



**Universitat Autònoma
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**THE ENFORCEMENT OF
PRENUPTIAL AGREEMENTS IN
SPAIN**

Public policy as the limit

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ABSTRACT

Prenuptial agreements have grown to become a very popular part of marriage in the United States, almost as a ceremonial rite, prenuptial agreements are a very common part of the marriage ceremony. Is that so, that very commonly we see in the news the eccentric prenuptial agreements the new celebrity power couple gets. Prenuptial agreements are not only part of the popular culture but also a very useful way to regulate almost every aspect of the marriage and even the aspects of the plausible separation. Because they can regulate many aspects, they can incur in huge controversy and due to the fact that international marriages are every day more common, in this paper I would analyse if it is really possible for a prenuptial agreement to be enforced in a country with no prenuptial agreements in its legal system such Spain. Specially digging in the public policy as the limit of the prenuptial agreement's enforcement.

KEY WORDS

Prenuptial agreements, premarital agreements, public policy, applicable legal system, international competence and jurisdiction, matrimonial capitulations, American case law.

INTRODUCTION

Prenuptial agreements are agreements the future spouses sign regulating many aspects of the marriage, and even regulating the possible breakup of the marriage. In a society where 50% of the marriages end up in divorce, it is not surprising that a legal figure that can regulate very thoroughly the consequences of a separation has grown this popular between future spouses, whether they are wealthy or not, prenuptial agreements have grown to become a rite of passage for many prospective spouses.

In this thesis I would analyse and study American prenuptial agreements. I chose to centre my paper in the American prenuptials because United States has become a landmark of prenuptial agreements, even though they are legal figures in other countries, we cannot deny the importance and cultural reference of the United States regarding prenuptial agreements, for every now and then news break out of another couple of celebrities that chose to sign a prenuptial agreement before getting married, and that leads me to the other reason why I choose to centre the research in American prenuptial agreements. Due to the many legal systems in the States and the great importance of individuality, self-expression and free will, the States are the birth place of very controversial prenuptial agreements that only there could they be possible.

This study would not only be about prenuptial agreements but also about their enforceability in Spain. As every day international marriages are more and more common in our society, it is very possible that Spain may encounter a lawsuit about a prenuptial agreement signed in America that has to be effective in Spain. However, in Spain has never been the tradition of prenuptial agreements unlike Anglo-Saxon countries, that may be because Spain has a deeply-rooted catholic believes and divorce was not an option for many years, for in Spain getting divorced has been legal for around only 30 years.

That may explain the delay of Spain in figures that let the prospective spouses regulate the events of their future divorce before even getting married.

Because I am very interested in the possibility of Spanish courts having to resolve a lawsuit about the validity of an American prenuptial agreement I would analyse closely every step of the way for that prenuptial to be either valid or invalid.

I will specially emphasise in the limits of prenuptial agreements, for what may be allowed in the States, may be a huge infringement of the Spanish public policy.

This thesis will be dealing with International Private Law matters, most closely international Family Law. This research will be divided in two parts, the first one would be about prenuptial agreements, the concept, its history and evolution, highly transcendent case law, the possible content, formal requirements of a prenuptial agreement and the most similar figure of prenuptial agreements in Spanish legislation, that being matrimonial capitulations. This way I wish the readers would have a clear picture of the typical American prenuptial agreement before deciding if it is possible to actually enforce them in Spain.

The second part, would explain all the steps a prenuptial agreement must follow in order to know if it will be valid or not in Spain. It will be subdivided in three parts, the international competence and jurisdiction of the Spanish courts, the applicable law when resolving the lawsuit and finally, the actual possibility for a prenuptial agreement to be enforced by the Spanish courts, making and special digging about Spanish public policy as the limit for that prenuptial to be enforceable. Finishing with a conclusion to sum the whole study up and to finally resolve if a prenuptial agreement could be enforced in Spain.

PRENUPTIAL AGREEMENTS

PART I

Concept

Prenuptial Agreements also known as antenuptial agreements or premarital agreements, abbreviated as prenups, are binding legal contracts between prospective spouses. The objective of a prenuptial agreement is to regulate different aspects of the marriage, this aspects can be both, personal or financial.

The prenuptial agreement can regulate economical aspects such as establishing the economical regime of the marriage; in case of a divorce, the prenuptial agreement can regulate everything, from the causes itself of the divorce to how will the goods of the marriage be divided or even if there will be any spousal support at all.

When it comes to the personal aspects, the prenuptial agreements can regulate most things concerning future unborn children such as education to day to day issues like in cases of domestic disagreements ways to solve them.

These agreements can be very useful, in case of marriage breakup because the agreement can save them money and time as they may avoid going to court and having a legal battle with each other.

But prenuptial agreements are not only useful in terms of separation, although it may be the most popular reason to have a prenuptial agreement, prenuptial agreements can regulate succession matters in case of spousal death; or even it can regulate how the couple will have to interact with each other during the marriage, like the famous prenup of Rex and Teresa LaGalley whose prenuptial regulated even how many times a week they should have intercourse¹.

¹ MARSTON, A. (1997). Planning for Love: The Politics of Prenuptial Agreements. *Stanford Law Review*, 49(4), 887-916.

Origins and evolution

Introduction

Prenuptial agreements are far older than most expect them to be, the prenuptial agreements we now know and see in everyday life have antecedents of over 2.000 years, from which we based the modern prenuptial agreements.

In the following pages I will explain the different and most outstanding stages in the long life of the prenuptial agreements.

Ancient Egypt

The first ever documented prenuptial agreement was found in Ancient Egypt, is almost 3.000 years old, and nowadays is exhibited in the Oriental Institute of the University of Chicago.

This prenuptial agreement is 2.43 meters long scroll and it concedes a compensation of 1.2 pieces of silver and 36 bags of grain for every year for the rest of her life, which would have been considered quite beneficial to the wife. Prenuptial agreements' objectives were to provide enough alimony for the wife to live with her needs covered in case of the marriage going south or the death of her husband. Also, Egyptian women of the time could own property and had the same legal rights as men, so many of the prenuptial agreements of the time agreed to return the property that the wife had contributed to the marriage or its equivalent in money in case of marital separation².

Ketubah

The next oldest form of premarital agreements are the Ketubah, the first ketubah is estimated to be 1.500 years old and are of Jewish marital tradition and they still are part of the actual marital Jewish ceremony.

² B, Gunn (1934). *The Journal of Egyptian Archaeology*, 20, 223-228.

American prenuptial agreements are mostly based on the Ketubah³. The Ketubah consists in a contract written in Aramaic where the husband compromises to take care of his wife in terms of food, clothing, marital relations, fidelity, funeral expenses and alimony in case of marriage breakup or the death of the husband.

Currently, although the Ketubah is still used as a part of the Jewish marriage ceremony, it is not enforced, in exception of Israel.

Europe in the IXth century

In that time in Europe there was the figure of the dower or dowery which was an early form of a prenuptial agreement.

The dower was very simple and it only consisted of one-third of the property owned by the husband that the spouses shared, but only in case of the husband dying the wife was entitled of that one-third of property.

The wife was entitled as well to the property and goods that she brought into the marriage⁴.

Colonial America until the XIXth century United States

Until the XIXth century, women in the British colonies and for a long time in the final United States could not own property, specially not married women, as they acquired that right far after single women. So the only way to protect them was by signing a marriage contract that stipulated that in case of their husband dying, disappearing or divorcing them they would be able to sustain themselves by guaranteeing them some of their husband property.

This changed in 1848 with the Married Women's Property Act. With this Act, the whole aim of prenuptial agreements changed, for now the main importance was not to allow the widowers or ex-wives some part of the late husbands' property, but to protect the wives' own properties, belongings and

³ MANN, C. k. (2007). *American Jurisprudence Proof of Facts*. New York: Westlaw

⁴ UNKNOWN. *How Prenups Have Changed Throughout U.S. History*. The prenuptial agreements organisation

assets in cases of getting married with a less wealthy men than them, so the future husbands would not take advantage of their money and throw that away.

With the new type of prenuptial agreements, the husbands of wealthier women than them, were not allowed to touch their wives' own assets.

Prenuptial from 1950's in the United States

In the 1950's divorce laws started to change, making it easier for the spouses to get a divorce, but judges tended to look for a guilty party who would have been the reason behind the divorce. And then, when the judge decided whose fault it was, the judge would divide the assets of the spouses accordingly. That meant that the one spouse found guilty of the breakup will get much less assets than the other party, if any at all.

That caused a rise of prenuptial agreements, many prospective spouses fearing the wrath of the judge and that causing the loss of all prospects of getting something out of the marriage⁵.

