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INSIGHTS

NUPTIAL AGREEMENTS IN THE CONTEXT OF AN INTERNATIONAL COUPLE – VIEWS FROM FRANCE AND SPAIN

Insights Special Edition

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EDITORS' NOTE

In this month's edition of *Insights*, our articles address the following:

- **Prenuptial Agreements in the Context of an International Couple – Views from France and Spain.** Choosing a life partner is a complex decision. It becomes even more complex if the parties are not of the same nationality or if one of the parties moves to another country in order to avoid a two-city lifestyle. 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 the rules of the first country of residence after their marriage becomes official. Conversely, other couples believe that they are protected by the provisions of a prenuptial agreement signed in France or in Spain that generally provides for separation of property. However, the contract may not be followed in common law countries such as England and United States, meaning that each spouse is entitled to one-half of the marital assets. All this and more are explained in the article authored by Delphine Eskenazi, a Partner of Libra Avocats, Paris, and Maria Valentin, of Counsel to Libra Avocats, Paris. The takeaway is that life can be about more than tax planning.

- **New Belgian Federal Government Announces Significant New Tax Measures.** The most recent general election in Belgium took place in June, but a new government was not sworn in until February, when the five-member coalition government agreed to a federal government agreement, a document of 200 pages in a single language containing many significant tax measures. Tax items addressed include, *inter alia*, (i) the replacement of a dividends received deduction by a simple exclusion, (ii) the modernization of the group contribution regime, the Belgian equivalent of group relief, making it more flexible and simpler to coordinate, (iii) the simplification of the investment deduction rules, the Belgian equivalent of investment credits in the U.S., (iv) the adoption of accelerated depreciation rules for CAPEX investments, (v) the adoption of a "solidarity contribution," a 10% capital gains tax on financial assets held by individuals, allowing a basis step-up to current value as of the effective date of the tax, (vi) simplification of disallowed expense rules, and (vii) the adoption of carried interest rules for managers of investment funds. Werner Heyvaert, a senior international tax lawyer based in Brussels and a partner at AKD Benelux Law Firm explains these and other tax provisions. The takeaway is that Belgium is modernizing its tax rules.

- **French Budget 2025 – Significant Provisions Affecting Individuals.** The French Budget for 2025 reflects significant political instability reflecting two factors. The first is the fragmentation of the French Parliament after elections last summer. The second is a significant budgetary deficit. It was adopted with limited debate on February 14, 2025, after an earlier Finance Bill was rejected in December 2024, resulting in a change of government. Key measures to note include, *inter alia*, (i) Introduction of enhanced social contribution on high incomes, with an instalment that was due in December 2025, (ii) reform of the tax and social security treatment of management packages, including those already in existence, (iii) an overhaul of the tax framework for the B.S.P.C.E., one of the main employee shareholding tools, (iv) tax incentives for gifts received to acquire a new primary residence or to finance energy-efficient renovations, (v) Introduction of a special reassessment period in cases of misreported tax residence, (vi) clarification on the supremacy of treaty law in determining tax residency, (vii) additional social contributions for companies with revenues over a €1 billion, and (vii) a tax on capital reductions linked to share buybacks by companies with revenues exceeding a €1 billion. Philippe

Stebler, the founder of Stebler Avocats, Paris, explains these and other provisions. The takeaway is that, if you thought French taxes in 2024 could not get any higher, you were mistaken.

- **N.H.R. 2.0 in Portugal – a Better Regime for Skilled Workers and Their Employers.** Following the unexpected termination of the N.H.R. regime to newly arrived residents as of December 31, 2023, a new regime was offered, known as N.H.R. 2.0. The new regime attracts working individuals, investors and international groups planning on setting up Portuguese subsidiaries. N.H.R. 2.0 is now fully operational for those within scope of eligible activities, which is very wide. João Luís Araújo, a Partner in the Porto Office of Telles, and Sara Brito Cardoso, an Associate in the Porto Office of Telles, explain why N.H.R. 2.0 provides a better result for newly arrived skilled personnel and their employers. The takeaway is that Portugal is very much open for business and keen to attract talent, companies, and investment.

- **French Tax Investigations target H.N.W. Individuals.** Tax evasion and avoidance have been significant concerns for governments worldwide, and France is no exception. In recent years, the French government has ramped up efforts to investigate high net worth individuals ("H.N.W.I.'s") suspected of tax evasion, particularly as global scrutiny increases over the wealthy's financial practices. France, with its robust tax system and a tradition of enforcing tax compliance, utilizes a range of investigative techniques to target H.N.W.I.'s. The article delves into how French tax investigations are carried out, focusing on methods, legal framework, and high-profile cases involving the wealthy. Sophie Borenstein, a partner of attorneys Klein Wenner, Paris, explains all. The takeaway is that the footprint of an H.N.W.I. is large and is being looked at in detail by French tax authorities.

