

The Status of Marriage Contracts and Foreign Nuptial Agreements in France and in Spain: A Comparative Study

by

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While common law countries do not have the concept of “matrimonial property regimes,” this notion is pivotal in civil law countries like France and Spain. Despite these differences, even more complex in an international environment, many couples marry without a marriage contract or a pre-nuptial agreement.¹ The purpose of this article is to identify and understand the pitfalls of the absence of such anticipation for binational couples, whose lives are intertwined between France or Spain and a common law country such as the United States.

Moreover, while France and Spain are neighbors and civil law countries, the applicable rules are actually very different on these issues and could lead to very surprisingly different results. Indeed, many couples in France and Spain are unaware that in the absence of a duly executed prenuptial agreement, the rules that determine how property will be distributed if the marriage is dissolved due to divorce or death will be those of the first country of residence after their marriage becomes official.²

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¹ Statistics published in 2017 by IPSOS showed that 25% of married couples only had entered into a marriage contract before the wedding and generally, this would be the case primarily for individuals coming from wealthier background. See IPSOS, *Un contrat qui n'est pas encore entré dans les habitudes des français*, <https://www.ipsos.com/fr-fr/contrat-de-mariage-31-des-francais-pensent-quel-est-surtout-destine-aux-personnes- riches> (last visited Mar. 18, 2026).

² 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. Council Regulation (EU) 2016/1103, 2016 O.J. (L 183) 1, art. 26. This Regulation applies in France and in Spain.

Conversely, other couples living in the United States believe that they are protected by the provisions of a civil law marriage contract signed in France or in Spain, when certain requirements may impede its recognition in common law countries.

In Section I this article will analyze first the law applicable to the spouses' matrimonial property regime in the absence of a choice of law provision. Section II will then describe how domestic marriage contracts are regulated in France and in Spain. Finally, in Section III, the article will explore how foreign nuptial agreements, in particular from common law countries, are recognized and enforced in France and in Spain.

I. Conflicts of Law Rules Applicable to the Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement

If the spouses do not have a prenuptial agreement, they will be subject to a matrimonial property regime defined according to certain rules, which are rather complex in an international context. The concept of a 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

A. French Conflict of Law Rules Applicable to the Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement in France

Historically, the backdrop legal matrimonial property regime is the law implicitly chosen by the spouses. This is often referred to as the law of autonomy by international family law practitioners. The origin of this rule goes back to an opinion given to the de Ganay spouses in 1525 by Charles Dumoulin, a lawyer who practiced before the Parliament of Paris. He interpreted the legal matrimonial regime as a sort of tacit contract that is subject to the law chosen by the parties. By choosing their domicile, the de Ganay spouses

³ *Id.* art. 3(1)(a).

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 in effect in France for spouses married prior to September 1, 1992.⁵ 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 marriage. This conclusion has been reaffirmed many times in court opinions.⁶

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 (1) Article 4 of The Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes⁷ and (2) Article 26 of the European Matrimonial Property Regimes

⁴ This rule dates to the famous consultation by Parisian lawyer Charles Dumoulin in 1525, when he was asked to determine the matrimonial regime of the de Ganay spouses, who were married without a contract. They lived in Paris and owned property both in Paris and in the Lyonnais region. At the time, several rules were applicable: real estate was subject to the customs of the place where it was located (the Lyonnais region and Paris), and personal property was subject to the customs of the marital home (Paris). Mr. Dumoulin analyzed the matrimonial regime as a tacit contract: in the absence of a marriage contract, the spouses had tacitly chosen to submit to the custom of their domicile. This solution was enshrined by the Parliament of Paris in 1529. See Symeon C. Symeonides, *Party Autonomy Then and Now*, 26 GERMAN L.J. 703, 706 (2025) (“For marriages, the then applicable rule of *lex loci celebrationis* required the application of the law of the place of celebration of the marriage, which usually coincided with the wife’s domicile. Dissatisfied with this rule, Dumoulin argued that the applicable law should be the law of the husband’s domicile, again because of the assumption that this would be *his* intention.”).

⁵ For spouses married before September 1, 1992, the principle is applicable as the general conflict of law rules, since the spouses are not subject to the Hague Convention on the Law Applicable to Matrimonial Property Regimes.

⁶ See, e.g., Cass. 1^{er} civ. 19-9-2007 n° 06-15.295; Cass. 1^{er} civ. 22-10-2008 n° 07-16.385 F-D; Cass. 1^{er} civ. 26-9-2012 n° 11-20.463; Cass. 1^{er} civ. 3-10-2019 n° 18-22.945.