Even though prenuptial agreements were more and more typical every time, many judges of the era chose not to enforce this prenuptial agreements which regulated the outcome in cases of divorce, for they considered them to go against the public policy of the institution of marriage, "*encouraged divorce and altered the essential elements of marriage*"⁶.

The only type of prenuptial agreements that were enforced undoubtedly were those that only regulated the outcome in terms of spousal death.

All of this changed in the State of California where they had a more open approach to divorce and the judges did not seek for a culprit of the breakup of the marriage. But this also caused a huge interest of prenuptial agreements that

⁵ UNKNOWN. *How Prenups Have Changed Throughout U.S. History*. Cit.,

⁶ WEITZMAN Lenore J, (1981). *The Marriage Contract: Spouses, Lovers and the Law*. Michigan: Macmillan USA, p.349.

specifically assessed unfaithfulness as an issue that would provoke the adulterer part of getting less of the marriage earnings if anything at all.

Modern Divorce changes Prenups

In this period of time, we have to divide it in two segments, the first one would be prenuptial agreements before *Posner vs. Posner* followed by prenuptial agreements after *Posner vs. Posner*.

Before *Posner vs. Posner*, prenuptial agreements tended to only be enforced in cases where the spouses did not stipulate clauses regarding plausible divorce. The prenuptial agreements that were enforced were those that were fairly upon the newlyweds and that regulated their property in case of death of one of the couple, not in case of divorce, for that was considered to go against the public policy of the institution of marriage.

After *Posner vs. Posner*, a case in 1970 that arrived to the Florida Supreme Court, as other few cases like *Gant vs. Gant*, courts stopped to see prenups that regulated the situation in cases of divorce as a way of encouraging divorce, instead, as the society changed and getting divorce became a very common outcome in any marriage⁷, it was only logical to allow this kind of agreements in order to protect the economical assets of the spouses, for without this kind of assurance, many people would choose not to get married.

This sudden change of perspective was fruit of the new courts' policy of no fault" divorce, as stated by Professors Parley and Lindey: "*The development of 'no fault' divorce [...] lessened the concerns about the advantaged spouse unduly imposing on the other party to force him or her to start a divorce case in order to take advantage of the agreement, as the advantaged spouse could commence an action whenever he or she chose*"⁸. With this new point of view,

⁷ *Gant v. Gant*, (W. Va. 1985). 329 S.E.2d 106, 113–14.

⁸ "LINDEY Alexander", "PARLEY Louis I".(Spring 2002). *Lindey and Parley on Separation Agreements and Antenuptial Contracts*. Real property, Probate and Trust Journal, Vol. 37 N° 1, 45-51. JSTOR Database.

the courts felt more open to enforce prenuptial agreements that regulated what would happen in case of divorce or separation.

Current estate of Prenups

Nowadays, prenuptial agreements have become a very popular and common resource used by future spouses, independently of their social status, unlike in the past where it was a resource mainly used by the wealthy to secure themselves from undesirable outcomes.

Prenuptial agreements are now enforced in the majority of cases in contrast to the difficulties they arose in past generations, and are currently considered a wise way to save on legal costs and fasten an impending divorce.

Moreover, even though prenuptial agreements may be more popular for their use in cases of divorce, we must not forget that a prenuptial agreement can stipulate rules to follow within the matrimony however extravagant they may seem to most. It is common knowledge that the eccentric clauses many celebrities include in their prenuptial agreements.

What once was a way of protecting women in cases of their husbands' death, defending their rightful property in front of others, has mutated to a form of contract allowing very questionable clauses ethically speaking, distorting the very aim of the original prenuptial agreement.

Significant Case Law

Introduction

Therewith, I will proceed to introduce and explain thoroughly the most influential case law, exposed in chronologic order, in terms of prenuptial agreements.

This three rulings of the Supreme Courts of different States of the United States, were consequential of the prenuptial agreements as we know them today. These case law is closely related to the evolution of prenuptial agreements in the United States, showing three different stages of the evolution of prenuptial agreements.

Del Vecchio vs. Del Vecchio

The *Del Vecchio vs. Del Vecchio*⁹ case dated in June 29th 1962 filed in the Supreme Court of Florida by Mrs. Josephine Del Vecchio as petitioner and Mr. Samuel Del Vecchio as Executor of the Estate of Domenico Del Vecchio, Deceased respondent.

This prenuptial agreement did not have a clause that regulated the outcome of a matrimonial breakup, as at the time that would have made the prenuptial agreement invalid due to it being against public policy. Instead, this case was about the succession clause in the prenuptial agreement.

Mrs. Del Vecchio was a 23 years-old waitress and cashier with estimated assets of \$8.000 who in 1946 married Mr. Del Vecchio, a 56 years-old co-owner with his son of a chain of hardware stores worth an estimated amount of \$500.000 in Washington, D.C. Mr. Del Vecchio's son was the one who suggested signing a prenuptial agreement, which pronounced that Mrs. Del Vecchio, in case of the death of Mr. Del Vecchio would renounce to all property located in Washington D.C. except for the family home where the spouses lived.

Lately, in May of 1958 Mr. Del Vecchio passed away and Mrs. Del Vecchio did not want her prenuptial agreement to be enforced, and so, she brought it into

⁹ *Del Vecchio vs. Del Vecchio*, (1962) 143 So. 2d 17. Florida Supreme Court.

court stating that the agreement lacked of validity due to the fact that her consent was not informed, for she said that in times of signing the agreement she was not told how much her husband was truly worth nor was she assisted legally by a lawyer.

The Court considered that Mrs. Del Vecchio should have known, and most probably knew her husband's financial status even though it was not disclosed in its entirety when she signed the prenuptial agreement. Therefore, in terms of consent, the Court did not observe any deficit.

The next cause the Court examined was if the agreement was proportionate in relation to the provisions intended for the wife in case of the death of Mr. Del Vecchio compared to Mr. Del Vecchio's economic status.

The Court decided that as Mrs. Del Vecchio ought to have known or most probably knew about her late husband's patrimony and because the clauses established in comparison to Mr. del Vecchio's wealth to that which was conceded to Mrs. Del Vecchio in case of his death, was more than fair in the eyes of the Court, the prenuptial agreement was considered valid and enforceable.

Using the validity of consent, including in this consent the requisite of the parties knowing each other's patrimony, before signing away their rights and examining if the agreement is disproportionate became a precedent when it comes to decide if a prenuptial agreement is rightful or invalid. This precedent was used in the notorious judgment of *Posner vs. Posner*.

Posner vs. Posner

The *Posner vs. Posner*¹⁰ case may be one of the most influential and change-inducing cases regarding prenuptial agreements in the United States. This case was brought into the Supreme Court of Florida in March 25th 1970 by Mr. Victor Posner as the petitioner, against Mrs. Sari Posner, the respondent.

Mr. Posner made his future wife sign a prenuptial agreement 14 days before their ceremony. This prenuptial agreement stated that in case of separation or

¹⁰ *Posner vs. Posner*, (1970) 233 So. 2d 381. Florida Supreme Court.

divorce Mr. Posner would pay \$600 as spousal support each month and in case of them having children, he would also pay \$600 per children per month as alimony.

Six years after they got married, they filed for divorce, having had 2 children during the marriage.

Subsequently, Mrs. Posner tried to enforce their prenuptial agreement, unfortunately Mr. Posner denied his obligation to pay that quantity of money as alimony and claimed that the prenuptial agreement was invalid, therefore he was not obliged to pay said quantities. It is important to say that until their case, the prenuptial agreements that regulated what would happen in case of divorce or separation were not enforced by the courts, stating that these clauses promoted divorce and were contrary to the public policy of the institution of matrimony, so Mr. Posner was convinced that his prenuptial agreement would not be enforced like those prenuptial agreements similar to his before him.

The District Court ruled in favour of Mr. Posner, following the previous case law, which, as I mentioned before, the provision of alimony in cases of divorced made the agreement not binding due to being against public policy. In consequence to this undesirable result, Mrs. Posner decided to appeal, and finally it arrived to the Supreme Court of Florida.

The Supreme Court of Florida decided on a totally different course. The court based its ruling in two main points, the first one deals with the non-violation of public policy. The Court regarding public policy states that “*We have given careful consideration to the question of whether the change in public policy towards divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void ab initio as `contrary to public policy’*”¹¹

The second decisive point was concerning the validity of the agreement. The arguments used by the Court in order to proof that it was indeed a valid

¹¹ *Posner vs. Posner “The ruling”*, cit.,

prenuptial agreement were, the fact that Mr. and Mrs. Posner consent when signing the agreement was believed by the Court to be validly given by both parties. The Court ruled that the consent was well informed and free, with no proof of coercion of any kind, both parties understanding the implications of the prenuptial agreement. The only way for the prenuptial agreement to be void was if the circumstances regarding the economic situation of the parties changed drastically so that the stipulations in the prenuptial agreement would be disproportionate and unfair.

