that: **"...in the case of death of the partner owning the family home of residence, the survivor partner has the right to continue living in the same for two years or for a period of time equal to the cohabitation period, however, for at most five years."**

It is a kind of "*uxorio usufruct*" already provided for by the Italian legislation in favour of the spouse, who, in his/her capacity as surviving partner is entitled to remain in the family home for all his/her life span.

Obviously, such provision, should the deceased partner have legitimate heirs (children or parents), creates a limitation to the right of the heirs who shall not freely dispose of their inherited house or of the furniture therein for the entire period of time the dwelling right of the surviving partner applies.

However, in paragraph 43, the Law provides that: **"The right referred to in paragraph 42 shall not apply in case the surviving partner ceases to live permanently in the family home or in case of marriage, civil partnership or of a new de facto cohabitation."**

QUESTION 1: Do cohabitation agreements exist in your jurisdiction? If so, what form do they take?

- **THE DOMESTIC PARTNERSHIP AGREEMENT**

Unlike the provisions regarding the spouses, who have not the possibility to stipulate marriage agreements, the cohabitants, in accordance with paragraph 50 and following may regulate: **“the property regime relating to their life together by signing of a domestic partnership agreement.”**

According to paragraph 51: **“The agreement referred to in paragraph 50, its amendments and its resolution shall be drawn up in writing, under penalty of nullity, by public deed or private deed with the signature notarized or authenticated by a lawyer intended to certify the compliance with the mandatory rules and the public order.”**

Paragraph 53 provides that: **“The agreement referred to in paragraph 50 bears the indication of the address provided by each party to which the notices relating to the agreement thereof shall be served.”**

The agreement may contain:

a) the indication of the residence place (joint);

b) the modalities of contribution to the needs of the common life, in relation to each partner’s possibilities and to the professional or home working capacity;

c) the community property regime referred to in Section III, Chapter VI, Title VI of the first book of the Civil Code.

Therefore, it shall be emphasized that the current cohabitation regime **offers the possibility to regulate the business and financial relations between the cohabitants that are broader and more flexible than those regarding marriage**. However, it shall be underlined that the cohabitation does not give rise to inheritance rights nor to social security rights given to the spouse and to the “the civilly united” partner.

Our Constitutional Court, which verifies the laws’ compliance with the Constitution, expressed its consideration, prior to the enactment of Law No. 76 of 2016, on the constitutionality of the difference between the family founded on marriage and the cohabitation, by pronouncing Judgement no. 140 of 2009-¹: **“By keeping distinct the two forms of common life between man and woman** (nowadays, even homosexuals may enter into a Civil Partnership with rights and obligations comparable to those arising from marriage, excluding the duty of faithfulness or of cohabiting without formalizing their relationship) **it becomes possible to recognize each one’s specific dignity, to regard the cohabitation no longer as a lower form of marital relationship, rejected or barely tolerated; furthermore, no improper run-up to the discipline of marriage is, thus, being grafted by those who have chosen to freely cohabit. Above all, the foundations for the legal consideration of the personal and property relations within the couple in the two different situations are being laid down. Such consideration, without prejudice to the duties and rights regarding their children and third parties, takes into account and, therefore, respects the growing significance the individual subjectivity of each partner has within the cohabitation regime and vice versa gives, inside the marriage, a greater emphasis to the objective needs of the family as such, deemed as a stable supra-individual institution.”**

QUESTION 2: What do they cover? What is their legal status? Can they be enforced?

¹ - Constitutional Court, 4 May, 2009, the Official Gazette

Certainly, with the domestic partnership agreements, the parties, according to the contractual regulations under Article 1322 of the Civil Code and limited only by the mandatory rules and the public order, may regulate their personal and property relationships as they see fit.

Apart from the rules that relate to the asset management of the cohabiting couple, is it possible to agree on an obligation regarding the mutual faithfulness and to provide for penalty clauses establishing compensation for damages for breach of such duty of faithfulness? I have not found any precedents on this matter, but I am inclined to give a positive response.

Surely, the domestic partnership agreements are contracts at all effects and, therefore, their enforcement is guaranteed by the Civil Code provisions on contracts.

- **THE COHABITANTS' COMMUNITY PROPERTY REGIME**

Finally, I would like to emphasise that the lawmaker has gone so far as to provide that the cohabitants, in their domestic partnership agreement, may even agree on the regime of community of property according to which all purchases made together or separately be owned jointly at 50%.

This provision creates a number of practical problems that I will not insist upon and, also, it does not consider the fact that most married couples opt for the separation of property regime.

¹ - Constitutional Court, 4 May, 2009, the Official Gazette