⁷ Hague Convention on the Law Applicable to Matrimonial Property Regimes, Mar. 14, 1978 (entered into force Sept. 1, 1992). This Convention relates only to property relations between spouses, to the exclusion of spousal support,

Regulation (“Article 26”), applicable to spouses married after January 29, 2019.⁸

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. It is the spouses’ first habitual residence and no investigation is needed to ascertain any 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. For example, if French law applies, the default matrimonial property regime in France is the regime of community of assets.⁹

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 countries. This might occur 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. Indeed, the Hague Convention provides for certain situations in which the matrimonial property regime is automatically mutable.¹⁰

surviving spouses’ right to inherit, and the spouses’ capacity. All issues related to personal relations between the spouses are, of course, excluded.

⁸ *Id.*

⁹ Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201, 231 (2020) (“In France, couples can marry and opt into the traditional community property regime to govern the disposition of their property at dissolution, they can allocate property rights as they wish, or they can just use the PAC default which requires no sharing of property at dissolution.”).

¹⁰ 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

For spouses married after January 29, 2019, and in the absence of a first common habitual residence, Article 26 will apply. In pertinent part, it provides as follows:

[The law] of (b) 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.]¹¹

Article 26(c) clearly provides unpredictable results as it is commonly difficult to determine the law having the closest connection with the spouses at the conclusion of a marriage when spouses live in different countries. Note that for this purpose, the term "conclusion of the marriage" refers to the time of the marriage.

B. *Spanish Conflict of Law Rules Applicable to Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement*

In the absence of a marriage contract, the domestic territorial law applicable to the matrimonial property regime will need to be determined.¹² In Spain, the determination of the law applicable to the matrimonial property regime is governed by Regulation 2016/1103 establishing enhanced cooperation in the field of jurisdiction, applicable law, recognition, and enforcement of decisions in matters of matrimonial property regimes.¹³ If the Regulation is not applicable,¹⁴ the conflict of law rules provided for in Articles 9.2 and 9.3 of the Civil Code ("CC") apply.¹⁵

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. Convention on the Law Applicable to Matrimonial Property Regimes art. 7(3), Mar. 14, 1978.

¹¹ Council Regulation (EU) 2016/1103, art. 26(1)(b), 2016 O.J. (L183) 1.

¹² For examples of the application of Article 9.2 of the CC in the domestic context, see Juliana Rodríguez Rodrigo, *Aplicación de la norma española de conflicto de leyes interno para determinar el régimen económico matrimonial*, 15 CUADERNOS DE DERECHO TRANSNACIONAL 1301 (2023).

¹³ *Id.*

¹⁴ It must be noted that the Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes is not applicable in Spain.

¹⁵ For an example, see Juliana Rodríguez Rodrigo, *Ley aplicable al régimen económico matrimonial, a propósito del comentario de la sentencia de*

For this purpose, the provisions of Article 9.2 of the CC¹⁶ establishes that the law applicable to the matrimonial property regime is determined by reference to the following criteria:

First, the common personal law of the spouses at the time of the marriage is applied.¹⁷ If that is not determinative, the personal law of the habitual residence of either party may be chosen by both in a public document executed prior to the celebration of the marriage. If that is not determinative, the law of the common habitual residence immediately following the marriage is applied or, in the absence of common residence, the place of celebration of the marriage.

It must be noted that under Spanish national law, the applicable property regime is the community property regime.¹⁸ Nevertheless, in the absence of a marriage contract, the application of the foregoing criteria may lead to the application of autonomous legislation when determining the matrimonial property regime. The term autonomous legislation relates to local law that is applicable in seventeen autonomous regions, including Andalusia, Catalonia, the Basque Country, Galicia, the Canary Islands, and the Valencian Community. In comparison, Spanish national civil law applies the community property regime, while some autonomous laws have adopted the separate property regime as the default regime. Catalonia is an example.

The default regime can be modified by marriage contract, after determining the law applicable to the matrimonial property regime. In the presence of a territorial multi-legislative country such as Spain, the conclusion of a marriage contract determining the applicable law to the matrimonial property regime may be of special relevance since the law applicable by default depending on

la audiencia provincial de Madrid, de 30 Septiembre 2019, 12 CUADERNOS DE DERECHO TRANSNACIONAL 1137 (2020).

¹⁶ CÓDIGO CIVIL [“CC”] [CIVIL CODE], art. 9.2 (Spain). Article 16.3 of the CC establishes that the effects of marriage between Spaniards will be regulated by the Spanish law according to the criteria of article 9 and, in its absence, by the Civil Code.

¹⁷ Article 16.1 of the CC establishes that the personal law is determined by “vecindad civil.” *Id.* art. 16.1. The vecindad civil is a civil status by which a person is considered a resident of a certain territory and determines the personal law applicable in certain matters, among which are the matrimonial regime and the inheritance law.