However, the Court considered that there was lack of a change in the circumstances making the economical clauses unfair and disproportionate, this argument was based in the previously mentioned case *Del Vecchio vs. Del Vecchio*.

The ruling in the case *Posner vs. Posner* must be one of the most important and decisive cases regarding prenuptial agreements, and the direct cause to the prenuptial agreements we see now everyday. That is why, in order to explain the evolution of prenuptial agreements, this case is indispensable for there is a before and after in terms of prenuptial agreement enforcement and content.

Simeone vs. Simeone

The *Simeone vs. Simeone*¹² case dated in September 25th 1990 brought into the Supreme Court of Pennsylvania. The parties are Mrs. Catherine E. Walsh Simeone as the appellant and Mr. Frederick A. Simeone as the appellee.

Mr. Simeone who was a neurosurgeon of 39 years-old of age with an estimated income of \$90.000 per year with other assets valued in \$300.000 got married with Mrs. Simeone, a 23 years-old unemployed nurse.

Just the night before of the ceremony, Dr. Simeone alongside his lawyer made Mrs. Simeone sign a prenuptial agreement. She claims that she did not know that they would sign a prenuptial agreement and was ambushed the night

¹² *Simeone vs. Simeone*, (1990) 581 A. 2d 162. Pennsylvania Supreme Court.

before of the ceremony, nor did she have legal assistance before or after signing said prenuptial agreement.

This prenuptial agreement stated that in case of alimony, she would receive \$200 per week until a maximum of \$25.000 and, she would renounce her right to alimony *pendente lite*, which is a kind of alimony, different to spousal support and its main difference with spousal support is that alimony *pendente lite* is temporary and short-lived. Its aim is to cover financially the party in the divorce that has the biggest economic imbalance. This economic support starts with the litigations and stops once the court has decided on a ruling.

Seven years after getting married the couple decides to separate, and following the prenuptial agreement that they signed, Dr. Simeone gave Mrs. Simeone each week \$200.

Notwithstanding that, two years after separating, and just when they filed for divorce, Mrs. Simeone asked the Court to grant her alimony *pendente lite* and to consider the prenuptial agreement invalid due to the fact that her consent was coerced and uninformed, consequently making the prenuptial agreement void.

The interesting points in this case are, first that the Court had a non-paternalist reasoning leaving behind the old and very wrong belief that women were always the weaker party, and that they were unable to comprehend the legal matters and could not be expected to understand the clauses of a legal document, making it unnecessary for them to read it or question it, they needed a lawyer for it to be fair. The secondly and most important point of the case is that the Court considered the prenuptial agreement as a pure contract, and therefore legal assistance was not an essential requisite for its validity. Therefore, the court ruled against Mrs. Simeone's wishes and proclaimed the prenuptial agreement valid.

This specific case created a precedent, and many courts all over the country changed their interpretation to welcome this non-paternalistic view of the law and the conception of these agreements as just contracts where the freedom of agreement was the main right to protect rather than the fairness of the prenuptial agreement.

Uniform Premarital Agreement Act

The case *Posner vs. Posner* had a huge impact in all United States, and subsequently most of the Courts of the 50 states started using *Posner vs. Posner* as a precedent and started enforcing prenuptial agreements with marriage breakup provisions. That triggered the need of a change in the common sets of laws.

That need of change was brought up by the National Conference of Commissioners on Uniform State Laws in its 92th annual conference celebrated in Boca Raton, Florida from July 22th to 29th 1983.

In that conference the Uniform Premarital Agreement Act was approved. The Uniform Premarital Agreement Act just regulates the basics so that it is easier to make compatible the different legislations of the States, for its true aim is to harmonize the different laws about premarital agreements in the States.

Although for the Premarital Agreement Act to be used in a State it has to be accepted and integrated in the legal system of that State, therefore this act is not used in all States, only in those who has adopted it.

As of now, since 2009 only 27 States has adopted the Uniform Premarital Agreement Act, those States are: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia and Wisconsin.

This act introduces the basics for States to decide if a prenuptial agreement should be enforced or not¹³.

¹³ ATWOOD, B., & BIX, B. (2012). A New Uniform Law for Premarital and Marital Agreements. *Family Law Quarterly*, 46(3), p. 314. Database Jstor.

The Premarital Agreement Act in its third article exposes which issues prospective spouses may contract in the agreement:

- A. *“The rights and obligations of each of the parties in any of the property or both of them whenever and wherever acquired or located;*
1. *The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;*
 2. *The disposition of property upon separation, marital dissolution death, or the occurrence or the non-occurrence of any other event;*
 3. *The modification or elimination of spousal support;*
 4. *The making of a will, trust, or other arrangement to carry out the provisions of the agreement;*
 5. *The ownership rights in and disposition of the death benefit from a life insurance policy.*
 6. *The choice of law governing the construction of the agreement;*
 7. *Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.*
- B. *The right to child support cannot be negatively affected by a premarital agreement”¹⁴.*

As we can see, this article assets the kind of issues a premarital agreement can discuss, but those are only the minimal issues a premarital agreement can include in its clauses, only the minimal limits it can regulate. Wherefore the premarital agreements of the States that apply the Premarital Agreement Act can settle many other topics the only limitations are that those other topics can affect negatively a future child regarding its alimony and that they must not infringe public policy or include an act typified as a felony¹⁵.

¹⁴ The Uniform Premarital Agreement Act.

¹⁵ ANGUITA Villanueva, Luís A. (2011). *Acuerdos Prematrimoniales: Del modelo de los Estados Unidos de América a la Realidad española*. Madrid: Universidad Complutense de Madrid. p.16-18

The sixth article of the Uniform Premarital Agreement Act establishes the causes that would make a premarital agreement unenforceable:

“A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- 1. That party did not execute the agreement voluntarily;*
- 2. The agreement was unconscionable when it was executed and, before execution of the agreement, that party:*
 - (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;*
 - (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;*
 - (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.*
- 2. If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.*
- 3. An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law¹⁶”.*

The act centres the importance of consent in the need of both parties knowledge of each other’s economical worth, the reason why this is such an important issue is because the majority of the American doctrine considers

¹⁶ Uniform Premarital Agreement Act.

premarital agreements as a form of patrimonial contracts¹⁷, and in the United States, when it comes to patrimonial contracts, the courts tend to be more exigent in the kind of consent the parties give due to the possibility that one of the parties or both could be hiding economical assets from the other party.

However, article six voices the causes for non-validity of the premarital agreement centred in the moment of the perfection of the agreement, that may be considered a mistake, the *Harvard Developments of the Law, Law review* expresses that “*The centre of attention of the Uniform Premarital Agreement Act is in concepts like voluntarily and abuse of power of one of the parties to illustrate how Matrimonial Law adapts to the usual doctrines of Contractual Law, meanwhile the requisites of patrimonial information show the traditional belief that the parties in order to be married are in a trusting partnership, a central idea of the conception of marriage as a community*”¹⁸.

The Uniform Premarital Agreement Act, although it is not applied in the fifty states, has had a notorious influence in America’s family law, as much as so that they differentiate the States who has adopted the act from those who had not. Some have adopted a modified version of the act in terms of the moment of perfection, in relation with the abuse of power, same sex couples marriage and prohibiting the provisions that relate to spousal support.

For example, the State of Arizona modified the Uniform Premarital Agreement Act, and its version stipulates that parties have to notarize the prenuptial agreement in order for it to be valid. In Arkansas the modification was forbidding the prevision of the marriage ending in divorce. However, if the marriage ends in divorce, that does not make the prenuptial agreement void, as long as the prevision of divorce was not the only purpose of the prenuptial agreement¹⁹. In California, clauses where the parties renounce to spousal support will be unenforceable unless the parties were given independent legal counsel.

¹⁷ HARRY Krause, DAVID Meyer. (2002). *Family Law in a Nutshell*. Illinois: Thomas-West. 5 ed. p. 83-84

¹⁸ UNKNOWN. (May 2013) *Marriage as contract and Marriage as Partnership: The Future of Antenuptial Agreement Law* Developments in the Law Harvard Law Review, Vol. 116, p. 2080.

