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CONTRACTUAL SOLUTIONS TO FAMILY PROBLEMS

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Cover image: *The Marriage Contract*, by Jan Josef Horemans the Younger (c. 1768)

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PART III
CONTRACTUALISATION IN TRANSNATIONAL FAMILIES: TOWARDS A EUROPEAN UNIFORM SUBSTANTIVE FAMILY LAW

"Le mariage est un contrat du droit des gens
dont les catholiques romains ont fait un sacrement."
("Marriage is a contract under the law of nations, which Roman Catholics have transformed into a sacrament.")

(VOLTAIRE, *Dictionnaire Philosophique*, in *Oeuvres complètes de Voltaire*, 20, *Dictionnaire philosophique*, IV, Paris, 1879, p. 27).

"Videns quales, et quantae indies suscitentur in foro lites, ac moveantur inter homines concertationes circa materias in capitulis matrimonialibus, et pactis nuptialibus que in contractu matrimonii fiunt, inclusas…"
("Observing the types of disputes that arise in the forum and the frequency of disagreements among individuals regarding the issues addressed in marriage contracts and nuptial agreements included therein…").

(FONTANELLA, *De pactis nuptialibus, sive de capitulis matrimonialibus*, I, Genevae, 1686, *Ad lectorem*, III).

"Gimme the Plaza… the jet and $150 million, too!"

(Title of a *New York Post* article dated February 13, 1990, referring to Ivana Trump's demands during her divorce from Donald Trump, based on a prenuptial agreement the newspaper described as "written in gold").

PART I
THE CONTRACTUAL APPROACH TO FAMILY LAW: HISTORICAL BACKGROUND, MARITAL PROPERTY AGREEMENTS AND AGREEMENTS IN TIMES OF MARITAL CRISIS

1. From Contract… back to Contract: Overview of Private Autonomy in Family Law.

1.1. Party Autonomy in Family Law: Its Role and Its Enemies.

A spectre is haunting European family law—the spectre of contractualisation. Over the last few decades, one of the most hotly debated topics among family law scholars has been the role played by private ordering and party autonomy in shaping personal and property relations within couples and households of all kinds ([1]). This phenomenon has become so prominent that even the EU legislation nowadays explicitly acknowledges the existence of "contracts governed by family law" ([2]). While some legal writers continue to treat family law as predominantly public law ([3]), this perspective is no longer shared by a growing number of jurisdictions worldwide, as will be illustrated in this essay.

Contractual freedom constitutes an expression of the fundamental principle of self-determination, recognised by Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life ([4]). Within this framework, private ordering and party autonomy

([1]) OBERTO, *I contratti della crisi coniugale*, I, Milano, 1999, pp. 28 ff.; BRINIG, From *Contract to Covenant: Beyond the Law and Economics of the Family*, Harvard, 2000; FENOUILLET and DE VAREILLES-SOMMIÈRES (eds), *La contractualisation de la famille*, Paris, 2001; BONINI BARALDI, *Variations on the Theme of Status, Contract and Sexuality: an Italian Perspective on the Circulation of Models*, in BOELE-WOELKI (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerpen, 2003, pp. 300 ff.; HOFER, SCHWAB and HENRICH (eds), *From Status to Contract? – Die Bedeutung des Vertrages im europäischen Familienrecht*, Bielefeld, 2005; TARDIA and BRIGNONE, *Gli accordi patrimoniali tra coniugi in vista del divorzio*, in *Rassegna di diritto civile*, 2008, pp. 1 ff.; BIX, *Private Ordering and Family Law*, in *Journal of the American Academy of Matrimonial Lawyers*, Vol. 23, 2010, pp. 249 ff., *Minnesota Legal Studies Research Paper No. 10-59*; FUSARO, *Marital contracts,* Ehevertrag*, convenzioni e accordi prematrimoniali*, in *Nuova giurisprudenza civile commentata*, 2012, II, pp. 475 ff.; SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, London, 2012; CABRILLAC, *La contractualisation du lien familial, l'exemple des régimes matrimoniaux*, in SIFFREIN-BLANC, AGRESTI and PUTMAN (eds), *Lien familial, lien obligationnel, lien social*, Livre I, *Lien familial et lien obligationnel*, Aix – Marseille, 2013, pp. 93 ff.; SWENNEN, *Contractualisation of Family Law in Continental Europe*, in *Familie & Recht*, 2013, available online at https://www.bjutijdschriften.nl/tijdschrift/fenr/2013/07/fenr-d-13-00003.pdf; BALESTRA, *Convivenza* more uxorio *e autonomia contrattuale*, in *Giustizia civile*, 2014, pp. 133 ff.; BUGETTI, *La risoluzione extragiudiziale del conflitto coniugale*, Milano, 2015; QUEIROLO and HEIDERHOFF (eds), *Party Autonomy in European Private (and) International Law*, Tome I, Ariccia, 2015; SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, Antwerp, 2015; DOSI, *Il diritto contrattuale della famiglia. Le funzioni di consulenza e negoziazione dell'avvocato*, Torino, 2016; HOHLOCH, *The Privatization of Family Law in Germany*, in *Familia*, 2017, pp. 582 ff.; MAZZILLI, *The Privatization of Separation and Divorce in Spain and Italy: a Comparative Study*, in *Familia*, 2017, pp. 563 ff.; MONTINARO, *Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective*, in *The Italian Law Journal*, 2017, pp. 75 ff.; CARICATO, *La privatizzazione del diritto di famiglia*, Siena, 2020; GONZÁLEZ BEILFUSS, *Agreements in European Family Law – The Findings, Theoretical Assessments and Proposals of the Commission on European Family Law (CEFL)*, in *European Review of Contract Law*, 2022, 18(2), pp. 159 ff.; OBERTO, *Contratto e famiglia*, in ROPPO (ed.), *Trattato del contratto*, VI, ROPPO (ed.), *Interferenze*, Milano, 2022, pp. 84 ff.; SESTA, *Manuale di diritto di famiglia*, Milano, 2023, pp. 135 ff.; OBERTO, *Giubileo d'argento per i patti prematrimoniali. Venticinque anni di oscillazioni sul tema degli accordi preventivi in materia di crisi coniugale*, Torino, 2025, https://www.giacomooberto.com/Giacomo_Oberto_Accordi_prematrimoniali_2025.pdf.

([2]) *See* the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), art. 9, Para 2. (d). On this particular rule *see* also below, at para. 3.3.

([3]) *See* SWENNEN, *Private Ordering in Family Law: A Global Perspective*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., p. 8 s.

([4]) *See* ECHR, 16 December 1992, Case 13710/88, *Niemitz v Germany*, Mn 29: "Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings"; for contractual relations *see* HARRIS, O'BOYLE, WARBRICK, BATES and BUCKLEY, *Law of the European Convention on Human Rights, Oxford University Press*, 2nd ed., Oxford, 2009, pp. 364 ff. and GRABENWARTER, *Europäische*

appear as the most effective instruments to achieve family law's ultimate goal—ensuring that each individual is free to pursue happiness in their own unique way. This may also explain why creating a coherent, comprehensive, and satisfactory system of family law is so challenging and demands significant effort.

As the French author Jules Renard aptly observed, "Si on bâtissait la maison du bonheur, la plus grande pièce serait la salle d'attente"—"If we were to build the house of happiness, its largest room would be the waiting room." Indeed, family law may be regarded as the waiting room of every legal system, where unfulfilled aspirations, unrealised expectations, desires, hopes, nostalgic longings for Puritan ideals ("God, Fatherland, Family"), and yearnings for freedom seek resolution—often through the most powerful tool that States still wield: the law.

Legal systems, however, tend to respond to these complex needs in inconsistent, partial, slow, and often delayed ways—thereby shifting the burden onto judges. Judges become therefore the true *gardiens des promesses* or "guardians of promises," as framed by the title of a well-known French essay on the role of the judiciary in democratic governance ([5])—or, more precisely, the guardians of promises made by politicians and left unkept. In this context, contractual freedom can serve as a key that empowers individuals to unlock the door of that vast "waiting room."

Of course, contractual freedom is not unlimited. Even in jurisdictions where this freedom is fully embraced within family law, certain inalienable principles must be respected. Compliance with core fundamental rights and mandatory legal norms is a general prerequisite for all types of contracts, including those beyond the realm of family relations. As Hans Kelsen famously warned, complete autonomy of the parties cannot exist in private law. In fact, it is the legal system that determines that a contract "produces law, so that the legal determination ultimately stems from the law itself—not from the legal subjects who are subject to it" ([6]).

Paradoxically, this principle is illustrated in legal provisions that allow parties to choose stricter regulatory frameworks for their family relationships. Consider the "covenant marriage contracts" found in some U.S. states, where couples can opt for a form of marriage in which divorce is significantly more difficult than under default legal provisions ([7]). Here, private autonomy is so robust that it creates its own limitations—yet this is only possible because the legal order permits such autonomy, precisely in line with Kelsen's theory.

It is also undeniable that the path toward full recognition of contractualisation in family law remains strewn with obstacles and ingrained prejudices. According to some scholars, the purported *numerus clausus* of family formations has long obstructed the validity of contracts between cohabiting partners ([8]). Consequently, contractualisation would apply only to "traditional" families, excluding "new" family structures such as *de facto* cohabiting couples from the sphere of private autonomy ([9]).

Quite on the contrary, the historical analysis offered in this essay will demonstrate the deeply rooted nature of contractualisation in families of all kinds. The social need to consensually address

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Menschenrechtskonvention, 4th ed., München, 2009, para. 22, Mn 13. Cf. also Article 7 of the European Charter of Fundamental Rights (2007/C 303/01); rather explicitly Article 2, para. 1, of the German Basic Law; for the interaction of self-determination and marital contracts *see* also DAUNER-LIEB, *Gütertrennung zwischen Privatautonomie und Inhaltskontrolle*, in *Archiv für die civilistische Praxis*, 210, 2010, pp. 580 ff., as well as SANDERS, *Statischer Vertrag und dynamische Vertragsbeziehung*, Bielefeld, 2008, pp. 106 f.

([5]) GARAPON, *Le gardien des promesses*, Paris, 1996.

([6]) KELSEN, *La dottrina pura del diritto*, Italian translation by Treves, Einaudi, n.p., 1956, p. 57.

([7]) So, in Louisiana, Arkansas and Arizona, the statutorily prescribed contractual terms for a covenant marriage contract in all three States include limiting divorce to situations where there are proven allegations of serious fault, including adultery, conviction of a felony, abandonment for one year, or physical or sexual abuse of a spouse or a child of one of the spouses: *see* HUNTER JULES and NICOLA, *The contractualisation of Family Law in the United States*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., pp. 345 f.

([8]) SWENNEN, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 8 s.

([9]) This is the view of SWENNEN, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 1, 8 f.

practical issues arising from cohabitation is as old as civilisation itself ([10]). In fact, the social need to address consensually all relevant problems that can rise from the very fact of living under the same roof is as old as the world. These needs include not only patrimonial concerns related to family formation, but also the means to navigate the consequences of the dissolution of family ties. Today, contractualisation increasingly converges with *de-judiciarisation*, as I have discussed in previous works ([11]). The trend among European legislators to remove mutual consent separations and divorces from court proceedings clearly reveals a desire to "pave a golden path" toward greater private autonomy in this domain.

Surprisingly, some academic essays still maintain that agreements in domestic relations "are not considered to be as binding upon the parties or the courts as contracts in general" ([12]). This assumption is demonstrably inaccurate. On the contrary, "family contracts" of all types—marriage agreements, premarital arrangements contemplating divorce, separation and divorce settlements, contracts between cohabiting partners, and so on—are flourishing across Europe. Judges, notaries and scholars increasingly rely on general contract law provisions to resolve cases in the absence of specific legislation ([13]).

More than ever before, we grasp the wisdom of Henry Sumner Maine's observation made over a century ago: the evolution of progressive societies has indeed been a movement "from status to contract" ([14]).

1.2. The Robust Historical Roots of Contemporary Family Law Contractualisation.

A deeper exploration of the history of family law reveals that even Roman law contained numerous provisions related to agreements between prospective spouses (or their families), known as *pacta nuptialia* or *pacta ante nuptias*. These terms closely resemble current expressions such as "antenuptial agreements" or "prenuptial agreements." A central feature of these contracts was the right of the parties to stipulate the restitution of the dowry. The dowry—consisting of land, real estate property, money, livestock or commercial assets—was provided by the bride's family to the groom or his family to help bear the financial burdens of establishing a new household (*ad onera matrimonii ferenda*). While the husband had the right to manage those assets and enjoy their fruits (for the benefit of the family), he was not their legal owner in the full sense. Upon the dissolution of the marriage, he (or his heirs) was obligated to return them—a process known as *dotis restitutio*.

These *pacta nuptialia* often included clauses determining: *a*) *What assets* should be given back (e.g. those assets which had been given, or their monetary value), *b*) *To whom* the dowry would be returned (e.g. the wife, her father, brothers or heirs), or *c*) *When* this restitution would take place (e.g. several months or years after dissolution of marriage). Marriage dissolution in Roman law could be caused not only by death or *capitis deminutio maxima* (e.g. captivity or enslavement), but also by divorce. Roman legal sources offer detailed insights into how and when the dowry should be returned in cases of divorce, primarily guided by the terms of such agreements. Moreover, many passages in the *Digest* and the *Codex Justinianeus* reflect the understanding that divorce—rather than death—was the prototypical scenario contemplated when drafting agreements regarding the patrimonial consequences of marriage.

([10]) *See* below, para. 1; further reference at para. 10.

([11]) *See* OBERTO, *Il divorzio in Europa*, in *Famiglia e diritto*, 2020, pp. 129 ff.; OBERTO, *Judges and Notaries: International and National Experiences*, available at https://giacomooberto.com/Giacomo_OBERTO_Presentation_Rome_6th_July_2023.pdf. On some special aspects of de-judiciarisation in France *see* MORACCHINI-ZEIDENBERG, *La contractualisation de la séparation et de ses conséquences en droit français*, in *Les Cahiers de droit*, Volume 59, numéro 4, décembre 2018, pp. 1113 ff., available at https://www.erudit.org/fr/revues/cd1/2018-v59-n4-cd04207/1055265ar/, pp. 1 ff.

([12]) *See* e.g. SWENNEN, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 1.

([13]) On this particular point *see* below, at para. 3.3.

([14]) *See* MAINE, *Ancient Law: Its Connections with Early History of Society and Its Relations to Modern Ideas*, New York, 1888, p. 164 f.

We may find one of the most compelling illustrations of this concept in the following passage from the Digest, which refers to the writings of the renowned second-century A.D. Roman jurist Julius Paulus: "It was asked whether the expression 'dowry to be returned upon dissolution of marriage' should be understood to encompass not only divorce but also death—namely, whether the parties to such an agreement intended for this clause to apply in the latter case as well. Many scholars believed this to be so, while others held a contrary view. The Emperor ruled that under no circumstances should the dowry remain with the husband" ([15]). This passage reveals that, during Paulus' time, interpretive doubt had arisen regarding a contractual clause in a marriage agreement that regulated the restitution of the dowry upon dissolution of the union (*soluto matrimonio*). The core issue was whether the clause applied solely to divorce or also extended to dissolution by death of a spouse. Notably, the framing of the question itself suggests that, in Roman thought, divorce—rather than death—was perceived as the more "natural" endpoint of marriage ([16]).

A significant confirmation of this perspective is found in the writings of Tertullian, who, around the same historical period, observed that the age of harmonious marriages had long passed. He remarked that, upon entering into matrimony, spouses now essentially committed themselves to repudiation, such that divorce had become the natural outgrowth of marriage ("Repudium vero iam et votum est, quasi matrimonii fructus") ([17]).

Even in subsequent centuries, after the Catholic Church and canon law had exerted control over marriage, there is evidence of prenuptial contracts that set patrimonial rules for the parties in the event of marital crisis (in this case, legal separation, since divorce was prohibited by the Church).

The first case we may mention in this context deals with a decision issued at the end of the 16th century regarding the validity of a marriage contract that we could, in modern terms, describe as a prenuptial agreement made in contemplation of legal separation. This case was reported by Francesco Maria Cardinal Mantica (1534–1614), one of the most renowned jurists of the time, who was made a cardinal by Pope Clement VIII. In this instance, the *Rota Romana* (the appellate and supreme court of the Papal States) upheld the decision of the lower court, the *Rota* of Bologna, which had declared valid and enforceable a notarial agreement concluded before marriage by a wealthy couple from that city. According to this premarital contract, the husband had promised to pay his wife a fixed annual sum in the event of legal separation (*separatio a mensa et thoro*). He had also agreed that, should he fail to fulfill this obligation for one year, his wife could sue him and demand the restitution of her entire dowry. As he failed to pay alimony for the year 1589, he was sentenced to return the dowry ([18]).

([15]) *See* D. 50, 16, 240: "Cum quaerebatur, an verbum: Soluto matrimonio dotem reddi, non tantum divortium, sed et mortem contineret, hoc est, an de hoc quoque casu contrahentes sentiant? Et multi putabant hoc sensisse; et quibusdam aliis contra videbatur: secundum hoc motus Imperator pronunciavit, id actum eo pacto, ut nullo casu remaneret dos apud maritum."

([16]) On this rule and on other similar sources of the Roman law, *see* OBERTO, *I contratti della crisi coniugale*, I, Milano, 1999, pp. 66 ff.; MAGAGNA, *I patti dotali nel pensiero dei giuristi classici. Per l'autonomia privata nei rapporti patrimoniali tra i coniugi*, Padova, 2002, 157 ff., 239 ff., 271 ff.; GIUMETTI, *«Soluto matrimonio dotem reddi»: profili ricostruttivi dello scioglimento del matrimonio e della disciplina giuridica della dote*, Torino, 2022, pp. 96 ff.

([17]) *See* TERTULLIAN, *Apologeticum*, ch. VI, para. 6. Tertullian's concern was evidently to present Christianity as an effective barrier against the degenerate customs of pagan Roman society during the imperial age.

([18]) "The judges [of the *Rota Romana*] upheld the [first-instance] judgment, which had stipulated that, in the event of legal separation: (a) Mr Constantine would be obliged to pay his wife, Mrs Lisia, an [annual] alimony of 270 *scuta* [a silver currency used in the Papal States at the time, with an approximate contemporary value of €80 per *scutum*]; and (b) should Mr Constantine fail to pay the said amount for a full year, Mrs Lisia would have the right to sue and request the court to compel restitution of her dowry. As Mr Constantine failed to make the payment in 1589, the court ruled that he was liable to return the full dowry to Mrs Lisia": *see Bononien. restitutionis dotis*, 16 May 1595, in MANTICA, *Decisiones Rotae Romanae*, Romae, 1618, p. 539 ("Placuit Dominis, sententiam esse confirmanda: quia cum convenerit, ut in eventum separationis tori, D. Constantius teneretur D. Lisiae eius uxori praestare scuta 270, pro alimentis, et si in solutione eorum cessaverit per annum, ipsa possit agere ad restitutionem totius dotis: & D. Constantius dictam summam non solverit anno 1589, necessario sequitur, quod dos eidem D. Lisiae debeat restitui").

Even more interesting is the following case, decided on 20 June 1612 by the Supreme Court of Sicily. In this case, a Sicilian notary drafted a prenuptial deed for a couple residing in the city of Messina. In a curious mixture of Italian and Latin, the deed stipulated that, in the event of separation, the customary community of goods (a form of general co-ownership that was the default marital property regime in that part of Sicily at the time) would be considered as if it had never existed for that couple. Consequently, each spouse would, in the event of separation, reclaim only the assets they had brought into the marriage—effectively mirroring what we now call the "separation of property" regime ([19]).

This case is not the only example of such agreements in Europe. The French tradition, for instance, is well acquainted with the so-called *Clause Alsacienne* (Alsatian Clause), which allows a couple to opt for a regime of general community of property (including real estate and assets acquired by either spouse before the marriage). However, in the event of divorce, the dissolution of the marriage operates as a resolutory condition.

The result is that if the marriage ends in death, the community property regime applies, and the surviving spouse retains their share (along with any inheritance). If, on the other hand, the marriage ends in divorce, the community regime is retroactively nullified, as if the couple had never been married. It seems perfectly reasonable to state that a couple shall live under the community regime "until death do them part" if all goes well, whereas they are considered to be in a regime of separation of assets if the relationship is falling apart ([20]). This logic was so compelling that, in 2006, it was codified in Article 265 of the French Civil Code. According to this provision: "If the marriage contract provides for it, the spouses may always take back the assets that they had brought into their community regime" ([21]).

The historical pursuit of contractualisation in family law does not concern only the formation of marital unions. It also characterizes the potential dissolution phase. As already noted, the Catholic Church maintained a firm grip on the regulation of marriage for centuries, not only banning divorce but also exercising strict control over legal separations.

Nevertheless, throughout the centuries, we find numerous (often successful) attempts to resolve unhappy marriages through non-contentious means. One such example is the practice of *séparations amiables* (amicable separations) in pre-revolutionary France. These agreements, typically concluded within noble or wealthy families, were formalized through notarial deeds as transactions between husband and wife.

An intriguing historical study of such forms of agreement reveals that the practice of formalising consensual separation (or conversely, reconciliation between estranged spouses) through notarial deed originated in late medieval France. This was a consequence of ecclesiastical judges' custom,

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([19]) "Mr Santoro Pagano married Mrs Cornelia de Pactis without expressly choosing between the "Greek" or "Messinese" matrimonial regime [i.e., the separate property regime: as a result, the marriage was deemed governed by the customary "Latin" regime of universal community of property]. Nevertheless, the marriage contract included the following clause: that, in the event (God forbid) of legal separation—without children, or where children were born but predeceased their parents as minors, or, having reached majority, died intestate—each spouse would retain only the dowries and assets individually contributed to the marriage, and no more. In such cases, the bride would be entitled solely to the sum of thirty *unzi* [*unzo*, *onza*, or *oncia* was the gold currency unit of the Kingdom of Sicily at the time, each equivalent to approximately €200]": *see* GIURBA, *Decisionum novissimarum Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, I, Panormi, 1621, p. 399 ("Sanctorus Pagano matrimonium contraxit cum Cornelia de Pactis, Nullo expresso contrahendi more, Graecorum, vel Messanensium: Sed cum pacto, Item che lo presenti matrimonio si intenda con patto, che casu (quod absit) di separatione di matrimonio, tanto senza figli come nati figli, et quelli morti in minori età, vel maiori ab intestato, che ogni uno stia con le suoi doti, et beni, che ha portato, et non aliter, et detta sposa non possa disponere, nisi tantum di unzi trenta").

([20]) As was once wittily noted by an Italian comedian, the idea of marriage as an indissoluble bond—meaning it could not be dissolved—originated in a historical context when the average lifespan was around 30 years.

([21]) For further information on the "Alsatian Clause" *see* OBERTO, *La comunione legale tra coniugi*, in *Trattato di diritto civile e commerciale Cicu-Messineo*, I, Milano, 2010, p. 386, fn. 171; II, Milano, 2010, p. 1671, fn. 198; OBERTO, *Suggerimenti per un intervento in tema di accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2014, p. 90, fn. 11; TERRÉ and SIMLER, *Droit civil. Les régimes matrimoniaux*, Paris, 2015, pp. 219 ff.

upon pronouncing a separation *a mensa et thoro*, of ordering the spouses to effect the separation and division of property held in common. These acts were then executed by notaries.

Subsequently, toward the end of the sixteenth century, when such notarial instruments appeared to render a prior judicial decision superfluous, the practice emerged of resorting directly to the notary: "puis cette coutume s'étant étendue, les notaires remplacèrent la décision absente par un acte spécial de séparation consensuelle" ("then, as this custom became more widespread, notaries replaced the missing judicial decision with a special act of consensual separation") ([22]). Indeed, the mighty *folio* volumes of the *arrêtistes* (case reporters) of the time document a significant number of such cases ([23]).

Yet, in the seventeenth century, more and more French *Parlements* (roughly the equivalent of our modern Courts of Appeal) issued *arrêts de règlement* (precedential rulings, applicable to future cases of the same kind), prohibiting courts ([24]) or notaries ([25]) from accepting or executing voluntary separations ("contracts de séparation de corps volontaires") in the future ([26]). Such judgments were

([22]) *See* RICHARDOT, *Les pactes de séparation amiable entre époux. Étude historique comparative et critique de la séparation de corps par consentement mutuel*, Paris, 1930, pp. 129 ff.

([23]) *See* e.g. CHARONDAS LE CARON, *Responses et décisions du droict françois*, Paris, 1612, p. 451; BRODEAU, *Recueil d'aucuns notables arrests donnez en la cour de parlement de Paris, pris des mémoires de Mons. Maistre Georges Loüet conseiller du Roy en icelle*, II, Anvers, 1666, pp. 404 ff.; JOVET, *La bibliothéque des arrests de tous les parlemens de France*, Paris, 1669, pp. 239 f.; BARDET, *Recueil d'arrests du parlement de Paris*, I, Paris, 1690, pp. 71, 281, 526; BARDET, *Recueil d'arrests du parlement de Paris*, II, Paris, 1690, p. 308, 600; DESPEISSES, *Oeuvres*, I, Lyon, 1696, p. 175; BRILLON, *Dictionnaire des arrests, ou jurisprudence universelle des parlemens de France, et autres tribunaux*, III, Paris, 1711, p. 552; BLONDEAU and GUÉRET, *Journal du palais, ou recueil des principales décisions de tous les parlemens et cours souveraines de France*, I, Paris, 1737, p. 179; AUGEARD, *Arrests notables des différens tribunaux du royaume*, Paris, 1756, p. 91; DENISART, *Collection de décisions nouvelles et de notions relatives à la jurisprudence actuelle*, III, Paris, 1764, pp. 65 ff.; RUSSEAUD DE LA COMBE, *Recueil de jurisprudence civile du pays de droit écrit et coutumier, par ordre aphabétique*, Paris, 1769, p. 639; BASNAGE, *Commentaires sur la coutume de Normandie*, in *Oeuvres de maître Henri Basnage*, II, Rouen, 1778, pp. 90 ff.; MERLIN, *Recueil alphabétique des questions de droit qui se présentent les plus fréquemment dans les tribunaux*, V, Paris, 1820, pp. 627 ff.; MERLIN, *Dizionario universale ossia repertorio ragionato di giurisprudenza e questioni di diritto*, ed. italiana, XIII, Venezia, 1842, pp. 18 ff. About the origin in Catholic Church's canon law of this principle *see* VAN ESPEN, *Jus ecclesiasticum universum caeteraque scripta omnia, decem tomis comprehensa*, II, Venetiis, 1769, pp. 200 f.; VIII, Venetiis, 1769, pp. 128 f.; COSCI, *De separatione tori coniugalis, tam nullo existente seu soluto, quam salvo vinculo matrimonii, ejusque effectibus*, Florentiae, 1856, pp. 453 ff.; ESMEIN, *Le mariage en droit canonique*, II, 1891, pp. 89 f. For general information on the so-called "amicable separation" agreements, or "self-separation" (*séparation amiable*), *see* as well RICHARDOT, op. cit., pp. 135 ff.; LEFEBVRE-TEILLARD, *Introduction historique au droit des personnes et de la famille*, Paris, 1998, pp. 160 ff.; OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 90 ff.; OBERTO, *Gli accordi sulle conseguenze patrimoniali della crisi coniugale e dello scioglimento del matrimonio nella prospettiva storica*, in *Foro italiano*, 1999, I, col. 1317 ff.; VLEESCHOUWERS-VAN MELKEBEEK, *Self-divorce in Fifteenth-Century Flanders: The Consistory Court Accounts of the Diocese of Tournai*, in *Tijdschrift voor rechtsgeschiedenis*, 68, 2000, pp. 83 ff.; BUTLER, *The Language of Abuse: Marital Violence in Later Medieval England*, Leyden/Boston, 2007; FALZONE, *Entre droit canonique et pratiques laïques : les couples en difficulté devant l'officialité de Cambrai (1438-1553)*, in *Revue du Nord*, 89, 372, 2007, pp. 789 ff.

([24]) *See* the judgement rendered by the Paris Parliament on 14 February 1602, quoted in CHENU, *Cent notables et singulières questions de droict*, Paris, 1606, p. 227.

([25]) *See* the judgement rendered by the Aix-en-Provence Parliament on 19 February 1685, quoted in MERLIN, *Dizionario universale ossia repertorio ragionato di giurisprudenza e questioni di diritto*, ed. italiana, III, Venezia, 1835, pp. 766 ff.; *see* as well BASNAGE, op. cit., p. 91.

([26]) Another reason that may explain the disfavour toward such agreements is the concern—shared by judges and legal scholars—that separations by mutual consent could potentially conceal fraud against the couple's creditors. On this point, see the opinion of the renowned 15th-century French jurist Dumoulin, who stated that "the separation between husband and wife is not valid unless it is effected by a judicial sentence, after which the division of their assets must be carried out without fraud" ("que la separation d'entre mary et femme n'est valable, si elle n'est faite par Sentence de Iuge, et partage executé sans fraude"). Judges were therefore advised to "take care that the parties do not collude in order to defraud their creditors, which is one of the most important considerations in cases of legal separation" ("bien prendre garde que les parties ne s'accordent cauteleusement et en fraude de leurs creanciers à se separer, qui est une des choses la plus à considerer en matière de ces procez de separation"): DUMOULIN, *Notae Solemnes Caroli Molinaei Iurisconsulti Celeberrimi ad Consuetudines Gallicas, Coutumes du Comté et Baillage de Montfort*, in *Caroli Molinaei (...) Omnia quae extant Opera*, II, Parisiis, 1681, p. 700. Se as well LE PRESTRE, *Questions notables de droict*, Paris, 1663, pp. 191

sometimes delivered even *à peine de punition corporelle* ("under penalty of corporal punishment") ([27]).

The French example is certainly not the only one that may be cited. One might also refer to the case of separation agreements in medieval and Renaissance Spain, where numerous *cartas* (written agreements) can be found, variously designated as *separación*, *partición*, *división*, *absolución*, *relajación*, *transacción*, *composición*. These documents reflect how married couples "in crisis," as we might say today, sought to regulate their personal and patrimonial relations within a family life no longer marked by cohabitation ([28]). Conversely, during the same period, various couples sought to formalise their reconciliation—after a time of separation—through the drafting of a written "reconciliation agreement" ([29]).