¹⁸ *Id.* art. 1316.

the territorial connection within Spanish territory may implicate a completely different result (separation of assets versus community property regime). In Spain, some autonomous regions have specific legislation distinct from national law. In those regions, national law is not applied.

II. The Domestic Status of Marriage Contracts and Pre/Post Nuptial Agreements

A. Legal Validity of Domestic Marriage Contracts in France

1. Imperative Formal Requirements of “Notarial Deeds” for French Domestic Marriage Contracts

Article 1387 of the Civil Code, the first Article of Title Fifth of the Civil Code entitled “Re the marital agreement and marital regimes,” provides that: “The law does not regulate marital associations, as regards property, except in the absence of special agreements, which the spouses may enter into as they deem advisable, provided they are not contrary to good mores nor to the provisions below.”¹⁹

If the parties wish to enter into a marriage contract, the agreement must be made in the form of a notarial deed. All marital property agreements shall be drawn up by deed in the presence of a *notaire*,²⁰ in the presence of and with the simultaneous consent of all those persons that are parties thereto or their attorneys-in-fact.

Indeed, article 1394 of the Civil Code provides that: “All marital agreements shall be drawn up by deed in the presence of a *notaire*, in the presence and with the consent simultaneously of all the persons that are parties thereto or their attorneys-in-fact.”²¹ According to this provision, a French contract of marriage is considered a “notarial deed” (*acte notarié*).

¹⁹ CODE CIVIL [C. CIV.] [CIVIL CODE], art. 1387 (Fr.).

²⁰ A *notaire* is a lawyer who, in addition to having had the obligation to complete a full law school curriculum, must specialize in specific areas of the law, notably family law. Before being admitted to practice, a *notaire* must successfully pass a special post-graduate exam to secure the *Notaire Diploma* (*Diplôme de Notaire*). A *notaire* is appointed by the government (Minister of Justice) and acts by delegation of sovereign power for the benefit of the general public. *Notaires* enjoy a monopoly in certain areas of the law, such as for the preparation of Marital Agreements as well as for other categories of agreements, such as real estate transfer.

²¹ C. civ., art. 1394.

It is important given that a notarial deed cannot be challenged as to (1) who the party or parties thereto are, (2) what the date of the deed is, or (3) what the parties agreed to, except by way of very specific proceedings involving an action directed against the *notaire* on the basis of falsification of a public document.²² Under Article 1395 of the Civil Code: “Marital agreements must be written before the celebration of the marriage and come into effect only on the date of such celebration.”²³

Under Article 1397 of the Civil Code, after the celebration of the marriage, a marriage contract can be modified or replaced by a completely different marriage contract, but only by way of a notarial deed.²⁴ In summary, future spouses freely select a matrimonial property regime, either by abstaining from entering into a marital agreement or conversely by entering into one, but once the marital regime is adopted it can only be modified pursuant to the above rules.

Once a marriage contract is signed by the *notaire* and the parties, the *notaire* delivers a certificate to the future spouses certifying that a contract was entered into. That certificate must be handed over to the *officier d'état civil* (civil status officer) who makes a note of the existence of a contract (or, absent such a certificate, of the absence of a contract) in the *acte de mariage* (marriage deed), the official document which the spouses, the civil status officer, and the witnesses sign after the bride and bridegroom have exchanged their consent to be married.

If the marriage deed indicates that there was no agreement, the spouses shall be deemed, vis-à-vis third parties, to be married under the default regime, except in those cases where upon signing deeds with third parties, they declare that they entered into a marital property agreement.

2. *The Different Matrimonial Property Regimes Under French Law*

As explained above, a matrimonial property regime is the body of rules that the parties have chosen (or are deemed to have chosen if there is no contract), to govern the issues of ownership

²² *Id.*, art. 1319.

²³ *Id.*, art. 1395.

²⁴ *Id.*, art. 1397.

of assets during the marriage and disposition of assets on the occasion of the dissolution of the marriage by divorce or death. A matrimonial property regime deals only with the above issues.

If there is no marriage contract, Article 1393 of the Civil Code provides that the default regime is regulated by Articles 1400 to 1491 of the Civil Code.²⁵ This default regime is referred to generally as the “*régime legal*” (legal regime), which is also referred to as the “*communauté légale*” (legal community). In other words, the marital regime is organized under the above Articles of the Civil Code, as opposed to the marital regime organized by contract.

Under this regime of legal community, assets acquired during the marriage are deemed to be jointly owned by the spouses on a 50-50 basis, irrespective of whether (1) they were acquired by both or by one of the spouses, (2) they were paid for by the income of one or both spouses, or (3) the origin of the income is the earned income or the savings on the income originating from either or both spouses’ personal property.