¹⁹ UNKNOWN . (March 2010). *The Uniform Premarital Agreement Act and its variations throughout the States*. American Association Matrimonial Law, 23 n° 335,p. 23.

American Law Institute: Principles of the Law of Family Dissolution

In the year 2002 the American Law Institute published the Principles of the Law of Family Dissolution: Analysis and Recommendations. This was the first attribution of the American Law Institute about Family Law and despite the fact that the Principles of the Law of Family Dissolution has no legislative value, it has had a remarkable influence in the legal world due to it gathering within its over thousand pages, the most significant aspects of the United States' Family Law²⁰.

The Principles of the Law of Family Dissolution does not focus its entirely content on the premarital agreements, it only refers exclusively to the effects of a premarital agreement in case of the falling out of the marriage, it does not specify the possible content of a prenuptial agreement nor does it expose its limits.

The Principles of the Law of Family Dissolution refer to the effects of premarital agreements in its section seven, dividing it in four other categories, general dispositions, requisites for the efficiency of the agreement, rules relative to the clauses in particular and separation agreements. This means that not only are the premarital agreements regulated but a few others like separation agreements, consequently the Principles of Family Dissolution has a bigger area of application than the Uniform Premarital Agreement Act.

The requisites for efficiency are determined in the 7.04 paragraph: The requisites of the process that the paragraph 7.04 specify are:

- a) The celebration of the agreement has to happen at least 30 days before the ceremony.
- b) The possibility to both parties to have had independent legal counselling.

²⁰ MICHAEL. R. Calishman & ROBIN Fretwell Willson (2008), *American Law Institute's Principales of the Law of Family Dissolution, Eight Years After Adoption: Guideing Principles or Obligatory Footnote*. Vol. 42 n° 3. P. 573-575.

- c) In case of not receiving independent legal counselling, the agreement must be worded in a way that any adult with an average intelligence could understand which rights she or he is giving up.
- d) In case of giving up spousal support, it is mandatory for the other party to inform the future spouse about his or her patrimony. It would be considered that the other party has been informed when before signing the agreement that party is presented with a list specifying the most important economical assets and its value in the moment of signing, the annual earnings of the last three years and the information of any future acquisition or change in the earnings.

All these requisites aim is to protect the parties of the prenuptial agreement, because in most cases one part may lose rights and is in a clear position of weakness in front of the other. So by these requisites the courts can reassure themselves that it was a free and informed consent, no party took advantage of the delicate situation of a close future wedding nor used the normal pressure and emotional struggle to impose an unfair prenuptial agreements.

The paragraph 7.05 exposes that in case of substantial unfairness in its application, the courts should not enforce those premarital agreements. We can talk about substantial unfairness when, the party demanding the invalidity of the agreement proofs:

- a) There has been a notorious change of circumstances regarding the patrimony of one or both parties.
- b) The parties had had a child after signing the agreement.
- c) It has passed more than the fixated years (this number of years is fixated by each State).

The Principles of Family Dissolution contains the Second Look Doctrine basing it in the criteria of the substantial unfairness in the application of the agreement. The Second Look Doctrine consists in the fact that a court may determine the legality of a unforeseen future concern based on whether it actually confers within the perpetuities period.

As the Uniform Premarital Agreement Act, the Principles of Family Dissolution in its 7.06 paragraph, it is stated that in no case the right of child support can be negatively affected by the agreement.

Although the Principles of Family Dissolution provides very good points missed in the Uniform Premarital Agreement act, there are still loopholes concerning the legal nature of the agreements and the effects that they can cause²¹.

²¹ UNKNOWN . (2001). *Principles of the Law of Family Dissolution: Analysis and Recommendations*. Duke Journal of Gender Law & Policy, 8:1, 33-36.

Content of a prenuptial agreement

As we have seen until now, prenuptial agreements can regulate plenty of things, from the outcome in case of spousal death to how the spouses will have to interact during the marriage. Every State can have its own specific rules about premarital agreements, the most influential, as I stated previously are the Uniform Premarital Agreement Act approved in 27 States, and, in spite of the fact that it is not considered a law, the Principles of Family Dissolution has a great influence in all 50 States so courts mostly decide on whether or not enforcing a prenuptial agreement basing their ruling in the requirements that the Principles of Family Dissolution state in the seventh section.

A part from all that, prenuptial agreements can also include in their content²²:

- a) The distinction between separate and marital property, every state has its own laws regarding types of properties, by using a prenuptial agreement, the future spouses can decide by themselves what would be marital property or individual property.
- b) Protection against the other spouse's debts, by including this clause in the prenuptial agreement, the creditors of one of the parties would not be able to demand the debt to the other spouse not responsible of them.
- c) Provisions in case of spousal death, in a prenuptial agreement you can dispose what the parties would like to leave as inheritance to the other spouse, their own children and even children from previous relationships, just like in a Will.
- d) Protections for estate plans, in this case, a Will and a Living Trust must be added to the prenuptial agreement.

²²COVENTRY, A., & RAVDIN, L. (2015). *Premarital agreements & trusts*. Family Advocate, 38(2), p. 10-12.

- e) Directions for property distribution upon divorce, this must be one of the most popular reasons why people have a prenuptial agreement. In this case, in most states, but not in all 50 states, you can also arrange the quantity of alimony or even if there would be any alimony at all. This do not include child support, for this cannot be renounced in a prenuptial agreement.
- f) To address common issues, for example whether or not to file for joint or separate income tax returns, whether to have joint accounts, and if so how to manage them, establish procedures and ground rules for future decisions and how to settle in future disagreements and causes of divorce.
- g) You can also settle how will the spouses act during their marriage, setting up rules about the day to day married life and family like, for example stating which school their future children must attend to. Although this kind of clauses will not uphold in court, judges tend to feel uncomfortable with this clauses, prenuptial agreements are more of a financial rather than a personal contract. However, there are many prenuptial agreements like the one of Mr. and Mrs LaGalley that settle personal and domestic matters.
- h) It is also possible to stablish an economical compensation that one of the spouses must pay to the other, in case one of the spouses would infringe the rules they agreed upon in the prenuptial agreement. For example, they can stablish that in case of one of them cheating, the adulterous one must pay an economical compensation to the other spouse or even renounce to spousal support if committing adultery. However, there is two schools of thoughts regarding this economical compensations or renounce to the spousal support in case of adultery, there are Courts that allow them for there are like any compensation for damages caused. On the other hand, there are courts that do not enforce this clauses because of the doctrine of “no-fault divorce” which means that no party should be disadvantaged due to being the cause of the divorce.

The prenuptial agreement cannot deal with the following topics:

- a) The prenuptial agreement cannot restrict child support, custody or visitation rights, this is forbidden in the 50 states for the states consider the welfare of children a matter of public policy.
- b) As I aforementioned, some states do not allow to give up the right to alimony by signing a prenuptial agreement

Formal Requirements

Even though every state has its own family law, in exception of those who have approved and apply the Uniform Premarital Agreement Act, this formal requirements are common in all fifty states²³:

- All prenuptial agreements must be done in writing, oral agreements will not hold up in court.
- Both spouses must voluntarily sign the prenuptial agreement. In most cases due to the Principles of Family Dissolution, in order to proof that the consent was informed ergo valid, spouses must write a form listing all their assets.
- The prenuptial agreement must be witnessed.
- If one of the parties is legally represented, the other party must have legal representation as well in order to receive independent legal advice.
- The prenuptial agreement must not contain any fraudulent clauses or incomplete ones, hiding one of the parties full income and economical assets like properties and also a full disclosure of their liabilities.
- The consent must be free and valid, none of the parties can sign a prenuptial agreement because they are forced physically, psychologically, under extreme emotional pressure, threats, duress, coercion, undue influence or be ambushed by it right before the ceremony, the Principles of Family Dissolution fix a thirty-day period of time previous the ceremony to sign the prenuptial agreement.
- There cannot be any clause in the prenuptial agreement that infringes public policy or is typified as a felony.

²³ COVENTRY, A., & RAVDIN, L. *Premarital agreements & trusts. Family Advocate*, cit., p. 13

Spain's matrimonial capitulation and United States' prenuptial agreements

The most similar figure of prenuptial agreements in Spain's legal system are the matrimonial capitulations.

Just like in the United States, Spain has different legal system depending on the autonomous community and there are different Civil Codes that regulate matrimonial capitulations differently. I decided to base this part also with the Catalan legal system due to the proximity and my better familiarisation with the Catalan Civil Code rather than any other statutory legal systems in this matter.