Marital (or marriage-related) contracts are not the only domain in which we find evidence of the contractualisation of family law. Another significant category includes agreements concerning cohabitation outside of marriage. Here too, we find centuries-old historical examples. Notarial deeds reveal numerous instances of such agreements, known as *contrats de concubinat* in France, *cartas de mancebía e compañería* in Spain, or even cohabitation agreements in the Italian city of Genoa, dating back to the 13th and 14th centuries ([30]). Similar examples can be found in the notarial practice of 15th

f.; D'ARGENTRÉ, *Commentarii in patrias Britonum leges, seu Consuetudines generales antiquissimi Ducatus Britanniae*, Parisiis, 1661, p. 1511: "nobis nulla separatio ex bona gratia fit, ut olim ex l. si constante. C. de repud. praeterquam ea, quae ex consensu fit religionis causa: Certe, ni fallor, omnes in invitos fiunt. Voluntaria saepe est illa bonorum usurpata Cenomanis, Andibus, Normanis, nobis pene inaudita usu, nec expedit, quia nunquam sit sine fraude creditorum, cum subinde illi inducunt, iterant rursum: sed raro nisi fraude"; BRODEAU, op. cit., p. 403: "du Molin en ses Annotations, sur le cent vingt troisième article de la Coustume de Montfort, desire que telle separation se fasse par Sentence du Iuge, *causa cognita*, et par partage des meubles de la communauté, qui soit executé ; ce qui est assisté de grande raison, dautant que telle separation estant de l'honnesteté publique, ne doit dépendre de la nuë volonté des particuliers : qu'il se presenteroit de grandes fraudes, que la moindre colere de l'un des deux conioints, emporteroit comme une espece de divorce: que par la mesme legereté que telles conventions se feroient, elles se deferoient : ce ne seroient que tromperies." The same opinion was expressed also by LE MAISTRE, *Les plaidoyez et harangues de monsieur Le Maistre*, Paris, 1659, p. 211; [GIBERT], *Tradition ou histoire de l'eglise sur le sacrement du mariage*, Paris, 1725, pp. 350 f.; DUPERRAY, *Traité des dispenses de mariage, de leur validité ou invalidité, et de l'état des personnes*, Paris, 1730, pp. 499 f.; BORNIER, *Conférences des ordonnances de Louis XIV. Roy de France et de Navarre avec les anciennes ordonnances du royaume, le droit écrit et les arrests. Enrichies d'annotations et de décisions importantes*, II, Paris, 1744, pp. 652 f.; DUPLESSIS, *Traité douzième. De la communauté de biens entre conjoints*, in *Traités de Mr Duplessis, ancien avocat au parlement, sur la coutume de Paris. Avec des notes de MM. Berroyer et de Laurière*, I, Paris, 1754, p. 432 (also fn. [*bbb*] and [*ccc*]); BOURJON, *Le droit commun de la France et la coutume de Paris*, Paris, 1770, pp. 604 f. (on the *séparation de biens*), 608 ff. (on the *séparation de corps*); FEVRET, *Traité de l'abus et du vrai sujet des appellations qualifiées du nom d'abus*, II, Lausanne, 1778, pp. 101 ff.

([27]) *See* BONIFACE, *Arrests notables de la Court du Parlement de Provence*, I, Paris, 1670, p. 382, referring about a decision of the *Parlement de Provence* on 19 october 1649.

([28]) As noted by a French writer, "the so-called 'free separations' were indeed a marital reality in the Middle Ages, with couples sometimes brought before the courts afterwards or approaching them independently at a later stage. In the Iberian Peninsula, such separations—recorded by public notaries, including those affiliated with diocesan courts—were sufficiently widespread to prompt repeated condemnation in Iberian synodal legislation. The notary emerged as a genuine competitor to ecclesiastical officials, raising questions about his role in formalising such transactions. He was the one who knew how to draft contractual clauses effectively, without necessarily placing himself in explicit violation of ecclesiastical matrimonial law" ("les séparations dites libres […] sont bien une réalité conjugale du Moyen Âge, les couples étant parfois rattrapés par la justice après, ou y recourant d'eux-mêmes dans un second temps. En péninsule Ibérique, les séparations libres enregistrées par les notaires publics, y compris d'ailleurs par ceux rattachés aux tribunaux diocésains, sont une réalité suffisamment tangible pour que la législation synodale ibérique tente régulièrement de les condamner. Le notaire est un véritable concurrent des officiaux et cela pose la question de son rôle comme encadrant de ce type de transaction. Il est celui qui sait comment formuler les clauses sans que l'on puisse pour autant décréter qu'il se situe sciemment en transgression du droit matrimonial ecclésiastique"): *see* CHARAGEAT, *Pacte conjugal et jeux de transactions en Aragon (XVe-XVIe siècle)*, in CLAUSTRE (ed.), *Transiger. Éléments d'une ethnographie des transactions médiévales*, Paris, 2019, pp. 231 ff.

([29]) CHARAGEAT, *Pacte conjugal et jeux de transactions en Aragon (XVe-XVIe siècle)*, op. cit., pp. 231 ff.; *see* as well GARCÍA HERRERO, *Artesanas de vida. Mujeres de la Edad Media*, Zaragoza, 2009, pp. 417 ff.

([30]) AUBENAS, *Cours d'histoire du droit privé*, VI, Aix en Provence, 1958, p. 35. Further information on the notarial deeds of Genua about cohabitation contracts in medieval times is provided by FERRANTE, *Legittima concubina, quasi*

-century Rome, where, as in Genoa, such agreements could anticipate the consequences of an eventual end of the relationship ([31]).

In fact, throughout the Middle Ages and until the Council of Trent, concubinage was widely accepted in Europe. It was often seen as a practical solution when a man and a woman could not marry due to differences in social class or when they sought to form a bond of solidarity in times of hardship. "Sharing the same bed and the same table could serve as a temporary remedy for poverty or illness" ([32]). And wherever cohabitation was accepted—or at least tolerated—we find contractual solutions to the inevitable issues that arise from living together.

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moglie, anzi meretrice. Note sul concubinato tra medioevo ed età moderna, in BIONDI (ed.), *Modernità: definizioni ed esercizi*, Bologna, 1998, pp. 127 ff. The paper refers, among other things, to a contract deed, signed on 8 December 1287 in the Corsican city of Bonifacio (Corsica), at the time under the Genoese rule, before the Genoese notary Emanuele Nicola De Porta, with the assistance of three witnesses, between Johaneta Oliveti, from Bonifacio, and the Venetian merchant Marco Bentrame, who was in the harbour of that city with his ship. Johaneta obliged herself to stay with Marco like his servant and "amaxia" (lover) for the following six years, following him wherever he should go. The woman promised to preserve and guard the "master" and his possessions "in good faith and without deception"; the man promised to give her "suitable food and clothing." Furthermore, should, at the end of the six years, one of the two desire to put an end to their relationship, Johaneta would receive the sum of 10 Genoese liras. This information is confirmed as well by VITALE, *Documenti sul Castello di Bonifacio nel secolo XIII*, Genova, 1936, p. 290, and referred to by BARNI, *Un contratto di concubinato in Corsica nel XIII secolo*, in *Rivista di storia del diritto italiano*, 1949, 12, p. 138. In Spain, the so-called *Carta de Avila* (Avila Charter), dating back to 1361, under the title "carta de mancebía e compañería", is another eloquent example of a contract between a man and his *barragana* (concubine), through which he bestowed on her given rights on his income, and promised to share with her "pan e mesa e cuchiello por todos los días que (...) visquiéredes" ("bread, table and bed for all the days that you shall live"): *see* FOSAR BENLLOCH, *Estudios de derecho de familia*, III, *Las uniones libres*, Barcelona, 1985, p. 15; the author remarks as well that in such contract "we may *see* nothing that we could interpret as submission of the woman. Quite on the contrary, she receives a number of advantages that assure her economical independence, as well after the death of her companion." Also the provision of the right to have meals "on the same desk" shows (taking into account that we are in Middle Ages!) a sign of "respcct" for the woman. Further information on medieval Spanish cohabitation agreements is provided by CORDOBA DE LA LLAVE, *A una mesa y una cama: barragania y amancebamiento a fines de la Edad Media*, in CALERO SECALI and SOMALO (eds), *Saber y vivir/ Mujer, Antigüedad medioevo*, Malaga, 1996, pp. 127 ff.; SEIDEL MENCHI and QUAGLIONI (eds), *Trasgressioni. Seduzione, concubinato, adulterio, bigamia (XIV-XVIII secolo)*, Bologna, 2004.

([31]) We may refer here about the notarial deed signed on 24 July 1489 before three witnesses, whereby Margherita and Angelo declare that they want "simul vivere et habitare et stare" ("to live and dwell and stay together"); the woman gives to the man, as a sort of dowry, the sum of 19 golden ducats. What is even more interesting is that the deed foresees also the event that the two part, either due to death of one of the parties, or "per discessum ab uno ad alterum ipsorum sive de communi voluntate vel quocumque alio modo" ("should one of us leave the other, or if we part by mutual agreement, or in any other way"). In this case, Angelo obliges himself to give back to Margherita (or to her heirs) the said 19 ducats. In another notarial deed dating back to the 19 January 1469 Giovanni promises to "his concubine" Angelella to give her 16 ducats before the following month of June. With that money she was allowed to by a property and to keep the ownership of it, under the condition "to live honestly." Otherwise, after Angelella's death, Giovanni could claim back that real estate. In another notarial deed, dating back to 25 August 1470, we find a mother, Margarita, who "sells" her daughter Perna as concubine to a man called Andrea, with the (at least, alleged) agreement of the young girl. The latter was to stay with Andrea until her mother would find her a husband. In this case, Andrea promised to pay Perna's dowry and let her free to marry. Another notarial deed of 16 March 1496 between Lionello and the "teutonic" Giannetta, is in fact a sort of agreement on the dissolution of concubinage. In fact, Lionello solemnly declares to "free" Giannetta "not willing to keep her as concubine any more", but "allowing her to be free to dispose of her person as she wills." This, however, against the payment of 12 ducats, that Giannetta gives him as a compensation for the expenses he had made for her. Furthermore, the whole agreement is signed under the condition that Giannetta will not accept any man "as her pimp," otherwise Lionello will have the right to claim her the sum of 25 ducats and take her back as his concubine. On all the above mentioned cases *see* ESPOSITO, *La marginalità femminile a Roma nel '400: serve, schiave, concubine*, in CRIMI and ESPOSITO (eds), *Figure ai margini: nella storia, nell'arte, nella letteratura (Roma e dintorni XV-XVI sec.)*, Roma, 2021, pp. 206 ff.

([32]) *See* LOMBARDI, *Storia del matrimonio. Dal Medioevo a oggi*, Bologna, 2015, p. 55; BRACCIA, *Le convivenze* more uxorio *nel basso medioevo ed in età moderna: quasi matrimoni, matrimoni presunti o clandestini?*, in VIARENGO (ed.), *Unioni di fatto. Dal diritto romano ai diritti attuali*, Torino, 2016, pp. 27 ff., 32 f.

Incidentally, these reflections also refute the outdated notion that family law is a "recent" branch of the legal order ([33]).

2. Why is the Contractualisation of Family Law Seen as "Modern"? The Long Journey from the "Institutional" to the "Constitutional" Concept of Family.

If the contractualisation of family law dates back centuries, why is it often presented as something "new", something just typical of contemporary times?

The reason lies in the fact that, when examining the evolution of family law, we tend to limit our observation to the past two centuries—starting from the French Revolution and the *Code Napoléon*. Within this shortened (and somewhat distorted) perspective, modern contractualisation is contrasted with an old conception—the one that dominated the entire 19th century and much of the 20th—that left very limited space for private ordering and party autonomy. Yet, we forget that an even older conception left much more space to contractual freedom.

To give a concrete example from my own country: at the beginning of the 20th century, a renowned scholar and professor at the University of Bologna, Antonio Cicu, developed a theory he called the "institutional concept of family." This idea was based on the belief that the family was an entity—an institution—with its own identity, distinct from that of its individual members. The family was thus seen as the bearer of a preeminent interest, even above the interests of its members. The legal system, therefore, was to protect the interests of the family as a whole, not those of the individuals within it.

For obvious reasons, since the family's interest was considered singular and unified, it had to be represented by a single member—namely, the husband, who was the head and "master" of the family, endowed with both parental and marital authority over children and wife. Unsurprisingly, this theory—developed before the Fascist regime—was enthusiastically embraced by it. This concept promoted the idea of the family as a miniature version of the State. Just as the family should have only one chief, so too should the State—hence the *Duce* ([34]).

Upon closer inspection, however, it becomes clear that Antonio Cicu had invented nothing new. His "family as an institution" was merely a modern version of the Napoleonic concept of family. As Honoré de Balzac famously wrote: "Le Code a mis la femme en tutelle. Il l'a considérée comme un mineur, comme un enfant" ("The [Napoleonic] Code placed the wife under guardianship. It considered her a minor, a child") ([35]). In fact, studies on the drafting of the French Civil Code reveal

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([33]) According to SWENNEN, *Contractualisation of Family Law in Continental Europe*, in *Familie & Recht*, 2013, 1, https://www.bjutijdschriften.nl/tijdschrift/fenr/2013/07/fenr-d-13-00003.pdf, "Family law (…) is a fairly recent branch of law." The author here cites the renowned book *Ancient Law* by Maine (MAINE, *Ancient Law*, London, 1908, p. 129), which asserts that "law had not yet penetrated into the precincts of the family." Maine attributed this observation to the earliest period of Roman law, during which the concept of *patria potestas* was established. However, the subsequent development of Roman law contradicts this conclusion. Consider, for instance, Books XXIII, XXIV, XXV, and XXVI of the Digest, or Book V of the Codex Justinianus, mainly dedicated to issues of family law. The same holds true for legal doctrine and case law over the past two thousand years, which offer a wealth of material on virtually every aspect of patrimonial relations between spouses. This historical and legal richness stands in stark contrast to the view of an Italian scholar who described the family as "an island that the sea of law can only lap at its shores": JEMOLO, *La famiglia e il diritto*, 1957, in JEMOLO *et al*., *«Verso la terra dei figli»*, Milano, 1994, p. 69. For critical remarks on this position *see* OBERTO, *Introduzione*, in OBERTO (ed.), *Famiglia e patrimonio*, Padova, 2014, pp. 1 ff.

([34]) On the "institutional concept of family" *see* SESTA, *Il diritto di famiglia tra le due guerre e la dottrina di Antonio Cicu*, in MARMOCCHI (ed.), *Cicu. Il diritto di famiglia. Teoria generale, Lettura di Michele Sesta, Momenti del pensiero giuridico moderno. Testi scelti a cura di Pietro Rescigno*, Sala Bolognese, 1978, pp. 1 ff., 47 ff.; cf. as well OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 103 ff.

([35]) BALZAC, *Le contrat de mariage*, Paris, 1966, p. 59. Written and published in 1835, this novel explores a theme already articulated a decade earlier in the *Code des gens honnêtes* by the author of *La Comédie humaine*: the potentially devastating impact that contractual bonds can have on human relationships. From this perspective, contractual relations—when poorly conceived—are bound to "éclater comme une bombe" (explode like a bomb). Hence the maxim that the marriage contract represents "le plus saint des devoirs" (the holiest of duties).

that Napoleon himself took part in the preparatory work of the *Conseil d'État*, insisting on provisions that would ensure the husband's absolute authority over the family ([36]).

It is undeniable that, prior to the French Revolution and the Civil Code, the condition of women was by no means better. However, Roman, medieval, and customary laws had allowed a significant degree of freedom in marriage contracts, as previously discussed. Later, in early modern Europe (particularly in the 15th to 18th centuries), this freedom was closely linked to the legal practice of the *fideicommissum*—a widespread institution designed to preserve property (especially real estate) within a family line. Its purpose was to prevent the loss or fragmentation of patrimony and was often coordinated with marital contracts ([37]). These agreements defined in detail the patrimonial arrangements of new couples, especially in noble or wealthy families, aligning them with long-term strategies for the transmission of family assets ([38]).

As a French writer aptly remarked, "D'après cette conception, opposée à la notion classique de la propriété romaine purement individuelle, le patrimoine que chaque époux apportait en mariage n'était pas véritablement sa chose propre, mais plutôt une sorte d' depôt viager qu'il avait mission de transmettre aux représentants de sa race" ("According to this conception, which stands in contrast to the classical Roman notion of purely individual ownership, the estate each spouse brought into the marriage was not truly his or her personal property, but rather a kind of life deposit entrusted to him or her with the duty of transmitting it to the representatives of their lineage") ([39]). And this is how contractualisation was intended (and was so successful) in those remote times.

That form of private ordering and party autonomy was thus primarily exercised by families through their respective heads—rather than by individual husbands, and certainly not by wives. Nevertheless, a vibrant form of contractualisation was common practice in Europe, ensuring a degree of affluence and stability for couples, provided they belonged to the upper classes. Revolutionary legislation in France, followed by the *Code Napoléon* (and soon after by many other European legal systems), definitively abolished this older form of contractualisation. It was sacrificed on the altar of the

([36]) This "machist" approach of the *Code Napoléon* is undoubtedly attributable—at least to some extent—to the direct involvement of the First Consul in the drafting process. In fact, Napoleon, perhaps influenced by his own marital misadventures, vigorously insisted on the rule that a wife must obey her husband. This principle is enshrined in Article 213 of the *Code Napoléon*: "Le mari doit protection à sa femme, la femme obéissance à son mari" ("The husband must protect his wife; the wife must obey her husband"). Napoleon justified this provision with strikingly authoritarian language: "Les femmes doivent nous obéir. La nature a créé la femme pour qu'elle soit notre esclave! Le mari doit pouvoir dire à sa femme : Madame vous n'irez pas à la comédie; Madame vous ne verrez pas telle ou telle personne; Madame vous m'appartenez corps et âme" ("Women must obey us. Nature created woman to be our slave! The husband must be able to say to his wife: Madam, you will not go to the theatre; Madam, you will not see this or that person; Madam, you belong to me body and soul"). The eminent French jurist René Savatier, commenting on these words in 1927, offered a sharp critique: "À entendre ce discours passionné, on constate qu'il ne s'agit pas simplement d'une question de loi, mais d'un problème de ménage. Bonaparte pensait à Joséphine! Il s'agit ni plus ni moins du geste mesquin d'un homme qui n'arrivait pas à se faire obéir de sa femme. Et c'est pour cette raison que notre Code civil renferme l'énoncé historique : la femme doit obéissance à son mari" ("Listening to this passionate speech, one realizes that this is not merely a matter of law, but a domestic issue. Bonaparte was thinking of Joséphine! It is nothing more and nothing less than the petty gesture of a man who could not get his wife to obey him. And that is why our Civil Code contains the historical statement: the woman must obey her husband"): *see* SAVATIER, *L'art de faire les lois. Bonaparte et le code civil*, Paris, 1927, pp. 27 ff.; *see* as well THIBAUDEAU, *Mémoires sur le consulat. 1799 à 1804. Par un ancien conseiller d'Etat*, Paris, 1827, pp. 435 f.

([37]) *See* e.g. the opinion of the 16th century Toulouse professor Bérenger (BERENGARII FERNANDI, *Lucubrationum libri v. antehac in lucem editi, quibus sextum de futura conventionali successione pacta complexum adiunxit*, Lugduni, 1601, p. 708): "pactum de successione futura sive tollenda, sive etiam deferenda tunc demum consuetudine firmatur, quando sit incontinenti, iuxta conventionem matrimonii, aut sponsaliorum" ("the agreement as to a future succession, both in case it is intended to waive or to attribute inheritance rights, is valid, according to our customary law, when it is done together with a marriage or an engagement contract").

([38]) On the history of patrimonial family law *see* ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, Antwerpen – Oxford, 2006; *see* also OBERTO, *La comunione legale tra coniugi*, I, op. cit., pp. 3 ff.

([39]) *See* RICHARDOT, op. cit., pp. 141 f.

bourgeois desire to liberate private property from traditional constraints (*fideicommissa*, majorats, mortmains, etc.).

Paradoxically, this process took place at a moment in which, for the first time, marriage had been officially recognized as a "civil contract" by the French Constitution of 3 September 1791 ([40]). That conceptual shift stemmed from the intention to transfer control over marital matters from the Church to secular authorities. Yet, the idea of contractualising family relationships had not yet evolved into a modern framework for regulating patrimonial relations within marriage. That ancient form of private autonomy among wealthy families could not yet be replaced by a new form of contractualisation between husband and wife. Indeed, a true contract requires two parties on equal footing. This was, however, not feasible, given the stark legal and social inequality between husbands and wives at the time.

Social relations between husbands and wives began to change noticeably in the twentieth century. The renowned 1930 essay by Thomas Mann on marriage, in which the great German writer—anticipating a revolution that would unfold some forty years later—voiced criticism of the "classical" nineteenth-century bourgeois ideal of marriage, viewed as a union between unequal individuals, as "a matter of domination and subordination" ("ein Problem der Herrschaft und Unterordnung"), given that the patriarchal spirit of the "classical marriage" had by then become fundamentally unfeasible, "due to women's emancipation, individualisation and liberation, and their equal dignity and equality with men" ("durch ihre Emanzipation, ihre Individualisierung und Befreiung, ihre Ebenburtigkeit und Gleichstellung") ([41]).

It was not until the 1960s and 1970s that a dramatic transformation occurred. Equality in marriage and family relations finally gained full recognition and implementation, spurred by social movements (such as feminism and LGBTQ+ rights), economic growth, welfare reforms, constitutional changes, and the introduction of international human rights principles and institutions ([42]). In Italy, this epochal shift was supported by the republican Constitution, which, in Article 29, enshrines the principle of moral and legal equality between spouses. For this reason, I have described this transformation in previous essays as a shift from the "Institutional" to the "Constitutional" concept of family ([43]). As a French author once remarked, the family became a "collection de droits subjectifs établis sur la tête de chacun de ses membres," or, "a collection of subjective rights vested in each of its members" ([44]).

Once the principle of absolute equality was firmly established—both in the law in books and in the law in action—the conditions were finally ripe for the flourishing (or re-flourishing) of contractualisation across many European countries. The first two areas where this trend took root—and continues to thrive—are: *a*) contracts related to marital breakdown and *b*) cohabitation agreements between unmarried partners. A third, equally important area is that of *c*) marital property agreements. Prenuptial agreements made in contemplation of divorce fall within both the category of marital crisis contracts and that of marital property arrangements. Therefore, the topic of prenuptial

([40]) *See* OBERTO, *Il divorzio in Europa*, op. cit., p. 117; *see* as well THOLOZAN, *Appropriation de soi et contractualisation du lien familial dans le libéralisme lockien et le Code civil*, in SIFFREIN-BLANC, AGRESTI and PUTMAN (eds), op. cit., 47 f. An exhaustive account of the relations between contract and sacrament in the legal conception of marriage under the *Ancien Régime* is provided by AGRESTI, *Le mariage et le contrat à la fin de l'Ancien Régime : éléments de réflexion tirés de l'histoire du droit*, *ibid.*, pp. 53 ff.

([41]) *See* MANN, *Über die Ehe*, in *Über die Ehe, Lessing, Freud in der modernen Geistesgeschichte, Meine Zeit*, Paris, 1970, p. 66: "Wir sehen also : Bedrohung und Problematisierung der Ehe und des 'Hauswesens' vom Manne her aus Libertinage, Recht auf Glück, Recht auf Wechsel, wenn ihm sein Glück nicht vollkommen scheint; von der Frau, von den Kindern, vom 'Gesinde' her durch Emanzipation, gewonnenen Selbstsinn, Freiheit, Persönlichkeit." ("We thus observe: the threat and problematisation of marriage and the 'domestic sphere'—from the man's side, through libertinism, the right to happiness, the right to change if his happiness seems incomplete; from the woman, the children, and the 'servants' through emancipation, acquired self-awareness, freedom, and individuality").

([42]) On this kind of revolution *see* ANTOKOLSKAIA, op. cit., pp. 261 ff.

([43]) OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 103 ff.

([44]) CORNU, *Droit civil, La famille*, 9th ed., Paris, 2006, n° 7 b.

agreements in contemplation of divorce will be addressed in this essay following a brief discussion of marital property agreements and contracts related to marital breakdown.

3. Marital Property Agreements and Marriage Crisis Agreements: Two Sides of the Same Contract.

3.1. Marital Property Agreements as Family Law Contracts. Historical Precedents in France and Germany.

Starting with the category of marital property agreements, it should be reiterated here that this is one of the areas in which party autonomy and contractualisation have historically played a pivotal role. This is evident from the fact that such deeds are referred to as "contracts" in the legal terminology of many countries—for example, *contrat de mariage* in France, *Ehevertrag* in Germany, and even in Italy, where the term *convenzione matrimoniale*, though formally distinct from *contratto matrimoniale*, is now considered by legal doctrine and case law to be fully equivalent to "marriage contract" ([45]).

Historically, the principle that marital property agreements could contain any kind of stipulation—provided it was not *contra bonos mores*—was typical of Roman law and remained respected throughout medieval, modern, and contemporary legal systems. The same applied to the freedom to choose a matrimonial property regime other than the default regime "offered" by law ([46]).

Already under the Ancien Régime, French legal doctrine emphasized that marriage contracts were *"susceptibles de toutes sortes de stipulations en faveur des mariés, et de leurs descendants"* (susceptible to all kinds of stipulations in favor of the married couple and their descendants). Parties were thus allowed to *"faire entrer dans leurs contrats toutes sortes de clauses"* (include all kinds of clauses in their contracts), with the sole limitation that *"elles n'ayent rien de contraire aux bonnes mœurs"* (they must not be contrary to good morals) ([47]). This principle was even codified in some local *coutumes* ([48]). Among the great French civilists of the time, we may refer to Domat, who—after

([45]) OBERTO, *Contratto e famiglia*, in ROPPO (ed.), *Trattato del contratto*, VI, ROPPO (ed.), *Interferenze*, Milano, 2022, pp. 89 ff.

([46]) OBERTO, *I precedenti storici del principio di libertà contrattuale nelle convenzioni matrimoniali*, in *Il diritto di famiglia e delle persone*, 2003, pp. 535 ff.

([47]) LAURIÈRE, *Traité des institutions et des substitutions contractuelles*, I, Paris, 1715, pp. 1 f. of the *préface*; [DU PERRAY], *Traité des contrats de mariage*, Paris, 1741, p. 119; *see* as well COCHIN, *LXXIX. Cause au Req. du Palais*, in *Œuvres de feu Mr. Cochin, écuyer, avocat au Parlement, contenant le recueil de ses mémoires et consultations*, III, Paris, 1753, pp. 479 ff.; LE BRUN, *Traité de la communauté entre mari et femme*, Paris, 1709, pp. 19 f.; ARGOU, *Institution au droit françois*, II, Paris, 1753, p. 19; RENUSSON, *Traité de la communauté de biens entre l'homme et la femme conjoints par mariage*, in *Œuvres de M. de Renusson*, Paris, 1760, p. 16; DENISART, *Collection de décisions nouvelles et de notions relatives à la jurisprudence actuelle*, I, Paris, 1763, pp. 592 f.; POCQUET DE LIVONNIÈRE, *Règles du droit françois*, Paris, 1768, p. 295; DE FERRIERE, *Dictionnaire de droit et de pratique*, I, Paris, 1769, p. 586; PREVÔT DE LA JANNÉS, *Les principes de la jurisprudence françoise*, II, Paris, 1770, p. 24; POTHIER, *Coutumes des Duché, Bailliage et Prévôté d'Orléans et ressort d'iceux*, Paris - Orléans, 1780, pp. 287 ff.

([48]) Orléans: "En traicté de mariage, et avant la foy baillée, et benediction nuptiale, homme et femme peuvent faire et apposer telles conditions, doüaires, donations, et autres conventions, que bon leur semblera" ("In a marriage contract, and before the giving of faith and the nuptial blessing, man and woman may make and establish such conditions, dowries, donations, and other agreements as they see fit"—art. 202, in BOURDOT DE RICHEBOURG, *Nouveau coutumier general*, III, Paris, 1724, p. 790); Montargis: "En traicté de mariage et avant la foy baillée, homme et femme qui se veulent marier par premieres et autres nopces peuvent mettre et apposer telles conditions, conventions donations et autres contracts que on leur semblera en leurdit mariage qui sortiront effect. Toutesfois les renonciations de communité de biens ne pourront prejudicier aux creanciers" ("In a marriage contract, and before the giving of faith, a man and woman who intend to marry—whether in first or subsequent nuptials—may establish and set forth such conditions, agreements, donations, and other contracts as they deem appropriate for their said marriage, which shall take effect. However, any renunciation of community of property shall not prejudice the rights of creditors."—*Chap*. 8, art. 8, in BOURDOT DE RICHEBOURG, op. cit., III, p. 845); Bourbonnais: "Toutes donations, conventions, avantages, institutions d'heritiers, et autres choses faites en contract de mariage et en faveur d'iceluy au proffit et utilité des mariez, de l'un d'eux, ou des descendans dudit mariage, le mariage fait par paroles de presens, sont bonnes, et valables en quelque forme qu'elles soient faites, *etiam* en donnant et retenant, et posé que'elles soient immenses, inoffieciuses, et jusques à l'exhéredation des propres enfans dudit

noting that marriage contracts did not differ from "regular" contracts (except for being subject to the implicit condition of the marriage being celebrated) ([49])—traced the legal basis for contractual autonomy in *contrats de mariage* ([50]) to some provisions of the Justinian code ([51]). These same provisions had led Bartolus of Sassoferrato to declare centuries earlier: *"Omnia pacta dotalia, quae non sunt contra legem, serventur intacta"* ("All marital agreements that are not against the law must be considered valid and enforceable") ([52]).