Assets that a spouse owned before the marriage or acquired by way of gift of legacy during the marriage are and remain personal property unless the deed of gift or the will provides that the gift or legacy inures to both spouses. Assets that are acquired by one spouse by way of reinvestment of the proceeds of the sale of personal property are personal property.

Assets are deemed to be community property assets unless proven to be personal property. Investments of personal assets and reinvestments of the sales proceeds of personal assets must be noted in the purchase deed of the asset, otherwise the newly acquired asset becomes community property (unless the spouses agree otherwise among themselves, which agreement has no effect on third parties).

Debts generated during the marriage are community property debts. Debts in existence at the time of marriage and debts attached to legacies or gifts remain personal debts.

Community property assets may be managed by one spouse, except that the acts of management of disposition relating to the business of one spouse may only be performed by that spouse.

Community property assets may not be disposed of by one spouse acting alone, without consideration. Legacies of community

²⁵ *Id.*, arts. 1400–1491.

property assets by one spouse may not exceed that spouse's share in the community. Legacies in kind are generally limited. The sale or pledging of real estate assets or shares of shares of stock of unlisted companies may not, if they are community assets, be done by one spouse alone.

Articles 1497 to 1527 provide for extremely flexible rules whereby the spouses can vary the legal community. This is referred to as the "*communauté conventionnelle*" (conventional community), which can be an adaptation of the rules of legal community.²⁶ Articles 1536 to 1542 in turn are the rules which apply to *séparation de biens* (separation of property).²⁷

Under a separation of assets regime, each spouse manages (administers, receives the income, leases, etc.) and performs all acts of disposition (purchases, sells, pledges, etc.) alone, with respect to all his or her personal assets. Each spouse remains responsible for his or her own debts. Increases and losses in value are to the benefit or the detriment of the owner of the asset. Thus, the proceeds of a sale or public offering of a personal asset is the property of the owner of the original asset.

Presumptions of ownership written into a marriage contract are effective as between the spouses and as against third parties. Otherwise, proof of ownership may be brought by any means. Assets over which neither spouse can establish exclusive property are deemed to be jointly owned, each owning half.

Each spouse contributes to the expenses of the marriage as specified in the marriage contract, failing which in proportion to the respective means of the parties.

The last marital regime is the *communauté réduite aux acquêts* (community reduced to acquisitions), under which the spouses during the marriage retain title to their respective assets as in a separation of property regime, but on divorce or death each spouse is entitled to one half of the gains on the assets of the other (net assets at the time of divorce or death less net assets at the time of marriage).²⁸

²⁶ *Id.*, arts. 1497–1527.

²⁷ *Id.*, arts. 1536–1542.

²⁸ *Id.*, arts. 1569–1581.

B. *Legal Validity of Domestic Marriage Contracts in Spain*

The situation in Spain regarding marriage contracts could be summarized as a hybrid²⁹ between the French position and the Anglo-Saxon tradition of prenuptial agreements. Traditionally,³⁰ Spanish law is similar to French law in the sense that the autonomy of will is limited to the matrimonial property regime of the spouses through the concept of the “*capitulaciones matrimoniales*,” which translates to “matrimonial capitulations” (referred to below as “marriage contracts”).

1. *The Object of Marriage Contracts*

Under Spanish national law,³¹ couples can choose the matrimonial property regime by means of marriage contracts.³² Marriage contracts may be entered into before or during the marriage. By definition, marriage contracts choose the matrimonial property regime, meaning the set of rules that govern the property relations between the spouses and with third parties during the marriage. The Spanish Civil Code establishes different matrimonial property regimes,³³ which include the community property regime (“*sociedad de garanciales*”),³⁴ the participation regime (“*regimen de participación*”),³⁵ and the separate property regime (“*separación de Bienes*”).³⁶

²⁹ Since the 1990s, the Spanish Supreme Court has progressively accepted the validity of agreements stipulating provisions applicable in the case of a breakup other than rules relating to the matrimonial property regime. See case law cited *infra* notes 54–56 in text.

³⁰ Prior to 1975, spouses were not permitted to contract marital rights regarding divorce. Law 14/1975 acknowledged the possibility for women to have legal capacity allowing them to act without the representation of husbands. Law 14/1975 (May 2, 1975) (Spain). This law allowed spouses to conclude marriage contracts after the celebration of the marriage.

³¹ The term “Spanish common law” refers to the Spanish Civil Code (“CC”) and other laws applicable in the national territory, when autonomous laws do not apply.

³² CC, arts. 1315, 1326.

³³ The autonomous laws may contain their own legislation on matrimonial property regimes.