I am going to expose bellow the difference and similarities of the matrimonial capitulations of the common Civil Code and the matrimonial capitulations of the Catalan Civil Code with the prenuptial agreements.

Matrimonial capitulations are a contract where you can state which normative will regulate the economic relation in the matrimony, you have to sign them with a notary public. They are regulated in the Book II of the Catalan Civil Code and in the chapter two of the Title third from article 1325 to article 1335.

Similarities between the matrimonial capitulations and Prenuptial agreements

As prenuptial agreements the common matrimonial capitulations and the Catalan matrimonial capitulations can modify, determine and change the economic regime of the matrimony. This part is also similar with the Catalan matrimonial capitulations.

Just like prenuptial agreements, Catalan matrimonial capitulations, unlike common civil law matrimonial capitulations, can regulate successions by the succession pacts, and a prevision of marriage breakup²⁴.

²⁴ PEDRO del Pozo Carrasco, ANTONI Vaquer Aloy, ESTEVE Bosch Capdevila. (2016). *Derecho de Cataluña. Derecho de Familia*. Barcelona: Marcial Pons 2ªed.

Likewise prenuptial agreements, the matrimonial capitulations whether Catalan or from the common Civil Code had to be written, not spoken in order to be valid.

The most special thing about the Catalan matrimonial capitulations is that there is a possibility to agree on a pact with prevision of the breakup of the marriage, which is the main difference between the Catalan matrimonial capitulations and the common civil code's matrimonial capitulations. The pact with prevision of the marriage's breakup is regulated in the article 231-20 of the Catalan Civil Code. Like the prenuptial agreements that follow the Principles of Family Dissolution, the pacts had to be signed 30 days before the ceremony. Also, the parties have to disclose every patrimonial information like the income, savings and economical expectations in the moment of signing in order to give an informed consent.

In case of substantial unfairness due to the change of economic circumstances, not the pact of prevision of the marriage's breakup nor the prenuptial agreement will be enforced²⁵.

Clauses against public policy would mean the non-validation of Catalan and common matrimonial capitulations and prenuptial agreements.

Either common, Catalan matrimonial capitulations or prenuptial agreements can be modified any time during the marriage if both parties agree to it.

Differences between Matrimonial Capitulations and Prenuptial agreements

The first difference is that, meanwhile prenuptial agreements do not need a notary public in order to be valid, even though you can notarize your prenuptial agreement voluntarily, matrimonial capitulations, both Catalan and common, on the other hand have to be notarized for them to be valid.

²⁵ *Catalan Civil Code* Book II, article 231-20. p.46

The second difference between either matrimonial capitulations and prenuptial agreement is that the matrimonial capitulations can be bestowed either before or after the marriage contrary to prenuptial agreements that have to be signed before the marriage ceremony, because then they will not be prenuptial agreements but postnuptial agreements.

Unlike premarital agreements, common and Catalan matrimonial capitulations can regulate donations to the spouse. This does not happen with prenuptial agreement, but because there is such an open frame when it comes to prenuptial agreements, I do not rule out the possibility that if the prospective spouses wished to, probably they could to. However this will not be a common use of the prenuptial agreement.

In both matrimonial capitulations can be intervened by other people a part from the future spouses, differently from prenuptial agreements where only the prospective spouses can take part in it.

Conclusion

Common matrimonial capitulations are less similar than the Catalan ones, for the common matrimonial capitulations cannot regulate successions nor pacts in prevision of marital breakup.

It is safe to say that Catalan matrimonial capitulations are significantly more similar to prenuptial agreements.

However, Catalan matrimonial capitulations can regulate far more issues than prenuptial agreements like donations and the fact that more people can take part in them.

Notwithstanding that, when it comes to marriage breakup, both, Catalan matrimonial capitulations and prenuptial agreements are quite similar, even though the breakup pact is in addition to the matrimonial capitulations and you can expire the matrimonial capitulations due to divorce and still keep the pact in prevision of breakup.

EFFECTIVENESS OF PRENUPTIAL AGREEMENTS IN SPAIN

PART II

International Competence and jurisdiction

European Regulation 2201/2003

Spain has an specific European Regulation that settles the laws of international competence and jurisdiction and the rules in execution and recognition of foreign rulings, if they are about divorce, separation, marriage annulment and parental responsibility.

This European Regulation is the 2201/2003²⁶, also known as Brussels II *bis*, this European Regulation replaced the European Regulation 1347/2000.

Its Article 1 explains in depth the material ambit of the ER 2201/2003. This article states that: “ *This Regulation shall apply, whatever the nature of the court or tribunal, in civil matter relating to: a) divorce, legal separation or marriage annulment; b) the attribution, exercise, delegation, restriction or termination of parental responsibility*²⁷”.

This European Regulation only applies to married people, not to people who might be in similar situations, like partners asking for a legal separation but that are not married, instead they are partners in a civil union or a similar form different from marriage.

Notwithstanding that, the term of what marriage is, must be stated by the Estates in particular, the ER 2201/2003 does not define what it considers to be a marriage, that is up to every Member State.

The article 3 states which court may have jurisdiction in terms of divorce, legal separation or marriage annulment: “*The jurisdiction shall lie with the courts of the Member States (a)*

- *In whose territory the spouses are habitually resident.*

²⁶ ER 2201/2003 onwards.

²⁷ European Regulation 2201/2003 (November the 27th of 2003), *Official Jpurnal of the european Union*, The Council of European Union.

- *The spouses were last habitually resident, insofar as one of them still resides there, or, the respondent is habitually resident.*
- *In the event of a joint application, either of the spouses is habitually resident.*
- *The applicant is habitually resident if he or she resided there for at least a year immediately before the application was made.*
- *The applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question.*
- *In the case of the United Kingdom and Ireland, has his or her “domicile” there;*

(b) of the nationality of both spouses or, in case of the United Kingdom and Ireland, of the “domicile” of both spouses²⁸”.

If Spain can relate to one of those requisites, then Spain will have the International Competence and Jurisdiction, even though the marriage may not have been celebrated in Spain. That means, that regardless of the nationality of the spouses, the domicile of the defendant or even if the spouses are not nationals from Member States, Spain will have competence if the spouses have their regular residence in Spain²⁹.

The article 7 of the ER 2201/2003, exposes when the national laws of international competence and Jurisdiction will be applied instead of the European Regulation. The national laws of international competence and jurisdiction are subsidiary to the ER 2201/2003.

The article 7.1 of the ER 2202/2003 exposes that: *“Where no court of a Member State has jurisdiction pursuant to articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State³⁰”*

²⁸ European Regulation 2201/2003 (2003), Cit. Article 3.

²⁹ GARCIMARTIN Alferez, Francisco. (2017). *Derecho Internacional Privado*. Pamplona. 4^a ed. Thomas Reuters. p. 149.

³⁰ European Regulation 2201/2003 (2003), Cit. Article 7.1.

- Article 4 ER 2201/2003: *“The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation”.*

This means that in cases when the article 3 cannot be applied to the situation, like in cases where one spouse is Spanish, the other spouse is American, they got married in America and have lived most of their married life in the United States, but then the Spanish spouse goes to Spain and presents the divorce lawsuit in Spain, the Spanish courts will only have competence following the norms of the European Regulation, if the Spanish spouse has lived in Spain for 6 months before presenting the lawsuit³¹.

If that was to happen, we would have to use article 7 which would refer as to the Spanish national laws of international competence and jurisdiction, in the cases where our national legislation would grant competence to Spain.

The Spanish law that regulates international competence and jurisdiction is the *Ley orgánica del Poder Judicial*³², more specifically in our particular case, the articles 22 *bis*, 22, *ter* and 22 *quáter*.

The article 22 *bis*. paragraph one of the LOPJ gives the possibility for Spanish courts to be competent by the parties free will, whether it being tacitly or explicitly, the parties can decide willingly if they want to be judged by a Spanish court³³.

We would be talking about tacit free will when the petitioner files the lawsuit in a Spanish court, and the defendant does not demand the incompetence of said court.

Contrarily, we would be speaking of explicit free will when the parties pacted previously in a clause of the premarital agreement that in case of any disagreement, they would turn into a Spanish court.

The other reason why Spanish courts may be competent is stated in article 22 *ter*. paragraph 2 of the LOPJ, which says that Spanish courts will have competence for a lawsuit if the defendant's regular residence is in Spain³⁴.

- Article 5 ER 2201/2003: “Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides”.

³¹ GARCIMARTIN Alferez, Francisco. (2017). *Derecho Internacional Privado*. Pamplona. 4^a ed. Thomas Reuters. p.154.

³² LOPJ onwards.