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disposant" ("All donations, agreements, benefits, appointments of heirs, and other provisions made in a marriage contract and in favour thereof—whether for the benefit of the spouses, one of them, or the descendants of said marriage—are valid and enforceable, provided the marriage has been concluded by words of present consent, regardless of the form in which they are made, even if given and retained, and even if they are excessive, prejudicial, or to the point of disinheriting the disposer's own children."—art. 219, in BOURDOT DE RICHEBOURG, op. cit., III, p. 1248); Auvergne: "Tous pactes, advantages, donation entre vifs, ou à cause de mort, convenance de succeder, soient mutuelles, égales ou non, et autres convenances quelsconques faites et passées en traité de mariage, et en faveur d'icelui par personnes capables à contracter sains ou malades, valent et tiennent au profit des mariez et leurs descendans : saisissent lesdits mariez et leursdits descendans, les cas advenus" ("All pacts, benefits, donations *inter vivos* or *mortis causa*, agreements regarding succession—whether mutual, equal or not—and any other arrangements whatsoever made and executed in the context of a marriage contract and in favour thereof, by persons capable of contracting, whether healthy or ill, are valid and binding for the benefit of the spouses and their descendants; they vest said spouses and their descendants upon the occurrence of the stipulated events."—*Chap*. XIV, art. 26, in BOURDOT DE RICHEBOURG, op. cit., IV, p. 1171).

([49]) DOMAT, *Les lois civiles dans leur ordre naturel*, I, Paris, 1756, p. 95. For the 16th century civilists *see* CUJAS, *In librum XXXV. Pauli ad edictum commentarii, seu recitationes solemnes. Anno 1584*, in *Iacobi Cuiacii I. C. Tolosatis Opera, Ad Parisiensem Fabrotianam Editionem Diligentissime Exacta*, V, Mutinae, 1777, c. 542: "In hisce pactis totum facit voluntas contrahentium: atque adeo sola voluntas contrahentium spectatur et observatur semper" ("In these agreements, the will of the contracting parties is everything: indeed, it is solely the will of the contracting parties that is considered and always upheld."); DUAREN, *In tract. soluto matrimonio, quemadmodum dos petatur, lib. Pandect. XIIII. Commentarius*, in *Franc. Duareni iureconsulti opera omnia tam recentia quam prius edita in iure civili*, Lugduni, 1554, f. 97: "… pro quodam veluti fundamento haec Regula traditur, *Omne hiusmodi Pactum valere*. Quod ita accipi debet, ut non modo ad exceptionem, verum etiam ad actionem prosit (…) Excipiuntur Pacta quae Iuri, aut bonis moribus contraria sunt. Item ea quae mulieri adhuc superstiti dotem adimunt, aut quae conditionem eius deteriorem reddunt. Idem dicendum est de eo pacto, quo convenit, ut vir fructus dotis non lucreteur, et aliis quibusdam similibus" ("On a certain foundational principle, this rule is handed down: that every such pact is valid. This must be understood to mean that it is effective not only as a defence, but also as a basis for legal action (…). Exceptions must be made to such rule for those pacts that are contrary to law or good morals, as well as those that deprive a surviving wife of her dowry or worsen her condition. The same applies to any agreement whereby the husband is not to enjoy the fruits of the dowry, and other similar arrangements").

([50]) DOMAT, op. cit, p. 97: "On peut dans les contrats de mariages, comme en tous autres, faire toutes sortes de conventions, soit sur la dot ou autrement ; pourvû que la convention n'ait rien d'illicite et de malhonnête ; ou qui soit défendu par quelque coutume, ou par quelque loi" ("In marriage contracts, as in all others, all kinds of agreements may be made, whether concerning the dowry or otherwise; provided that the agreement contains nothing illicit or dishonest, nor is prohibited by any custom or by any law").

([51]) "Illud etiam generaliter praesenti addere sanctioni necessarium esse duximus, ut si qua pacta intercesserint, vel pro restitutione dotis, vel pro tempore, vel pro usuris, vel pro alia quacunque causa, quae nec contra leges, nec contra constitutiones sunt: ea observerentur" ("We have deemed it necessary to add this general provision to the present sanction: that if any agreements have been made—whether concerning the restitution of the dowry, the time, interest, or any other cause—which are neither contrary to laws nor to constitutions, they shall be observed": C. 5. 13. 1. § *illud etiam*; *see* as well D. 23. 4. 12.; DOMAT, op. cit., p. 95).

([52]) BARTOLUS OF SASSOFERRATO, *In primam codicis partem commentaria*, Venetiis, 1602, f. 165; in the same sense *see* as well BALDUS DE UBALDIS, *In quartum et quintum codicis libr. praelectiones*, Lugduni, 1556, f. 210 ("Pacta dotalia quae dotis conditionem deteriorem non reddunt, sunt servanda": "Dowry agreements that do not worsen the condition of the dowry are to be upheld"); BARTOLOMEO DA SALICETO (quoted by BAUDOZA, *Codicis D.N. Iustiniani Sacratiss. Principis PP. Aug. Repetitae Praelectionis Libri XII. Diligenter recogniti (…) opera et studio Petri ab Area Baudoza Cestii I.C.*, Lugduni, 1593, c. 919), according to whom "Pacta dotalia, quae non sunt contra legem, sunt observanda et haec lex corrigit omnes alias sibi contrarias" ("Dowry agreements that are not contrary to the law must be observed, and this law overrides all others that conflict with it"); GOTHOFREDUS, *Codicis Iustiniani (…) Libri XII. Notis Dionysii Gothofredi I.C. illustrati*, Lugduni, 1652, c. 403, in a note to C. 5. 13. 1. § *Illud etiam*, for whom "Pacta dotalia quae dotis causam non minuunt, sunt servanda" ("Dowry agreements that do not diminish the purpose of the dowry must be upheld"); FONTANELLA, *De pactis nuptialibus, sive de capitulis matrimonialibus*, II, Genevae, 1684, p. 192: "Pacta omnia quae in eis [nuptialibus tabulis] fiunt, firma, validaque sunt, nisi expressim reperiantur prohibita" ("All agreements made in these [nuptial contracts] are firm and valid, unless they are expressly found to be prohibited"); ODOFREDUS, *De dote*, in BALDUS

French practitioners quickly embraced these theoretical principles. This explains why commentaries on the *coutumes* contain extensive lists of contractual clauses that could be included in marriage contracts. For instance, parties could exclude the community property regime in regions where it was the default between spouses ([53]). Conversely, it was possible to establish a community property regime contractually in southern regions of France (*Pays de droit écrit*) ([54]), where Roman law did not provide for such arrangements ([55]).

There are also examples of agreements that expanded or restricted the usual content of the community property regime ([56]). These were deemed valid even when the wife's share was significantly less than half of the assets acquired during the marriage ([57]).

Other agreements upheld by French courts include: *a*) A clause containing the provision of a future lump sum payment to the wife *en lieu* of the rights under the community property; *b*) A clause making the establishment of the community regime conditional on the wife surviving her husband and having

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NOVELLUS et al., *De dote, tractatus de variis iuris civilis intepretibus decerpti*, Venetiis, 1571, p. 387; DE LUCA, *De dote, lucris dotalibus et aliis dotis appenditiis*, in DE LUCA, *Theatrum veritatis et iustitiae*, VI, Lugduni, 1697, pp. 628 ff.; MANTICA, *Vaticanae lucubrationes de tacitis et ambiguis conventionibus, in libros XXVII. dispertitae*, I, Genevae, 1723, pp. 586 ff.; GAGLIARDI, *De iure dotium commentarius*, s.l., 1780, p. 68.

([53]) TRONÇON, *Le droict françois, et coustume de la Prevosté et vicomté de Paris*, Paris, 1626, p. 375 s.: "L'on a demandé sin l'on peut deroger à la communauté introduitte par la coustume, en sorte que la femme n'y ait aucune part, ou qu'elle n'en puisse proffiter que jusques à la concurrence de telle somme; la coustume de Berry art. 8 titre des Mariages, dit que ceste convention est vallable : la Cour la ainsi jugé en des coustumes qui n'en disposent, par Arrest du 1. Juillet 1485. au profit de Iehan Giraut contre les heritiers de Gillette de la Fontaine sa femme. Autre arrest de la my-Aoust 1529 au profit des heritier de maistre Anthoine Robert contre les Bouchars, en la coustume de Paris : tellement que la coustume de Berry est generale en ceste disposition ; conformé à l'opinion de Ioannes Faber sur la loy *de fidecommisso, Cod. De transact.*" ("It has been asked whether one may derogate from the community of property established by custom, such that the wife has no share in it, or may benefit only up to a specified amount. The Custom of Berry, Article 8, Title on Marriages, states that such an agreement is valid. The Court has ruled similarly in customs that do not expressly provide for this, by a judgment dated 1 July 1485, in favour of Jehan Giraut against the heirs of Gillette de la Fontaine, his wife. Another judgment from mid-August 1529, in favour of the heirs of Master Anthoine Robert against the Bouchars, under the Custom of Paris, confirms that the Custom of Berry is general in this provision; in accordance with the opinion of Joannes Faber on the law *de fidecommisso, Cod. De transact.*").

([54]) *See* e.g. DELALANDE, *Coutumes des duché, bailliage, prevosté d'Orléans et ressorts d'iceux*, Orléans, 1673, p. 228; LE BRUN, *Traité de la communauté entre mari et femme*, op. cit., p. 2.

([55]) It may be remarked that also some (very, very rare) *coutumes*, in central or northern France, did not allow the *communauté*. This was the case for Normandy (*see* art. 389 of the local *coutume*) and of Reims (art. 239). As for the first one, marriage contracts contemplating the community regime were held as null and void (BASNAGE, *Commentaires sur la coutume de Normandie*, in *Œuvres de Maître Henri Basnage*, II, Rouen, 1778, pp. 78 ff.), however only if they were stipulated in Normandy, whereas they were held as valid and enforceable if they were stipulated in a place (e.g. Paris) whose coutume contemplated the community as default regime. This was true, even if the parties were Normandy residents and their assets were located there (LE BRUN, *Traité de la communauté entre mari et femme*, op. cit., p. 2; *see* as well the decision of the Paris *Parlement* of 19 August 1655, in DU FRESNE, *Journal des principales audiences du Parlement*, I, Paris, 1757, pp. 632 ff.). The community property system was also held as incompatible with the *coutumes* of Auvergne (Tit. XIV, art. 1) and of the Marche (art. 296): *see* LE BRUN, *Traité de la communauté entre mari et femme*, op. cit., pp. 2 ff.

([56]) *See* e.g. DELALANDE, op. cit., p. 228. On the validity of a waiver of past and future acquests (*renuntiatio lucris acquisitis et acquirendis*) in Spanish and Portuguese community property systems *see* MOLINA, *De iustitia, tomus secundus de contractibus*, Moguntiae, 1602, c. 823; SANCHEZ, *De sancto matrimonii sacramento*, I, Venetiis, 1685, pp. 383 ff.; COVARRUVIAS, *Operum tomus secundus*, Genevae, 1734, pp. 376 ff.

([57]) ROBERT, *Rerum iudicatarum libri quatuor*, Parisiis, 1602, pp. 66 ff. The author refers of the judgement issued by the Paris *Parlement* on 16 January 1592, that held as valid and enforceable a marriage contract in which parties had stipulated that the wife would have, instead of the half, just one quarter of the properties to be acquired during the marriage ("… societatis partem haberet non dimidiam, qualem ex lege municipali, si nihil conventum foret, consequi debeat, sed quartam tantum societatis illius partem"). The same decision declared null and void a subsequent agreement by which the parties had decided to modify that previous covenant, taken into account the principle of ancient law that did not allow to modify the content of spousal agreements ("… legem contractus matrimonii servari iussit, ac Maeviae [mulieri] quartam societatis partem, non ampliorem adiudicavit").

children; *c*) A provision excluding specific assets from the common property ([58]). One *acte de notoriété* ([59]) from the Paris *Châtelet* (First instance Court) declared: "We, after having taken the advice of the King's Advocate and Prosecutor, and of the Councillors of this Court, Advocates and former Prosecutors of the *Châtelet*, do attest to the Gentlemen of the Imperial Sovereign Chamber of Speyer, that it is allowed and permitted to men and women, when they marry, to agree upon such clauses and conditions as they see fit, as well as to make such donations as they please, even to give each other all their property during their lifetime" ("Nous, après avoir pris l'avis des Avocat et Procureur du Roi, et des Conseilliers de ce Siége, Avocats et anciens Procureurs du Châtelet, attestons à Messieurs de la Chambre Souveraine Impériale de Spire, qu'il est libre et permis aux hommes et femmes, lorsqu'ils se marient, d'apposer telles clauses et conditions que bon leur semble et se faire telles donations qu'il leur plaît, même se donner entre-vifs tous leurs biens") ([60]).

As Tronçon incisively put it: *"La disposition de l'homme fait cesser celle de la coustume"* ("The will of the parties overrides the will of the [customary] law") ([61]). This principle was thus regarded as the general rule governing relations between husband and wife ([62]).

In Germany as well, both the Pre-Pandectists and the Pandectists emphasized the broad freedom granted to parties in their *Eheverträge* ([63]), albeit within certain limits: namely, the strictly patrimonial

([58]) RENUSSON, op. cit., p. 16: "Les personnes qui se marient peuvent stipuler qu'il n'y aura point de communauté, ou que l'un des conjoints aura seulement un tiers en la communauté, et que l'autre y aura les deux autres tiers ; ou ils peuvent stipuler que la femme aura pour tout droit de communauté une certaine somme, ou qu'il n'y aura communauté qu'en cas que la femme survive son mari, et qu'elle ait des enfans ; ou ils peuvent stipuler que leurs biens meubles leur seront propres en tout ou partie, non seulement ceux qu'ils ont actuellement, mais aussi ceux qui viendront à leur échoir par succession, donation ou autrement, ou qu'ils seront employés en achat d'héritage ; ou ils peuvent ameublir tous leurs immeubles, et les faire entrer en la communauté dans les coutumes qui permettent de disposer entre-vifs de tous biens ; ils peuvent enfin faire cesser par leurs stipulations la disposition de la Coutume." ("Persons who marry may stipulate that there shall be no community of property, or that one of the spouses shall have only one third of the community, and the other two thirds; or they may stipulate that the wife shall have, as her sole right in the community, a fixed sum; or that there shall be community only in the event that the wife survives her husband and has children. They may also stipulate that their movable property shall remain their own, in whole or in part—not only that which they presently possess, but also that which may come to them by succession, donation, or otherwise, or that may be used to purchase real estate. They may consider all their immovable property as if it was movable, and include it in the community, in those customs which permit inter vivos disposition of all property. Finally, they may, by their stipulations, override the provisions of the Customary Law"). For a deeper exam of such kind of clauses and of others (*préciput*, *forfait de communauté*, *reprise de l'apport de la femme*) *see* OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 87 ff.; OBERTO, *Gli accordi sulle conseguenze patrimoniali della crisi coniugale e dello scioglimento del matrimonio nella prospettiva storica*, op. cit., c. 1314 ff.

([59]) Sort of "opinions *pro veritate*" given by First Instance judges (*Lieutenants civils*), that, in contemplation of possible future litigations, tryed to "settle" in advance the case law of a given court on certain matters.

([60]) DENISART, *Actes de notoriété donnés au Châtelet de Paris sur la jurisprudence et les usages qui s'y observent*, Paris, 1769, pp. 10 ff. This *acte de notoriété* bears the date of 16 January 1680.

([61]) TRONÇON, op. cit., pp. 375 f.

([62]) "On peut déroger par un contrat de mariage à la Loi et à la Coutume, quand elle n'est point conçûe en termes prohibitifs, ou qu'elle ne dit pas expressément qu'on sera tenu d'observer ce qu'elle prescrit; on a voulu laisser la liberté à ceux qui se marient, pour faciliter le mariage" ("One may derogate, by means of a marriage contract, from the Law and from Custom, when these are not framed in prohibitive terms, or do not expressly state that their prescriptions must be observed; the intention was to leave freedom to those who marry, in order to facilitate marriage"): RENUSSON, op. cit., p. 16.

([63]) CARPZOVIUS, *Jurisprudentia forensis romano-saxonica, secundum ordinem constitutionum D. Augusti Electori Saxon*., Lipsiae et Francofurti, 1684, pp. 802 ff., 966 ("pacta dotalia de dote et donatione propter nuptias extrajudicialiter etiam concepta valent, modo dotem non reddant deteriorem, aut moribus ac legibus repugnent": "Dowry agreements concerning the dowry and the donation in contemplation of marriage, even if made extrajudicially, are valid—provided they do not diminish the dowry, nor conflict with morals or laws"); WESENBECH, *In pandectas iuris civilis et codicis iustinianei libros commentarii*, Genevae, 1639, c. 975 f.; BRUNNEMANN, *Commentarius in duodecim libros codicis iustinianei*, Lugduni, 1669, p. 285; KOHL, *Tractationes duae, prior de pactis dotalibus: altera de successione coniugum*, Lipisiae, 1671, pp. 5 ff. ("Pro regula tenendum: pacta in contractu dotis apposita omnino esse servanda […] Non modo, quia nihil est aequitati naturali magis consentaneum, quam quae inter paciscentes semel placuerunt, servare […], verum etiam, quia traditioni rei suae, puta, doti viro praestandae, legem quam vult, quisque dicere potest": "As a rule, it must be held that agreements included in the dowry contract are to be strictly upheld […] not only because nothing is more in

nature of such agreements and the requirement that they not diminish the value of the dowry, in conformity with the rules of Roman law ([64]).

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accordance with natural equity than to honour what has once been agreed between contracting parties […], but also because, in the act of transferring one's property, namely the dowry to the husband, each person may prescribe the conditions they wish"); STRYKIUS, *De cautelis contractuum necessariis*, in *Supplementum dissertationum et operum sive tractatuum jurid. ante hac editorum et ineditorum volumen XIII*, Florentiae, 1840, c. 340 ("pacta ipsa circa dotem iniri solita quod attinet, regulariter illa licita sunt, nisi conditionem dotis reddant deteriorem […] E.g. Si conventio iniretur, ut, quamvis maritus ante uxorem decesserit, tamen dos penes mariti haeredes remanere debeat, quo casu uxor redderetur indotata": "As for the agreements customarily made concerning the dowry, they are generally lawful, unless they worsen the condition of the dowry [...]. For example, if an agreement were made that, even if the husband dies before the wife, the dowry should remain with the husband's heirs—in which case the wife would be rendered without a dowry"); SCHOTT, *Einleitung in das Eherecht zu akademischen und gemeinnüzlichem Gebrauch*, Nürnberg, 1786, pp. 485 ff. (according to whom, the *Eheverträge* should be held valid "wenn sie auch in ihrem Inhalt von den gemeinen oder Statutarrechten abweichen, als eine für die Eheleute und deren Erben verbindliche Richtschnur geachtet werden": "even if they deviate in content from common or statutory law, they are to be regarded as a binding guideline for the spouses and their heirs"); THIBAUT, *System des Pandekten-Rechts*, I, Jena, 1818, p. 349 ("Die, durch die Gesetze als Folgen der Ehe angeordneten Verhältnisse können durch Verträge mannigfaltig moidificirt und geändert werden": "The relations established by law as consequences of marriage may be variously modified and altered by contract"); MÜHLENBRUCH, *Doctrina pandectarum*, Bruxellis, 1838, p. 503: "Vis autem omnis atque auctoritas horum pactorum ex uno illo pendet, ut ne adversentur aut honestati, aut publico juri" ("The force and authority of all such agreements depend entirely on this one condition: that they do not conflict with either morality or public law"); MÜHLENBRUCH, *Lehrbuch des Pandekten-Rechts nach der Doctrina pandectarum Deutsch bearbeitet*, III, Halle, 1840, pp. 79 f.; ARNDTS, *Lehrbuch der Pandekten*, München, 1861, pp. 628 f. ("Bei bestellung der Dos sind, wie bei andern Rechtsgeschäften, verschiedene Nebenbestimmungen möglich und können auch nacher noch besondere Verabredungen darüber getroffen werden" ("In the arrangement of the dowry, as in other legal transactions, various ancillary provisions are possible, and further specific agreements may also be made thereafter"); MAREZOLL, *Trattato delle istituzioni del dritto romano*, Napoli, 1866, p. 300 ("Gli sposi possono prima, durante, ed ancor dopo la conchiusione del matrimonio stabilire a lor talento il modo onde verranno regolati i loro rapporti matrimoniali, in ispecialità le relazioni economiche, così per la durata del matrimonio, come pel tempo che vien dopo la sua cessazione; fermare in tal guisa i *pacta nuptialia*": "The spouses may, before, during, and even after the conclusion of the marriage, freely determine the manner in which their matrimonial relations shall be regulated—particularly their financial relations—both for the duration of the marriage and for the period following its dissolution; thereby establishing the *pacta nuptialia*"); BARON, *Pandekten*, Leipzig, 1890, p. 579 ("Vor wie nach Eingehung der Ehe können von den Brautleuten resp. Gatten unter sich sowie mit dem dritten Besteller der Dos Verträge abgeschlossen werden, durch welche die Dos anderen als den gestzlichen Bestimmungen unterworfen wird. Die Contrahenten haben hiebei nicht immer freie Hand, vielmehr sind ihnen bedeutende Schranken gezogen auf Grund des Princips: *reipublicae interest, mulieres dotes salvas habere, propter quas nubere possunt, … quum dotatas esse feminas ad sobolem procreandam replendamque civitatem liberis maxime sit necessarium*": "Both before and after the conclusion of marriage, the betrothed or spouses may enter into agreements—among themselves or with the third party providing the dowry—by which the dowry is subjected to terms other than those prescribed by law. However, the contracting parties do not always have free rein; rather, significant limitations are imposed based on the principle: *that it is in the interest of the state that women retain their dowries, for it is by means of these that they are able to marry… for it is especially necessary that women be endowed with dowries in order to bear offspring and to populate the state with children*"); WINDSCHEID, *Lehrbuch des Pandektenrechts*, II, Frankfurt a. M., 1882, pp. 885 ff. ("Wenn die Parteien über das Schicksal der Dos, fur die Zeit während des Bestehens der Ehe oder für die Zeit nach der Auflösung derselbe, vertragsmäßige Bestimmungen getroffen haben, so sind, die Gültigkeit des Vertrages vorausgesezt, diese und nicht die bisher entwickelten gesetzlichen Regeln, maßgebend": "If the parties have contractually agreed upon the fate of the dowry—either for the duration of the marriage or for the period following its dissolution—then, assuming the validity of the contract, these provisions shall prevail over the statutory rules previously established").

([64]) *See* e.g. VANGEROW, *Leitfaden für Pandekten-Vorlesungen*, Marburg und Leipzig, 1843, pp. 335 ff.; SEUFFERT, *Praktisches Pandektenrecht*, III, Würzburg, 1852, p. 50 f. : "Die persönlichen Verhältnisse der Eheleute können durch die Ehepacten nicht verändert werden. Aber auch in Ansehung der Vermögensrechte ist ihre Wirksamkeit mehrfach beschränkt" ("The personal status of the spouses cannot be altered by marital agreements. Even with regard to property rights, their effectiveness is subject to multiple limitations"); PUCHTA, *System und Geschichte des römischen Privatrechts*, II, Leipzig, 1881, p. 411 : "Die rechtlichen Vorschriften über die Dos können zum Theil abgeändert werden durch besondere Verabredungen, *pacta dotalia*, sowohl vor als während der Ehe. Sie sind ihrem Inhalt nach beschränkt, sie dürfen 1) nich gegen das Wesen der Ehe streiten, z.B. darf dem Mann nicht das *beneficium competentiae* entzogen werden; 2) nicht gegen das Wesen der Dos, z.B. kann nicht die Restitution aller Früchte bedungen werden; 3) darf die Lage der Frau nicht verschlimmert werden, z.B. durch Verlängerung des Restitutionstermins, wenn die Dos an die Frau fällt" ("The legal provisions concerning the dowry may, in part, be modified by special agreements—*pacta dotalia*—both before and

We must also recall that medieval German codifications—such as the *Sachsenspiegel*, *Schwabenspiegel*, and *Deutschenspiegel*—recognized a wide scope for marriage agreements ([65]). It is therefore unsurprising that a 1572 constitution issued by Elector Augustus of Saxony explicitly affirmed the contractual nature of marriage agreements, as attested by Carpzovius ([66]). In Prussia, the draft of the "Frederick Code" by Samuel von Cocceji stated: "Marriage agreements or marriage contracts (…) have the same efficacy as all other agreements; consequently they must be executed, unless they contain clauses that could give the spouses the opportunity to commit a sin, or if the agreement is for other reasons contrary to morality or the laws" ([67]). Moreover, it added: "Particular pacts or agreements may be added to marriage contracts, both *in continenti* and *ex intervallo*" ([68]). Years later, the *Allgemeines Landrecht für die preußische Staaten* (General Code for the States of Prussia – *ALR*) of 1794 fully incorporated these principles in several of its paragraphs ([69]).

As a German scholar noted at the end of the 19th century, private autonomy in marriage contracts—unlike the limitations imposed by Roman law on the economic relations between spouses—had achieved full recognition in German common law ([70]). Following the unification of national civil law at the dawn of the 20th century, legal scholars unanimously affirmed that the general rule could only be that of *Vertragsfreiheit* (freedom of contract) ([71]).

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during the marriage. However, their content is subject to limitations: 1) They must not conflict with the nature of marriage—for example, the husband may not be deprived of the *beneficium competentiae*; 2) They must not conflict with the nature of the dowry—for instance, the restitution of all fruits may not be stipulated; 3) They must not worsen the position of the wife—for example, by extending the restitution period when the dowry is to revert to her").

([65]) SCHROEDER, *Geschichte des ehelichen Güterrechts in Deutschland*, II, 1, Stettin und Elbing, 1868, pp. 137 ff.; II, 2, 1871, pp. 1 ff.; II, 3, 1874, pp. 218 ff. According to this author, such agreements could even be made in contemplation of a possible divorce (*see* e.g. Article 74 of the 3rd Book of the *Sachsenspiegel* and the Chapter CXXV of the *Schwabenspiegel*, which, however, do not make any reference to marriage contracts).

([66]) "Nach deme die Ehestifftunge *Contract* seyn / so ist es auch genug / wann zweene oder drey Zeugen dabey gewesen…" ("Since the marriage settlement is a contract, it is sufficient if two or three witnesses are present…"): *see* CARPZOVIUS, op. cit., p. 802 (the said *constitutio* is the No. II, 43 of the collection).

([67]) *See* [VON COCCEJI], *Projet du corps de droit Frédéric ou corps de droit pour les états de sa majesté le roi de Prusse*, I, suivant l'édition de Halle, 1751, p. 172.

([68]) *See* [VON COCCEJI], op. cit., p. 185.

([69]) *ALR*, II, 1, §§ 198, 208, 209, 215, 251; *see* SCHMIDT, *Das preußische Familienrecht nach dem allegemeinen Landrechte*, Leipzig, 1843, pp. 186 ff.: "die Eheleute können sich, sobald sie wollen, als zwei Behörden einander gegenüberstellen, und ihr besonderes Interesse eigennützig wahrnehmen" ("the spouses may, whenever they wish, confront one another as two separate authorities and pursue their individual interests in a self-serving manner").

([70]) NEUBAUER, *Das in Deutschland geltende eheliche Güterrecht nach amtlichen Materialien zusammengestellt*, Berlin, 1889, p. 67: "Im Gegensatze zu der dem römischen Rechte eigenen Beschränkung der Ehegatten in der vertragsweisen Regelung ihrer gegenseitigen vermögensrechtlichen Beziehungen erlangte unter dem Einflusse deutscher Rechtssitte die Freiheit des Ehevertrages gemeinrechtliche Anerkennung in Deutschland" ("In contrast to the restrictions inherent in Roman law on the spouses' ability to regulate their mutual property relations by contract, the freedom of the marriage agreement gained general legal recognition in Germany under the influence of German legal custom"). For similar remarks, referred to the evolution of Swiss law, *see* VON WYSS, *Die ehelichen Güterrechte der Schweiz in ihrer rechtsgeschichtlichen Entwicklung*, Zürich, 1896.

([71]) It can be of a certain interest to compare the two different *incipits* with which the same authoritative writer (Heinrich Dernburg) intervenes on the same matter, respectively, before and after the relevant date of 1 January 1900:

DERNBURG, *Pandekten*, III, Berlin, 1892, pp. 32 f.:	DERNBURG, *Das bürgerliche Recht des Deutschen Reiches und Preußens*, IV, *Familienrecht*, Halle, 1903, pp. 171 f.:
"Die Vertragsfreiheit ist bezüglich der Dotalverhältnisse wesentlich beschränkt. 1. Dotalverträge sint nichtig, wenn sie gegen Grundprincipien des Dotalrechtes verstoßen (…). 2. Ferner wurden Dotalverträge verworfen, welche die Rechtsstellung der Frau ungebührlich verschlechtern (…)". ("Freedom of contract is significantly restricted with regard to endowment relationships. 1. Endowment	"Für die Ordnung der Verhältnisse unter den Gatten besteht Vertragsfreiheit, soweit nicht zwingende Rechtsnormen entgegenstehen. Von größter Wichtigkeit ist für das Eherecht, daß Verträge nichtig sind, welche gegen ein gesetzliches Verbot oder gegen die guten Sitten verstoßen, §§ 134, 183. Nichtig sind daher namentlich solche Verträge, welche mit dem Wesen der Ehe unvereinbar sind, z.B. die vertragsmäßige Entbindung der

3.2. Marital Property Agreements as Family Law Contracts: Contemporary Experiences.

In contemporary times, freedom of choice in marital property arrangements has been enshrined also in the European Principles of Family Law Regarding Property Relations between Spouses ([72]), drafted by the Commission on European Family Law (CEFL) ([73]). This principle is recognized in nearly all modern European legal systems. According to a CEFL survey ([74]), spouses may—through pre- and/or post-nuptial agreements—choose a statutory matrimonial property regime in Austria, Belgium, France, Germany, Greece, Italy, Lithuania, Malta, the Netherlands, Portugal, Slovakia, Spain, and Switzerland. Moreover, although Nordic countries do not offer a choice among multiple property regimes, spouses may still modify the default legal rules through marital property agreements, thereby tailoring their property relations to individual needs (as in Denmark, Finland, Norway, and Sweden).

