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TO SAY "YES" OR TO SAY "OUI"
HOW TO GET MARRIED AS AN INTERNATIONAL COUPLE

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Getting married, choosing the person with whom you want to spend the rest of your life, is a complex decision. It becomes even more complex if your sweetheart is not of the same nationality or if you and your spouse-to-be live in or need to move to another country.

Many couples are, in fact, unaware that if they do not sign a prenuptial agreement, the rules that determine how their property will be distributed if the marriage is dissolved (due to divorce or death) will be those of their first residence after their marriage. This discovery often leads to many disappointments for the less fortunate party in a separation, often the wife who, as a French woman married in France, lived all her married life with the mistaken belief that she would be protected by French rules governing marriage.

Conversely, other couples believe that they are protected by the provisions of a prenuptial agreement, generally providing for separation of property, that they signed in France. In that case, the husband is most often the one who discovers at the time of separation that the contract will not necessarily be taken into account in common law countries (England, United States, English-speaking Canada, Hong Kong, Singapore, etc.). He then learns that he must share half of his assets, which he thought were protected by his separation of property agreement.

The purpose of this article is therefore to give a few pointers to spouses whose marriage will have an international character, whether they are (I) planning a wedding or (II) choosing a prenuptial agreement (where this is an option).

I – A VALID MARRIAGE RECOGNIZED IN FRANCE AND ABROAD

When a couple wants to get married abroad, there are generally two options to consider: either (A) get married at the embassy or consulate located in the country in question or (B) have a foreign civil registrar perform the wedding ceremony.

A – FOREIGN RECOGNITION OF A MARRIAGE PERFORMED BY DIPLOMATIC OR CONSULAR AUTHORITIES

In general, two French people can get married abroad in a ceremony performed by the ambassador or consul of the foreign country in which the couple resides.

A marriage performed at the consulate or embassy simplifies the steps the couple needs to take. They will not need to have the marriage recorded since it will automatically be recognized. The marriage will generally be recognized in the foreign country, although it may be necessary to complete some additional formalities to have the marriage recorded or registered depending on the country in question.

In practice, however, the future spouses should consult the embassy or consulate of the country where they plan to get married because, in most countries, this is only an option for marriages between two French citizens and not between a French citizen and a foreign citizen.[1]

Thus, in the few countries where this is an option, marriages performed abroad between French citizens and foreign nationals by French diplomatic and consular authorities will often not be recognized by local authorities and will, therefore, only take effect under French law.

If this is the case, and if the couple does not wish to get married in France (engaged couples living abroad have the option of getting married in France provided that they establish residence in a municipality),[2] they may have their marriage performed by a foreign authority.

B – RECOGNITION IN FRANCE OF A MARRIAGE PERFORMED BY FOREIGN AUTHORITIES

It is also possible for a French person to get married abroad before a foreign authority, according to the principle of recognizing the sovereignty of the foreign country in question.

A marriage performed abroad in compliance with local procedural rules will be recognized, but such a marriage will only take effect with respect to the spouses and children. It will not be binding on third parties. To be enforceable with respect to third parties (including French public organizations and agencies), the marriage must be recorded in the civil registers of the French consulate in the foreign country in question.

Engaged couples are often unaware that, in practice, recording will be quicker and less complex if the formalities are undertaken beforehand, prior to the marriage, rather than if they are taken care of several years later, for example at the birth of a child whom the couple wants to have French nationality.

If the formalities are completed before the marriage, it is often necessary to contact diplomatic or consular authorities several weeks before the marriage (in general, at least six weeks before the intended wedding date), in order to obtain a certificate of capacity to marry. This certificate will be issued after the formality of publishing banns, which are published in the French partner's home municipality in France or with the consular authority of the foreign country, has been completed. There is a possibility that the spouses will need to attend a hearing, but in practice, a hearing is only done if there is a suspicion of fraud or a sham marriage.

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[1] A decree dated October 26, 1939 establishes a limited list of countries in which it is possible to perform a marriage at a consulate or embassy between a French citizen and a foreigner: Afghanistan, Saudi Arabia, China, Egypt, Iraq, Iran, Japan, Morocco, the Sultanate of Oman, Thailand, and Yemen. A second decree dated December 15, 1958 added Cambodia and Laos. This option was essentially introduced in countries where marriage requires a religious conversion, so as to guarantee freedom of conscience and religion for French citizens.