³⁴ CC, arts. 1344–1410.

³⁵ *Id.*, arts. 1411–1434.

³⁶ *Id.*, arts. 1435–1444.

In addition to choosing one of these regimes, the marriage contract can modify or change the matrimonial property regime.³⁷ The modifications made cannot affect third parties acting in good faith.³⁸

When a marriage contract exists and Spanish national law applies, the applicable domestic law for assessing validity of the marriage contract is Article 9.3 of the CC.³⁹ In turn, the validity of the marriage contract is governed by the general rules applicable to contracts.⁴⁰

In addition, marriage contracts must respect laws, morality, and public order.⁴¹ These precepts include constitutional principles, such as the principle of equality of rights of the parties.⁴² Where the foregoing requirements are not wholly met, the marriage contract is not effective.⁴³

As will be analyzed below, Spanish courts are progressively accepting the validity and enforceability of marriage contracts that go beyond the simple choice of a set of rules applicable to the matrimonial property regime.

2. *The Effectiveness of the Marriage Contract*

The requirements of a marriage contract may vary depending on whether Spanish national law or an autonomous law applies. Under Spanish national law, the marriage contract dealing with a matrimonial property regime needs to be drafted in a public document before a notary as a matter of validity.⁴⁴ Once a marriage contract is executed, the marriage must be celebrated within one year. If no marriage is celebrated within the one-year period, the marriage contract becomes null and void.⁴⁵ With marriage, the economic regime and all marriage contract covenants must be registered in the Civil Registry.⁴⁶

³⁷ *Id.*, art. 1325.

³⁸ *Id.*, art. 1217.

³⁹ *Id.*, art. 9.3.

⁴⁰ *Id.*, art. 1335.

⁴¹ *Id.*, art. 1255.

⁴² Article 32 of the Spanish Constitution.

⁴³ CC, art. 1328.

⁴⁴ *Id.*, art. 1327 and art. 1280 3°.

⁴⁵ *Id.*, art. 1334.

⁴⁶ *Id.*, art. 1333; Lcy 20/2011, de 21 de julio, del Registro Civil art. 60, B.O.E. No. 175, July 22, 2011 (Spain).

For a marriage contract executed outside of Spain, the scope of the document is limited to the choice of the matrimonial property regime and related provisions. A foreign agreement typically is recognized in Spain once it is assimilated to the traditional figure of a Spanish marriage contract.⁴⁷

It is common for the parties to a marital contract to address matters that go beyond the matrimonial property regime, such as spousal support, the family home, or even matters relating to the children. Where that is done, questions arise as to the validity and enforceability of the terms of the contract in Spain.

III. Recognition of a Foreign Prenuptial and Postnuptial Agreement in France and in Spain

A. Recognition in France of a Foreign Nuptial Agreement

The next question is how prenuptial agreements from English-speaking countries are applied in France, which is not without difficulties when it comes to issues of classification.

1. Provisions Dealing with the Division of Assets in the Event of Divorce

The main difficulty here is that the concept of a matrimonial property regime does not exist in a strict sense even though common law countries have default rules for the division of spousal property in the absence of a prenuptial agreement. The first question on which a French court must rule when faced with petition to enforce a prenuptial agreement is whether a marital property regime exists in the relevant common law country.

Although the classification is determined under the concept of *lex fori*, the law of the forum, French courts generally consider definitions provided in European texts and relevant European jurisprudence. In its *Van den Boogaard* decision,⁴⁸ the European

⁴⁷ Council Regulation (EU) 2016/1103, arts. 22, 23, 2016 O.J. (L 183) 1.

⁴⁸ *Van den Boogaard c/ Laumen*, Feb. 27, 1997 (Court of Justice of the European Union, case C-220/95), Recitals 21 and 22 (“21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in

Court of Justice clarified that an agreement relates to a support obligation in either of two circumstances. The first is that it provides for an allowance regarding the maintenance of a spouse in need. The second is that the needs and resources of each of the spouses are taken into consideration in determining the amount of the allowance. On the other hand, when an allowance is intended only to divide property between the spouses, the decision relates to a matrimonial property regime.

With this guideline in mind, and in the absence of more recent jurisprudence on these issues, it is imperative for spouses to specify in the agreement the obligations that relate to the matrimonial property regime and the obligations that relate to support obligations. A clear distinction in a prenuptial agreement will enable French courts to consider the provisions of the prenuptial agreement when liquidating the spouses' matrimonial property regime.

2. *Provisions Dealing with Spousal Support or Alimony*

In English-speaking countries, it is common for prenuptial agreements to provide for alimony to be paid in the event of divorce. It is often recommended to the parties to include clauses about financial compensation and spousal support during separation (known as "*prestation compensatoire*" under French law, or "spousal support" or "alimony" in common law countries).