Even more significantly—as will be discussed in greater detail with reference to France ([75])—in many legal systems, spouses can, by notarial deed, modify the default legal regime to better reflect their personal needs, expectations, and aspirations. For example, a general feature of deferred community of property regimes is the coexistence of marital and separate property. In jurisdictions where such a regime is the default, spouses may redefine asset categories and restrict participation. They may agree, for instance, that part of the marital property shall be treated as separate property (as in Denmark and Norway). They may also exclude certain assets from the marital estate or convert them into separate property (as in Denmark, Finland, Norway, and Sweden) ([76]).

A high degree of freedom is also granted to spouses regarding the modification or complete change of the matrimonial property regime ([77]). This marks a departure from older traditions, which discouraged such flexibility in the name of preserving the "stability" of matrimonial regimes—both to safeguard the vertical transmission of family wealth and as a patrimonial analogue to the principle of the indissolubility of marriage ([78]).

The transformations of this latest historical period have been so profound as to affect the contractual freedom of family members in domains beyond the scope of family law. For a long time, the imperative nature of the matrimonial regime curtailed spouses' contractual freedom. Accordingly, the law long remained reluctant to allow contracts between spouses, fearing that such agreements might undermine the principle of immutability of the matrimonial regime, enable one spouse to

contracts are void if they violate fundamental principles of endowment law (...). 2. Furthermore, endowment contracts that unduly worsen the legal position of women were rejected (...)").	Frau von der Verplichtung, bei ihrem Manne regelmäßig zu wohnen, die Übernahme der Verpflichtung, in eine Ehescheidung zu willigen." ("Freedom of contract exists for the regulation of relationships between spouses, unless mandatory legal norms conflict with this. Of utmost importance for marriage law is that contracts are void if they violate a legal prohibition or common decency (§§ 134, 183). Therefore, contracts which are incompatible with the essence of marriage are void, e.g., the contractual release of the wife from the obligation to regularly reside with her husband, the assumption of the obligation to consent to a divorce").

([72]) BOELE-WOELKI *et al.*, *Principles of Family Law Regarding Property Relations Between Spouses*, Cambridge-Antwerp-Portland, 2013, pp. 92 ff.

([73]) *See* https://ceflonline.net/.

([74]) BOELE-WOELKI *et al.*, *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., pp. 92 ff.

([75]) *See* below, at para. 8.

([76]) BOELE-WOELKI *et al.*, *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., pp. 95 f.

([77]) BOELE-WOELKI *et al.*, *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., pp. 99, 116 ff.; CABRILLAC, op. cit., pp. 97 ff.

([78]) *See* GOODY, *Famiglia e matrimonio in Europa*, Bari, 1995, pp. 261 ff.

exploit their influence over the other to dispossess them, and at times prove incompatible with the duties of mutual assistance and cooperation between spouses. The gradual expansion of spouses' contractual freedom ultimately made it possible to apply the rules of general contract law to agreements between spouses, lifting long-standing prohibitions and restrictions—as illustrated by the topical examples of donations ([79]), sale contracts, business partnership agreements, and employment contracts ([80]).

In common law countries, marital property agreements often extend beyond asset division to include provisions on spousal support, lump-sum payments, and alimony in the event of divorce. As will be shown later ([81]), such agreements are increasingly recognized as valid and enforceable in those jurisdictions as well.

Another fascinating aspect of family law contractualisation—particularly in relation to matrimonial property regimes—is the possibility of creating entirely new types of regimes, beyond those provided by statute. According to the CEFL study on Property Relations Between Spouses, "In some several of the reviewed jurisdictions the spouses can also create new types of matrimonial property regimes, so as, for example, to follow the rules of a foreign regime or to create their own 'tailor-made' regime (e.g. Austria, Belgium, France, Hungary, The Netherlands, Portugal, and Russia)" ([82]).

The same study lists several legal systems where this is not permitted—including Italy. However, this information is inaccurate. In fact, both Italian legal doctrine and case law affirm that spouses are free, by notarial deed, to create a matrimonial property regime different from those provided in the Italian Civil Code. There is no *numerus clausus* in this area, as evidenced by the rejection of a proposed amendment to the Civil Code during the preparatory work for the 1975 family law reform, which would have introduced such a limitation. Moreover, all Italian scholars agree that marital property agreements are, in essence, contracts. Therefore, the general principle of private autonomy and contractual freedom (see Article 1322 of the Italian Civil Code) applies fully in this domain ([83]).

([79]) Several European legal systems have, for centuries, prohibited donations between spouses, following a principle already established in Roman law. For a historical overview of this prohibition in French law up to the Napoleonic Code, *see* BOUTRY, *Essai sur l'histoire des donations entre époux et leur état d'après le Code Napoléon*, Paris, 1852. In Italian law, the prohibition remained in force until a Constitutional Court ruling in 1973: *see* Corte cost., 27 giugno 1973, n. 91.

([80]) Art. 1585 of the 1804 French Civil Code originally prohibited sales between spouses. A prohibition justified not only by the reasons cited in the text, but also by the risk of shielding assets from creditors' claims. This restriction was lifted by the Law of 23 December 1985: sales between spouses are now permitted freely. They remain void only if they result in an early liquidation of the matrimonial regime or a prohibited alteration thereof, such as the sale of a jointly held asset to one spouse to convert it into separate property. The business partnership contract underwent a similar evolution. For many years, jurisprudence annulled companies formed between spouses, on the grounds that the equality of partners conflicted with the hierarchical structure of marriage. Gradually, the courts and the legislature relaxed this rule, and the final restriction—preventing spouses from being jointly and severally liable for corporate debts—was abolished by the Law of 23 December 1985. Article 1832-1 of the French Civil Code now provides that "even if spouses use only community property as contributions to a company or for acquiring shares...," husband and wife, alone or together with others, may be partners in the same company and may participate jointly or separately in its management. The expansion of spouses' contractual freedom has thus brought them closer to general contract law by allowing them to form business partnerships. A similar development can be observed with regard to employment contracts. The element of subordination intrinsic to the employment relationship long seemed incompatible with the relationship between spouses. Paradoxically, it was at a time when equality within the couple was gaining ground that employment contracts between spouses became possible. The French Law of 10 July 1982 removed any lingering doubts, although a certain specificity remains, insofar as case law has acknowledged that such employment contracts may exist without a necessary relationship of subordination. Thus, the contractualisation of matrimonial regimes has not only broadened spouses' contractual freedom under general contract law, aligning it with that of other contracting parties, but has also extended their freedom to enter into matrimonial agreements. On these topics *see* CABRILLAC, op. cit., pp. 96 f.

([81]) *See* below, at para. 5 f.

([82]) BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., p. 105.

([83]) The subject is dealt with in depth in OBERTO, *Contratto e famiglia*, in ROPPO (ed.), *Trattato del contratto*, VI, *Interferenze*, 2nd ed., Milano, 2022, pp. 164 ff.

One may also mention the widespread use among wealthy Italian families of the foreign legal instrument known as the "family trust," often through a broad interpretation of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition ([84]). A similar function is served by Article 2645-*ter* of the Italian Civil Code ([85]), which allows, by notarial deed, for one or more real estate assets to be dedicated to the benefit of a family or specific family members. This mechanism can also limit the enforceability of creditors' claims. In practice, such deeds—when made in contemplation of family interests—create special rules governing certain assets, effectively establishing a new form of matrimonial property regime not specifically regulated by the Civil Code ([86]).

All of the above considerations are closely linked to the fact that general contract law rules apply to marital agreements. Despite differences in detail across European legal systems, there is broad consensus on the basic conditions for contractual validity: consent must not be vitiated by mistake, fraud, threat, or coercion, and the agreement must not contravene morality or public policy ([87]). Moreover, more and more courts in many countries take the principle of *pacta sunt servanda* seriously and are generally reluctant to modify matrimonial agreements ([88]).

In most European Continental systems, notaries play a central role in drafting these agreements and informing the parties of their rights and obligations ([89]). According to a recent study by the Commission of European Affairs of the International Union of Notariat (UINL), over 80% of European countries assign notaries the task of creating or modifying matrimonial property regimes ([90]). This role must be exercised from a position of complete independence. This requirement applies in virtually all jurisdictions that follow the so-called Latin (or Roman) notarial system ([91]). Under this system, the Latin notary has a legally binding duty to: *a*) Ensure that the agreement complies with legal provisions; *b*) Explain to the parties the legal and fiscal consequences of their contract, including potential risks; *c*) Remain absolutely neutral and impartial.

As legal scholars have noted, formalities such as the notarial form—which includes legal information and independent counselling—help prevent rash decisions or exploitation. They also ensure that the parties fully understand the significance and implications of the agreement. This is particularly important when one spouse lacks legal or business experience or is not fluent in the language of negotiation. Interpretation during negotiations and translation of documents may be essential. Requiring notarisation also increases the likelihood that the parties will anticipate and address potential changes in circumstances over the course of a lifelong relationship ([92]).

([84]) OBERTO, Trust *e autonomia negoziale nella famiglia*, in *Famiglia e diritto*, 2004, pp. 201 ff., 310 ff.

([85]) For a study in English on this Italian legal provision *see* DE MARCO, DIBARI and SCALERA, *The Italian Law "After Us" nr. 112/2016 and Protection Measures for Persons with Severe Disabilities and without Family Support*, available at https://www.ijbmer.com/docs/volumes/vol8issue4/ijbmer2017080401.pdf.

([86]) OBERTO, *Le destinazioni patrimoniali nell'intreccio dei rapporti familiari*, in RESCIGNO (ed.), *Trattato dei contratti*, 19, CALVO and CIATTI (eds), *I contratti di destinazione patrimoniale*, Torino, 2014, pp. 140 ff.

([87]) DETHLOFF, *Contracting in Family Law: A European Perspective*, in BOELE-WOELKI, MILES and SCHERPE (eds), *The Future of Family Property in Europe*, Cambridge-Antwerp-Portland, 2011, pp. 76 f.

([88]) DETHLOFF, *Contracting in Family Law: A European Perspective*, op. cit., p. 79.

([89]) For a comparative overview of notaries' duties *see* BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., pp. 126 f. On the role of notaries in France and Germany *see* FITCHEN, *The Private International Law of Authentic Instruments*, Oxford, 2020, pp. 33 ff.

([90]) *See Union Internationale du Notariat - Commission des Affaires Européennes - Législature 2023-2025*, *Les competences notariales en matiere non contentieuse. Etude de la Commission des Affaires Européennes (CAE)*, 2024, Sous la responsabilité de Me Bertrand Basseville (Notaire en France) et la Présidence de Me Valentina Rubertelli (Notaire en Italie), p. 2 (the study is in the process of being published).

([91]) On this system *see* FUSARO, *Il notaio esercita attività giurisdizionale?*, in *Rivista di diritto privato*, 2017, pp. 497 ff.; the study provides an historical view of the professional figure of the Latin notaries.

([92]) DETHLOFF, *Contracting in Family Law: A European Perspective*, op. cit., p. 88. On the advantages of the notary form for marriage property contracts *see* BRAMBRING, *Die Ehevertragsfreiheit und ihre Grenzen*, in HOFER, SCHWAB and HENRICH (eds), *From Status to Contract?— Die Bedeutung des Vertrages im europäischen Familienrecht*, op. cit., pp. 24 ff. In the English case law an increasing value is given to independent legal advice, as will be pointed out later: *see* below, on this topic, at para. 6. In England the Home Office advises to sign a pre-nuptial agreement at least 21 days before

In this sense, the Latin notary is not a "client's notary." The professional relationship between notary and client must not compromise the notary's duty to draft only legally sound deeds, in the shared interest of both parties. As a public officer and impartial professional, the Latin notary plays a crucial "anti-litigation" role: notarial deeds are intended to prevent future disputes ([93]). It must be stressed as well that, in those European systems in which notaries are not known, or are not involved in the making of marital property agreements, it is recommended that parties seek independent legal advice before entering into such contracts ([94]).

It is therefore surprising to read, in a recent study, that "in Italy (…) in so far as marital property agreements are permitted, the notary is not required to provide information to the parties" ([95]). This statement is clearly inaccurate. On the contrary, Italian law imposes strict obligations on notaries to provide complete, impartial, and thorough information to clients regarding the content, purpose, and effects of the deed they are about to sign. Failure to do so may result in disciplinary or civil liability ([96]). Moreover, it is incumbent upon us to take due account of an international tendency to underscore the significance of advisory and support functions afforded to both contracting parties, particularly in legally sensitive domains such as family law. A paradigmatic illustration of this trend is found in the document entitled *Good Notarial Practices to Promote Gender Equality in Europe*, issued in 2025 by the International Union of Notaries (UINL). This instrument is intended to orient the notarial profession towards the adoption of practices aimed at fostering gender equality within the framework of family relations.

The document expressly acknowledges that notaries "play a pivotal role in reducing gender inequalities by advising on matrimonial property regimes, protecting spouses' independence, preventing economic violence, and ensuring fairness during inheritance proceedings," and accordingly urges notaries "to collectively champion the cause of gender equality," in such a way as to "ensure that the values of justice and impartiality that define [the notarial] profession are reflected in every aspect of [the notarial] work." Within this normative context, particular attention is warranted for the sections providing operational guidance to notaries on measures designed to reinforce "equality within couple, during marriage and divorce" (including legal advice concerning

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the wedding, cf. HOME OFFICE, *Supporting Families - A Consultation Paper*, London, 1998, 4.23. However, the courts seem to apply no specific time limit, cf. *K v K (Ancillary Relief Pre-Nuptial Agreement)* [2003], 1, FLR, 120 as well as Thorpe LJ in *Radmacher v Granatino* [2009], EWCA, Civ, 649, [2009] 2 FLR 1181 at para. 33. The UK Supreme Court did not mention the timing explicitly, for the circumstances attending the making of the agreement in general cf. *Radmacher v Granatino* [2010], UKSC 42, at para. 68 et seq; while in the US the Uniform Premarital Agreement Act did not set a time period, some states amended that act and included the requirement of a lapse of a certain time period between the presentation of the pre-nuptial agreement and its signing, e.g. Californian Family Code para 1615 (c) (2). Indeed, this provision addresses the enforceability of premarital agreements, specifically regarding the "7-day rule." This rule, introduced for agreements executed on or after January 1, 2020, mandates a minimum of seven calendar days between the presentation of the final agreement and its signing, regardless of whether the parties have legal counsel (*see* as well below, at para. 5.2). In other states, the fact that the agreement was signed several weeks before the wedding will be considered in establishing the voluntariness, cf. KATZ and CLAYMAN, *When Your Elderly Clients Marry: Pre-nuptial Agreements and Other Considerations*, 16, *Journal of the American Academy of Matrimonial Lawyers*, (1999-2000), pp. 445 ff.

([93]) The Italian notarial tradition of the last decades was raised and educated under the teaching of the famous sentence pronounced by Francesco Carnelutti, a very famous lawyer and professor of procedural law, according to whom, "tanto più notaio, quanto meno giudice" ("the more you turn to a notary, the less you will go to court"): *see* CARNELUTTI, *La figura giuridica del Notaro,* in *Rivista trimestrale di diritto e procedura civile*, 1950, pp. 921 ff.

([94]) BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., p. 128.

([95]) BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., p. 128.

([96]) *See* articles 50, b), of the Notarial Deontological Code of Italy and 47, para. 2, of the Italian Notarial Law of 16 February 1913, No. 89. Such duties have been stressed by two decisions of the Italian Supreme Court of Cassation in 2018: *see* Cass., No. 32147/2018 and Cass., No. 3984/2018. On the other hand, it is true that the vast majority of Italian couples opt for the separate property regime at the time of their marriage, by means of a simple declaration made either to the municipal registrar officiating the civil ceremony or to the priest conducting the religious one. In such cases, no legal information is provided to the parties by any independent authority or professional.

matrimonial property regimes, separation and divorce), as well as those relating to the dissemination of information "about mandatory provisions that help prevent economic violence" ([97]).

In short, as legal doctrine affirms, "Latin notaries are bound by the obligation of impartiality towards the parties and must be considered as legal advisors in non-contentious matters involving real estate transfers, family law, successions, and corporate law" ([98]).

3.3. Marriage Crisis Contracts: The Use of Contractual Norms to Regulate the Patrimonial Consequences of a Marriage Breakup.

Let us now examine divorce- and separation-related contracts, focusing first on those agreements entered into at the very moment of separation or divorce (leaving for the following paragraphs a discussion of premarital agreements). European legal doctrine agrees that the contractual regulation of the pecuniary consequences of the dissolution of family relationships is nowadays widely accepted. Some scholars even go so far as to claim that "in most cases divorce itself is a contract" ([99])—a statement that, of course, does not hold when the spouses are not in agreement. Alimony agreements may be concluded within pre-marital, marital or separation contracts, although some legal systems are more receptive to such arrangements than others ([100]).

This kind of agreements began to flourish alongside the statistical explosion of marital breakdowns starting in the late 1970s. The situation was further complicated by the severe backlog in the courts, which began to accumulate during those years. This was exacerbated by the fact that, since the introduction of divorce in Italy in 1970, legal separation was required as a mandatory preliminary step ([101]). As a result, every marital crisis had (and still has) to undergo two distinct legal procedures: first, legal separation, and then divorce.

Consequently, many Italian couples—often with the assistance of their lawyers (and sometimes notaries)—began to streamline the process by settling disputes through separation and divorce agreements. This phenomenon became so widespread that legal scholars had to coin a specific term for it: *contratti della crisi coniugale* (contracts of marital crisis) ([102]), which was later expanded into the broader category of *contratti della crisi familiare* (contracts of family crisis), to include agreements involving unmarried couples ([103]).

This shift prompted extensive theoretical reflection on a rich body of case law, one of the central legal questions being whether—and to what extent—the general rules of the Civil Code on "contracts in general" could be applied to separation and divorce agreements. In short, the answer has consistently been affirmative: both legal doctrine and case law have applied a wide range of general contract principles to such agreements, including rules on defects of consent (such as mistake, fraud, duress, or unconscionability) ([104]). The same applies to the phenomenon of simulation (yes, legal separations can be simulated—and this is often done in Italy for tax purposes) ([105]), as well as to legal

([97]) INTERNATIONAL UNION OF NOTARIES (UINL), *Strengthening Gender Equaliy. Guidelines for Notaries. Good Notarial Practices to Promote Gender Equality in Europe*, 2025, in https://uinl.org/news/good-notarial-practices-to-promote-gender-equality-in-europe/; *see* in particular pp. 15 ff.

([98]) FUSARO, *Il notaio esercita attività giurisdizionale?*, in *Rivista di diritto privato*, op. cit., p. 500.

([99]) PANSIER, *De la contractualisation du droit de la famille en general et du droit du mariage en particulier*, https://www.fjpansier.com/resources/contractualisation.htm, pp. 1 ff. The author adds that the "tendency towards contractualisation appears at the moment of the breakup of marriage," which, in my opinion, is not accurate—if it is intended to suggest that only at that point do the parties have the ability or desire to enter into contractual agreements.

([100]) SWENNEN, *Private Ordering in Family Law: A Global Perspective*, op. cit., p. 7.

([101]) According to the original version of the Italian Divorce Law of 1970, the waiting period between legal separation and divorce was five years—extended to seven years for the spouse found at fault in the separation proceedings, if the other spouse opposed the divorce. In 1987, this period was reduced to three years, and in 2015 to six months in cases of separation by mutual consent, or one year in cases of contentious separation.

([102]) OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 3 ff., 485 ff., 627 ff. The idea of such a title came to the author of this essay during a stroll along the seafront in Nice (France) on a rainy day in the winter of 1998.

([103]) OBERTO, *Contratto e famiglia*, op. cit., pp. 231 ff.

([104]) OBERTO, *Contratto e famiglia*, op. cit., pp. 109 ff.

([105]) OBERTO, *Contratto e famiglia*, op. cit., pp. 109 ff.

rules on contractual terms, conditions, formal requirements, and registration in public real estate records ([106]).

To give a concrete example, one particularly "thriving branch" of marriage crisis agreements concerns the transfer of immovable assets from one spouse to the other in the context of a consensual separation or divorce ([107]). The legal issue of whether such transfers have a *cause suffisante* (sufficient legal cause) has been addressed by Italian case law ([108]), which has embraced the theory I developed years ago regarding the existence of a "typical legal cause for contracts arising from marital or family crises" (*causa tipica dei contratti della crisi coniugale, o della crisi familiare*) ([109]). According to this view, dozens of Italian judgments have upheld the validity of agreements made at the time of marital breakdown, in which one spouse transfers—or undertakes to transfer—immovable assets (or shares thereof) to the other spouse (and/or to the children) as a means of fulfilling maintenance obligations.

It should also be noted that, in Italy, a very popular "sport" (besides football…) is attempting to defraud creditors. This has led to a significant number of cases in which legal separation was used as a pretext to transfer assets from one spouse to the other in order to shield them from enforcement actions ([110]). As a result, Italian courts have frequently had to declare such transfers ineffective vis-à-vis creditors, recognizing them as fraudulent conveyances ([111]). This conclusion stems from the straightforward application of the provisions of the Civil Code (Articles 2901 et seq.) regarding the so-called *actio pauliana*, a legal remedy that creditors can use to protect themselves against fraudulent acts carried out by debtors in order to remove all or part of their assets from enforcement actions.

These findings confirm that, even in such cases, legal doctrine and courts routinely turn to the general provisions of the Civil Code on contracts to resolve issues not explicitly addressed by the specific rules on marital property agreements. Consider, for other examples, the question of whether such agreements can be concluded through representatives of the spouses ([112]), or whether their effects can be made subject to contractual terms or conditions ([113]).

In conclusion, we can confidently state that both marital property agreements and marriage crisis contracts are governed by many of the same contractual principles. They thus represent two sides of the same broader trend: the contractualisation of family relationships ([114]).

([106]) OBERTO, *Contratto e famiglia*, op. cit., pp. 344 ff., 433 ff. On the applicability to the German *Eheverträge* (marriage contracts) of the general rules dictated by the civil code on contracts, *see* also DUTTA, *Marital Agreements and Private Autonomy in Germany*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 160 f.

([107]) OBERTO, *Contratto e famiglia*, op. cit., pp. 347 ff.

([108]) *See* on this point MARELLA, *The Contractualisation of Family Law in Italy*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., pp. 253 f.

([109]) OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 709 ff.; OBERTO, *Contratto e famiglia*, op. cit., pp. 270 ff. This *cause suffisante*, which is characteristic of agreements made during a marital crisis, rests on the spouses' willingness to regulate—by agreement rather than through contentious proceedings—their mutual legal and patrimonial relations arising from their shared life. It applies when the spouses themselves choose to make the consensual resolution of the marital crisis, or of a particular phase thereof (such as *de facto* separation, legal separation, or divorce), conditional upon the mutual regulation of such relations. This regulation is effected through either unilateral or reciprocal provisions, which may take the form of obligations or the transfer of property or other rights.

([110]) Not to mention those cases in which spouses established more or less fictitious *fondi patrimoniali* in order to evade enforcement proceedings against real estate. On this subject, see below at para. 9.1.

([111]) On this topic *see* VIGNUDELLI, *Revocatoria dei trasferimenti immobiliari in sede di separazione consensuale, fra interessi dei familiari e interessi dei creditori*, in *Famiglia e diritto*, 2014, pp. 362 ff.

([112]) *See* OBERTO, *Contratto e famiglia*, op. cit., pp. 148 ff.

([113]) *See* OBERTO, *Contratto e famiglia*, op. cit., pp. 150 ff.

([114]) A practical consequence of this theoretical finding can be seen in the rule of the European Directive on the electronic commerce: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). In fact, this EU instrument provides for, in its Article 9, para. 2, that "Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories: (…) (d) contracts governed by family law or by the law of succession." This official recognition of the existence of a category of contracts "governed by family law" clearly hints to all the agreements we are examining here: from matrimonial regime agreements,

3.4. Where Contractualisation Meets De-Judiciarisation: When Contract Can Shape Status.

There is yet another important point to be made regarding contracts arising from marital crises. So far, we have discussed agreements concerning the patrimonial consequences of a marriage breakup—whether legal separation or divorce ([115]). However, a new phenomenon has emerged in recent years within several major European legal systems. Under the pressure of de-judiciarisation and the need to reduce court workloads and backlogs, parties have been allowed not only to stipulate agreements on the effects of a marital crisis (as has long been the case), but also to address the very core of the proceedings that traditionally governed legal separation and divorce. In other words, we are witnessing a shift whereby divorce and separation by mutual consent are becoming fully "dejudiciarised"—not only with respect to their effects, but also with regard to the dissolution (in the case of divorce) or loosening (in the case of separation) of the marital bond itself—in many legal systems across Europe and beyond.

For instance, Italy introduced the so-called *negoziazione assistita* (assisted negotiation) in 2014, allowing couples to resolve marital crises without judicial intervention in a wide range of cases ([116]).

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to marriage crisis contracts (included, of course, all kind of pre- and post-nuptial agreements), to contracts among *de facto* partners.

([115]) Or even annulment of the marriage: on agreements concerning patrimonial consequences of annulment of marriage *see* OBERTO, *Contratto e famiglia*, op. cit., pp. 104 ff.

([116]) Cf. law decree of 12 September 2014, n. 132, converted with modifications in law 10 November 2014, n. 162. FADDA, *The Italian Marriage: Crisis or Tradition?*, 2018, pp. 142 ff., https://theitalianlawjournal.it/data/uploads/4-italj-1-2018/pdf-singoli/7-fadda.pdf explains this reform as follows: "It provides two new forms of separation and of the so-called consensual divorce. The first form consists of a separation or divorce agreement reached by the spouses as a result of negotiations in which they are assisted by one or more attorneys. The second form consists of a separation or divorce agreement reached by the spouses before a state official. The law has had a mixed reception in the Italian literature. Some define the reform as 'legislation without courage', while others speak of a 'further step on the road to privatization' of marriage. Others say that the rules have an 'epochal relevance' rendering marriage a 'private affair'. In our opinion, the law has taken a new step in the process of privatization of marriage and has attenuated public control over the marriage crisis by giving greater importance to the agreement of the spouses. The affirmation must be verified, and the subject matter must be distinguished as to whether separation or divorce is being considered and whether there are minor children or whether the children are not self-sufficient. With respect to separation, it is evident that the decision is left entirely to the spouses, which was already true with consensual separation, but now it is no longer necessary even to take legal action. The spouses can stipulate a separation agreement before a lawyer or a mayor (in the event there are no children) without taking any legal action in court, circumventing even the least invasive participation by a judge who ratifies the agreement. Nevertheless, even in these cases, a form of public control remains, albeit a reduced one. In the case of negotiations where the spouses are assisted by attorneys to find a 'consensual solution of separation', public control is exercised through the intervention of the public prosecutor to whom the parties must forward the agreement. The public prosecutor then may grant an authorisation (in cases where there are children) or a permit (in cases where there are no children). Only in the first case would the public control address the merits of the agreement in order to verify that the interests of the children are respected. In the second case, where there are no children, the public prosecutor is limited to exercising a control to verify the formal regularity of the agreement. If the public prosecutor's control is one of mere formal regularity (Art 6), it shows that there is the same kind of relation between public law and private law in cases where the attorney has assisted in the negotiated separation agreement, in a similar way to the officials who take part in the formation of the marriage bond. The decision is left to the spouses, and the public intervention does not affect the centrality and the constituent character of consent but performs a function of control and protection. Further confirmation of the above affirmations can be found in the second form of separation, that which is reserved to couples who mutually consent, who are without children, and whose procedure unfolds before the mayor. The public presence is reduced to the participation by a state official who, as in the moment of the formation of the marriage bond, intervenes to play a role which is neither substantive nor has the purpose of forming the marital bond. Instead, it merely controls the formal regularity of the agreement for purposes of providing a guarantee. In this case, the centrality of consent is evident. The agreement is free from judicial control and from any consideration concerning the merits of the decision. The mayor exercises the same function which he carried out during the formation of the marriage bond: ensuring the regularity of the act, the certainty of the relationship and the publication of notice of the changed relationship in order to protect third parties and the public interest. With respect to divorce, the agreement to dissolve the matrimonial bond is admitted only if the spouses are already separated. In this regard, certain authors in the literature have pointed out that the *legge* no. 162 of 2014 is limited to simplifying the procedure without introducing a form of 'consensual' divorce. However, the situation is not so different because a divorce decree is not always necessary in order to divorce; separated spouses, whatever the

In essence, it must be noted that—unlike in France—Italian notaries have been excluded from the procedure, except in cases where the parties choose to regulate their financial relations by transferring one or more immovable assets or real estate. In such circumstances, the parties' legal representatives—who are the principal actors in this type of agreement—must involve a notary, both for legal and practical reasons. Legally, this is required by the relevant reform; practically, the conveyance of real estate in Italy has become such a complex matter that only a notary possesses the requisite expertise to carry it out ([117]). Since 1 January 2017, France has permitted *divorce par consentement mutuel* to be finalized through a simple agreement between the parties, countersigned by their lawyers and incorporated into a notarial deed (see Article 229-1 of the French Civil Code).

In this context—just as we have seen with marital property agreements, prenuptial contracts, and agreements on the patrimonial consequences of marital breakdown—legal scholars are increasingly deriving the regulation of divorce and separation agreements from general contract law. As one French author observed: "At the moment of de-judiciarisation of divorce, contract law emerged as the most coherent method for regulating the dissolution of marriage. What other tool than a contract can give binding force to the agreement of the spouses on the principle and effects of divorce, when

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type of separation, even judicial separations, can stipulate a divorce agreement with the assistance of attorneys or before a mayor. In such cases, the formal control of regularity is performed by the public prosecutor or by the mayor. In particular, the mayor plays a role analogous to the one assigned to him during the celebration of marriage: controlling the regularity of the act and guaranteeing the certainty of status. It is true that the parallel is not perfect because in the formation of the marriage bond the choice of the parties is free, whereas in the dissolution of the marital bond the spouses cannot decide to dissolve the marriage relationship in the absence of a previous separation. However, at least in the case where both spouses have already decided to dissolve the marital bond, the necessity of a preceding separation, which may also be consensual, can be interpreted in the sense of requiring that the will of the spouses be sufficiently verified, thus revealing that the true meaning of the law seems to be one which increase the importance of the spouses' consent. It could be said that the source of the effects of the divorce is the consent of the spouses. In the case of a preceding consensual separation, the consent of the spouses has already been expressed during the separation process and is confirmed with the divorce agreement. Thus, the consent is deferred in time because the law allows for the dissolution of the marriage following a requisite period of reflection, beginning with the separation. At most, it can be pointed out the uselessness of dividing into two phases a procedure intended to obtain the dissolution of the marriage bond. There appears to be little purpose to a previous separation which is meant to guarantee that the spouses reflect upon their decision for a certain period of time given that the timing of it has been shortened and that it is often superfluous where the marital relation has been irreparably damaged. The referenced law has certainly taken a new step in the direction of the privatization of marriage. The new law confirms the parallelism between the phase of the formation of the marital bond and the phase of its dissolution, recalling the Roman maxim *consensus facit nuptias*. In both cases, the decision can be left to the spouses, without taking legal action in court, with a control of mere formal regularity conducted by the public prosecutor or by the mayor."