[2] Residence is defined as continuous habitation during the month preceding the publication of banns. It may be chosen for the purpose of the marriage, therefore temporarily, then be abandoned after the publication of banns. Furthermore, civil registrars generally regard the criterion of domicile or residence rather liberally.

If the formalities are completed after the wedding, it is still possible for the marriage to be recorded. It will simply take much longer in practice. Moreover, a hearing will be the norm, even if the diplomatic or consular authority still has the option of proceeding without a hearing and it believes that there is no intent to commit fraud.

When the marriage is recorded, the spouses have the option of indicating on the marriage certificate that they have signed a prenuptial agreement, with the specification that it may be a foreign prenuptial agreement. In this case, instead of the certificate usually issued by a French notary, the spouses-to-be should simply provide a certificate signed by the foreign lawyers who prepared the agreement.

The content of this foreign agreement must also be recognized under French law, as we will now discuss.

II – A VALID PRENUPTIAL AGREEMENT RECOGNIZED IN FRANCE AND IN OTHER COUNTRIES

A – APPLICABLE RULES IN THE ABSENCE OF A PRENUPTIAL AGREEMENT

If there is no prenuptial agreement, the spouses will be subject to a matrimonial property regime defined according to certain rules, which are rather complex in an international context. The concept of matrimonial property regime can be defined as "the set of rules concerning property relations between spouses and with respect to third parties, which result from a marriage or its dissolution."[3]

Historically, one's legal matrimonial property regime has fallen under the law of autonomy, in other words, the law that the spouses implicitly chose. The origin of this rule goes back to the famous opinion given by Charles Dumoulin, a lawyer before the Parliament of Paris, to the de Ganay spouses in 1525. At that time, he interpreted the legal matrimonial regime as a sort of tacit contract which, for that reason, is subject to the law chosen by the parties. By choosing their domicile, the de Ganay spouses were considered to have expressed their wish to be subject to the customs of their domicile.[4]

This conflict of laws rule based on autonomy of will is still current for spouses married prior to September 1, 1992. It assumes that, in the absence of a prenuptial agreement and express designation of the applicable law, the judge will investigate the will of the spouses. In this respect, the first marital domicile plays a dominant role. It is the basis of a presumption of an intent to connect the matrimonial regime to the law of the country in which the spouses established their first residence after they got married. This solution has been reaffirmed many times in court opinions.

For spouses married after September 1, 1992, the principle is generally that, when there is no prenuptial agreement, the applicable law is the law of the country on whose territory the spouses established their first habitual residence after getting married. This is based on Article 4 of The Hague

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[3] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2016) 106 final 2016/0059, Article 31(1)(a). The European Community Court of Justice had already had the opportunity to specify that the concept of matrimonial regime included all property relations that flow directly from the marital bond, CJEC, 27 March 1979, Case 143/78, De Cavel, JDI 1979, p. 681.

[4] M. Revillard, J.-Cl. Droit international, Vol. Régimes matrimoniaux et droit international privé français, Fasc. 536.

Convention of 1978 on the Law Applicable to Matrimonial Property Regimes[5] and on article 26 of the European Matrimonial Property Regimes Regulation[6] (for spouses married after January 29, 2019).

The application of the national law of the spouses' first habitual residence after marriage is thus based on the French system of private international law, which uses the criterion of the first marital domicile as the main indicator of the spouses' implicit intention. But the principle used by the Convention, that the competent law is that of the spouses' first habitual residence, is not open to interpretation.[7] It is the spouses' first habitual residence and there is no need to look into whether there has been a minimum duration in order to determine the spouses' common habitual residence.

Once the law is determined, the spouses' matrimonial property regime will once again be the legal matrimonial regime of that country (e.g., community of acquired assets in France).

Several exceptions are provided by the Convention. Some exceptions are similar to one another in that they designate the national law common to both spouses as the law that applies to the spouses, rather than the law of their place of habitual residence. The national law common to both spouses will thus apply:

- in the absence of a habitual spousal residence on the territory of a same country after marriage;
- when both spouses have Dutch nationality (unless they have resided in France or Luxembourg for five years and they marry and continue to reside there. In this case, they will be subject to French or Luxembourg law);
- when the spouses both have the nationality of certain countries and establish their first habitual residence in a country other than the country of their common nationality.[8] According to the Convention, the law of the spouses' common nationality is indeed applicable when that State: "is not a Party to the Convention and according to the rules of private international law of that State its internal law is applicable, and the spouses establish their first habitual residence after marriage a) in a State which has made the declaration provided for in Article 5, or b) in a State which is not a Party to the Convention and whose rules of private international law also provide for the application of the law of their nationality" (Article 4(2)).