The issue that arises is knowing to what extent such provisions will be applied by French courts ruling on divorce proceedings. If there is no election to apply foreign law, French law will be applied, making it impossible for a French court to determine the amount to be paid for spousal support or alimony in advance of a final decree of divorce.

each particular case to the specific aim of the decision rendered.²² It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.").

The answer is different if there is an election of a foreign law to govern this issue. In principle, an election to apply foreign law would be followed by a French court if the parties (1) elect to apply The Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations, (2) select a foreign law as the law to be applied to support obligations, and (3) the selected foreign law allows this type of provision.⁴⁹ 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 compensatory allowance or other form of spousal support. In fact, the Court of Cassation⁵⁰ recently stated that it was incumbent upon the Court to investigate, in a concrete manner, whether the effects of 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 sufficient amounts to cover the needs of the spouse seeking spousal support. The question of the validity of such clauses of prenuptial agreements has, therefore, not yet been entirely decided under French law.

To avoid future complications in an international scenario, a couple should be informed of the option of entering into a French prenuptial agreement ("*contrat de mariage*").⁵¹ 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 residence outside of France is taken.

The international efficacy of such contracts assumes that they can be recognized in France, in other civil law countries, and in common law countries such as England or the United States.

Recognition assumes that the couple has complied with certain legal requirements that do not exist in French law. To this end, the contract can take the form of a French separation of property

⁴⁹ Protocol of the Hague on the Law Applicable to Maintenance Obligations, art. 8. This supposes that the substantive and procedural conditions provided by the Protocol for choosing the applicable law have been met.

⁵⁰ Cass. 1st civ., July 8, 2015, no. 14-17880.

⁵¹ See, e.g., Peter M. Walzer, *A World of Agreements: Enforcing and Attacking Foreign Prenups in the United States*, FAM. ADVOC., Winter 2011, at 30.

contract, provided that certain substantive and procedural rules have been considered so that it is enforceable outside of France.

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. 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 states in the United States. Consequently, the following common law concepts should be embodied in the French prenuptial agreement:

First, the contract must be just and equitable for both parties (“fairness”). Second, each party should receive advice from independent counsel (“independent advice”), and third, each party is informed about all elements of the assets of the other party (“full financial disclosure”).

Financial disclosure requirements mean that the contract must include a detailed presentation of the assets and income of each party, most often attached as an appendix to the contract. Compliance with these requirements is an important condition for validating a French prenuptial agreement from an Anglo-Saxon perspective.

B. Recognition in Spain of a Foreign Nuptial Agreement

In Spain, it is perfectly possible for parties to have some control over the matrimonial property regime that will apply during the marriage. The validity granted to a prenuptial agreement executed under foreign law that calls for the matrimonial property regime to be governed by that law is recognized under Spanish law.⁵²

Virtually no authoritative guidance exists concerning the legal treatment of Anglo-Saxon prenuptial and postnuptial agreements in Spain. Spanish national civil law provides no definition of prenuptial or postnuptial agreements.

⁵² Terms that would not be incorporated in such covenants are terms not related to the civil law concept of matrimonial property regime. Examples include maintenance, compensation, children’s arrangement, personal obligations during the marriage, and use of the family home.

Spanish courts are predisposed to recognize and enforce foreign prenuptial and postnuptial agreements the scope of which goes beyond the matrimonial property regime. This type of agreement can be looked at as an agreement to regulate the personal and economic consequences of a possible future marital breakdown, and the validity of these agreements has been affirmed in Spain.⁵³

Among private client advisers, these agreements are referred to as agreements in anticipation of a breakup (“nuptial agreements”). Insofar as the Spanish Civil Code does not contain any regulation, the case law of the Spanish Supreme Court provides some guidance in this matter.

Nonetheless, several caveats should be remembered where the parties have connections with Spain, or a possibility exists for review of the agreement by Spanish courts.

1. *The Principle of Validity of Nuptial Agreements*

Since the late 1990’s, the Spanish Supreme Court has been admitting the validity of such agreements by virtue of the principle of party autonomy.⁵⁴

In a judgment of June 24, 2015, the Supreme Court ruled specifically on the conditions for the validity of a prenuptial agreement.⁵⁵ In this case, a married couple executed a marriage contract before a notary designating the matrimonial property regime and, in parallel, concluded a prenuptial agreement a few days before the wedding. In this agreement, they agreed on a monthly rent for life in favor of the wife. That arrangement was not part of the matrimonial property regime.