([117]) *See* OBERTO, *Contratto e famiglia*, op. cit., pp. 340 ff. Regrettably, the adoption of "negoziazione assistita" remains statistically limited. Unlike the situation in France, legal separation and divorce by mutual consent in Italy may still be pursued via traditional means—either before the Court or, where no property transfer is envisaged, directly before the Civil Status Registrar.

The statistical data (referred to 2023) are as follows (*see* https://www.ripartelitalia.it/istat-in-calo-i-matrimoni-nel-2024-aumentano-le-unioni-gay/):

Consensual Separations

- Total consensual separations: approximately 82,392
- Assisted negotiation by lawyers (under Article 6): 11.8%
- Filed before the Court: approximately 64.7%
- Registered directly with the Local Civil Status Registrar (under Article 12): 16.8%

Joint Divorce Petitions

- Total consensual divorces: approximately 79,875
- Assisted negotiation by lawyers (under Article 6): 9.1%
- Filed before the Court: approximately 53.4%
- Registered directly with the Local Civil Status Registrar (under Article 12): 23.8%

The limited success of this procedure is largely attributable to lawyers' reluctance to risk procedural errors. They tend to favour traditional consensual separation or divorce proceedings before the Tribunal. Paradoxically, in those settings, real estate transfers are permitted without the involvement of notaries, which frequently leads to significant issues—since Italian lawyers are not always familiar with the technical complexities inherent in such transactions (*See* OBERTO, *Contratto e famiglia*, op. cit., pp. 347 ff.).

the judicial decision is set aside?" ([118]). Unlike other forms of divorce, the entire process of divorce by mutual consent is, by definition, based on the spouses' agreement ([119]). It is precisely their shared will—regarding both the principle and the consequences of the divorce—that triggers the legal effect ([120]). As another author aptly put it, this is *"un contrat à part, mais un contrat tout de même"* ("a particular kind of contract, but a contract nonetheless") ([121]).

Similarly, in many countries of Europe and of the world it is now possible to divorce in a "contractual" manner—without a judge—provided that certain formalities are respected. These vary from country to country and typically involve the intervention of a public official. European countries that allow this include Denmark, Iceland, Norway, Sweden, Estonia, Lithuania, Russia, Ukraine, Moldova, Portugal (since 1995), Spain (since 2015), and Romania (since 2010) ([122]). Legal doctrine tends to group these systems into two categories: *a*) Notarial divorce (e.g., Baltic countries, France, Spain); *b*) Administrative divorce (e.g., Scandinavian and Eastern European countries). The case of former Soviet republics is particularly interesting, as several of them have retained administrative divorce even after the fall of the USSR (e.g., Estonia, Lithuania, Moldova, Russia, and Ukraine) ([123]). According to a recent study by the Commission of European Affairs of the International Union of Notariat (UINL), more than 32% of European countries now provide for notarial divorce—a mechanism that was virtually unknown just two decades ago ([124]).

While some legal systems remain firmly anchored to the principle that marriage can only be dissolved by judicial order ([125]), there is little doubt that the trend described here is expanding. It is supported by both national and supranational initiatives aimed at improving the efficiency of justice across Europe.

In other words, this is where contractualisation meets de-judiciarisation in family law. As a French scholar rightly noted, contractualisation does not necessarily imply de-judiciarisation. Indeed, if a

([118]) *See* e.g. FRÉVAL, *Droit des contrats et divorce par consentement mutuel extrajudiciaire*, Nantes, p. 10, in https://irdp.univ-nantes.fr/medias/fichier/memoire-emma-freval-m2-dpg-droit-des-contrats-et-divorce-par-consentement-mutuel-extrajudiciaire_1661244695299-pdf?ID_FICHE=1448620&INLINE=FALSE.

([119]) BARTEHELET, BOISARD-PETRISSANS, BOULENOUAR AZZEMOU *et al*., *Guide du divorce*, *Lexis Nexis*, 2019-2020, p. 10.

([120]) MALAURIE and AYNÈS, *Droit de la famille*, 7th ed., Paris, 2020, p. 46 ; POURE, *La convention de divorce par consentement mutuel : un contrat à part, mais un contrat tout de même*, in *Droit de la famille*, 2018, n° 3, https://droit.cairn.info/article/CDLJ_1701_0161/pdf?lang=fr, p. 1.

([121]) POURE, op. cit., p. 1.

([122]) FERRAND-FULCHIRON (ed.), *La rupture du mariage en droit comparé*, Paris, 2015, p. 49. We may consider here Article 374 of the Romanian civil code and Article 83 of the Spanish civil code, as modified by the law No. 15/2015, of the 2 July 2015, on voluntary jurisdiction. The system chosen in 2010 by Romania is defined by the French legal doctrine as a system based on "compétences plurielles" (multiple competencies), as it involves different professional stakeholders, such as notaries, clerks, etc. *See* also ARAS KRAMAR, *The transformation of divorce procedure in Europe*, in *Familia*, 2018, pp. 277 ff.

([123]) For a detailed analysis *see* ARAS KRAMAR, *The transformation of divorce procedure in Europe*, op. cit., pp. 277 ff.

([124]) *See Union Internationale du Notariat - Commission des Affaires Européennes - Législature 2023-2025*, *Les competences notariales en matiere non contentieuse. Etude de la Commission des Affaires Européennes (CAE)*, 2024, Sous la responsabilité de Me Bertrand Basseville (Notaire en France) et la Présidence de Me Valentina Rubertelli (Notaire en Italie), p. 2 (the study is in the process of being published).

([125]) This is the case, for instance, of Germany. Actually, the German Civil Code (BGB) states in its § 1564 that "Eine Ehe kann nur durch richterliche Entscheidung auf Antrag eines oder beider Ehegatten geschieden werden" ("A marriage can be dissolved only by a judicial decision upon the request of one or both spouses"). This is maybe the reason why the German language does not have a word equivalent to "De-judiciarisation." The legal doctrine prefers rather using long sentences, like e.g., "Justizentlastung durch Aufgabenverlagerung von den Richtern auf andere Organe" ("Reducing the burden on the judiciary by shifting [some of its] tasks from judges to other bodies": KAMPMANN and ZWICKEL, *Zivil- und zivilprozessrechtliche Aspekte der großen Justizreform in Frankreich (Justice du 21ème siècle)*, in *Civil Procedure Review*, https://www.civilprocedurereview.com, p. 14.

matter is governed by contract, contract law applies—and a judge may still be called upon to assess the validity or enforceability of the agreement ([126]).

However, we should avoid the conceptual trap of denying ([127]) the clear link between these two phenomena (namely: contractualisation and de-judiciarisation). To "dejudiciarise" a given aspect of life means that it is no longer governed by judicial authority (or by a hybrid of private autonomy and judicial oversight), but rather by the will of the parties involved. While this may still lead to subsequent judicial intervention, such intervention is no longer a necessary precondition for the legal effects of separation or divorce by mutual consent. The judge is simply no longer part of the process. Thanks to premarital and separation agreements, judicial involvement becomes the exception rather than the rule—and that makes a significant difference.

In this context, we may mention an opinion issued in 2023 by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, based on the work of the CEPEJ-GT-SATURN Working Group, which I have the honour to chair. On 16 June 2023, the CEPEJ Plenary Assembly approved a draft prepared by this Group to update Recommendation (86)12 of the Committee of Ministers to member states concerning "Measures to prevent and reduce the excessive workload in the courts" ([128]).

In summary, the Opinion emphasizes the need to: *a*) Revise the provisions on alternative dispute resolution (ADR), with a focus on raising awareness among justice professionals; *b*) Include new provisions on the use of information and communication technologies (ICT) and the need to equip courts with adequate technical infrastructure; *c*) Update the list of non-judicial tasks from which judges could be relieved. This last point includes a comprehensive list of tasks that could be delegated to professionals other than judges—most notably, notaries ([129]). It is worth noting that the area most

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([126]) LARRIBAU-TERNEYRE, *Les conventions de rupture - État des lieux, in Droit de la famille*, 2015, dossier 4, correctly points out that "contractualisation does not necessarily imply de-judiciarisation", because allowing parties to sign contracts opens the door to possible judicial disputes on the validity or enforceability of said contracts. However, as explained in the text, this does not imply that prenuptial agreements are useless or that they lead to increased litigation—particularly when one considers the number of potential disputes they prevent, or the extent to which they reduce the complexity of legal questions that may arise between the parties.

([127]) As it is done, for instance, by MORACCHINI-ZEIDENBERG, op. cit., pp. 29 ff. (of the online version).

([128]) We must say that CEPEJ-GT-SATURN has been working on this document since its meeting of March 2022, based on two draft proposals submitted, respectively, by myself and by Prof. Marco Fabri (Italy). In the course of the discussion, we consulted other CEPEJ Working Groups, as well as the European Union of *Rechtspfleger* and the Pilot Courts Network of the CEPEJ. An important contribution was given by the International Union of Notaries, from which we received valuable comments and we thank them for it. Once the proposal adopted by the Plenary Assembly of CEPEJ in June 2023, it has been sent to the European Committee on Legal Co-operation (CDCJ), which is the official "engine" of any initiative of that kind in the Council of Europe, especially when official recommendations of the Council of Ministers are concerned.

([129]) "Proposal for the update: examples of non-judicial tasks that judges in some States could be relieved of, depending on each country's specific circumstances:

1. Law of persons

-Declaration of absence and death

-Decision to authorise or record consent for organ donation

-Decision to authorise the protection to safeguarding the rights of children and persons with disabilities

-Court approval or authorisation for the performance of acts of disposal, encumbrance or other acts relating to the property and rights of children or adults subject to legal protection measures

-Granting powers of representation, such as "future protection mandate"

-Judicial grant of emancipation and of the benefit of legal age

-Gender reassignment

-Non-litigious cases concerning the status of physical persons:

- Appointment of tutors, curators, and other administrators
- Administration of the property of those lacking legal capacity

2. Family law

- Divorce and legal separation by mutual consent for couples without children or with adult children only
- Change of matrimonial regime
- Conclusion and registration of civil partnerships

affected by these "winds of change" is that of so-called "voluntary jurisdiction" (*juridiction gracieuse*, *volontaria giurisdizione*, *freiwillige Gerichtsbarkeit*, etc.). This refers to activities typically performed by judges that do not involve resolving disputes between opposing parties, but rather consist in evaluating the appropriateness or convenience of a legal act ([130]).

- Granting alimony and determining issues arising from it
- Adoption / consent to adoption of persons over the age of majority
- Approval or authorisation in non-litigious proceedings of the declaration of parenthood in respect of children born out of wedlock
- Collection of consents in the context of medically assisted procreation
- Handling non-litigious proceedings for the administration of common property when one of the spouses is unable to act

3. Real estate, property and succession law
- Supervision of real estate records
- Supervision of property records relating to motor vehicles, ships, boats, and aircrafts
- Non-litigious proceedings in the field of succession law:

- Presentation and publication of secret wills
- Declaration of an opening of succession
- Setting up of inventories
- Issuance of a national or European certificate of succession
- Acceptance of an inheritance with the benefit of inventory
- Issuance of an authorisation for accepting or waiving an inheritance or a legacy, when such acts are submitted for authorisation
- Submission of executors' accounts and removal of executors, authorisation of
- acts of disposition by executors (except for children and persons with disabilities)
- Authorisation of the sale and purchase inheritance goods
- Liquidation and property division in the context of non-litigious and litigious cases

4. Commercial and contract law
- Issuing payment and injunction orders
- Decision to authorise the establishment and registration of legal persons
- Production of accounts by persons required to keep accounting records, or otherwise bound to produce accounts
- Consumer disputes (small claims)
- Non-litigious proceedings concerning trusts:

- Approval of particular "arrangements" on behalf of any person who may have an
- actual or contingent interest in a trust (including unborn children)
- Varying or revoking all or any of the terms of the trust
- Approval of transactions considered expedient but cannot otherwise take place
- for lack of power of the trustee or for any other reason
- Issuance of declarations as to the validity or enforcement of a trust, the existence
- of any resulting or constructive trust, breach of trust or failure of a trust, etc.
- Non-litigious proceedings concerning debt relief or debt settlement for natural persons

5. Criminal law
- Authorisation of payment or delayed payment of fines
- Transcription of testimonies or depositions given during hearings and subsequently proofreading of related court documents

6. Procedural law
- Control of payment of judicial fees
- Participation in out-of-court settlement disputes/conducting mediation/conciliation processes

7. Enforcement procedures
- Judicial sales by auction
- Declaration of enforceability of court decisions

8. Others
- Appointment and participation of judges as members or presidents of disciplinary or selection boards/committees regarding persons who are not members of the judiciary (for example notaries, lawyers or accountants)
- Administering oaths for non-judiciary professionals (auditors, notaries),
- Collection of testimonies and written evidence
- Legalisation or apostille of documents."

([130]) To give another example concerning voluntary jurisdiction unrelated to relations between spouses or cohabiting partners: in Italy, Legislative Decree No. 149 of 10 October 2022, effective as of 18 October 2022, repealed Article 375

Finally, it is important to recognize that the trend toward contractualisation and de-judicialisation has also been acknowledged by the European Union. Indeed, the EU has shown growing interest in this phenomenon through a project undertaken by the European Law Institute (ELI), entitled "Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters." This initiative is informed by a notable trend among Member States to transfer competences in family and succession law from judicial bodies to alternative authorities—including notaries, civil registry officials, child protection agencies, judicial officers, legal practitioners, and, in some cases, the private parties themselves. As a result, a central question arises: to what extent are existing rules on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments suitable for addressing this process of de-judicialisation? ([131]). A first concrete result of ELI's efforts in this direction is the document called "ELI Principles on the Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters" ([132]).

Some noteworthy responses have already emerged at the legislative level of the European Union. One illustrative example is found in the Brussels II-*ter* Regulation, which expressly provides in

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of the Civil Code. This reform transferred the responsibility for issuing relevant authorisations from the Court to the Tutelary Judge, including authorisation for the continuation of business activity (formerly governed by Article 320, paragraph V of the Civil Code). Here, we refer to authorisations for the performance of acts of extraordinary administration concerning the assets of minors or of individuals lacking capacity, whether due to interdiction, disqualification, or being subject to a support administration order. As a result, authorisations under Article 374 of the Civil Code may now be issued by a notary (specifically, the notary responsible for drawing up the deed), whose jurisdiction is now complemented by that of the Tutelary Judge—who remains the *dominus* of the matter. This replaces the previous arrangement, in which the Court, sometimes in collegial composition, held jurisdiction. The authorisation is granted upon written request by the parties (parents of the minors, guardians, curators, or support administrators), either personally or through legal counsel, and is communicated by the notary to the clerk of the Tutelary Judge competent for issuing the homologation order, as well as to the Public Prosecutor at the same court. If I may add a personal remark: this reform was long overdue. Judicial attitudes towards such matters were often overly cautious. The mentality—sometimes even prejudices and a particular fondness for procedural complexity—of many Italian judges frequently led them to search for hidden motives behind such requests, suspecting intra-family fraud. In reality, what lay behind these requests was often nothing more than the urgent and desperate need of a family to sell assets belonging to an elderly relative in order to provide for their care. The result was frequently intolerable delays, with the unfortunate consequence that the contractual counterpart would withdraw, or the concerned individual would pass away before the transaction could be completed. For this reason, this reform should be welcomed as a modernising step forward—one that brings Italy's cumbersome and outdated procedural framework closer to the standards of a civilised legal system. On the subject of voluntary jurisdiction in Italy, it is worth noting that a similarly wise legislative solution was adopted in 2000, with the abolition of the so-called homologation review by the courts and the subsequent transfer of responsibility for the establishment of companies and corporations to the notary. To give a sense of the impact: prior to 2000, the homologation process for company deeds required approximately 150 days from execution to effective operation. Today, such deeds may become operative on the same day, or within a matter of days.

([131]) *See* https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-principles-extra-judicial-administration-of-justice-in-cross-border-family-and-succession-matters/. The project will be divided into two phases. First, a preliminary study will be conducted, in order to identify the current controversial issues on the basis of the recent case law of the CJEU. The main objective of this phase is to produce a short policy statement. The second step requires an in-depth comparative analysis in order to identify existing out-of-court proceedings and non-judicial bodies in family and succession law at a national level. This analysis is needed in order to both develop a harmonised concept of court in family and succession matters and adjust existing European instruments to the increasing de-judicialisation. The main objectives of this phase are to identify and circulate critical issues and best practices, in order to encourage national legislators to implement substantive and procedural standards, to ensure a uniform application of EU instruments. The first output of the project will be a policy statement addressed to both the European legislator and the CJEU. Rather than suggesting detailed solutions to the several questions surrounding non-judicial authorities at both national and EU level, it will aim at the elaboration of recommendations and interpretative guidelines. A starting policy option would be to consider a more open definition of "court" in the European instruments and the extension of the provisions on jurisdiction to other non-judicial authorities. In the second phase of the project, the Team will aim at the detection of crucial questions and practical problems and the identification of best practices at national level, in order to improve the application and implementation of out-of-court proceedings, and, in doing so, at the protection of the fundamental rights of the parties involved.

([132]) https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Extra-Judicial_Administration_of_Justice.pdf.

Article 65 that recognition and enforcement mechanisms extend not only to judicial decisions, but also to "authentic instruments and agreements concerning legal separation and divorce" ([133]).

In this way, we can confidently affirm that party autonomy now has the power not only to regulate the consequences of personal status, but to shape personal status itself—through the instrument of contract.

([133]) *See* Council regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (recast), Article 65: "65 *Recognition and enforcement of authentic instruments and agreements* 1. Authentic instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognised in other Member States without any special procedure being required. Section 1 of this Chapter shall apply accordingly, unless otherwise provided for in this Section. 2. Authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin shall be recognised and enforced in other Member States without any declaration of enforceability being required. Sections 1 and 3 of this Chapter shall apply accordingly, unless otherwise provided for in this Section." For an explanation about the issues that gave birth to this kind of provision in the "Brussels II-*ter*" Regulation *see* BERNASCONI, *La circolazione degli accordi di negoziazione assistita e di altre forme di divorzio stragiudiziale in Europa*, in *Famiglia e diritto*, 2019, pp. 335 ff. On the EU law notion of "authentic instrument" *see* FITCHEN, *The Private International Law of Authentic Instruments*, Oxford, 2020, pp. 117 ff., 328 ff.

PART II
PRENUPTIAL AGREEMENTS IN CONTEMPLATION OF DIVORCE: COMPARATIVE PERSPECTIVES AND INTERSECTIONS WITH COHABITATION CONTRACTS

4. Prenuptial Agreements in Contemplation of Divorce: Planning to Fail or Failing to Plan?

A particularly significant "branch" of marriage- and family-related contracts today is represented by prenuptial (or antenuptial, premarital, or antemarital) agreements made in contemplation of divorce.

It is important, first of all, to highlight the fundamental differences between marriage contracts and prenuptial agreements. According to legal doctrine, the two are entirely distinct—at least in a number of legal systems. A marriage contract is an agreement by which spouses organize their matrimonial property regime—that is, a set of rules defining who legally owns the assets acquired during the marriage. Marriage contracts are relevant not only in the event of death (at least in those legal systems where such matters can be regulated *inter vivos* by contract) or divorce, but also for managing the financial relationship between spouses during the marriage. Marriage contracts are customary in civil law jurisdictions, and the vast majority of European countries operate under matrimonial property regimes. The main purpose of such contracts is to allow couples to elect a specific property regime; otherwise, they fall under the default statutory regime of the country—usually the community of acquests ([134]). Marriage contracts are also important from the perspective of third parties, as they regulate the spouses' liability for each other's debts—unlike in English common law, where spouses are not liable for one another's debts unless they are jointly incurred.

A prenuptial agreement, by contrast, is generally broader in scope and serves a different purpose. It is not required by any national law. It is an agreement between prospective spouses that stipulates all or some of the financial consequences of divorce. In common law systems, such agreements typically regulate property division and maintenance obligations upon divorce, and are often intended to limit the financial responsibilities of one party. Therefore, a common law prenuptial (or premarital) agreement may be defined—where permitted—as being "in contemplation of divorce," when it anticipates that possibility and includes provisions accordingly. A postnuptial agreement may contain the same terms but is concluded after the marriage has taken place ([135]).

Some scholars even argue that comparing marital agreements under common law and civil law is not feasible, given their fundamentally different content. In civil law systems, marital agreements focus on the functioning of the matrimonial property regime during the marriage and the consequences of its dissolution. In common law, the emphasis is placed on the consequences of divorce. Thus, common law marital agreements are more comparable to civil law divorce agreements—which, however, remain subject to restrictions in many civil law jurisdictions ([136]).

That said, the distinction between marriage contracts and prenuptial agreements becomes less clear in countries where both are permitted. For example, in the well-known case of *Radmacher v Granatino* ([137]), which involved a German *Ehevertrag* (marriage contract), concerning both marriage property regime and alimony in case of divorce, both the UK Court of Appeal and the UK Supreme Court referred to the agreement as a "premarital contract" or "ante-nuptial agreement."

([134]) OBERTO, *La comunione legale tra coniugi*, I, op. cit., pp 329 ff., II, op. cit., pp. 1131 ff.; OBERTO, *La comunione coniugale nei suoi profili di diritto comparato, internazionale ed europeo*, in *Il diritto di famiglia e delle persone*, 2008, pp. 367 ff.

([135]) On the distinction between marital contracts, prenuptial and postnuptial agreements *see* SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., p. 484 f.

([136]) PINTENS, *Matrimonial Property Law in Europe*, in BOELE-WOELKI, MILES and SCHERPE (eds), *The Future of Family Property in Europe*, op. cit., pp. 44 f.

([137]) *See* below, at para. 6.

The UK Supreme Court's detailed reasoning described the agreement as follows: "The ante-nuptial agreement was drawn up in Germany by a notary. It contained a choice of law clause that provided that the effects of their marriage, including the laws of matrimonial property and succession, were to be subject to the law of the Federal Republic of Germany. The main part of the agreement provided first for separation of property. In clause 3 it was declared that the statutory matrimonial regime was to be excluded, and that each party was to manage his or her assets entirely independently. By clause 4 the parties excluded the equalisation of pension rights. By clause 5 they waived claims for maintenance after the marriage was terminated. Clause 6 contained a waiver of the statutory right to a portion of the estate of the first one of them to die. The effect of the agreement was that neither party was to derive any interest in or benefit from the property of the other during the marriage or on its termination. It made no provision for what was to happen in the event of their having children."

It is thus evident that, depending on the legal culture in which such arrangements arise, they may focus narrowly on alimony or encompass a broader scope, including the full structure of the couple's matrimonial property regime.

From a historical perspective, even after the introduction of divorce, planning for the consequences of marital breakdown was long viewed (and still is, in some more conservative jurisdictions such as Italy) as contrary to public policy. The rationale was that the couple appeared to be "planning to fail." Today, however, many legal systems are shifting toward a different view: with divorce rates rising, failing to consider the consequences of a possible breakup is increasingly seen as "failing to plan." ([138]).

In a certain way, marital agreements can be likened to car insurance: one does not plan to have an accident, but acknowledges the risk and takes precautions. These agreements make financial consequences more manageable and predictable. Yet their function often goes beyond mere "insurance." They may serve to protect premarital assets, ensure children from previous relationships receive a fair share of inheritance, achieve tax efficiency, shield one spouse from the other's creditors, or simply secure one's own financial interests ([139]).

As a German scholar aptly noted, encouraging couples to consider the consequences of a potential divorce—before or after marriage—does not promote divorce; on the contrary, it may even foster stability ([140]).

Moreover, even in jurisdictions where domestic family law still poses obstacles to the admissibility of prenuptial agreements, courts often hold that such restrictions do not apply to international couples. Italy offers a telling example: in 1984, the Court of Cassation upheld the compatibility with international public policy of an agreement between two U.S. spouses residing in Italy, who had agreed on the regulation of their mutual property relations in the event of divorce ([141]). Twenty years later, the same Court recognized the enforceability in Italy of a judgment from a court in the Principality of Monaco, which had validated a prenuptial agreement signed by an Italian couple residing and married in Monaco. The couple had made an *optio iuris* in favor of Monegasque law, which was permitted under Italian private international law at the time—and remains so under current EU regulations ([142]).

([138]) The sentence "planning to fail—failing to plan" was the title of Sarah Hitchins' 2008 dissertation in the "Family in Society" Seminar. The expression was later used by SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., p. 445; it is somehow linked to Benjamin Franklin's quote: "If you fail to plan, you are planning to fail!"

([139]) SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 445 f.

([140]) DETHLOFF, *Contracting in Family Law: A European Perspective*, op. cit., p. 85.

([141]) Cass., 3 maggio 1984, n. 2682, in *Giurisprudenza italiana*, 1984, p. 370. For a recent analysis of this issue, *see* PERLINGIERI and ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019.

([142]) *See* on this point below, at para. 11.

5. Prenuptial Agreements in the U.S.A.: Unromantic, but Important.

5.1. U.S. Prenups: Historical Recognition and Development.

Returning to a comparative analysis of the current state of prenuptial agreements in contemplation of divorce, it is well known that such contracts are now widely recognized and practiced in the United States ([143]). As early as 2010, *USA Today* described them as "Unromantic, but Important" ([144]).

What is less widely known, however, is that historically, U.S. judges long viewed prenuptial agreements as undermining the institution of marriage, and often refused to recognize them ([145]). Moreover, until state legislatures abolished the traditional rule of "fault divorce"—a process that began in the mid-1970s—premarital agreements in contemplation of divorce were seen as a way for a husband to "buy himself out of the marriage, regardless of the circumstances of the divorce" ([146]). As one scholar noted, "where divorce was based on fault, and as such many of the consequences were dependent on fault as well, it seemed patently absurd to allow the couple to 'plan' this event in advance, thereby violating the spirit and sanctity of the marital union" ([147]).

In that context, fault was considered an essential prerequisite for any divorce. A prenuptial agreement made before marriage was thus seen as a way to "conceal" potential future misconduct, and was therefore deemed contrary to public policy and incompatible with the very essence of divorce ([148]). As a result, it was not until 1976—after the adoption of no-fault divorce in several states—that two state Supreme Courts upheld and enforced premarital agreements ([149]). Even earlier, however, a 1972 appellate court decision had stated that "public policy is not violated by permitting (...) persons (...) to anticipate the possibility of divorce and to establish their rights by contract in such an event as long as the contract is entered with full knowledge and without fraud, duress or coercion" ([150]).

Today, prenuptial agreements are recognized in all U.S. states, although they are not always enforced. To ensure enforceability, both parties should be represented by independent legal counsel. Some attorneys even recommend videotaping the signing, although this is optional. In states like California, legal representation is required if the agreement limits or waives spousal support (alimony).

Prenuptial agreements are, at best, a partial solution to mitigating the risks of property disputes in the event of divorce. Nevertheless, they can be powerful tools, capable of limiting property rights and alimony obligations. A premarital agreement can also determine what happens upon the death of a spouse. Unlike some civil law systems, common law jurisdictions do not prohibit agreements concerning future inheritance. Thus, American prenups can function as contracts to make a will

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([143]) On American prenups *see* CLEMENS and JAFFE, *Drafting and Litigating Prenuptial, Cohabitation, and Marital Settlement Agreements: Program Material*, Oakland (Ca), 1981; MACKAY, *Who Gets a Better Deal? Women and Prenuptial Agreements in Australia and the USA*, in *University of Western Sydney Law Review*, 7, 2003, pp. 109 ff.; PARKMAN, *The Contractual Alternative to Marriage*, in *Northern Kentucky Law Review*, 32, 2005, pp. 125 ff.; KATZ, *Family Law in America*, New York, 2011, pp. 30 ff.; ELLMAN, *Marital Agreements and Private Autonomy in the United States*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 411 ff.; BIX, *Family Law*, New York, 2013, pp. 136 ff.; HUNTER JULES and NICOLA, *The contractualisation of Family Law in the United States*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., p. 342 ff.; PROBERT and THOMPSON, *Research Handbook on Marriage, Cohabitation and the Law*, Cheltenham, 2024, pp. 425 ff.

([144]) PETRECCA, *Prenuptial Agreements: Unromantic, but Important*, in *USA Today*, Mar. 8, 2010.

([145]) OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 494 ff.

([146]) *See* the Supreme Court of Maryland in the 1956 case *Cohn v Cohn*, 209 Md. 470 (Md. 1956); further information on this case in OBERTO, *I contratti della crisi coniugale*, I, op. cit., p. 494.

([147]) SCHERPE, *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., p. 486.

([148]) The history of the enforceability of divorce-focuses premarital agreements is summarized by BIX, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, in *William & Mary Law Review*, 1998, vol. 40. pp. 145 ff, at pp. 148 ff.

([149]) For California *see in Re Marriage of Dawley*, 17 Cal. 3d 342, S.F. No. 23418, Supreme Court of California (June 29, 1976). For Connecticut *see Parniawski v Parniawski*, 33 Conn. Sup. 44, 359 A. 2d 719 (1976).

([150]) *Volid v Volid*, 286 NE 2d 42, 46-47 (III App 1972).

and/or to waive rights to property, probate homestead, probate allowances, predetermined heirship, and the right to act as executor or administrator of the spouse's estate.