If the spouses do not have a common nationality or a habitual residence in the same State after their marriage, Article 4, paragraph 3 also provides that "their matrimonial regime is governed by the

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[5] This Convention relates only to property relations between spouses, to the exclusion of spousal support, surviving spouses' right to inherit, and the spouses' capacity. All issues related to personal relations between the spouses are, of course, excluded.

[6] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[7] M. Revillard, Régimes matrimoniaux et droit international privé français, Jurisclasseur Droit international, fasc. 536, no. 55.

[8] The Permanent Bureau of The Hague Conference, CRIDON Lyon and the Internationaal Juridisch Instituut have drawn up a list of countries that are not parties to the convention and whose private international law prescribes the application of the national law of the spouses: Afghanistan, Albania, Algeria, Angola, Austria, Belgium (until October 1, 2004), Bulgaria, Cape Verde, Chad, Czech Republic, Egypt, Finland, Germany, Greece, Hungary, Indonesia, Iraq, Italy, Japan, Jordan, Korea, Kuwait, Lebanon, Liechtenstein, Morocco, Poland, Portugal, Romania, Senegal, Somalia, Sweden, Syria, Slovak Republic, Spain, Thailand, Tunisia, Turkey, United Arab Emirates, the Vatican, Yugoslavia, Haiti, Dominican Republic, Suriname.

internal law of the State with which, taking all circumstances into account, it is most closely connected."

In addition to the complexity of designating the matrimonial property regime that applies to the spouses after their marriage is the fact that it will sometimes be necessary to apply the law of several foreign countries if, for example, the couple then lived for over ten years in a foreign country or if the couple moved to the country of their common nationality. (The Hague Convention provides for certain situations in which the matrimonial property regime is automatically mutable.)[9]

Since January 29, 2019, another instrument is applicable for spouses married after this date and in the absence of a first common habitual residence, the law of *"(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances"* will govern the spouses' matrimonial regime. This article 26, subsection c) clearly provides some unpredictability since it would often be difficult to determine the law which had the closest connection with the spouses at the time of the marriage…

B – RECOGNITION OF A FRENCH PRENUPTIAL AGREEMENT IN OTHER COUNTRIES

In an international scenario, in order to avoid future complications, couples should be informed of the option of entering into a French prenuptial agreement ("contrat de marriage"). The idea of such contracts is to offer the spouses predictability in the event of divorce by signing a document that can be recognized and applied even if they take up residence outside of France.

The international efficacy of such contracts also assumes that they can be recognized not only in France and other civil law countries (Belgium, Germany,[10] Spain, Switzerland, the Province of Quebec in Canada, etc.) but also in common law countries, such as England or the United States.

Recognition assumes that the couple has complied with certain legal requirements which are completely non-existent in French law. To this end, the contract can perfectly well take the form of a French separation of property contract, but one for which certain substantive and procedural rules have been taken into account in order to ensure that it is recognized outside of France.

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[9] The Convention of The Hague also provides for certain cases of automatic mutability of the spouses' matrimonial property regime: "Nonetheless, if the spouses have neither designated the applicable law nor concluded a marriage contract, the internal law of the State in which they both have their habitual residence shall become applicable, in place of the law previously applicable: (1) when that habitual residence is established in that State, if the nationality of that State is their common nationality, or otherwise from the moment they become nationals of that State, or
(2) when, after the marriage, that habitual residence has endured for a period of not less than ten years, or
(3) when that habitual residence is established, in cases when the matrimonial property regime was subject to the law of the State of the common nationality solely by virtue of sub-paragraph 3 of the second paragraph of Article 4."

[10] The legal principles are similar enough that it was possible to create a specific French-German matrimonial property regime to be applied in France and Germany. Here we are thinking of the optional French-German partnership of acquests regime which entered into effect on May 1, 2013, the objective of which was to standardize the rules that apply to the partnership of acquests legal regime in Germany and the community of acquired assets legal regime in France in order to create a common matrimonial property regime in France and Germany.

Such contracts will thus make it possible to protect spouses' property and to anticipate how property will be divided if the couple separates. Often, they also allow spouses to guard against the negative effects of internationalizing divorce proceedings (here we are thinking of what is referred to as "forum shopping") by allowing parties to include clauses about financial compensation and spousal support during separation (better known as "prestation compensatoire" under French law or "spousal support" or "alimony" in common law countries).