- **When Baskets Go Beyond Weaving – Understanding Foreign Tax Credit Baskets Under the Look-Through Rules.** While the word "basket" may trigger a mental image of a bicycle with a daisy basket that is a gift in early childhood, the term has a totally different connotation in the tax world. It denotes "foreign tax credit baskets" to an international tax geek in the U.S. The foreign tax credit provisions are among the most complicated areas of U.S. and become further complicated when a "U.S. Shareholder" of a Controlled Foreign Corporation includes income in one year but receives distributions in another. In their article, Neha Rastogi and Stanley C. Ruchelman explore the labyrinth of the foreign tax credit provisions that are designed to ensure that (i) income and (ii) related foreign taxes are reported in the same foreign tax credit basket. The takeaway is that, if the exercise is not computed properly, double taxation of income is sure to arise.

- **New B.O.I. Regulations Under the C.T.A. are ISSUED by FinCEN.** On Friday, March 21, 2025, the Financial Crimes Enforcement Network ("FinCEN") submitted an interim final rule narrowing the existing beneficial ownership information ("B.O.I.") reporting requirements under the Corporate Transparency Act (the "C.T.A."). Entities previously defined as "domestic reporting companies" now are exempted from the reporting requirements. They do not have to report B.O.I. to FinCEN, or update or correct B.O.I. previously reported to FinCEN. With limited exceptions, the interim final rule does not change the existing filing requirement for foreign reporting companies. As a service to our readers, particularly those based outside the U.S., Insights has published significant excerpts from the preamble of the FinCEN interim regulations, with footnotes deleted. The preamble explains the change in rules, and does so in plain English.

We hope you enjoy this issue.

- The Editors

NUPTIAL AGREEMENTS IN THE CONTEXT OF AN INTERNATIONAL COUPLE – VIEWS FROM FRANCE AND SPAIN

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Tags
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de Ganay
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INTRODUCTION

Getting married involves choosing the person with whom you want to spend the rest of your life. For most, it is a complex decision. It becomes even more complex if the parties are not of the same nationality or if one of the parties must move to another country in order to avoid a two-city lifestyle.

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.

This discovery often leads to many disappointments for the less fortunate party in a separation, often the wife who, as a French or Spanish woman married in France or in Spain, lived all her married life with the mistaken belief that she would be protected by French or Spanish rules governing marriage.

Conversely, other couples believe that they are protected by the provisions of a prenuptial agreement signed in France or in Spain that generally provides for separation of property. In that case, the husband is most often the one who discovers at the time of separation that the contract will not necessarily be considered in common law countries such as England, United States, English-speaking Canada, Hong Kong, or Singapore. He then learns that he must share half of his assets with his ex-wife, notwithstanding the fully executed property agreement.

The purpose of this article is therefore to give a few pointers to 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.

THE STATUS OF MARRIAGE CONTRACTS AND PRENUPTIAL / POST NUPTIAL AGREEMENTS IN FRANCE

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:

> [T]he set of rules concerning property relations between spouses and with respect to third parties, which result from a marriage or its dissolution.

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

Historically, one's legal matrimonial property regime is the law implicitly chosen by the spouses. This is often referred to as the law of autonomy. 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 were considered to have expressed their wish to be subject to the customs of their domicile.

This conflict of laws rule based on autonomy of will is still in effect in France 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 marriage. This conclusion 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 (i) Article 4 of The Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes[1] and (ii) Article 26 of the European Matrimonial Property Regimes Regulation ("Article 26"), applicable to 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. It is the spouses' first habitual residence and there is no need to investigate 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. In France, the regime is the community of acquired assets in France.

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

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[1] 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.

necessary to apply the law of several 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. Indeed, the Hague Convention provides for certain situations in which the matrimonial property regime is automatically mutable.[2]

"Finally, one should not forget that, if French law applies, the default matrimonial property regime in France is the regime of community of assets."

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.]

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.

Finally, one should not forget that, if French law applies, the default matrimonial property regime in France is the regime of community of assets.

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 when it comes to issues of classification.

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*, French courts generally consider definitions provided in European texts and relevant European

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[2] 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.

jurisprudence. In its *Van den Boogaard* decision,[3] the European 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 (Recitals 21 and 22).

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.

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.

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 (i) elect to apply The Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations, (ii) select a foreign law as the law to be applied to support obligations, and (iii) the selected foreign law allows this type of provision.[4] 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 Cassation[5] 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.

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3 ECJ, 27 Feb. 1997, case C-220/95, *Van den Boogaard*.

4 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 choosing the applicable law have been met.