The Supreme Court considered that this prenuptial agreement fell within the scope of Article 1323 of the Civil Code, which establishes that spouses may transfer property and rights by any title and enter into all kinds of contracts with each other.

⁵³ A.J. Muñoz Navarro, *Los pactos prematrimoniales o en previsión de ruptura matrimonial*, en 25 LA LEY DERECHO DE FAMILIA: REVISTA JURÍDICA SOBRE FAMILIA Y MENORES 3 (2020).

⁵⁴ STS 325/1997 of April 22nd 1997 (ROJ STS 2817/1997); STS 1053/2007 of October 17th 2007 (ROJ STS 6618/2007); STS 217/2011 of March 31st 2011 (ROJ STS 2158/2011).

⁵⁵ STS 392/2015 of June 26th 2015 (ROJ STS 2828/2015).

To conclude that the prenuptial agreement was valid, the Supreme Court considered the following factors.

First, the court verified that the terms of the agreement and the conditions generating the obligations were clear so that compliance would not be left to the discretion of the spouses. Second, the court determined that the terms of the agreement did not promote the crisis, since neither spouse was in a compromised economic situation. Third, the court decided that the principle of equality was not violated, since there was no serious prejudice to the husband. Fourth, neither spouse abused a dominant position or was in a situation of precariousness. The Spanish Supreme Court concluded that the agreement was valid. It was negotiated by both parties, and the financial provisions were adequate.

In a judgment of May 30, 2018,⁵⁶ the Spanish Supreme Court ruled again on the validity of a prenuptial agreement. Prior to the wedding and in the presence of a notary, the individuals waived any possible indemnities or compensatory pensions that might arise in the event of a marital crisis.

At some point, the couple encountered difficulties, and the wife filed for divorce. The first instance judge granted a compensatory pension to the wife, considering the agreement null and void for being contrary to the principle of equality. On appeal, the court overturned the decision, ruling that the agreement was valid.

The wife filed an appeal in cassation before the Spanish Supreme Court, which was dismissed. In its decision, the Court referred to factual elements that established informed consent of the parties to the agreement.

The Court found that the woman was aware of what she signed because she received legal advice from the notary or lawyer. Furthermore, the Court considered that the agreement was not contrary to public policy because the woman's employment status and her limited knowledge of Spanish did not place her in a precarious situation even though she was a Russian national living in Spain. Finally, the Court established that the principle of equality was not violated because it was a waiver entered into by both parties in the context of a relationship of trust.

It follows from this judgment that, although there are no statutory criteria in Spanish national law, the effectiveness of

⁵⁶ STS 315/2018 of May 30th 2018 (ROJ STS 1925/2018).

prenuptial agreements is evidenced by the following factors: First, the parties to the marital agreement each obtained independent legal advice to ensure an understanding of the terms of the agreement. Second, the provisions of the marital agreement applied to both parties, and third, the terms of the marital agreement were sufficiently clear, so that at the time of their application, neither party was blindsided.

These judgments emphasize that, when dealing with family matters, effectiveness of the agreements will depend on the application of concepts that protect families.

2. *Mandatory Concepts That Apply to Nuptial Agreements*

As mentioned above for marriage contracts, important limitations exist in nuptial agreements that are based on public policy. When they apply, they may limit the effectiveness of the agreement. For a party to prevail, the nuptial agreement cannot violate concepts of (1) law, (2) public order, (3) morality, (4) constitutional principles such as the equality of spouses in marriage,⁵⁷ (5) integral protection of the family and children,⁵⁸ (6) rights and duties of the spouses,⁵⁹ (7) the principle of noncausal separation or divorce,⁶⁰ (8) the rules of the primary matrimonial property regime,⁶¹ (9) the rules relating to the constitution of the marriage,⁶² and (10) the limits of public order to the paternal-filial relations regarding inability to waive parental authority, custody of the common children, or alimony.

The effectiveness of a prenuptial or a postnuptial agreement will depend on the facts and circumstances presented to a court. Here are several:

Agreements affecting minor children. When a nuptial agreement is related to the use and attribution of the home, validity will depend on whether minor children live at home.⁶³ If there are minor children, the judge will give priority to the best interests of the child over any nuptial agreement. The best interests of the

⁵⁷ CONSTITUCIÓN ESPAÑOLA, Dec. 27, 1978, art. 32.1 (Spain).

⁵⁸ *Id.*, art. 39.

⁵⁹ CC, arts. 66–71.

⁶⁰ *Id.*, arts. 81, 86.

⁶¹ *Id.*, art. 1315.

⁶² *Id.*, arts. 44–58.

⁶³ *Id.*, art. 96.

child will also guide the assessment of the agreements relating to custody and child support.⁶⁴ The right to child support cannot be waived.