Among the elements generally required for a valid prenuptial agreement in the United States are: *a*) The agreement must be in writing (oral prenups are typically unenforceable); *b*) Independent legal counsel for both parties (required in some states) ([151]); *c*) Full and/or fair disclosure at the time of execution ([152]); *d*) The agreement must be unconscionable ([153]).

With respect to financial matters ancillary to divorce, prenuptial agreements are routinely upheld by courts in nearly all states. However, there are cases in which courts have refused to enforce certain provisions ([154]).

The movement toward greater enforceability was reinforced by the 1983 promulgation of the Uniform Premarital Agreement Act (UPAA) ([155]). Currently, 28 states and the District of Columbia have adopted either the UPAA or its updated version, the Uniform Premarital and Marital Agreements Act (UPMAA).

The UPAA, adopted in 1983 by the Uniform Law Commission (ULC), aimed to promote uniformity and predictability across state laws in an increasingly mobile society. One of its goals was to ensure that a prenup validly executed in one state would be honoured in another. The UPMAA, introduced in 2012, sought to modernize and harmonize inconsistent state laws and to provide a uniform framework for both prenuptial and postnuptial agreements. Specifically, the UPMAA: *a*) Requires marital agreements to be in writing and declares them enforceable without consideration; *b*) Offers couples a flexible framework for responsible planning and informed decision-making; *c*) Provides courts with a consistent method for evaluating the validity of agreements, regardless of where they were executed.

Although states that adopt the UPAA/UPMAA may implement slightly different versions, the framework has significantly improved the ability of legal practitioners to draft enforceable agreements.

A "sunset provision" may also be included in a prenuptial agreement, specifying that the agreement will expire after a certain period ([156]). In some states, such as Maine, the agreement automatically lapses upon the birth of a child, unless renewed ([157]). In other states, a certain number of years of marriage will cause a prenuptial agreement to lapse. While the UPAA/UPMAA does not mandate sunset clauses, parties are free to include them contractually (note as well that states have different versions of the UPAA/UPMAA).

5.2. California: A Case Study.

In California, parties may waive disclosure beyond what is legally required, and notarization is not mandatory—though it is considered best practice. If the agreement limits spousal support, both parties

([151]) ELLMAN, *Marital Agreements and Private Autonomy in the United States*, op. cit., p. 422.

([152]) ELLMAN, *Marital Agreements and Private Autonomy in the United States*, op. cit., pp. 420 ff.

([153]) ELLMAN, *Marital Agreements and Private Autonomy in the United States*, op. cit., pp. 423 ff.

([154]) For example, in a 2007 decision by the Appellate Division in New Jersey, the court refused to enforce a provision of a prenuptial agreement relating to the wife's waiver of her interest in the husband's savings plan. The New Jersey court held that when the parties executed their prenuptial agreement, it was not foreseeable that the husband would later increase his contributions toward the savings plan: *see* DOKANIA and ACHARYA, *Legality of Contract Marriage*, in https://www.academia.edu.

([155]) *See* CURRY, *The Uniform Premarital Agreement Act and Its Variations throughout the States*, in *Journal of the American Academy of Matrimonioal Lawyers*, 2010, vol. 23, pp. 355 ff. *See* also the voice "Uniform Premarital Agreement Act" in https://en.wikipedia.org/wiki/Uniform_Premarital_Agreement_Act. The text of the UPAA can be found at https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=2e456584-938e-4008-ba0c-bb6a1a544400&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiJjZTU5Mzk5My02ZTZiLTQ2MjMtYWE3Yy1jZDkyMjliMDk4ZWUifQ%3D%3D.

([156]) SKOLOFF, RICHARD, SINGER and BROWN (eds), *Drafting Prenuptial Agreements*, Supplement, 2025, New York, p. 32.

([157]) Maine Uniform Premarital Agreement Act, Sec. 606. Effect of children.

must have independent counsel. Additionally, the agreement must be presented at least seven days before signing, though there is no requirement that it be signed a specific number of days before the wedding ([158]). California couples may use a prenuptial agreement to: *a*) Waive rights to community property ([159]); *b*) Limit or waive spousal support (subject to judicial review for unconscionability); *c*) Create a contract to make a will; *d*) Waive probate rights, including allowances, executor status, and inheritance rights ([160]).

Registered Domestic Partners in California may also enter into prenuptial agreements. However, these agreements can be more complex due to differences in federal tax treatment compared to married couples ([161]).

California is a community property state, meaning that property acquired during the marriage is generally considered jointly owned. This principle applies to both assets and debts. Upon divorce, community property is divided equally unless otherwise agreed. Therefore, it is crucial to recognize that U.S. states follow two main systems: *a*) Equitable distribution (41 states); *b*) Community property (9 states) ([162]).

A prenup drafted in a community property state may not be suitable for use in an equitable distribution state, and vice versa. Given the mobility of many couples—who may own homes or work in multiple states—it is often advisable to consult attorneys in more than one jurisdiction when drafting the agreement.

6. Prenuptial Agreements in the United Kingdom: Before and Beyond Radmacher.

6.1. The Tortuous Path to Radmacher.

Prenuptial agreements in contemplation of divorce have historically not been considered legally valid in Britain. However, it is worth noting that prenuptial agreements in contemplation of legal separation were already considered valid and enforceable in the eighteenth century and remained so into the early decades of the nineteenth century, as evidenced by one of the most important essays on English family law from that period ([163]). The negative stance toward premarital agreements in

([158]) *See* Cal. Fam. Code § 1615(c)(2).

([159]) TOUR-SARKISSIAN (7 July 2016), *When Does Separate Property Become Community Property (or Vice Versa)?*, in *Real Property Law Reporter, Continuing Education of the Bar*; available at SSRN: https://ssrn.com/abstract=2912717 or http://dx.doi.org/10.2139/ssrn.2912717.

([160]) *See* subsection (c) of the California Family Code, Sec. 612, available at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=4.&title=&part=5.&chapter=2.&article=2.

([161]) *See* SACKS LOWENSTEIN, *Prenuptial Agreements and their Equivalent for Registered Domestic Patnerships*, available at http://www.lowensteinfamilylaw.com/San_Diego_Prenuptial_Registered_Domestic_Partnership.html.

([162]) On the different marriage property systems of the U.S.A. *see* GLENDON, *The New Family and the New Property*, Toronto, 1981; MCCLANAHAN, *Community Property Law in the United States*, New York-San Francisco, 1982, pp. 6 ff.; REPPY JR. and SAMUEL, *Community Property in the United States*, Charlottessville, 1982; GLENDON, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe*, Chicago, 1989; PRENTICE HALL EDITORIAL STAFF, *Lawyer's desk book*, Englewood Cliffs, 1989, pp. 371 ff.; WAGGONER, *Marital Property Rights in Transition*, in *Missouri Law Review*, 59 (1994), pp. 23 ff.; DALLON, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division,* in *Brigham Young University Law Review*, 2001, nt. 62 ff.; MCGOVERN JR. and KURTZ, *Wills, Trusts and Estates*, St. Paul, 2001, pp. 146 ff.; WAGGONER, ALEXANDER, FELLOWS and GALLANIS, *Family Property Law, Cases and Materials on Wills, Trusts, and Future Interests*, New York, 2002, pp. 585 ff.; REPPY JR., *Community Property*, 18th ed., Chicago, 2003; MENNELL and CARRILLO, *Community Property in a Nutshell*, 3rd ed., St. Paul, Minn, 2014; REPPY JR., SAMUEL and BROWN RICHARDSON, *Community Property in the United States*, 8th ed., Durham, NC, 2015.

([163]) CLANCY, *A Treatise of the Rights, Duties, and Liabilities of Husband and Wife, at Law and in Equity*, First American, from the Third London Edition, New York, 1828, pp. 421 ff.: "The cases in the preceding chapter prove, that a contract between husband and wife for a separate maintenance, upon an intended immediate separation, have been considered valid both at law, and in equity. It shall be now shown, that an agreement of the same kind, entered into in contemplation of a future separation, is equally sustainable, and will be equally recognised in our courts of justice." The

contemplation of divorce persisted until the landmark case of *Radmacher v Granatino*, which marked a turning point in English matrimonial and divorce law. This decision departed from the previous line of authority, which had held that prenuptial agreements were contrary to public policy and therefore null and void.

A deeper examination of the evolution of the English legal system reveals that the longstanding suspicion toward prenuptial agreements was not rooted in a dogmatic aversion, but rather in the central role attributed to the judge. English law traditionally entrusts judges with the responsibility of upholding binding principles aimed at protecting interests deemed to be of general importance. The first twentieth-century case involving a prenuptial agreement was heard by the House of Lords in 1929. The court held that a marital contract entered into before the wedding could not prevent a spouse from seeking maintenance during divorce proceedings. The rationale was that the husband's duty to support his wife served not only her interests but also those of third parties who might interact with her. The court further ruled that excluding state jurisdiction through such an agreement was contrary to public policy ([164]).

This approach was echoed in subsequent English case law, which almost systematically disregarded prenuptial agreements in separation and divorce proceedings. In *Miller v Miller*, for example, the House of Lords awarded the wife a settlement of £7.5 million—far exceeding the £275,000 previously agreed upon with the husband. The court may have been influenced by the fact that the agreement had been "imposed" on the wife as a condition for marriage, which in turn was the only way for her to retain custody of the child she had conceived with her future husband ([165]).

A shift in judicial attitude began to emerge in *Ella v Ella*, where the parties—who held dual British and Israeli citizenship—had included a jurisdiction clause in their prenuptial agreement, stipulating that any divorce proceedings would fall under Israeli jurisdiction. When the wife later filed for divorce in the UK, the husband invoked the clause, and the court upheld the agreement, referring the case to the Israeli courts ([166]).

Further progress was made in 2008 with the Privy Council's decision in *MacLeod v MacLeod* ([167]), which upheld the validity of a postnuptial agreement. The court distinguished between prenuptial and postnuptial agreements, noting that the latter are entered into after the couple has already assumed the obligations and responsibilities of marriage. As such, a postnuptial agreement is no longer "the price which one party may extract for his or her willingness to marry." The court concluded that agreements made during the marriage were valid not only for the period of cohabitation but also for arrangements concerning separation—although the latter remained subject to the court's power of variation.

This gradual evolution reflected a growing dissatisfaction among legal scholars and judges with the prevailing negative stance on prenuptial agreements ([168]). In other words, UK courts and legal doctrine began to recognize the need to place some limits on the previously unbounded discretion of

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Author, after having referred to the case *Hoare v Hohare* of the Irish House of Parliament, concludes that "this is the only instance to be found in the books, of an agreement before marriage, between the intended husband and wife for a separate maintenance for her after marriage, in the event of a future separation between them. And if it be once established, that an agreement after marriage for a separate maintenance upon a prospective separation is valid, there seems to be no reason (as Lord Eldon observes in *St. John v St. John*), why a similar covenant should not be permitted in settlement before marriage."

([164]) *Hyman v Hyman* (1929) AC 601. On this precedent *see* LOWE, *Prenuptial agreements: the English position*, in *InDret*, *Review on the Analysis of Law*, vol. 1, 2008, pp. 5 f.

([165]) *Miller v Miller* (2006) UKHL 26.

([166]) *Ella v Ella* (2007) *EWCA Civ* 99, (2007) 2 *FLR* 35.

([167]) Available at http://www.postnuptial.agreements.co.uk/case_law/MacLeod_v_MacLeod.pdf.

([168]) COOKE, *Marital Property Agreements and the Work of the Law Commission for England and Wales*, in BOELE-WOELKI, MILES and SCHERPE (eds), *The Future of Family Property in Europe*, op. cit., pp. 103 ff. expresses dissatisfaction for the British case law prior to *Radmacher v Granatino*, referring about the efforts of the *Law Commission* to find guidelines which might allow to consider prenups as enforceable; one of the remarks (*see* in particular p. 108) is about the lack in Britain of a professional similar to the "Latin" notary.

judges in allocating property and financial resources upon divorce. According to this emerging perspective, the very existence of a prenuptial agreement constitutes "evidence of the parties' intentions," which courts should not disregard ([169]).

6.2. Radmacher *and Its Rationale.*

The landmark case *Radmacher v Granatino* ([170]) marked a decisive shift in English law, establishing that prenuptial agreements can, "in the right case," carry decisive weight in divorce settlements. Both the Court of Appeal and the UK Supreme Court held that such agreements should be given effect, provided they were entered into freely by both parties, with a full understanding of their implications.

The parties were both foreign nationals: Ms. Radmacher, a wealthy German heiress (with assets estimated at around £100 million), and Mr. Granatino, a French investment banker working in London. They had signed a prenuptial agreement valid under German law, but later divorced in the UK, where they were residing. The High Court in London awarded the husband £5.6 million, despite the agreement stating that neither party would seek maintenance from the other in the event of divorce. The wife appealed.

Delivering the lead judgment in the Court of Appeal, Thorpe LJ allowed the appeal, finding that the High Court had failed to give sufficient weight to the existence of the agreement. At paragraph 53, he stated: "in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings" ([171]).

([169]) LEECH, *With All My Worldly Goods I Thee Endow? The Status of Pre-Nuptial Agreements in England and Wales*, in *Fam. L.Q.*, 34, 2000, pp. 193 ff. On this subject *see* as well PANFORTI, *Gli accordi paramatrimoniali fra autonomia dispositiva e disuguaglianza sostanziale. Riflessioni sul* Family Law Amendment Act 2000 *Australiano*, in *Familia*, 2002, p. 156.

([170]) Available at http://www.bailii.org/ew/cases/EWCA/Civ/2009/649.html (*see* also: http://www.dailymail.co.uk/news/article-1322117/Judges-pre-nuptial-agreements-Britain-Katrin-Radmacher-wins-landmark-case.html). On this case *see* MILES, *Marriage and divorce in the Supreme Court and the Law Commission: For Love or Money?*, in *Modern Law Review*, 2011, 74(3), p. 430 ff. *See* as well MILES, *Marital Agreements and Private Autonomy in England and Wales*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 96 ff.; HARPER and FRANKLE, *An English Practitioner's View on Pre-Nuptial, Post-Nuptial and Separation Agreements*, *ibidem*, pp. 122 ff.; THOMPSON, *Prenuptial Agreements and the Presumption of Free Choice. Issues of Power in Theory and Praxis*, Oxford, 2015, pp. 50 ff.

([171]) Other relevant parts of the reasoning by Lord Justice Thorpe are the following. "There are many instances in which mature couples, perhaps each contemplating a second marriage, wish to regulate the future enjoyment of their assets and perhaps to protect the interests of the children of the earlier marriages upon dissolution of a second marriage. They may not unreasonably seek that clarity before making the commitment to a second marriage. Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion."

"I also hold my opinion because: i) In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace."

"As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe. Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts."

"In the circumstances, I agree in effect with my Lords that this is a case in which the pre-nuptial agreement made by the parties should be given decisive weight in the section 25 exercise. Their agreement was entered into willingly and knowingly by responsible adults. The husband had a proper understanding of the consequences of his agreement. It is to be inferred that without that agreement no marriage would have taken place, and that the wife's father would not have made over to her the additional resources which followed her marriage. The parties entered into their agreement with the help and advice of a German lawyer, under German law, making an agreement which was familiar to the civil law under which both parties and their families had grown up in Germany and France."

The UK Supreme Court confirmed this judgment in 2010 ([172]). The core of its reasoning was encapsulated in the following principle: "We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod*: 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'."

The Court also examined the circumstances under which the agreement had been signed, emphasizing the role of the German notary, who had explained the contents and implications of the contract to both parties ([173]).

The judgment described the agreement in detail: "The agreement stated (in recital 2) that (a) the husband was a French citizen and, according to his own statement, did not have a good command of German, although he did, according to his own statement and in the opinion of the officiating notary (Dr Magis), have an adequate command of English; (b) the document was therefore read out by the notary in German and then translated by him into English; (c) the parties to the agreement declared that they wished to waive the use of an interpreter or a second notary as well as a written translation; and (d) a draft of the text of the agreement had been submitted to the parties two weeks before the execution of the document."

Although the parties had chosen German law to govern the agreement, the British courts applied the *lex fori* (English law), while still recognizing the agreement's enforceability. Clause 5 of the agreement included a mutual waiver of maintenance claims, even in cases of hardship, and acknowledged the notary's explanation of the consequences of such a waiver ([174]).

The Supreme Court also rejected Mr. Granatino's argument (and that of the first-instance judge) that the absence of independent legal advice invalidated the agreement. The Court found that the notary had provided sufficient information, highlighting the value of a neutral, independent professional—such as the "Latin" notary—who is not an advocate for either party but ensures informed consent.

This emphasis on neutrality was echoed in the 2019 case *Ipekci v McConnell*, where the husband had received legal advice from a lawyer who had previously represented the wife. The judge cited this apparent conflict of interest as one of several reasons for refusing to give the agreement any weight ([175]).

6.3. Beyond Radmacher*: Attempts to Legislate.*

Following *Radmacher v Granatino*, the Law Commission ([176])—a statutory independent body advising on legal reform—recommended that prenuptial agreements be made legally binding, subject to strict conditions. ([177]). These include: *a*) Full disclosure of material financial information by both

([172]) The judgement of the Supreme Court is available at http://www.bailii.org/uk/cases/UKSC/2010/42.html.

([173]) "91. On 1 August, 1998 the parties attended at the office of Dr Magis near Düsseldorf. Their meeting with him lasted for between two and three hours. The husband told Dr Magis that he had seen the draft agreement but that he did not have a translation of it. Dr Magis was angry when he learned of the absence of a translation, which he considered to be important for the purpose of ensuring that the husband had had a proper opportunity to consider its terms. Dr Magis indicated that he was minded to postpone its execution but, when told that the parties were unlikely again to be in Germany prior to the marriage, he was persuaded to continue. Dr Magis, speaking English, then took the parties through the terms of the agreement in detail and explained them clearly; but he did not offer a verbatim translation of every line. The parties executed the agreement (which bears the date of 4 August, 1998) in his presence."

([174]) "The waiver shall apply to the fullest extent permitted by law even should one of us—whether or not for reasons attributable to fault on that person's part—be in serious difficulties. The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above. Each of us is aware that there may be significant adverse consequences as a result of the above waiver."

([175]) *Ipekci v McConnell* [2019] EWFC 19 (Mostyn J).

([176]) The official web site of the Law Commission is https://lawcom.gov.uk/.

([177]) For a comprehensive commentary on the Law Commission's works on this subject *see* COOKE, *The Law Commission's Consultation on Marital Property Agreements*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 144 ff.

parties; *b*) Independent legal advice for each party; *c*) Enforceability only after both parties' financial needs and any responsibilities toward children have been met. The Commission warned that introducing prenuptial agreements without safeguards would be "very damaging."

It also called on the Family Justice Council (comprising judges and legal professionals) to issue authoritative guidance on financial needs, enabling couples to reach agreements that reflect their mutual responsibilities. Additionally, the Commission urged the government to fund a long-term study to assess whether a non-statutory formula could be developed to provide clearer expectations regarding financial obligations. These proposals were submitted to the Ministry of Justice ([178]). However, successive UK governments have shown reluctance to reform marriage laws.

Legal scholars have welcomed the Commission's recommendations, emphasizing that qualifying nuptial agreements would enhance autonomy, predictability, and fairness. They argue that limiting judicial discretion and allowing couples to predefine financial outcomes would reduce uncertainty and litigation ([179]). It has furthermore been remarked that these recommendations represent a welcome step towards greater autonomy and legal certainty for couples. In any case, scholars and practitioners agree on the positive effect of limiting judicial discretion and allowing couples greater predictability and pre-agreed financial control in the event of relationship breakdown ([180]).

Some sceptics have pointed out that the recognition of premarital contracts "ironically (…) leads to a situation where parties to an agreement cannot usually be sure of the true effect of that agreement until it is considered in the course of proceedings that it was often designed to avoid" ([181]). Yet this observation, rather than ironic, seems naïve: in any legal system governed by the rule of law, parties always retain the right to challenge a contract they believe to be invalid or unenforceable. This is not unique to family law. Ultimately, it is the responsibility of legal counsel to anticipate and address potential issues that might lead to judicial scrutiny. The *Radmacher* decision and subsequent developments represent a significant step toward balancing judicial oversight with party autonomy in the regulation of marital breakdown.

6.4. Beyond Radmacher*: The Most Recent Case Law.*

Recent British case law confirms the enduring influence of *Radmacher v Granatino*, as illustrated by a 2014 judgment ([182]) in which a Dutch husband argued that the parties were bound by a Dutch prenuptial agreement, while the British wife sought a compensatory payment, citing the high-powered career she had given up. The court upheld the agreement—signed in the Netherlands before a Dutch notary—which excluded the default Dutch regime of community property. Instead, it provided for the equal sharing of marital acquests, specifically the surplus of joint income. Unlike the German agreement in *Granatino*, it did not address spousal maintenance. Nevertheless, the rationale of the decision echoed *Radmacher*, reaffirming that: "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

Another key case is *KA v MA* ([183]). where the husband (MA) and wife (KA) entered into a prenuptial agreement before marriage. At the time, they had one child together, and the husband had three adult children from a previous marriage. The husband, with assets worth £32 million, agreed to pay the wife a lump sum of £600,000 (indexed), monthly payments of £2,000, and child maintenance. The wife, a full-time mother, owned rental properties and had previously been financially

([178]) *See* https://lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/.

([179]) *See* https://www.theguardian.com/money/2014/feb/27/pre-numpial-agreements-legally-binding-divorce-law-commission.

([180]) *See* MORGAN, *Family Law*, Oxford, 2024, pp. 216 ff.

([181]) SHERPE and SLOAN, *Contractualisation of Family Law in England & Wales: Autonomy vs. Judicial Discretion*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., p. 165.

([182]) *SA v PA (Pre-marital agreement: Compensation)* [2014] EWHC 392 (Fam), available at http://www.familylawweek.co.uk/site.aspx?i=ed127807.

([183]) *KA v MA* [2018] EWHC 499.

independent. Both parties received independent legal advice. The wife's solicitors noted her dissatisfaction with the terms and advised against signing, but she proceeded, motivated by the desire to marry for their child's benefit. Upon divorce, she sought to depart from the agreement, claiming it did not meet her needs, which she estimated at £6 million. She acknowledged having no claim under the sharing principle.

The judge upheld the agreement in part, finding that it had been freely entered into and that the husband's insistence on a prenup did not amount to duress. They were mature adults, each of whom had been married before. The wife had an established professional career and was financially independent prior to the marriage. Although the agreement was entered into before the Supreme Court decision in *Radmacher*, the wife had been clearly advised that she may well be bound by the agreement and that this was "the direction of travel" of the case law. The wife was awarded £1.35 million for housing and a Duxbury fund of nearly £1.6 million in lieu of lifetime maintenance, on top of which she was capable of earning up to £20,000 per year from employment. The wife's need was for a home that was comfortable and safe for her and for their child, when he lived with her during boarding school holidays. The judge held that there was no basis for generosity, given that the the source of the award was non-matrimonial assets that the husband had specifically entered into the agreement to protect ([184]).

After such precedents, the 2023 judgement in *MN v AN* ([185]) has become a significant point of reference in family law, highlighting the complexities of financial remedies upon divorce and the discretion of the courts in achieving fairness. The case involved a high-net-worth couple who, after a long marriage, sought to dissolve their marriage. The primary issues at stake were the division of considerable assets accumulated during the marriage and the interpretation and enforcement of a prenuptial agreement signed before the marriage, which stipulated how their assets would be divided in the event of a divorce. However, MN (the wife) argued that the prenup was outdated and did not account for the substantial changes in their financial circumstances and contributions during the marriage. The court also had to consider the fairness of the proposed financial settlement, taking into account both parties' needs and the standard of living they had enjoyed during the marriage. This included examining the extent to which each party had contributed to the accumulation of assets and the care of the family.

The case highlighted as well the discretionary powers of the court under Section 25 of the Matrimonial Causes Act 1973. This section allows the court to consider a range of factors, including the welfare of any children, the length of the marriage, the contributions of each party, and the financial resources available, to reach a fair outcome.

In his judgment, Mr. Justice Mostyn upheld the validity of the prenuptial agreement but did not enforce it strictly as written. Instead, he applied the principle of "fairness," which allowed for some deviation from the terms of the prenup. The court recognized that while prenups are important and should be given significant weight, they are not absolutely binding, especially if they lead to an unfair outcome. Justice Mostyn emphasized that the prenup was just one of many factors to consider. He acknowledged MN's contributions to the marriage, both financially and in terms of non-monetary contributions like raising children and supporting AN's career. The court ultimately awarded MN a significant financial settlement that exceeded what was stipulated in the prenuptial agreement, recognizing the couple's current financial circumstances and MN's needs post-divorce. Albeit MN received significantly less than she may have otherwise received has there been no pre-nuptial agreement in place at all.

([184]) More British cases following the *Radmacher* precedent are listed and commented in PATTERSON, *Contextualising the Law on Pre-Nuptial Agreements in England: A Comparative Study and a Proposal for Reform*, available at https://www.york.ac.uk/media/law/documents/eventsandnewsdocs/4.Contextualising%20the%20Law%20on%20Prenuptial%20Agreements_Emily%20Patterson.pdf, pp. 6 ff.

([185]) *MN v AN* [2023] EWHC 613 (Fam).

6.5. Beyond Radmacher*: The Alleged "Spartan Lifestyle" (or: "The Rich Also Cry").*

In another 2023 judgment, Mr. Justice Mostyn offered a vivid analogy to describe judicial discretion in the context of prenuptial agreements. Referring to a "Spartan lifestyle," he suggested that in "needs" cases, there exists a range of acceptable future living standards within which the court may exercise its discretion—an exercise largely immune from appellate review ([186]).

However, in a 2024 High Court decision, this analogy was challenged. The case involved a wealthy husband (net worth £50 million) seeking to enforce a restrictive prenuptial agreement that provided for a payment of £800,000 to the wife, who was now the primary carer of their two young children (aged 2 and 4). During the five-year marriage, the husband's business had flourished, and the wife's notional sharing claim was assessed at £7.5 million. The court rejected the idea of imposing a "Spartan lifestyle" on the wife and children. Instead, it awarded her: *a*) £2.75 million for housing; *b*) £300,000 for relocation expenses; *c*) £110,000 per annum for 10 years (capitalised). The court emphasized that enforcing the prenuptial agreement must not result in unfairness and noted that "the scale of the wealth cannot be ignored ([187]).

As one commentator observed, judges appear increasingly reluctant to impose austere living standards on the former partners of the ultra-wealthy, even when a valid prenuptial agreement exists ([188]). Needless to say that the reference to a "Spartan lifestyle" in such contexts may seem, at best, ironic—and at worst, offensive to those genuinely in need.

Summing up the recent evolution of British case law, we may conclude the courts' primary objective remains achieving fairness. This may require adjusting the terms of a prenuptial agreement to reflect changes in the couple's circumstances and contributions over time. These cases underscore the importance of regularly reviewing and updating prenuptial agreements, particularly in response to significant financial or familial developments.

While prenuptial agreements remain a valuable tool for asset protection, they are not immune from judicial scrutiny—especially when they fail to reflect the realities of a long marriage. Courts continue to consider the broader context, including non-financial contributions, when determining a fair settlement. Nonetheless, the existence of a prenuptial agreement remains a significant factor in the court's analysis, and the outcome would likely differ in its absence ([189]).

7. Prenuptial Agreements in Contemplation of Divorce in Catalonia, Spain, Portugal (and Brazil), Germany and Austria: A Well-Established Reality.

7.1. Catalonia and Spain: Where Contractual Autonomy Is Even "Larger" Than Regional Autonomy.

As previously noted ([190]), the rationale of *Radmacher v Granatino* rests on the assumption that, had the prenuptial agreement been brought before a court in France or Germany, it would have been

([186]) *See Cummings v Fawn* [2023] EWHC 830 (Fam): "Imagine that the discretionary range is a line of books on a shelf bracketed left and right by book-ends. The book-ends may be quite far apart. The right book-end represents a comfortable, perhaps even luxurious, life-style. The left book-end represents a Spartan lifestyle catering for not much more than essentials. The space in between is the discretionary range. When the Supreme Court says that it may not be fair to uphold an agreement which leaves the applicant in a 'predicament of real need', it is clearly saying that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand bookend, then that would be unfair. It is also saying that to make the agreement fair it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend."

([187]) *See AH v BH* [2024] EWFC 125.

([188]) *See* DEANS COURT CHAMBERS, *Nuptial Agreements: Case Law Update since* Cummings v Fawn *[2023] EWHC 830 (Fam) – Will the Court impose a 'Spartan Lifestyle'?*, available at https://deanscourt.co.uk/articles/nuptial-agreements-case-law-update-since-cummings-v-fawn-2023-ewhc-830-fam-will-the-court-impose-a-spartan-lifestyle.

([189]) *See* PORTER, MN v AN *[2023] EWHC 613 (Fam): A Landmark Decision in Family Law*, available at https://www.thefamilylawco.co.uk/blog/divorce-and-seperation/mn-v-an-2023-ewhc-613-fam-determining-the-settlement/.

([190]) *See* above, at para. 6.2.

considered valid and enforceable. This is certainly true with regard to the choice of matrimonial property regime—particularly the separation of property—which is a well-established concept in continental Europe. However, the answer may differ when it comes to antenuptial agreements concerning alimony or maintenance in the event of divorce or legal separation. Such agreements are still excluded in countries like France and Italy, whereas an increasing number of European jurisdictions now allow them.

A notable example is the former 1998 Family Law Code of Catalonia (*Codi de família*), whose Article 15 ([191]) allowed spouses to agree on patrimonial matters "àdhuc en previsió d'una ruptura matrimonial" (even in contemplation of a marital breakdown). This provision was replaced in 2010 ([192]) by article 231-20 of the *Codi Civil de Catalunya* ([193]), which not only expressly permits such agreements but also sets out specific rules regarding their formation and enforcement. Interestingly, the same provisions apply to cohabiting partners, as will be discussed later ([194]).