5 Cass. 1st civ., 8 Jul. 2015, no. 14-17.880.

Recognition in France of a Foreign Prenuptial Agreement

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 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 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 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 U.S. Consequently, the following common law concepts should be embodied in the French prenuptial agreement:

- The contract must be just and equitable for both parties ("fairness").
- Each party should receive advice from independent counsel ("independent advice").
- 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.

THE STATUS OF MARRIAGE CONTRACTS AND PRENUPTIAL / POST NUPTIAL AGREEMENTS IN SPAIN

The situation in Spain regarding marriage contracts could be summarized as a hybrid between the French position and the Anglo-Saxon tradition of prenuptial agreements. Traditionally,[6] 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

[6] 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. This law allowed spouses to conclude marriage contracts after the celebration of the marriage.

the concept of the "*capitulaciones matrimoniales*," which translates to "matrimonial capitulations" (referred to below as "marriage contracts").

However, the desire of the spouses to have predictability regarding the consequences of a breakup has led to the use of agreements regulating other aspects of family relations through "*acuerdos en prevision de la rupture*," which translates to "agreements in anticipation of the breakup" (referred to below as "nuptial agreements"). Spanish Courts are predisposed to recognize and enforce foreign prenuptial and postnuptial agreements. 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.

Marriage Contracts Recognized Under Spanish Law Allow for the Divisions of Matrimonial Property

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.[7] To illustrate, a prenuptial agreement that acknowledges the application of New York State law to property owned by the prospective spouses and specifies the way in which equitable distribution under New York State law generally will be recognized by Spanish courts if the married couple ultimately reside in Spain, albeit perhaps with limited modification.

The Object of Marriage Contracts

Under Spanish national law,[8] couples can choose the matrimonial property regime by means of marriage contracts.[9] 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,[10] which include the community property regime ("*sociedad de garanciales*"),[11] the participation regime ("*regimen de participación*"),[12] and the separate property regime ("*separación de bienes*").[13]

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[7] 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.

[8] 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.

[9] Articles 1315 and 1326 of the CC.

[10] The autonomous laws may contain their own legislation on matrimonial property regimes.

[11] Articles 1344 *et seq*. of the CC.

[12] Articles 1411 *et seq*. of the CC.

[13] Articles 1435 *et seq*. of the CC.

In addition to choosing one of these regimes, the marriage contract can modify or change the matrimonial property regime.[14] The modifications made cannot affect third parties acting in good faith.[15]

The Applicable Regime in the Absence of Marriage Contracts

Under Spanish national law, the applicable property regime is the community property regime.[16] This can be modified by marriage contract, which is important because the matrimonial property regimes vary depending on the connection that each of the spouses has with different parts of Spanish territory.

In the absence of a marriage contract, the domestic territorial law applicable to the matrimonial property regime will need to be determined.[17] 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. If the Regulation is not applicable, the conflict of law rules provided for in Articles 9.2 and 9.3 of the CC apply.[18]

For this purpose, the provisions of Article 9.2 of the CC[19] 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.[20]
- 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.

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[14] Article 1325 of the CC.

[15] Article 1217 of the CC.

[16] Article 1316 of the CC.

[17] For examples of the application of Article 9.2 of the CC in the domestic context see Juliana RODRIGUEZ RODRIGO, Aplicación de la norma española de conflicto de leyes interno para determinar el régimen económico matrimonial, Cuadernos de Derecho Transnacional, (October 2023), vol. 15, n°2 pp. 1301-1308.

[18] For an example, see Juliana RODRIGUEZ RODRIGO, Ley aplicable al régimen económico matrimonial, a propósito del comentario de la sentencia de la audiencia provincial de Madrid, de 30 Septiembre 2019, Cuadernos de Derecho Transnacional (October 2020), Vol. 12, n°2, pp. 1137-1145.

[19] 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.

[20] Article 16.1 of the CC establishes that the personal law is determined by "*vecindad civil*." 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.

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 17 autonomous regions, including Andalusia, Catalonia, the Basque Country, Galicia, the Canary Islands, and the Valencian Community. In comparison Spanish national civil law which applies the community property regime, some autonomous laws provide that have adopted the separate property regime as the default regime. Catalonia is an example.

The Validity of the Marriage Contract

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. In turn, the validity of the marriage contract is governed by the general rules applicable to contracts.[21]

In addition, marriage contracts must respect laws, morality, and public order.[22] These precepts include constitutional principles, such as the principle of equality of rights of the parties.[23] Where the foregoing requirements are not wholly met, the marriage contract is not effective.[24]

The Effectiveness of the Marriage Contract

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.[25] With marriage, the economic regime and all marriage contract covenants must be registered in the Civil Registry.[26]

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.

It is common for the parties to a marital contract to address matters that go beyond the matrimonial property regime. Where that is done, questions arise as to the validity and enforceability of the terms of the contract in Spain.

Prenuptial and Postnuptial Agreements in the Spanish National Civil Law

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 post nuptial agreements.