³³ LOPJ, *Boletín Oficial del Estado*, (2019) p.17

³⁴ LOPJ, “BOE”, cit., p. 18

The article 22 *quáter c)* of the LOPJ, is specifically about matrimonial issues which means that is closely related to our cause. This article exposes a few ways Spanish courts would have competence in any matters regarding personal or patrimonial issues between spouses. These ways are the following:

- Both spouses had their regular residence in Spain during the filing of the lawsuit.
- When the spouses had had their last residence in Spain and one of them still lives there.
- When the defendant has his or her regular residence in Spain.
- When the lawsuit is of common agreement and one of the spouses has his or her regular residence in Spain; or the petitioner has lived in Spain for at least one year since filing for the lawsuit; or the petitioner is Spanish and has lived for 6 months in Spain before suing; and if both of the spouses are Spanish³⁵.

As we can see all these requirements are mostly the same to those exposed in the third article of the ER 2201/2003, this means that the application of the national law regarding international competence and jurisdiction, will not change the fact of the Spanish Courts to be competent if the European Regulation has previously made the Judge arrive to the conclusion that Spanish courts do not have competence.

The only exception that can make the Spanish courts competent even though the European Regulation says otherwise, is the clause in article 22 *bis* first paragraph, of the LOPJ about tacit free will autonomy of the parties.

European Regulation 2016/1103

The European Regulation 2016/1103³⁶, is of use in jurisdictional issues as in applicable law issues, when the matter at stake are the economical regime of the

³⁵ LOPJ, “BOE”, cit., p. 19

³⁶ ER 2016/1103 onwrds.

matrimony, of those marriages celebrated January the 29th of 2019 and onwards or when the spouses have pacted the applicable law of the economical regime of the marriage the same date as aforementioned. This is a relatively new European Regulation. The ER 2016/1103 resolve jurisdictional issues from article 4 to 19. However, I am going to explain articles 5, 6, 7, 8, 9, 10 and 11, for those are the ones that relate the most to our topic.

Article 5 exposes when would the courts have jurisdiction in cases of divorce, legal separation or marriage annulment, it says: “1. *Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.*

2. Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the court that is seised to rule on the application for divorce, legal separation or marriage annulment:

(a) is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

(b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;

(c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or

(d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.

3. If the agreement referred to in paragraph 2 of this Article is concluded before the court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7(2)³⁷”.

As we can see, this article is closely related to the ER 2021/2003, as the same article refers to that regulation.

Article 6, exposes the jurisdiction in other cases from those exposed in articles 4 and 5: *“Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:*

(a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that

(b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that

(c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that

(d) of the spouses' common nationality at the time the court is seised³⁸”.

Article 7 and 8, decide on the competence by the use of the choice of court of the parties and the jurisdiction based on the appearance of the defendant, respectively, this means, the tacit and explicit free will of the parties.

Article 10, talks about the subsidiary jurisdiction, that is, when none of the courts of the Member States have competence, the courts of the Member State where the parties have immovable property would have the right to jurisdiction only regarding that immovable property.

³⁷ European Regulation 2016/1103 (January 29th 2019), Official Journal of the European Union.

³⁸ European Regulation 2016/1103, OJEU, Cit. Article 6.

Article 11, states the forum necessitates, which would be the one to apply when: “ *No court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected.*

The case must have a sufficient connection with the Member State of the court seised³⁹”.

It is safe to say that regarding the jurisdiction of the Spanish courts, there are many variables to take into account, we have to refer ourselves whenever we encounter a case of the international competence and jurisdiction of a Spanish court regarding prenuptial agreements, we would have to study the ER 2201/2003, the ER 2016/1103 and in defect of those European regulations, the Spanish LOPJ.

³⁹ European Regulation 2016/1103, OJEU, Cit. Article 11.

Applicable law

In cases of international private law, there can be times when a Spanish judge may have to apply a different legal system from that to the Spanish one. This is a way to avoid forum shopping, for if all judges were forced to always apply their national law, regardless of the legal issue, the solution to that lawsuit would depend greatly on where the parties decided to turn in the lawsuit⁴⁰.

That is way, even though at first glance the fact of a Spanish judge solving a case in a foreign legal system may seem strange, the true is that it is highly beneficial to the international private law system.

To find out if a Spanish judge would solve the legal issue with his or her national law or would have to use a foreign one, we would need to use a conflict rule within the judge's legal system.

European Regulation 2016/1103

The European Regulation 2016/1103, is the regulation that the Spanish courts have to apply to any issue about the economical regimes of the matrimony, to all those marriages celebrated or that had specified the applicable law of the economical regimes of the matrimony at the date of January the 29th 2019 and onwards. All those matrimones that were celebrated before, or that chose the applicable law before that date, would be remitted to the Spanish conflict rule in the common Civil Code.

The ER 2016/1103 talks about the applicable law in its chapter III, from article 20 to article 35.

Article 20 states that this regulation, is of universal application, and that whether the law designated to be applied is of a non-Member State, the court would have to apply it anyway.

Article 21 exposes that no matter of the location of the properties, only one law should be applied to all the goods that fall into the economical regime of the

⁴⁰ GARCIMARTÍN, “*Derecho Internacional Privado*”, cit., p. 300

matrimony. That means that by this regulation, there will be a unity of the applicable law.

In article 22 it is stated the main way of designating the applicable law, and that is by the explicit free will of the parties. But that is not almighty, the spouses or future spouses will have to choose between the following options: “ (a) *the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or (b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded*⁴¹”. So, the spouses will not be able to choose any applicable law in the world.

This same article also says that if the spouses change the applicable law, unless they agree otherwise, the new applicable law will only concern to those goods acquired after making that modification, nor can these changes affect negatively other people.

Article 23 exposes how the agreement on a choice of applicable law will be valid. Firstly, it has to be in writing, dated, and signed by the both parties. It is also valid to make this agreement by electronic communications, like in an email for an instance. Also, the agreement shall abide by the formal requirements of the Member State where it was signed. In cases where there is more than one regular residence, it is only needed to apply the formal requisites of one of those States. They will have to apply as well, any additional formal requirement about matrimonial property that the Member State lays down, when only one of the spouses has his or her regular residence in that State.

This shows that the general rule to designate the applicable law in this regulation, is by the explicit choice of the future spouses.

⁴¹ European Regulation 2016/1103, OJEU, Cit. Article 22.

If that agreement is missing, article 26 explains which will be the applicable law: “ *the law applicable to the matrimonial property regime shall be the law of the State:*

(a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

(b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

(c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.

3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State⁴²”.

It is very important to take issue in article 25, which specifically talks about the validity of a matrimonial property agreement, which would apply to the prenuptial agreement. This means that by this regulation, a prenuptial agreement would be formally valid if:

- The agreement is in writing, dated and signed by both spouses. It will also be valid if it is through electronic communications with durable record, like an email.
- The agreement has the additional formal requirements the State where the spouses have their regular residence when the agreement is concluded. When the spouses have the regular residence in different States at the time of the conclusion of the agreement, and each state has different formal requirements, it will only be necessary to accomplish the formal requisites of one of the States.
- The agreement has applied the additional formal requirements that the applicable law of the economical regime of the matrimony imposes.

Article 27 exposes what will the application law regulate, that being: a) the classification of the goods of one or both spouses in different categories during the marriage and after; b) the transfer of the goods from one category into the other; c) responsibility of the spouses regarding debts of the other; d) the rights, duties and faculties of both spouses regarding their patrimony; e) the dissolution of the economical regime of the matrimony and distribution of the property; f) the patrimonial effects of the economical regime of the matrimony upon the legal

⁴² European Regulation 2016/1103, OJEU, Cit. Article 26.

relationship between a spouse and a third party; and finally, g) the material validation of the matrimonial economic agreements, which would be the matrimonial capitulations in Spain, or the prenuptial agreement in the United States.

Article 30 is about the mandatory provisions in the applicable law, it states that the imperative provisions of the law of the forum shall be applied. Just as article 31 expresses that public policy of the law of the forum, shall always be the limit of the applicable law.

Article 32 forbids the renvoi, which means that once the application law is designed, we will only apply those laws resolving the conflict, not those regarding which should be the applicable law.

Article 33 is applied in cases of States with a plural legal system, which is the case in Spain. It says that firstly, that State's legal system should fix that issue and designate which territory's legal system should be applied. In Spain this issue would be resolved with the civil neighbourhood. However, it also states a process for those States who do not have a solution in their legal system.

Before the European Regulation 2016/1103 was applicable

For all those marriages celebrated before January 29th 2019, we must search for the conflict rule in the Spanish legal system, regarding the legal issue in question and once we found it we would know the legal system to use in order to resolve the lawsuit.