What is particularly noteworthy is how private contractual autonomy in Catalonia has evolved alongside the region's legislative autonomy: from ordinary regional law, to the Family Code, and finally to the Civil Code of the autonomous community. In a kind of legal *calembour*, one might say

([191]) "15. *Contingut*. 1. En els capítols matrimonials, hom pot determinar el règim econòmic matrimonial, convenir heretaments, fer donacions i establir les estipulacions i els pactes lícits que es considerin convenients, àdhuc en previsió d'una ruptura matrimonial.

2. Els capítols matrimonials es poden atorgar abans o després del casament. Els atorgats abans només produeixen efectes a partir de la celebració del matrimoni."

("15. *Content*. 1. In marriage agreements, one may determine the matrimonial property regime, agree on inheritances, make donations, and establish lawful stipulations and covenants deemed appropriate—even in anticipation of a marital breakdown.

2. Marriage agreements may be executed either before or after the wedding. Those executed beforehand shall only take effect upon the celebration of the marriage").

([192]) *See* the *Llei 25/2010, del 29 de juliol, del llibre segon del Codi civil de Catalunya, relatiu a la persona i la família.*

([193]) "231-20. *Pactes en previsió d'una ruptura matrimonial.* 1. Els pactes en previsió d'una ruptura matrimonial es poden atorgar en capítols matrimonials o en una escriptura pública. En cas que siguin avantnupcials, només són vàlids si s'atorguen abans dels trenta dies anteriors a la data de celebració del matrimoni.

2. El notari, abans d'autoritzar l'escriptura a què fa referència l'apartat 1, ha d'informar per separat cadascun dels atorgants sobre l'abast dels canvis que es pretenen introduir amb els pactes respecte al règim legal supletori i els ha d'advertir de llur deure recíproc de proporcionar-se la informació a què fa referència l'apartat 4.

3. Els pactes d'exclusió o limitació de drets han de tenir caràcter recíproc i precisar amb claredat els drets que limiten o als quals es renuncia.

4. El cònjuge que pretengui fer valer un pacte en previsió d'una ruptura matrimonial té la càrrega d'acreditar que l'altra part disposava, en el moment de signar-lo, d'informació suficient sobre el seu patrimoni, els seus ingressos i les seves expectatives econòmiques, sempre que aquesta informació fos rellevant amb relació al contingut del pacte.

5. Els pactes en previsió de ruptura que en el moment en què se'n pretén el compliment siguin greument perjudicials per a un cònjuge no són eficaços si aquest acredita que han sobrevingut circumstàncies rellevants que no es van preveure ni es podien raonablement preveure en el moment en què es van atorgar."

("231-20. *Agreements in contemplation of marital breakdown*. 1. Agreements in contemplation of a marital breakdown may be entered into within the framework of marriage contracts or by means of a public deed. If such agreements are concluded prior to the marriage, they shall only take effect if executed at least thirty days before the date of the marriage ceremony.

2. Before authorising the deed referred to in paragraph 1, the notary must inform each party separately of the scope and legal effects of the agreements in relation to the supplementary matrimonial regime, and must also advise them of their mutual obligation to disclose the information referred to in paragraph 4.

3. Any agreement that waives or restricts the rights of either party must be reciprocal and must clearly specify the rights being waived or limited.

4. A spouse seeking to enforce an agreement in contemplation of marital breakdown bears the burden of proving that, at the time of signing, the other party had sufficient knowledge of their assets, income, and financial expectations, insofar as such information was relevant to the content of the agreement.

5. Agreements in contemplation of marital breakdown shall not be effective if, at the time of their intended enforcement, they are seriously prejudicial to one spouse and that spouse proves the existence of relevant circumstances that were not foreseen, and could not reasonably have been foreseen, at the time the agreements were made").

([194]) *See* below, at para. 10.

that the expansion of Catalonia's regional autonomy has gone hand in hand with the expansion of contractual autonomy for Catalan couples.

However, this trend toward greater autonomy for couples extends well beyond Catalonia. In Spain's general civil law, prenuptial agreements in contemplation of divorce are increasingly used and recognized as valid. Although such agreements were virtually unknown in Spain until recently—neither traditional notarial practice nor the Spanish Civil Code provided for them—the growing incidence of divorce, the rise of blended families, and increased awareness of the consequences of marital breakdown have fostered a more favorable legal and cultural climate for private agreements in family matters.

The diversification of legal services has also contributed to the spread of these agreements. Several *Audiencias Provinciales* (provincial appellate courts) have issued rulings on their validity, and case law is gradually taking shape ([195]).

A particularly relevant issue concerns prenuptial agreements addressing economic imbalance. According to Article 97 of the Spanish Civil Code: "The spouse for whom the separation or divorce causes an economic imbalance in relation to the other's position, resulting in a deterioration of their situation compared to that prior to the marriage, shall be entitled to compensation, which may consist of a temporary or indefinite allowance, or a lump sum, as determined in the settlement agreement or in the judgment."

Legal scholars have debated whether this "imbalance compensation" can be waived before marriage ([196]). In practice, agreements that either waive or predetermine such compensation are becoming increasingly common in Spain ([197]). The Spanish notariat has long been attentive to this development. As a prominent scholar and notary wrote in 1985: "Since the reforms of Spring and Summer 1981, marriage contracts are increasingly used in contemplation of a future divorce or separation (…) to prepare such proceedings in advance, so that they do not cause problems when the time comes" ([198]). Today, the prevailing opinion is that such agreements are valid and enforceable, reflecting the growing importance of individual autonomy in family law. In a landmark decision on 31 March 2011, the Spanish Supreme Court explicitly upheld the validity of such agreements ([199]).

([195]) *See* FERRER-RIBA, *Marital Agreements and Private Autonomy in Spain*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 360 ff. For a thorough information on the Spanish case law admitting the full validity of prenuptial agreements in contemplation of divorce, as an expression of the spouses' autonomy, *see* BARBA, *Patti prematrimoniali tra diritto spagnolo e diritto italiano. Riflessioni in attesa della riforma legislativa e suggerimenti per un revirement della giurisprudenza italiana*, in *Rivista di diritto civile*, 2023, p. 16 ff. *See* as well CAZORLA GONZÁLEZ-SERRANO, *Funcionamiento de los acuerdos prematrimoniales en España*, in LANDINI and PALAZZO (eds), *Accordi in vista della crisi dei rapporti familiari*, Milano, 2018, pp. 429 ff.; ANTÓN JUÁREZ, *Los acuerdos prematrimoniales en derecho internacional privado español*, in *Estudios Socio-Jurídicos*, 2019, 21(1), pp. 61 ff., available at http://dx.doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.7256.

([196]) *See* MARTÍNEZ DE AGUIRRE ALDAZ, *Family Law in Spain: Contractualisation or Individualisation?*, in SWENNEN (ed.), *Contractualisation of Family Law – Global Perspectives*, op. cit., p. 308.

([197]) *See* CABEZUELO ARENAS, *Polémicas judiciales sobre significado, fijación, contenido y variabilidad de la pensión de alimentos de los hijos tras la separación y divorcio (art. 93 CC)*, Pamplona, 2010.

([198]) FOSAR BENLLOCH, *Estudios de derecho de familia*, II, *La separación y el divorcio en el derecho español vigente*, 1, Barcelona, 1982, p. 323. The same Author added as well (*ibidem*, p. 325), in relation to the legal reform of 1981, which introduced divorce in Spain: "It goes without saying that the possibility for spouses to reach an agreement between themselves on the settlement of the consequences of annulment, separation, and divorce merits favourable consideration—even where they have not jointly applied for separation or divorce under the procedure set out in Articles 81(1) and 86 *in fine* of the Civil Code (…). There is no doubt that such an agreement, which must be presumed valid and equitable, may effectively contribute to eliminating any residual notion of fault in the settlement of the consequences of divorce. In my view, this principle aligns us with the more progressive European legislations concerning the regulation of the consequences of marital breakdown."

([199]) STS 217/2011, 31 de Marzo de 2011, RJ 2011/3137, available at https://vlex.es/vid/matrimonial-validez-pactos-conyuges-c-276150511. The reasoning of the judgement describes the agreement made by a married couple in contemplation of a possible future separation in such terms: "It constitutes an atypical yet valid contract between the spouses, in accordance with the principle of autonomy of will. It satisfies the requirements laid down in Article 1261 of the Civil Code for contractual validity and imposes obligations on one of the parties. As regards the content of the

In the absence of specific statutory provisions, these agreements must comply with the general requirements for family contracts, including contractual capacity and freedom of consent. They are not subject to additional safeguards such as mandatory waiting periods, independent legal advice, or financial disclosure—although these may be advisable. Under general contract law, they may be challenged in court on grounds of mistake, fraud, or duress, pursuant to Articles 1265–1270 of the Spanish Civil Code ([200]). A safeguard against abuse is provided by Article 90(2) of the Civil Code, which states: "Agreements between spouses regulating the consequences of annulment, separation, or divorce shall be approved by the judge, unless they are detrimental to the children or seriously prejudicial to one of the spouses."

As for formal requirements, there is some debate as to whether agreements contemplating future separation or divorce must be formalized as *capitulaciones matrimoniales* (formal marriage contracts), or whether they may also be executed as ordinary public deeds or private documents. These agreements are often included within broader contracts that modify the matrimonial property regime (e.g., replacing community property with separation of property), in which case the *capitulaciones* form is required. However, if the agreement does not affect the property regime, then private documents may also be considered valid ([201]).

7.2. Portugal and Brazil: Where Football Still Leads the Dance.

Beyond the borders of Spain, it is worth adding that also within the Lusophone world, the notion that a *pacto antenupcial* (prenuptial agreement) may include provisions regarding potential divorce settlements and other financial arrangements in the event of separation now appears to be widely accepted—both in Portugal and in Brazil.

Evidence of this can be found, e.g., in the prenuptial agreement recently signed by the renowned footballer Cristiano Ronaldo. According to this agreement, "In the event of a separation, the Al Nassr superstar would guarantee his future wife a lifelong allowance for herself and their children. Figures have even been mentioned: reportedly $114,000 per month (just over €97,000 at the current exchange rate, amounting to more than €1 million per year). According to reports from Portugal, the agreement was signed by the couple following the birth of their first daughter, Alana Martina, on 12 November 2017. Later came Bella Esmeralda. In addition to the financial support, Georgina would also receive the villa located in Madrid's La Finca district. It is a residence worth nearly €5 million, spanning 4,000 square metres, designed by architect Joaquin Torres, and featuring door handles engraved with the CR monogram" ([202]).

Legal doctrine on both said Lusophone countries points out as well that "although the right to alimony only arises with the breakup of the communion of life (…) the inclusion of a clause that establishes an obligation to pay monthly, in the eventual ending marriage, cannot be disregarded by the judge for the establishment of an eventual maintenance obligation, as it is an integral part of the family planning outlined by the spouses" ([203]).

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agreement between the spouses, the alimony agreed upon for the benefit of the husband must be deemed valid. However, the promise of a donation is void, as it concerns the donation of an indeterminate future asset."

([200]) FERRER-RIBA, *Marital Agreements and Private Autonomy in Spain*, op. cit., pp. 360 ff.

([201]) GARCIA RUBIO, *Los pactos prematrimoniales de renuncia a la pensión compensatoria en el Código civil*, in *Anuario de Derecho Civil*, 2003, 1660; REBOLLEDO VARELA, *Pactos en previsión de una ruptura matrimonial*, in GÓMEZ GÁLLIGO (ed.), *Homenaje al profesor Manuel Cuadrado Iglesias*, vol. I., Cizur Menor, 2008, pp. 740 ff.

([202]) RIGGIO, *L'accordo prematrimoniale tra Ronaldo e Georgina: a lei 100mila euro al mese e la super villa di Madrid*, in *Corriere della Sera*, 25 August 2025.

([203]) MONTEIRO MAFRA and BAETA MENDONÇA, *Prenuptial Agreement: Provisions on Alimony and Patrimony Penalties in Case of Divorce*, in *Revista internacional Consinter de direito*, 2022, https://revistaconsinter.com/index.php/ojs/0001525, where the authors remark as well that the number of prenuptial agreements drawn up in Brazil increased by about 95% (ninety-five percent) between 2006 and 2017, which emphasizes the topic's relevance. The essay also concludes for the possibility to include in the premarital agreement a clause stipulating the establishment of property penalties in the event of divorce, either due to voluntary and unmotivated rupture, or due to the culpable dissolution of the marital relationship. Such provision may occur by establishing an amount to be

As regards the specific case of Brazil, it should be noted that in the state courts there are rulings to the effect that, upon the dissolution of the marital bond, the provisions agreed upon by the spouses in the prenuptial agreement concerning the parameters for the determination of maintenance obligations shall prevail ([204]).

The following decisions corroborate the author's assertion:

i) "Pedido de redução de alimentos provisórios. Valor previsto em pacto antenupcial. 1. Devem ser mantidos os alimentos provisórios, uma vez que arbitrados em observância ao pacto antenupcial firmado pelas partes, em caso de dissolução da sociedade conjugal" ("Request for reduction of interim maintenance. Amount stipulated in prenuptial agreement. Interim maintenance must be upheld, as it was determined in accordance with the prenuptial agreement entered into by the parties in the event of dissolution of the marital union") ([205]).

ii) "Pretende a autora que sejam estabelecidos alimentos em seu benefício tomando-se percentual de todas as rendas percebidas pelo varão, sem caráter de transitoriedade. Não há causa para o acolhimento do seu pedido, porquanto na referida escritura pública do pacto antenupcial os litigantes deliberaram que haveria o pagamento de pensão alimentícia para ela no valor de cinco salários mínimos por período não superior a cinco anos. Nada há nos autos para retirar da cláusula sua validade e eficácia, pois o documento foi firmado por pessoas maiores, capazes e no pleno exercício de sua autonomia dc vontade, tratando de direito disponível" ("The claimant seeks the establishment of maintenance in her favour, calculated as a percentage of all income earned by the husband, without any temporary limitation. There is no basis for granting her request, given that in the aforementioned public deed of prenuptial agreement, the parties agreed that maintenance would be paid to her in the amount of five minimum wages for a period not exceeding five years. There is nothing in the case file to invalidate the clause or render it ineffective, as the document was executed by adults, legally capable and acting in full exercise of their autonomy of will, concerning a right that may be freely disposed of") ([206]).

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paid by one spouse to the other at the end of the marriage, or even adding of conditions (suspensive to one regime and resolutive for another) in the event of divorce, as for example, in the event that the spouses agree on a regime of partial communion that becomes a Separate Property Ruling with the dissolution of the marital bond. The patrimonial penalties can be fixed in the prenuptial agreement for different reasons and purposes, with a merely compensatory character, to offset the frustration of the expectation created when the family entity was formed, or it may have a reparatory feature, to recover any damages experienced due to the entering the relationship, such as resignation from the professional activity performed or career advancement Generally, indemnification clauses for marital relationship breakup are inserted in pacts that adopt the Separate Property Ruling, willing to compensate, at the end of the marriage, the financially disadvantaged spouse who, for example, has left their job to move to the other consort's city. In prenuptial agreements, clauses stipulating payment of amounts in proportion to the duration of the marriage are common, precisely considering the insertion of that low-income part in the standard of living provided by the most financially wealthy. In this approach, the establishment of a patrimonial penalty, in order to avoid a sudden decrease in the standard of living of one of the spouses, would be similar to the institute of compensatory alimony, which is to reestablish the spouse or partner who suffered a worsening in their financial situation after the marital relationship ended, which translates into an economic imbalance in relation to the position of the other, being entitled to a pension fixed in a court decision." In the same sense is also another author (see CARDOSO, *Property regime and prenuptial agreement*, São Paulo, 2011, 204), who states that "there are no legal reasons to consider null or ineffective the existence of a clause in the prenuptial agreement that regulates the payment of compensation in case of breach marriage contract or failure to perform any of the marital duties." Following the results found so far, it appears that in Brazil the intervention of the State-judge should only take place in the specific case, if it is found that the provisions contained in the prenuptial agreement offend the basic imperative statute of marriage, in particular regarding the norms of public order, good customs, social function, good faith principle, the fundamental rights and guarantees enshrined in the Constitution.

([204]) Cf. BARSAGLIA PIMENTEL, *A Potencialidade Ampliada do Pacto Antenupcial: Critérios Objetivos Para a Aferição da (in)validade das Disposições Pré-Nupciais*, Londrina, 2025, pp 118 f.

([205]) Judgment of the Court of Justice of the Federal District and Territories, Interlocutory Appeal No. 2010.00.2000253-7, Third Civil Chamber. Rapporteur: Nídia Corrêa Lima, Brasília, DF, published on 12 August 2010.

([206]) Judgment of the Court of Justice of the State of Rio Grande do Sul, Civil Appeal No. 70054895271, Eighth Civil Chamber. Rapporteur: Luiz Felipe Brasil Santos, Porto Alegre, RS, adjudicated on 1 August 2013.

iii) "(…) 3. Não se vislumbra nulidade da cláusula estabelecida em pacto antenupcial que prevê a obrigação do cônjuge varão em, no caso de divórcio, pagar mensilmente ao cônjuge virago, pelo prazo de 9 (nove) anos, 15% de seus rendimentos líquidos, porquanto tal stipulacào não contraria o ordenamento jurídico, além de não haver provas de ter sido estipulada com a finalidade de praticar ilicitude ou fraudar a lei, inexistindo ofensa aos artigos 104 e 166, do Código Civil. 4. Não há falar-se na ocorrência do vicio de consentimento (lesão), porquanto a estipulação da cláusula inserta no pacto antenupcial não fora realizada sob premente necessidade ou por inexperiência do nubente que assumiu o encargo. 5. O mero arrependimento não configura, via de regra, hipótese de anulação de negócio jurídico. 6. A assunção da obrigação inseria na cláusula questionada não caracteriza ofensa ao direito ao divórcio, na medida em que pôde ser livremente exercido sem que houvesse quaisquer questionamentos atinente à culpa dos cônjuges, tanto que fora decretado por decisão que, no âmbito da audiência de conciliação, homologou o acordo celebrado entre as partes nesse ponto") ("3. There is no apparent invalidity in the clause established in the prenuptial agreement which provides for the obligation of the husband, in the event of divorce, to pay the wife 15% of his net income monthly for a period of nine (9) years, since such stipulation does not contravene the legal order, nor is there any evidence that it was agreed with the intent to commit an unlawful act or to defraud the law, and no violation of Articles 104 and 166 of the Civil Code is found. 4. There is no indication of a defect in consent (lesion), as the clause inserted in the prenuptial agreement was not stipulated under pressing necessity or due to inexperience on the part of the spouse who undertook the obligation. 5. Mere regret does not, as a rule, constitute grounds for annulment of a legal transaction. 6. The assumption of the obligation contained in the contested clause does not infringe the right to divorce, insofar as the right was freely exercised without any dispute regarding the fault of the spouses, as evidenced by the decree issued during the conciliation hearing, which ratified the agreement reached by the parties on this matter" ([207]).

The attentive reader will not have failed to observe that, even in Brazil, the judiciary is by no means indifferent to arguments typically found in common law systems, as well as in various continental European jurisdictions. These include the recognition of the parties' full legal and natural capacity to enter into the agreement; the imperative to uphold the principle of *pacta sunt servanda*; the applicability of general contract law—in particular, the doctrine of defects in consent—to prenuptial agreements; and the irrelevance of such agreements to the exercise of the right to divorce.

7.3. The German Experience: Where Ancient Tradition Meets Modern Needs.

Turning now to Germany ([208]), it is important to note that party autonomy has always played a central role in the German legal tradition. This principle, incidentally, reflects the thinking of some of Germany's greatest philosophers. For instance, Hegel ([209]) stated that marriage contracts (*Ehepakten*) should be understood as instruments to regulate relations between spouses "in case of separation of marriage by death, divorce, or similar events" (*gegen den Fall der Trennung der Ehe durch natürlichen Tod, Scheidung u. dergl.*).

Two key historical factors must be kept in mind when considering the German legal system: *a*) Since the early 16th century, Germany has been shaped by the rise of Protestant doctrine, which rejected the notion of marriage as a sacrament. This theological shift made it easier for German jurists of the 16th to 18th centuries (such as Thomasius, Struvius, Leyser, Lauterbach, Boehmer, among

([207]) Judgment of the Court of Justice of the State of Minas Gerais, Civil Appeal No. 10000180981817005, Nineteenth Civil Chamber. Rapporteur: Bitencourt Marcondes, Belo Horizonte, MG, adjudicated on 10 June 2021.

([208]) *See* references in OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 529 ff.; OBERTO, «*Prenuptial agreements in contemplation of divorce» e disponibilità in via preventiva dei diritti connessi alla crisi coniugale*, in *Rivista di diritto civile*, 1999, II, pp. 171 ff.; OBERTO, *Gli accordi preventivi sulla crisi coniugale*, in *Familia*, 2008, pp. 25 ff.; OBERTO, *Il futuro europeo del diritto patrimoniale della famiglia (Conferenza in lingua italiana). Prenuptial Agreements in Contemplation of Divorce (Presentation in English). Eheverträge anlässlich der Scheidung nach deutschem Recht (Bericht auf Deutsch)*, para. 9-11, available at http://giacomooberto.com/Bozen2012/traccia.htm#para9.

([209]) HEGEL, *Grundlinien der Philosophie des Rechts*, Leipzig, 1930, p. 147.

others) to develop a new legal doctrine of marriage. From this perspective, marriage was seen as a contract—one that, like any other, could be dissolved. And if a civil relationship can be terminated, what could be more natural than allowing parties to agree in advance on the consequences of that termination? *b*) In many regions of Germany, Roman law remained in force until 31 December 1899. As previously discussed, Roman law accepted that spouses could regulate the patrimonial consequences of a potential divorce from the moment of marriage.

As a result, German case law and legal doctrine have consistently affirmed the validity and enforceability of such agreements—even when they involve a complete waiver of spousal rights in the event of divorce.

For example, in a 1995 decision, the Federal Supreme Court of Germany (*Bundesgerichtshof*, BGH) held that: "In relation to financial agreements entered into by spouses during or even before marriage, in contemplation of a possible future divorce, the principle of full contractual freedom (§ 1408 paras. 1 and 2 of the BGB – German Civil Code) must be recognized. No special scrutiny of the content of such agreements is required to assess whether the regulation is appropriate. Enforceability does not depend on additional conditions, such as the provision of compensation in exchange for a waiver of maintenance" ([210]). The Court also clarified that the enforceability of such agreements is not affected by the fact that divorce might become economically more difficult for one spouse than the other ([211]). In practice, approximately 25% of German marital agreements deviate from the default rules on post-divorce maintenance ([212]).

In response to this jurisprudence, German notaries have developed various models of marriage contracts (*Eheverträge*) ([213]), which I described in detail in my 1999 book on "Contracts of Marital Crisis" ([214]). These agreements may include clauses in which one or both parties waive any right to alimony, such as: "The husband [or the wife, or both] waives any claim to alimony in the event of divorce, even in a situation of need" ([215]).

([210]) *BGH* 27.9.1995, available at https://giacomooberto.com/prenuptial/bgh_27_9_1995.htm.

([211]) *BGH* 19.12.1989, in *Zeitschrift für das gesamte Familienrecht*, 1990, pp. 372 ff.; *see* also *BGH* 2.10.1996, available at https://giacomooberto.com/prenuptial/bgh_2_10_1996.

([212]) *See* DUTTA, *Marital Agreements and Private Autonomy in Germany*, op. cit., p. 171.

([213]) In Germany *Eheverträge* (marriage contracts) must be executed by notarial deed: *See* DUTTA, *Marital Agreements and Private Autonomy in Germany*, op. cit., pp. 77 ff.

([214]) OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 529 ff., 539 ff.

([215]) "III. *Nachehelicher Unterhalt*. 1. Der Ehemann verzichtet gegenüber seiner Ehefrau vollständig auf die Gewährung nachehelichen Unterhalts (auch für den Fall der Not).

2. Für den Unterhaltsanspruch der Ehefrau verbleibt es bei der gesetzlichen Regelung, jedoch mit folgenden Maßgaben:

a) Der Anspruch auf Unterhalt wird auf höchstens ... DM monatlich begrenzt. Die Ehefrau verzichtet auf einen etwa weitergehenden Unterhaltsanspruch.

b) Die Ehefrau ist verpflichtet, die zu einem Steuervorteil für ihren Ehemann erforderlichen Erklärungen abzugeben, wenn ihr die hieraus entstehenden Nachteile ersetzt werden. Der obige Höchstbetrag ist also immer als Nettobetrag zu verstehen.

c) Der Höchstbetrag ist nach den heutigen Lebenshaltungskosten festgelegt. Wir vereinbaren deshalb, daß der Höchstbetrag noch oben oder nach unten im gleichen prozentualen Verhältnis verändert, wie sich der von statistischen Bundesamt festgestellte Preisindex für die Lebenshaltung aller privaten Haushalte nach oben oder unten verändert. Die erste Anpassung erfolgt nach Rechtskraft der Ehescheidung durch Vergleich des für den Monat des Vertragsschlusses festgestellten Preisindex mit dem dann festgestellten Preisindex. Jede weitere Anpassung erfolgt dann jeweils für den Januar eines Jahres.

d) Durch die Vereinbarung einer Höchstgrenze bleiben die gesetzlichen Vorschriften über den nachehelichen Unterhalt im übrigen unberührt."

("III. *Post-marital Maintenance*. 1. The husband waives any and all claims to post-marital maintenance from his wife, including in cases of financial hardship.

2. The wife's entitlement to maintenance shall remain subject to the statutory provisions, but with the following conditions:

a) The maintenance entitlement shall be limited to a maximum of ... DM per month. The wife waives any claim to maintenance exceeding this amount.

Other agreements do not waive alimony entirely but instead predefine it in specific terms ([216]). Examples include: *a*) Setting a monthly cap (e.g., "no more than €___ per month"); *b*) Linking

b) The wife shall be obliged to make any declarations necessary to secure tax benefits for her husband, provided that any resulting disadvantages to her are compensated. The above maximum amount shall therefore always be understood as a net amount.

c) The maximum amount is based on current living costs. Accordingly, the parties agree that this amount shall be adjusted upwards or downwards in the same proportional ratio as the consumer price index for the cost of living of all private households, as determined by the Federal Statistical Office, increases or decreases. The first adjustment shall take place upon the finalisation of the divorce, by comparing the index for the month in which the agreement was concluded with the index then in force. Subsequent adjustments shall be made annually, in January.

D) The agreement of a maximum limit shall not affect the statutory provisions governing post-marital maintenance in all other respects").

Ehevertrag template model provided by Notary Dr Reimann: *see* OBERTO, *I contratti della crisi coniugale*, I, op. cit., p. 540; the above template refers obviously to DM—German Marks, now replaced by Euro.

([216]) "III. *Nachehelicher Unterhalt*. 1. Für den Fall der Scheidung der von uns beabsichtigten Ehe vereinbaren wir in Bezug auf den nachehelichen Unterhalt:

a) Der Unterhaltsanspruch wird insgesamt ausgeschlossen, wenn die Ehe nicht länger als fünf Jahre Bestand hatte.

b) Dieser Ausschluß gilt jedoch nicht, wenn und soweit der Unterhaltstatbestand des § 1570 BGB (Pflege oder Erziehung eines gemeinschaftlichen Kindes) vorliegt.

c) Im übrigen verbleibt es bei den gesetzlichen Bestimmungen.

2. Der Unterhaltsanspruch wird, sofern er gemäß den vorstehenden Vereinbarungen besteht, der Höhe nach wie folgt begrenzt:

a) Für den Eheteil, der ein gemeinschaftliches Kind betreut, beträgt der Unterhaltsanspruch höchstens pro Monat DM ….

b) In allen anderen Fällen, in denen ein Unterhaltsanspruch kraft Gesetzes nach Maßgabe der vorstehend vorgenommenen Beschränkungen besteht, beträgt der Unterhaltsanspruch die Hälfte des vorgenannten Betrages.

c) Tritt eine Änderung in der Höhe des Lebensbedarfs infolge der allgemeinen wirtschaftlichen Verhältnisse ein, so ist der genannte Betrag entsprechend zu ändern. Er soll sich dabei im gleichen Prozentverhältnis erhöhen oder vermindern, in dem sich der vom Statistischen Bundesamt festgestellte durchschnittliche jährliche Preisindex für die Gesamtlebenshaltung aller privaten Haushalte – berechnet auf der Basis 1980 = 100 – im Vergleich zu demselben Index für den Monat des Vertragsabschlusses erhöht oder vermindert. Die Neufestsetzung findet jeweils im April eines Kalenderjahres statt, wobei dann jeweils der Index für das vergangene Kalenderjahr mit dem Index für den Monat des Vertragsabschlusses verglichen wird.

Die Beträge gelten in ihrer veränderten Höhe jeweils vom ersten Januar an als geschuldet, der dem Monat der planmäßigen Neufeststellung vorangegangen ist. Bei einer Umstellung auf eine neue Indexbasis gilt die neue Indexreihe von ihrer amtlichen Veröffentlichung an.

Die Vertragsteile beantragen die Genehmigung dieser Wertsicherungsvereinbarung gemäß § 3 des Währungsgesetzes durch die Landeszentralbank.

d) Die Anwendung der Vorschrift des 323 ZPO wird im übrigen ausgeschlossen.

3. Für den Fall, daß ein Unterhaltsanspruch nach den vorstehenden Vereinbarungen besteht, gelten im übrigen die gesetzlichen Bestimmungen."

("III. *Post-Marital Maintenance*. 1. In the event of divorce from the marriage we intend to enter into, we agree the following with regard to post-marital maintenance:

a) The entitlement to maintenance shall be entirely excluded if the marriage lasted no longer than five years.

b) This exclusion shall not apply where, and to the extent that, the conditions of § 1570 of the German Civil Code (care or upbringing of a joint child) are met.

c) In all other respects, the statutory provisions shall apply.

2. Where a maintenance entitlement exists pursuant to the above provisions, it shall be limited in amount as follows:

a) For the spouse caring for a joint child, the maintenance entitlement shall not exceed DM … per month.

b) In all other cases in which a maintenance entitlement exists by operation of law, subject to the above limitations, the entitlement shall amount to half of the aforementioned sum.

c) If there is a change in living costs due to general economic conditions, the stated amount shall be adjusted accordingly. The adjustment shall reflect the same percentage increase or decrease as the average annual consumer price index for the overall cost of living of all private households, as determined by the Federal Statistical Office—calculated on the basis of 1980 = 100—compared to the index for the month in which the agreement was concluded.