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[21] Article 1335 of the CC.

[22] Article 1255 of the CC.

[23] Article 32 of the Spanish Constitution.

[24] Article 1328 of the CC.

[25] Article 1334 of the CC.

[26] Article 60 of the Civil Registry Law and article 1333 of the CC.

Nonetheless, this type of agreement can be looked at as an agreement to regulate the personal and economic consequences of a possible future marital breakdown.[27] 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.

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.[28]

In a judgment of June 24, 2015, the Supreme Court ruled specifically on the conditions for the validity of a prenuptial agreement.[29] 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.

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

- According to the agreement, compliance was not left to the discretion of the spouses, as the conditions that generated the obligation were clear.
- The agreement did not promote the crisis, since neither was in a compromised economic situation.
- The principle of was not violated, since there was no serious prejudice to the husband.
- Neither spouse was in a situation of abuse of a dominant position or in a situation of precariousness.

"Nonetheless, this type of agreement can be looked at as an agreement to regulate the personal and economic consequences of a possible future marital breakdown."

The Spanish Supreme Court concluded that the agreement was valid. It was negotiated by both parties, and the rent was adequate.

In a judgment of May 30, 2018,[30] 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.

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27 Muñoz Navarro, A. J., "*Los pactos prematrimoniales o en previsión de ruptura matrimonial*," *La Ley Derecho de familia: Revista jurídica sobre familia y menores*. Wolter Kluwer, 2020, No. 25, p. 3.

28 STS 325/1997 (RJ 1997/3251); STS 1053/2007 (RJ2007/7307); STS 217/2011 of March 31 (RJ 2011/3137).

29 STS 392/2015

30 STS 315/2018

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 considered that the woman was aware of what she signed because she received legal advice from the notary or lawyer.
- 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 Spain.
- 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 prenuptial agreements is evidenced by the following factors:

- The parties to the marital agreement each obtained independent legal advice to ensure an understanding of the terms of the agreement.
- The provisions of the marital agreement applied to both parties.
- 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.

Mandatory Concepts that Apply 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 (i) law, (ii) public order, (iii) morality, (iv) constitutional principles such as the equality of spouses in marriage,[31] (v) integral protection of the family and children,[32] (vi) rights and duties of the spouses,[33] (vi) the principle of noncausal separation or divorce,[34] (vii) the rules of the primary matrimonial property regime,[35] (viii) the rules relating to the constitution of the marriage,[36] and (ix) the limits of public order to the paternal-filial relations regarding inability to waive parental authority, custody of the common children, or alimony.

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[31] Article 32.1 of the Spanish Constitution.

[32] Article 39 of the Spanish Constitution.

[33] Article 66 *et seq*. of the CC.

[34] Articles 81 and 86 of the CC.

[35] Article 1315 of the CC.

[36] Article 44 *et seq*. of the CC.

“The effectiveness of a prenuptial or a post nuptial agreement will depend on the facts and circumstances presented to a court.”

The effectiveness of a prenuptial or a post nuptial 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.[37] 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 child will also guide the assessment of the agreements relating to custody and child support.[38] 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.[39] In the same vein, clauses sanctioning infidelity may be closely examined by the Spanish Courts and should be avoided.

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.

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

[37] Article 96 of the CC.

[38] Article 1814 of the CC.

[39] Article 10.1 of the Spanish Constitution.

Code (“CCCat”) establishes clear and detailed regulation of nuptial agreements. Among other things, it distinguishes between marriage contracts regulated in Art. 231-19 of the CCCat and agreements regarding a breakup regulated in Art. 231-20 of the CCCat. Regarding the latter, it establishes the conditions to enter said 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. He 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. Here are several examples:

- In anticipation of marital breakdown, the parties may agree on the use of the home by each party.[40] Agreements that harm the interest of the children or that compromise the basic needs of one of the parties are not effective.
- In anticipation of the breakdown of the marriage, the parties can agree on the compensatory pension and the economic compensation for work,[41] including amount, duration, and period of the compensation.

The example of Catalonian law illustrates that, in Spain, the question of recognition and validity of nuptial agreements is complex. Among other things, enforcement may depend on variables such as (i) the choice of law applicable to the substance and form of the agreement and (ii) the geographical location of the Court that rules on the enforcement of the agreement.

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[40] Article 233-21 of the CCCat.

[41] Articles 232-7 and 233-16 of the CCCat.

CONCLUSION

When a client has some connection to France or Spain, whether by nationality or residence, and envisions marriage – and possibly divorce – there, assistance of a local attorney having a family law practice is helpful in navigating the uncertain waters of nuptial agreements in France and in Spain. Absent such advice, parties risk an uncertain future regarding the enforcement of a prenuptial agreement or a postnuptial agreement.

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