The question of whether French prenuptial agreements will be recognized is thorniest in common law countries where the rules that apply to prenuptial agreements are very different from the rules that exist under French law.

For example, in English courts,[11] although such agreements may influence English judges, the latter are nevertheless not strictly required to apply them.

In fact, in the interest of ensuring the spouses' economic independence following the dissolution of the marriage, the English system, which is more egalitarian in this respect, grants judges the ability to set aside or modify a contract even if the parties freely agreed to it. It is, however, true that since the Radmacher v. Granatino decision,[12] judges are now required in certain circumstances to give prenuptial agreements a certain weight when ruling on the financial effects of a divorce. But it will be essential to comply with certain minimum requirements, which are listed below.

By comparison, the policy position of American courts is generally to accept the validity of foreign prenuptial agreements, but this validity also assumes compliance with certain requirements in order to increase the chances that a French contract will be recognized and applied in most American states.

Therefore, important substantive conditions should be met in order for the contract to be considered: the contract must be just and equitable for both parties ("fairness").

In practice, these requirements mean that each spouse should have received advice from independent counsel ("independent advice") and have been informed about elements of the other's assets (existence of a "financial disclosure").

This requirement of a financial disclosure means, in principle, that the contract must include a detailed presentation of the parties' respective assets and incomes. Most often, it must be attached as an appendix to the contract itself.

Compliance with such requirements today is therefore an important condition for validating a French prenuptial agreement from an Anglo-Saxon perspective.

C – RECOGNITION IN FRANCE OF A FOREIGN PRENUPTIAL AGREEMENT

Now we must raise the question of how prenuptial agreements from English-speaking countries are applied in France, which is not without difficulties either when it comes to issues of classification.

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[11] Certain Asian countries such as Hong Kong or Singapore have rules inspired by English rules and take a very similar position.

[12] Radmacher v. Granatino (2009) England and Wales Court of Appeal (UK) (EWCA) Civ 649 (2010) UKSC 42.

The main difficulty here has to do with the fact that, although the main common law countries have default rules for dividing the property of spouses, in the absence of a prenuptial agreement, the concept of a matrimonial property regime does not exist in a strict sense. However, when faced with the question of enforcing a prenuptial agreement, that is the first question on which a French court must rule.

Although the classification is done under the *lex fori*, French courts should refer to the definitions provided in European texts and relevant European jurisprudence. In its Van den Boogaard decision,[13] the European Union Court of Justice also provided some clarification about these different categories when it held that, if an allowance is intended to provide for the maintenance of a spouse in need or if the needs and resources of each of the spouses are taken into consideration in determining the amount of the allowance, the decision relates to a support obligation. On the other hand, when an allowance is only intended to divide property between the spouses, the decision relates to matrimonial property regimes (Recitals 21 and 22).

With this guideline in mind, and in the absence of more recent jurisprudence on these issues, one should make a distinction in prenuptial agreements. We therefore strongly recommend that spouses specify in the contract what falls under the matrimonial property regime and what falls under support obligations. Such a clear distinction will thus enable French courts to take the provisions of the prenuptial agreement into account when liquidating the spouses' matrimonial property regime.

Moreover, in English-speaking countries, it is common for prenuptial agreements to provide for the amount of alimony to be paid in the event of divorce. The issue that arises is knowing to what extent such provisions will be applied by French courts ruling on divorce proceedings.

In principle, such provisions would be legal today under French law if the parties, by applying The Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations, select a foreign law as the law to be applied to support obligations and this foreign law allows this type of provision.[14]That is the meaning of the new European text, even though the Court of Cassation has shown a certain reluctance to apply this type of clause in its decisions.

The court will undoubtedly be reluctant when the spouses have provided for a complete waiver of a compensatory allowance or other form of spousal support. In fact, the Court of Cassation[15] recently stated that "it was incumbent upon the Court to investigate, in a concrete manner, whether the effects of the law (the foreign law designated in the contract) were not manifestly contrary to French international public policy."

The question remains open in situations in which the prenuptial agreement provides for significant amounts which are sufficient to cover the needs of the maintenance creditor. The question of the validity of such clauses of prenuptial agreements has, therefore, not yet been entirely decided under French law.

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[13] CJEC, 27 Feb. 1997, case C-220/95, Van den Boogaard.

[14] Protocol of the Hague on the Law Applicable to Maintenance Obligations, Article 8. This supposes that the substantive and procedural conditions provided by the Protocol for such a choice of applicable law have been met.

[15] Cass. 1st civ., 8 Jul. 2015, no. 14-17.880.