Even though, as I aforementioned before, in the Catalan civil code, there is a prevision of pacts in case of marriage breakup within the Catalan matrimonial capitulations, meaning that prenuptial agreements are not a figure completely foreign for the Spanish legal system⁴³. In the Spanish common legal system, there is not a conflict rule specifically for prenuptial agreements.

Therefore, we must classify the prenuptial agreements within an existing legal figure with a conflict rule so we know which legal system to apply.

⁴³ CALVO Caravaca, Alfonso y CARRASCOSA González, Javier. (2008) *Derecho de Familia Internacional*. COLEX Madrid. p. 183.

There are two ways we could define the conflict rule for the prenuptial agreements⁴⁴:

- Thesis of the qualification by function: The aim of the thesis consists on analysing the foreign legal figure so that we could find a resembling one within the Spanish legal system that performs similar functions⁴⁵. It is clear that function wise, the most resembling Spanish legal figure that serves the most similar functions are the matrimonial capitulations. Fortunately, matrimonial capitulations have a conflict rule that we find in the article 9 paragraph three of the Spanish Civil Code that says: “*The pacts or matrimonial capitulations by which stipulate, modify or substitutes the economical regime of the marriage wills be valid when they follow the law that regulates the effects of the matrimony, or the law of the nationality or regular residence of any of the parties at the time of the bestowal*”⁴⁶.
- Thesis of the wide positive concepts: The legislator chooses to widen the hypothesis of the conflict rule so that it can fit legal figures new to the Spanish legal system. That is how we can use article 9 paragraph three as the conflict rule of prenuptial agreements or any kind of pact of a foreign country when that pact is about regulating the economic aspects of the matrimony, so the name of the pact does not matter when it comes to applying article 9 paragraph three⁴⁷.

⁴⁴ ANTÓN Juárez, Isabel. (2015). *Acuerdos prematrimoniales: Ley aplicable y Derecho comparado*. Cuadernos de Derecho Transaccional, 7 n° 1, 5-45.

⁴⁵ CALVO Caravaca, Alfonso y CARRASCOSA González, Javier. *Derecho de Familia Internacional*. cit., p. 418-419.

⁴⁶ Código Civil Español, “Boletín Oficial del Estado” article 9.3. p. 14. Trad: PARRA López, Sílvia.

⁴⁷ ANTÓN Juárez, Isabel. (2015). *Acuerdos prematrimoniales: Ley aplicable y Derecho comparado*. cit., p. 45.

Now, we must analyse further the conflict rule itself from article 9 paragraph three:

1. *Hypothesis*: the hypotheses of this rule are the matrimonial capitulations or any pacts by the spouses regulating the economical regime of the matrimony, that includes the premarital agreements.
2. *Connection criteria*: The subjective criteria of the article 9.3 are the nationality and regular residence of the spouses. The objective criteria would be the law that regulates the effects of the matrimony.

Finally, for a Spanish court to apply its own legal system, the spouses must either be Spanish, have a regular residence in Spain or to have been married in Spain so that the legal system that regulated the effects of the matrimony was the Spanish one.

Possibility for a prenuptial agreement to be effective and executed in Spain

Now that we have thoroughly analysed prenuptial agreements, their content, requirements, and limits, we have seen that it is possible that the Spanish courts could be the ones in charge to resolve a lawsuit regarding a disagreement within the enforceability of a prenuptial agreement or not.

When the applicable law is the Spanish one, the court would redeem the enforceability of a prenuptial agreement considering it a matrimonial capitulation. If the court is in Catalonia, it is more likely the prenuptial agreement would be enforceable due to the fact that the matrimonial capitulations of the Catalan Civil Code are uncannily similar to the average American prenuptial agreement.

On the other hand, if the prenuptial agreement falls into a Spanish court where the common civil law is the one to apply, the prenuptial agreement is more likely to be unenforceable, or at least a few of its clauses, like those regulating successions. The prenuptial agreement would be treated as a contract in terms of consent, which in contrast to Catalonia's matrimonial capitulations in pacts with prevision of the marriage's breakup, is less demanding, for the consent in a contract does not need that both parties disclose their patrimony in order for the consent to be considered informed and valid. Which may mean that in terms of validation of consent, the common Civil Code might be more permissive.

If on the contrary the Spanish court has to apply the American law, the validation of the clauses would have to be judged by the law of the State of the spouses; or the law of the State that regulates the effects of their marriage; or the law of the State of their regular residence. The reason of which is in order to avoid people doing forum shopping.

But whether the law used is the American, the common in Spain or the one in Catalonia, all of them have a limit, and that is the Spanish public policy, that means that a Spanish court cannot apply a law or enforce a clause that goes against the public policy of Spain.

Public policy as a limit

Public policy as a term of International Private Law is when the court of the forum, in this particular case would be a Spanish court, cannot apply the foreign law or accept the clause in question because it violates the principles and morality of the legal system of the forum.

When it comes to prenuptial agreements there are a few concepts that are very well legal in the United States legal system but are contrary to the principles on morality of our Family Law.

In this particular case, due to the fact that there is not a legal figure of prenuptial agreements in the Spanish legal system, we would have to assert the limits of the prenuptial agreements with the limits and requirements of the matrimonial capitulations.

Free consent

One of the main controversies about prenuptial agreements is the free consent of the parties, because how can we really know that it is really free consent when the prospective spouses are in a very intense and emotional state. Many spouses are ambushed with a prenuptial agreement close to the ceremony, with no personal legal advisement.

In fact, one of the main reasons why prenuptial agreements go to court is because one party states that he or she was emotionally coerced into signing the prenuptial agreement, with no time at all to revise it or to show it to her or his lawyer.

In spite of the Principles of the Law of Family Dissolution which it is clear in its dispositions that one of the aims of those principles is to guarantee the free consent, for example in the requisite about having to sign the prenuptial agreement at least 30 days before the ceremony and the need of the possibility of the parties having individual legal assistance. Those are not rules that people must abide, even though many courts in the States would take them into consideration in their rulings, they are not obliged to. So there are still prenuptial agreements that do not check those requirements and might be found valid by some courts in the States.

So a Spanish court can likely find itself in front of a prenuptial agreement that did not apply the Principles of Family Dissolution.

When The Spanish courts are judging whether there was a free consent or not, there are two guidelines the courts may follow, depending whether they are in Catalonia or in an Autonomous Community that applies the Common Spanish Civil Code.

When the case falls in a Catalonian court, the guidelines the court will follow are those stated in the matrimonial capitulations, which the article 231-20 of the Catalan Civil Code speaks about pacts with provision of marriage breakup, that pact ascertains a period of at least 30 days before the ceremony to sign the prenuptial. It does not mention the necessity of legal counselling for both parties because instead the Code says that a notary public must have a private talk with each party explaining the stipulations of the pact of prevision of marriage breakup in order to reassure that the consent is free and informed.

However, in cases of not being in Catalonia, the Spanish Civil Code states in its article 1335 that the invalidation of the matrimonial capitulations would be regulated by the general principles of the contracts⁴⁸. So, they would decide if the prenuptial agreement is valid following the principles of contracts, which are regulated in the Spanish Civil Code from article 1262 to 1270. More specifically the article 1265 which states that consent will be considered void whenever the consent is based on “*an error, violence, intimidation or fraud*”⁴⁹. This consent to be valid does not require for the parties to be informed of each other patrimony, which can make easier to consider the consent valid even though it was uninformed.

⁴⁸ Código Civil Español (2019), “Boletín Oficial del Estado” p. 201

⁴⁹ Código Civil Español (2019), “Boletín Oficial del Estado” Trad.: PARRA López Sílvia. p.192

Notarization

Matrimonial capitulations must be notarized for them to be valid, however, prenuptial agreements do not have to be notarized, even though it is a possibility for the prospective spouses to notarize the premarital agreement.

The question is if the lacking of notarization would suggest the non-enforcement of the prenuptial agreement.

García Rubio believes that the requisite of notarization would only be necessary in cases that the prenuptial agreement deals with succession topics or modifies or states the economic regime of the matrimony⁵⁰.

The ruling of the Supreme court of Spain number 38/1995 of February 4th, says that “ *The requirement of notarization <<ad solemnitatem>> that the article 1327 of the Civil Code demands, correctly interpreted, refers exclusively to the matrimonial capitulations, this means that, the stipulations through which the spouses establish the economical regime of the matrimony, modify it or substitute it for other economic regime*”⁵¹ This means that only those clauses regarding the economical regime must be notarized, this could suppose that other clauses of the prenuptial agreement that do not involve the economical regime, rather other topics like spousal support or successions may not need to be notarized for them to be valid.