Economic consequences between spouses: maintenance, indemnities, and compensatory pension. Article 151 of the CC establishes that the right to maintenance is unwaivable. However, the parties may agree on the amounts or forms of payment. A pension or compensation for housework differs from maintenance payments. The agreement should therefore clearly distinguish between the different forms of financial compensation.

Provisions concerning the personal relationships between the spouses. The drafter of the prenuptial agreement or post nuptial agreement must be mindful when including clauses that may deal with personal obligations of the spouses. Clauses that may be interpreted as obliging the spouses to have consensual relationships are not valid.⁶⁵ In the same vein, clauses sanctioning infidelity may be closely examined by the Spanish courts and should be avoided.

3. *The Form of Nuptial Agreements*

In comparison to marriage contracts, the absence of regulations applicable to nuptial agreements means that no standard forms exist. The form to be adopted will depend on the scope of the agreement. For example, if the nuptial agreement falls within the scope of a marriage contract because it relates to the choice of the matrimonial property regime, it must be executed in a public deed. In practice, resorting to a public deed is advisable since it will confer greater probative value to the nuptial agreement and will guarantee that the consent has been freely given.

When a foreign nuptial agreement deals with matters beyond marriage contracts, Spanish law applicable to international private law norms will determine whether it is valid. In other words, nuptial agreements are not regulated by the Spanish Civil Code. Consequently, the validity of the nuptial agreement in Spain will be addressed for the first time upon the breakup of the marriage. Until then, no certainty exists regarding its enforceability until a ruling is issued by a judge. If the parties reside in an autonomous region, surprises may be encountered, as discussed below.

⁶⁴ *Id.*, art. 1814.

⁶⁵ CONSTITUCIÓN ESPAÑOLA, Dec. 27, 1978, art. 10.1 (Spain).

4. *Potential Application of Autonomous Laws*

Because the Spanish Civil Code does regulate nuptial agreements, autonomous laws will apply. The law in certain autonomous regions may provide different outcomes as to the enforceability of said agreements. To illustrate, the Catalan Civil Code (“CCCat”) establishes clear and detailed regulation of nuptial agreements. Among other things, it distinguishes between marriage contracts regulated in Article 231-19 of the CCCat and agreements regarding a breakup regulated in Article 231-20 of the CCCat.⁶⁶ Regarding the latter, it establishes the conditions to enter these agreements:

Covenants in anticipation of the breakdown of the marriage may be granted in marital contracts or in a public deed.

Prenuptial agreements will be valid only if entered during the 30-day period before the celebration of the marriage.

The notary must inform each of the parties separately about the scope of the changes that are intended to be introduced with respect to the default legal regime. The notary must also ensure that each party has all necessary information about the default regime and the modified regime.

Covenants excluding or limiting rights must be reciprocal in nature and clearly specify the rights that are limited or waived.

The spouse who wishes to rely on a prenuptial agreement rather than the default treatment has the burden of proof as to whether the other party had sufficient information about assets, income, and financial expectations at the time of signing the agreement.

Covenants that are seriously detrimental to a spouse at the time of enforcement are not effective if circumstances change over time in a way that could not reasonably have been foreseen at the time the parties entered the agreement.

In addition, the Catalan Civil Code establishes substantive conditions for the effectiveness of the nuptial agreement. An example might be that in anticipation of marital breakdown, the parties may agree on the use of the home by each party.⁶⁷ Agreements that harm the interest of the children or that compromise the basic needs of one of the parties are not effective.

⁶⁶ Codi civil de Catalunya [“Codi civ. Cat.”], arts. 231-19, 231-20.

⁶⁷ *Id.*, art. 233-21.

Similarly, in anticipation of the breakdown of the marriage, the parties can agree on the compensatory pension and the economic compensation for work,⁶⁸ including amount, duration, and period of the compensation.

The example of Catalan law illustrates that, in Spain, the question of recognition and validity of nuptial agreements is complex and may, among other things, depend on the law applicable to the substance and form of such agreements or which court (from a territorial standpoint) is seized of the enforcement of the agreement.

Conclusion

The purpose of this article is to identify, understand and anticipate the pitfalls of marriage contracts and pre-nuptial agreements in an international context, especially when the United States and civil law countries like France and Spain are involved.

Very often, divorce proceedings (if there is a divorce) or even estate proceedings will be split among several countries.

This mosaic of jurisdictions and applicable laws means that a practitioner working on a marriage contract or a pre-nuptial agreement in an international environment must be careful to choose, right at the outset of the drafting, the right jurisdiction for the contract and to ensure recognition in the other potential jurisdiction which may be involved in the event of divorce or death.

⁶⁸ *Id.*, arts. 232-7, 233-16.