However, J. Egea believes that when it comes to prenuptial agreements it does not matter the content of the prenuptial agreement, it needs to have been notarized for it to be valid in Spain⁵².

In conclusion, there is not only one school of thought about that matter and because there is no case law resolving that issue we do not know for sure what would happen if a Spanish court encounters the lacking of notarization in a prenuptial agreement.

⁵⁰ GARCÍA Rubio, María Paz. (2014). Acuerdos prematrimoniales. De nuevo la libertad y sus límites en el derecho de familia. p. 2

⁵¹ Sentence of the Supreme Court of Spain number 38/1995 (04/02/1995). Database Aranzadi.

⁵² EGEA J., FERNANDEZ I., FERRER, J. (2014). *Comentari al article 231-20 del Codi Civil de Catalunya*. Barcelona: Atelier. p. 56

Establishing new causes of divorce and punitive clauses

Another possibility of clauses that the prenuptial agreements can content are clauses about different causes of divorce from those stated in the law. This would be highly against public policy, for the causes of divorce are a matter reserved for the legislator to decide⁵³.

Furthermore, spouses can include punitive clauses for causing the divorce or for committing acts against the marriage like adultery for an instance. In Spain the Civil Code states the duties and rights of spouses, one of those is fidelity, and more than once hurt spouses who had suffered adultery, have tried to sue their spouse or ex-spouse for economical compensation due to failure of fulfilling the marital duties.

However, the Supreme Court of Spain in its ruling of July 30th 1999 number 701/1999 has declared that even though we can consider the marriage as a contract, the unfulfillment of the marital duties exposed in the articles 67 and 68 of the Civil Code, although they can be of ethical reproach, they do not entitle for economical compensation for those duties cannot be forced upon someone and a part from that, the court also considered that the divorce or the separation was enough punishment⁵⁴.

Even though punitive clauses due to unfulfillment of the marital duties will most certainly not be enforced in a Spanish court, I do not believe the reason why they will not be enforced is due to being against Public policy.

Successions

Even though if we use the Catalan Civil Code, including successions in the premarital agreement will not go against public policy. If the Spanish court is resolving the controversy with the common Civil Law Code, any clause referring to a succession matter would be against public policy, the article 1271 from the common Civil Code, outlaws any pact about the future inheritance. It is also banned

⁵³ GARCÍA Rubio, María Paz. *Acuerdos prematrimoniales*. Cit., p. 2

⁵⁴ Sentence number 701/1999, Supreme Court of Spain (30/ 07/1999). Database Vlex.

if the future spouses were to pact to renounce to part of the inheritance that corresponds to them, for its article 816 specifically prohibits them⁵⁵.

Spousal support or alimony

When it comes to spousal support it all depends on the consideration of spousal support, if it acts as alimony would have another course than if it is just considered spousal support as a compensation for the economic imbalance after the marriage⁵⁶.

If it is considered spousal support not alimony, the right to spousal support regulated in article 97 of the Civil Code is considered a dispositive right, and so says the Supreme Court in its ruling of December 2nd 1987 “ *It is clear that we do not find each other in front of an imperative right, but instead in front of a dispositive right, it can be renounced by the parties, [...] all this independently of the possibility of asking for alimony*⁵⁷”.

The consideration of the spousal support to be a dispositive right makes it possible to suggest that one can renounce to it in a prenuptial agreement, although the fact of giving it up even before the marriage instead of at the separation can raise some eyebrows. The doctrine does not completely shut down the idea that it could be valid⁵⁸. There are two schools of thoughts about renouncing the spousal support, the first one would be being against it believing that renouncing to the mere expectation of a future right is against public policy. The second school of thoughts believes that it is fine to renounce to the spousal support before marriage, because you can renounce to future rights fruit of a contract as it is stated in the article 1271 of the Civil Code⁵⁹. Also, the fact that the right to spousal support is a dispositive right makes it possible for someone to renounce it in an agreement.

⁵⁵ GARCÍA Rubio, María Paz. *Acuerdos prematrimoniales*. Cit., p. 3

⁵⁶ DÍEZ Picazo, L y GULLÓN, A. (2014). *Sistema de Derecho de Familia*. p. 126-128.

⁵⁷ Sentence of the Supreme Court RJ number 1987\9174, (02/12/1987). Database Vlex.

⁵⁸ A. L. Rebolledo Varela (2015). *Pactos en previsión de ruptura*. *La Ley Derecho de Familia: Revista jurídica sobre familia y menores*, nº 5. p. 50.

⁵⁹ ANTÓN Juárez, Isabel. (2015). *Acuerdos prematrimoniales: Ley aplicable y Derecho comparado*. cit., p. 38

Having said all that, in conclusion, when it comes to giving up the future right to spousal support, courts tend to enforce these clauses when both parties give up the right to spousal support and so, it does not cause inequality within the spouses.

On the other hand, renouncing to alimony is not allowed for it is an imperative right and parties do not have the possibility or the right to renounce to it in an agreement. Any clause of a prenuptial agreement that includes the giving up of the parties future right to alimony would be without a doubt unenforceable for being against public policy.

Bizarre or abusive clauses

Although these kind of clauses are unenforceable in the States too, for Judges feel uncomfortable having to enforce personal clauses instead of patrimonial, they can still appear in a prenuptial agreement.

For an instance, these kind of clauses are very common in the prenuptial agreements of the celebrities. Examples of this kind of clauses would be those of one of the parties renouncing to date other people for a period of time after the marriage, or not to live on the same neighbourhood or even not to get married again⁶⁰. This kind of clauses are clearly against public policy and even the Fundamental Rights of the parties, therefore they would not be enforced.

Consequences

After listing the main causes of unenforceability of a prenuptial agreement, it is clear that there are causes that turn the whole prenuptial agreement void, like the lack of free consent, but most of the clauses aforementioned are unenforceable just those clauses, not the whole prenuptial agreement.

⁶⁰ GARCÍA Rubio, María Paz. Acuerdos prematrimoniales. Cit., p. 2

FINAL CONCLUSIONS

Nowadays, as international marriages are very common and the rate of divorce is so significant, it is not delusional to believe that the Spanish courts can encounter themselves with a lawsuit about a prenuptial agreement and whether or not to enforce that prenuptial agreements. It is possible for a Spanish court have international competence and jurisdiction, and event for them to have to solve the case using the Spanish legal system as the applicable law. However, there are many challenges to make a prenuptial agreement enforceable in Spain, especially if the court is not Catalan. All these challenges are regarding public policy, for there are barriers that cannot be trespassed, the challenges within notarization and the difficulties to reassure that there was a free consent would make it notably hard for a prenuptial agreement to be enforceable in Spain, at least not all the clauses.

Prenuptial agreements are contracts, that have been present in society for over 2.000 years. Those contracts are created by prospective spouses in order to regulate mainly patrimonial issues, and almost anything a married couple may encounter even in the prospects of separating.

As we now know prenuptial agreements are quite similar to Catalan matrimonial capitulations rather than those of the common Civil Code. Although there are important differences that as we have seen can challenge the enforceability of the prenuptial agreement in Spain. For what could be legal in the States, are against public policy in Spain.

That may be because the conception of individualism and freedom of pact that the United States carries is far wider that the Spanish concept, for those terms.

Matrimonial capitulations are exclusively economical, prenuptial agreements can go beyond patrimonial issues. That is why, the figure of a prenuptial agreement may sound more desirable to future spouses that the matrimonial capitulations.

That is why, as the society evolves, it is possible that the figure of the prenuptial agreements may become very desirable for the Spanish society for its uses beyond the ones possible in the matrimonial capitulations.

Because of that, there is a possibility that Spain may follow the steps of the Anglo-Saxon countries and include prenuptial agreements as a new legal figure to the legal system, because matrimonial capitulations, however similar they can be to prenuptial agreements, prenuptial agreements can englobe more issues a matrimony can go through that matrimonial capitulations. They may seem like a future evolution of the matrimonial capitulations we now know.

Having said that, it is highly unlikely that the figure of prenuptial agreement that the Spanish legal system may include would be as permissive as the American one, for our public policy is more demanding than the one in the States. For an instance, if prenuptial agreements were ever included in the Spanish legal system, it is highly probable that there will be requirement of notarization of the whole prenuptial agreement, for spouses may renounce to possible economic future rights, and the only way of knowing that the parties really understand what they are giving up is by notarizing it.

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