The revised amount shall be determined each April, by comparing the index for the previous calendar year with the index applicable at the time of the agreement. The adjusted amounts shall be deemed payable from the first of January preceding the month in which the adjustment is made. In the event of a change to a new index base, the new index series shall apply from the date of its official publication.

alimony to a percentage of the higher-earning spouse's net income (e.g., "20% of the net income of the wealthier party at the time of divorce"); *c*) Imposing a time limit (e.g., "alimony shall be paid for no more than five years after the dissolution of the marriage"). German marriage contracts (*Eheverträge*) may also include provisions concerning the death of one of the spouses ([217]).

The notarial practice has been formally recognized by the German legislature. The 2008 reform of maintenance law (*Unterhaltsrechtsreform*), in force since 1 January 2008, requires that any agreement concerning maintenance rights—if concluded before the divorce judgment becomes final—must be executed in the form of a notarial deed ([218]). There is no doubt among legal scholars that the expression *"Vereinbarung, die vor der Rechtskraft der Scheidung getroffen wird"* ("agreement entered into before the divorce judgment becomes final") also includes agreements made before the marriage ([219]).

The parties hereby apply for approval of this value adjustment clause pursuant to § 3 of the Currency Act (*Währungsgesetz*) by the relevant State Central Bank (*Landeszentralbank*).

d) The application of § 323 of the Code of Civil Procedure (ZPO) is hereby excluded.

4. Where a maintenance entitlement exists under the above provisions, the statutory provisions shall apply in all other respects").

Ehevertrag template model provided by Notary Dr Reimann: *see* OBERTO, *I contratti della crisi coniugale*, I, op. cit., p. 541; the template refers obviously to DM—German Marks, now replaced by Euro; the template refers as well to a basis of 1980=100 for calculating inflation, what should be referred to present times; a German official web site for this kind of calculations is available at https://www.destatis.de/DE/Home/_inhalt.html.

([217]) "IV. *Erbrechtliche Regelungen*. 1. Die Vertragsteile verzichten hiermit gegenseitig auf Pflichtteils- und Pflichtteilsergänzungsansprüche, die ihnen beim Ableben des jeweils anderen Eheteils zustehen könnten. Der Verzicht ist jedoch gegenständlich beschränkt und bezieht sich nur auf

a) das jeweilige voreheliche Vermögen der Vertragsteile,

b) dasjenige Vermögen, daß ein Vertragsteil während der Ehe durch Erbschaft, Schenkung oder vorweggenommene Erbfolge erhält,

c) die Surrogate der vorgenannten Gegenstände.

Der vorstehend erklärte Verzicht der Ehefrau gilt aber nur für den Fall abgegeben, daß durch ihn ein gemeinsamer Abkömmling der Vertragsteile begünstigt wird.

Der vorstehend erklärte Verzicht gilt nur für den Fall als abgegeben, daß durch ihn ein gemeinsamer Abkömmling der Vertragsteile, die Eltern der Ehefrau oder deren Geschwister begünstigt werden. Im letztgenannten Fall -Begünstigung der Eltern bzw. der Geschwister der Ehefrau durch den Pflichtteilsverzicht- gilt der Verzicht auch nur als abgegeben, wenn dem Ehemann, solange er nicht wieder verheiratet ist, ein unentgeltlicher Nießbrauch an dem Hause ... in ... eingeräumt wird, das die Ehefrau von ihren Eltern übergeben erhalten hat."

("IV. *Provisions Concerning Inheritance Rights*. 1. The parties hereby mutually waive any claims to the compulsory portion (*Pflichtteil*) and supplementary compulsory portion (*Pflichtteilsergänzung*) to which they might otherwise be entitled upon the death of the other spouse. However, this waiver is limited in scope and applies only to:

a) the premarital assets of each party;

b) any assets received by either party during the marriage by way of inheritance, gift, or anticipated succession;

c) any substitutes or surrogates of the aforementioned assets.

The waiver declared above by the wife shall be deemed valid only in the event that it benefits a joint descendant of the parties.

The waiver shall also be deemed valid if it benefits a joint descendant of the parties, the wife's parents, or her siblings. In the latter case—where the wife's parents or siblings are the beneficiaries of the waiver—the waiver shall only be considered effective if the husband is granted a gratuitous usufruct over the property located at ... in ..., which the wife received from her parents by way of transfer, and provided that the husband has not remarried").

Ehevertrag template model provided by Notary Dr Reimann: *see* OBERTO, *I contratti della crisi coniugale*, op. cit., p. 545.

([218]) *See* the current version of § 1585c *BGB* (German Civil Code): "*Vereinbarungen über den Unterhalt*. – Die Ehegatten können über die Unterhaltspflicht für die Zeit nach der Scheidung Vereinbarungen treffen. Eine Vereinbarung, die vor der Rechtskraft der Scheidung getroffen wird, bedarf der notariellen Beurkundung. § 127a findet auch auf eine Vereinbarung Anwendung, die in einem Verfahren in Ehesachen vor dem Prozessgericht protokolliert wird" ("*Agreements Concerning Maintenance*. – Spouses may enter into agreements regarding maintenance obligations for the period following divorce. Any agreement concluded prior to the finalisation of the divorce must be executed in the form of a notarial deed. § 127a shall also apply to any agreement recorded in proceedings relating to matrimonial matters before the court of first instance").

([219]) *See* e.g. WÖNNE, *Vereinbarungen zum Ehegattenunterhalt*, in DOSE (ed.), *Das Unterhaltsrecht in der familienrechtlichen Praxis*, München, 2011, pp. 1185 s.

The rationale behind this legislative requirement is clear: *"Die Beteiligten sollen dadurch vor unbedachten Erklärungen bewahrt und ihnen die Tragweite der Vereinbarung vor Augen geführt werden"* ("The parties should be protected from making rash declarations and should be made fully aware of the implications of the agreement") ([220]).

7.4. The Most Recent German Case Law: Sometimes Raising Unnecessary Obstacles.

In recent years, German case law has introduced additional rules concerning prenuptial agreements. A pivotal moment came with a 2001 decision by the Federal Constitutional Court (*Bundesverfassungsgericht* — BverfG) ([221]), followed by a 2004 ruling by the Federal Supreme Court (*Bundesgerichtshof* — BGH) ([222]). These two judgments ruled that notarized prenuptial agreements can be declared null and void if they seriously disadvantage one party. The courts affirmed that, in principle, a prospective spouse may fully or partially waive the right to receive alimony. However, if the agreement is manifestly one-sided, it becomes morally unacceptable and may be challenged in court.

This position aligned with the views of a minority within German legal scholarship that had long advocated for a rigorous *Inhaltskontrolle* (content control) of marriage contracts ([223]). The 2001 decision allowed for the invalidation of a premarital agreement that imposed a clearly unilateral burden on the woman, particularly in light of her pregnancy at the time of signing ([224]). The 2004 judgment similarly declared invalid an agreement: "Where the agreed distribution of burdens no longer does justice to the individual arrangement of the marital living conditions, because it is evidently one-sided and appears unreasonable for the burdened spouse when considering in a reasonable way the essence of that marriage" ("wo die vereinbarte Lastenverteilung der individuellen Gestaltung der ehelichen Lebensverhältnisse in keiner Weise mehr gerecht wird, weil sie evident einseitig ist und für den belasteten Ehegatten bei verständiger Würdigung des Wesens der Ehe unzumutbar erscheint") ([225]).

([220]) WÖNNE, op. cit., p. 1185.

([221]) *BVerfG* 6.2.2001, in *Zeitschrift für das gesamte Familienrecht*, 2001, p. 343, commented on by SCHWAB; in *Monatsschrift für Deutsches Recht*, 2001, p. 392, commented GRZIWOTZ; the judgement has been published in Italian language in *Familia*, 2002, 201, commented on by GEURTS; remarks on this decision are also made by BARGELLI, *Limiti dell'autonomia privata nella crisi coniugale (a proposito di una recente pronuncia della Corte Costituzionale tedesca)*, in *Rivista di diritto civile*., 2003, I, pp. 57 ff. The reasoning of the judgement (in German) is also available online at https://www.bundesverfassungsgericht.de/entscheidungen/rs20010206_1bvr001292.html.

([222]) BGH 11.2.2004, in *Zeitschrift für das gesamte Familienrecht*, 2004, p. 601, commented on by BORTH; in *Neue Juristische Wochenschrift*, 2004, p. 930; remarks on this decision are available in NARDONE, *Autonomia privata e controllo del giudice sulla disciplina convenzionale delle conseguenze del divorzio (a proposito della sentenza della Corte Suprema Federale tedesca dell'11 febbraio 2004)*, in *Familia*, 2005, pp. 134 ff. The reasoning of the judgement (in German) is also available online at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d45ce16fe9b926a5ab4635a5807d5aa6&nr=28453&pos=14&anz=15.

([223]) *See* e.g. SCHWENZER, *Vertragsfreiheit im Ehevermögens- und Scheidungsfolgenrecht*, in *Archiv für die civilistische Praxis*, 1996, pp. 11 ff.; HESS, *Nachehelicher Unterhalt zwischen Vertragsfreiheit und sozialrechtlichem Allegemeinvorbehalt*, in *Zeitschrift für das gesamte Familienrecht*, 1996, pp. 981 ff, esp. 986 ff. Such a position echoes, to some extent, the Common Law principles of *unconscionability, fairness, reasonableness, frustration*, which are frequently invoked in matters concerning prenuptial agreements: *see* OBERTO, *I contratti della crisi coniugale*, I, op. cit., pp. 501 ff.; OBERTO, *«Prenuptial agreements in contemplation of divorce» e disponibilità in via preventiva dei diritti connessi alla crisi coniugale*, op. cit., pp. 184 ff.; BARGELLI, *L'autonomia privata nella famiglia legittima: il caso degli accordi in occasione o in vista del divorzio*, in *Rivista critica del diritto privato*, 2001, p. 329; AL MUREDEN, *I* prenuptial agreements *negli Stati Uniti e nella prospettiva del diritto italiano*, in *Famiglia e diritto*, 2005, pp. 549 ff. In the Italian legal doctrine, MARELLA, *La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura*, in *Rivista critica del diritto privato*, 2003, pp. 103 ff., also offers an insightful comparison between the rationales underlying the two aforementioned German decisions and the Common Law doctrine of unconscionability.

([224]) Cf. BverfG, 6.2.2001, cited above.

([225]) Cf. BGH, 11.2.2004, cited above. For a detailed list of situations possibly touched by the said case law *see* WÖNNE, op. cit., pp. 1188 ff.

Following these decisions, the BGH found "evident one-sidedness" in cases where, for example: *a*) The weaker party lacked German citizenship and had difficulty understanding the language; *b*) The party feared losing residency rights; *c*) The party was pregnant at the time of signing ([226]); *d*) The agreement excluded post-divorce maintenance (*nachehelicher Unterhalt*) in cases where the beneficiary entered into a new cohabitation with another person ([227]). Conversely, waivers were upheld in cases involving illness or old age, provided the illness was unforeseeable or pension rights had already matured significantly at the time of marriage, or where the weaker party had already been receiving public assistance (*Sozialhilfe*) before the marriage ([228]).

In fact, very many scholars (and notaries) have criticised the above described view, according to which the traditional freedom of parties in a contract should be somehow "patronized" by judges' personal views. The introduction in Germany of such a control on the content of private agreements has not failed to raise serious and well-founded doubts, centred, on the one hand, on the lack of certainty in the legal relationships of married couples and, on the other side, on the fears of abandoning the traditional and deeply rooted principles of contractual freedom, replaced by a new form of "parties' inability" to be somehow protected.

Many scholars and notaries have criticized this judicial approach, arguing that it undermines the traditional principle of contractual freedom by subjecting private agreements to judicial paternalism. The introduction of content control has raised serious concerns about legal certainty in marital relations and the erosion of deeply rooted principles of private autonomy. Critics warn of a return to *schützende Bevormundung* ("protective paternalism"), echoing Henry Maine's famous phrase: "from contract to status"—where status, in this context, denotes not family situation, but a status of judicial protection ([229]).

This situation, described in Germany as one of *Entmündigung und Fremdbestimmung durch den Richter* ("incapacitation and external control by the court") ([230]), runs counter to the intentions of the drafters of the German Civil Code (BGB) ([231]). A close reading of the preparatory works of the BGB ([232]) reveals that § 1408(1) was explicitly based on the principle of contractual freedom (*Vertragsfreiheit*). Indeed, this norm provides that "Spouses can regulate their patrimonial relationships through a marriage contract; in particular, they may also terminate or modify their matrimonial property regime after the celebration of the marriage" ("Die Ehegatten können ihre güterrechtlichen Verhältnisse durch Vertrag (Ehevertrag) regeln, insbesondere auch nach der Eingehung der Ehe den Güterstand aufheben oder ändern"). Objections raised at the time—particularly those concerned with protecting women from "improper and abusive influence" (*ungebürlichen und missbräuchlichen Beeinflussung*)—were rebutted with the argument that spouses should be able to "freely and independently manage their own affairs" (*ihre Angelegenheiten*

([226]) *See*, respectively, BGH, in *Zeitschrift für das gesamte Familienrecht*, 2006, p. 1097; BGH, *ibidem*, 2007, p. 450, p. 1157; BGH, *ibidem*, 2006, p. 1359; BGH, 18.3.2009. All these judgements of the Supreme Court are cited by *Oberlandesgericht Celle*, 27.05.2009, Az.: 15 UF 4/09, available at https://voris.wolterskluwer-online.de/browse/document/84d163b3-1e23-4b24-8770-555150a24135; *see* as well WÖNNE, op. cit., pp. 1193 f.

([227]) *See* the decision of the *Oberlandesgericht München* (Court of Appeal of Munich), in *Zeitschrift für das gesamte Familienrecht*, 2006, p. 1449, cited by WÖNNE, op. cit., p. 1193.

([228]) *See* WÖNNE, op. cit., pp. 1192 f.

([229]) HOFER, *Privatautonomie als Prinzip für Vereinbarungen zwischen Ehegatten,* in HOFER, SCHWAB and HENRICH (eds), *From Status to Contract*? *– Die Bedeutung des Vertrages im europäischen Familienrecht*, op. cit., p. 16. For very similar kinds of critics *see* COESTER-WALTJEN, *Liebe-Freiheit-gute Sitten. Grenzen autonomer Gestaltung der Ehe und ihrer Folgen in der Rechtsprechung des Bundesgerichtshofes*, in CANARIS (ed.), *Festgabe aus der Wissenschaft, 50 Jahre Bundesgerichtshof, München*, 2000, p. 1001; KOCH, in *Zeitschrift für die notarielle Beratungs- und Beurkundungspraxis*, 2004, pp. 147 ff.

([230]) Cf. LANGENFELD, *Zur gerichtlichen Kontrolle von Eheverträgen*, in *Deutsche Notar-Zeitschrift*, 2001, p. 279.

([231]) *See* OBERTO, *Contratto e famiglia*, op. cit., pp. 124 s.

([232]) PLANCK, *Entwurf eines Familienrechts für das deutsche Reich*, Berlin, 1880, in SCHUBERT (ed.), *Die Vorlagen der Redaktoren für die erste Kommission zu Ausarbeitung des Entwurfs eines Bürgerlichen Gesezbuches*, IV/1, Berlin-New York, 1983, pp. 449 f., 746.

selbständig und frei zu ordnen). For this reason, the drafters concluded that it was not appropriate "to patronize them on this particular point" (*dieselben in diesem einzelnen Punkte zu bevormunden*) ([233]).

These doubts about the above mentioned precedents of 2001 and 2004 are further reinforced by the structural unsuitability of judicial review in civil law systems to assess the substantive fairness of contracts using "equitable" tools. Unlike common law judges—who enjoy broader discretionary powers due to their different institutional role and proximity to the legislative and executive branches—continental judges operate within a framework that does not support such expansive intervention ([234]). In civil law systems, judicial discretion cannot override the binding force of contracts unless specific, codified rules are violated ([235]). A party who freely and knowingly enters into an agreement cannot later escape its obligations merely because they have changed their mind.

In the wake of the 2001 and 2004 decisions, German courts have developed more precise criteria. A prenuptial agreement in contemplation of divorce may be declared void only if it imposes clearly unilateral financial burdens on one spouse. Such burdens are deemed "unilateral" when the agreement affects a "core area" of the default legal regime without offering adequate compensation. This "core area" includes: *a*) Post-divorce maintenance for childcare; *b*) Maintenance due to age or illness; *c*) Pension rights equalization. If the imbalance was foreseeable at the time of signing, the agreement is void under § 138(1) BGB as contrary to public policy, and the default rules apply. If the imbalance arises only later, invoking the agreement may be deemed contrary to good faith under § 242 BGB, and the court may adjust the agreement accordingly, taking into account subsequent developments and the interests of both spouses ([236]).

These are, however, exceptional circumstances. The overarching principle remains that prenuptial agreements in contemplation of divorce are lawful and enforceable in Germany—provided they are not manifestly unjust at the time of their conclusion.

7.5. Austrian Prenups: Much More than a Waltz Around Contractual Freedom.

Prenuptial agreements concerning post-divorce maintenance are also permissible in Austria, pursuant to § 80 of the Austrian Marriage Act (*Ehegesetz* — EheG) ([237]), which explicitly states that

([233]) MUGDAN, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, IV, Goldbach (reprint of the Berlin 1899 edition), 2004, p. 796.

([234]) On this subject *see* OBERTO, Civil law *e* common law *a confronto nell'ottica del giudice civile*, in *Contratto e impresa / Europa*, 2005, pp. 620 ff.

([235]) This is precisely what happens, for instance, in Article 278, para. 2, of the French Civil Code: "art. 278. 1. En cas de divorce par consentement mutuel, les époux fixent le montant et les modalités de la prestation compensatoire dans la convention établie par acte sous signature privée contresigné par avocats ou dans la convention qu'ils soumettent à l'homologation du juge. Ils peuvent prévoir que le versement de la prestation cessera à compter de la réalisation d'un événement déterminé. La prestation peut prendre la forme d'une rente attribuée pour une durée limitée. 2. Le juge, toutefois, refuse d'homologuer la convention si elle fixe inéquitablement les droits et obligations des époux" ("Article 278. 1. In the event of divorce by mutual consent, the spouses shall determine the amount and terms of the compensatory allowance either in an agreement drawn up by private deed countersigned by their lawyers, or in the agreement submitted to the judge for approval. They may stipulate that payment of the allowance shall cease upon the occurrence of a specified event. The allowance may also take the form of an annuity granted for a limited period. 2. The judge shall, however, refuse to approve the agreement if it unfairly defines the rights and obligations of the spouses"). This principle has no equivalent in either the Italian or the German Civil Codes.

([236]) *See* DUTTA, *Marital Agreements and Private Autonomy in Germany*, op. cit., p. 198.

([237]) "Die Ehegatten können über die Unterhaltspflicht für die Zeit nach der Scheidung der Ehe Vereinbarungen treffen. Ist eine Vereinbarung dieser Art vor Rechtskraft des Scheidungsurteils getroffen worden, so ist sie nicht schon deshalb nichtig, weil sie die Scheidung erleichtert oder ermöglicht hat; sie ist jedoch nichtig, wenn die Ehegatten im Zusammenhang mit der Vereinbarung einen nicht oder nicht mehr bestehenden Scheidungsgrund geltend gemacht hatten oder wenn sich anderweitig aus dem Inhalt der Vereinbarung oder aus sonstigen Umständen des Falles ergibt, dass sie den guten Sitten wiederspricht" ("Spouses may enter into agreements concerning maintenance obligations for the period following the dissolution of their marriage. If such an agreement is concluded prior to the finalisation of the divorce judgment, it shall not be deemed void solely on the grounds that it facilitated or enabled the divorce. However, it shall be considered void if, in connection with the agreement, the spouses asserted a ground for divorce that did not exist or no longer existed, or if the content of the agreement or other circumstances of the case indicate that it is contrary to public policy (*gute Sitten*)".

agreements on *Unterhaltspflicht* (maintenance obligations in the event of divorce) may be concluded "even before the celebration of marriage" ([238]). What is particularly noteworthy is that a rationale often used in other countries (and still invoked in Italy) to reject such agreements—namely, the fear that they might "make divorce easier"—is expressly addressed and dismissed by Austrian law. In fact, § 80 EheG clearly provides that a contract cannot be declared null and void solely on the grounds that it might facilitate divorce. This explains why the prevailing opinion in Austria is that agreements on post-divorce maintenance obligations may indeed be concluded prior to marriage ([239]).

The conclusion of such agreements is not subject to any specific formal requirements. Maintenance contracts are governed by the general principle of *clausula rebus sic stantibus* (i.e., they may be modified in the event of a fundamental change in circumstances). However, the parties may agree to exclude the relevance of future changes in circumstances ([240])—just as is permitted under German law.

General contract law principles apply to maintenance agreements in Austria; there are no specific family law provisions regulating them. If a maintenance agreement violates general principles of contract law—such as lack of legal capacity, mistake, sham transactions, or immorality—it may be declared wholly or partially invalid or contestable.

An agreement is considered contrary to morality, for example, if the obligated party's livelihood is endangered by the maintenance payments, or if the agreement is concluded with the sole intention of shifting the maintenance burden onto third parties, such as the public welfare system. Post-marital maintenance agreements often include a mutual waiver of any future claims. As already said, they may also exclude the *clausula rebus sic stantibus* and provide for scenarios involving poverty. However, a waiver of necessary maintenance even in the event of poverty could be deemed unethical and therefore invalid as a violation of moral principles ([241]).

8. Prenuptial Agreements in Contemplation of Divorce in France: The Hidden Face of Marriage Property Agreements.

As in other continental European countries, French law allows spouses to enter into a marriage contract (*contrat de mariage*) either before or during the marriage. Like in Italy, Spain, Germany, or Portugal, such contracts regulate the consequences of marriage on the spouses' property—both pre-existing and acquired during the marriage. This is why, in French law (as in other Romance legal systems), the term *matrimonial regime* is used: the word *régime* (from Latin *regimen*) refers to governance, management, or administration. A matrimonial regime is thus a set of rules governing the administration, enjoyment, and disposal of property between spouses during the marriage.

In French law, the purpose of a marriage contract is to determine the matrimonial regime chosen by the spouses. It does not address spousal support (maintenance or alimony) in the event of legal separation or divorce. These contracts are legally valid and binding, but they concern the division of assets and enrichment on an arm's-length basis, without introducing any "equitable" element that might pre-empt the divorce court's discretion to adjust the outcome. This contrasts with England and other common law jurisdictions, where prenuptial agreements are closely linked to divorce and the avoidance of equitable distribution.

According to many scholars, under French law, no one may waive in advance their right to a *prestation compensatoire* (compensatory allowance) in the event of divorce. This stands in contrast

([238]) FERRARI, *Die Bedeutung der Privatautonomie im österreichischen Familienrecht*, in HOFER, SCHWAB and HENRICH (eds), *From Status to Contract? – Die Bedeutung des Vertrages im europäischen Familienrecht*, op. cit., pp. 97 ff., 109.

([239]) *See* FERRARI, *Marital Agreements and Private Autonomy in Austria*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., p. 63.

([240]) *See* also FERRARI, *Marital Agreements and Private Autonomy in Austria*, op. cit., p. 63.

([241]) *See* also FERRARI, *Marital Agreements and Private Autonomy in Austria*, op. cit., p. 63.

to German law, where such a right may be waived even before marriage—as occurred in the *Ehevertrag* at issue in *Radmacher v Granatino* ([242]).

However, some elements of the French legal system may support the validity of such agreements. For instance, Article 373-2-11, paragraph 1, of the Civil Code provides that: "When ruling on the terms of exercise of parental authority, the judge takes into consideration in particular the practice that the parents had previously followed or the agreements that they may have previously concluded."

Moreover, premarital agreements concluded under foreign law may be recognized by French courts pursuant to EU private international law regulations. French case law includes decisions affirming that a prenuptial agreement concerning the *prestation compensatoire* is not necessarily contrary to international public policy ([243]). This position is supported by the theory of the "attenuated effect" of public policy (*ordre public atténué*), which holds that: "The reaction against a provision contrary to public policy is not the same depending on whether it hinders the acquisition of a right in France or whether it is a matter of recognizing effects acquired abroad, without fraud, and in accordance with the law designated by French private international law" ([244]).

Consequently, an early waiver of the compensatory allowance has not been deemed contrary to international public policy ([245]). However, in a more recent case, the *Cour de cassation* overturned a court of appeal decision, holding that the lower court had failed to verify whether, in that specific case, the waiver of the compensatory allowance violated French international public policy. The case involved a French-German couple who had married in Germany and signed a marriage contract before a German notary, waiving "any compensatory allowance according either to German or to any other law" ([246]).

The main obstacle to the validity of such agreements under French domestic law lies in the prevailing judicial view that one cannot waive in advance the right to a *prestation compensatoire*. Such a waiver is only permitted within the framework of a divorce by mutual consent ([247]).

This interpretation is based on Article 278 of the Civil Code, which addresses agreements on alimony only in the context of mutual consent divorce, and Article 273, which refers only to the revision of a *prestation compensatoire* previously awarded by a judge or agreed upon by the parties ([248]). Furthermore, Article 278(2) states that the judge "refuses to approve the agreement if it unfairly sets out the rights and obligations of the spouses," implying that such rights and obligations can only be validated at the time of the divorce, based on a fairness assessment made in that moment.

As a result, French courts have consistently held that agreements concerning the *prestation compensatoire* are admissible only once divorce proceedings have begun ([249])—or after they have

([242]) *See* above, at para. 6.2.

([243]) *See* Cour d'appel de Paris, 18 juin 1971, in *JDI*, 1972, 823, commented on by Ph. MALAURIE ; in *Dalloz*, 1971, p. 416: Cass. Civ. 1e, 7 novembre 1972, in *JDI*, 1973, p. 700, commented on by DE GEOUFFRE DE LA PRADELLE; in *Revue critique de droit international privé*, 1973, p. 691, commented on by WIEDERKEHR. *See* as well GALLANT, *Contrats nuptiaux internationaux et anticipation des conséquences financières du divorce: quel ordre public ?*, in *InDret*, 2017, pp. 139 ff.

([244]) *See* the decision of the French Cassation Court called *Arrêt Rivière*, 17 avril 1953, in ANCEL and LEQUETTE (eds), *Les grands arrêts de la jurisprudence française de droit international privé*, Paris, 2006, n° 26, pp. 232 ff.; in *Revue critique de droit international privé*, 1953, p. 412, commented on by BATIFFOL; in *Juris-classeur périodique*, 1953, II, p. 7863, commented on by BUCHET; in *Rabels Zeitschrift*, 1955, p. 520, commented on by FRANCESCAKIS.

([245]) Cour d'appel d'Aix-en-Provence, 14 mars 2002, n° 98/12029.

([246]) *See* the following judgement of the French Supreme Court: Cass. civ., 1e, 8 jullet 2015, 14-17.880, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000030871093/.

([247]) *See* Cass. civ., 2e, 10 mai 1991, n. 90-11008; Cour d'appel d'Aix en Provence, 17 décembre 2001, in *Droit de la famille*, *Juris-Classeur*, 4-2003, p. 30. The situation appears to be the same in Belgium: *see* LELEU and GALLUS, *La contractualisation du droit de la famille (I)*, in https://orbi.uliege.be/bitstream/2268/226309/1/20180705163629.pdf, p. 209.

([248]) *See* Cass. Civ. 2e, 28 janvier 1987, n. 85-12417.

([249]) *See* Cass. Civ. 2e, 21 mars 1988, n. 86-16.598; Cass. Civ. 1e, 3 février 2004, n. 01-17.094; in *Actualité Juridique Famille*, 2004, p. 101, commented on by DAVID; in *Revue trimestrielle de droit civil*, 2004, p. 272, commented on by HAUSER; in *Revue juridique Personnes et Famille*, 2004, p. 15, commented on by GARE; Cass. Civ. 1e, 8 février 2005, n.

concluded, when a former spouse may waive, wholly or partially, a compensatory allowance previously awarded ([250]).

The question of whether such agreements should be permitted arose during the preparatory work for the 2004 reform of French divorce law (Act No. 2004-409, in force since 1 January 2005). The Senate's Law Commission (*Commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale*) reported: "A number of notaries and lawyers propose to transpose into French law the prenuptial contracts provided for in the United States and made famous by Hollywood stars. This suggestion, although interesting, does not seem to be adapted to the present state of society. However, it will probably be the subject of debate in the years to come" ([251]).

The notarial profession, however, continues to advocate for the recognition of prenuptial agreements that anticipate the determination of the *prestation compensatoire*, which is currently seen as unpredictable and a source of legal uncertainty. Notaries recommend the systematic use of notarial deeds to ensure the authenticity of consent. The broader trend is toward greater autonomy of will. As a French notary poignantly remarked, "il faut faire preuve d'un peu plus d'audace et offrir enfin aux futurs époux des réponses plus précises aux questions qu'ils se poseront sans doute un jour" ("we must show a bit more boldness and finally offer future spouses clearer answers to the questions they will inevitably ask themselves one day") ([252]). If French law currently prohibits such agreements, it may eventually evolve, given their advantages: they offer flexibility, allow spouses to plan for maintenance obligations in advance, and reduce litigation at the emotionally charged moment of marital breakdown ([253]).

It is also worth noting that, unlike in Italy, French couples are not unfamiliar with the idea of negotiating patrimonial matters in anticipation of a possible divorce. French notaries, when drafting marriage contracts, have considerable discretion to tailor the chosen property regime to the couple's needs, expectations, and concerns—including those related to a potential breakup. For example, French courts recognize the validity of the so-called "Alsatian Clause," as we have already seen ([254]). Parties can furthermore provide a community of acquests regime in which the shares of the spouses are not equal, or where the rights of one of the parties can be paid off with a lump sum, or with the conveyance of movable assets or of real estates, and so on ([255]).

To some extent, then, French couples may not "need" prenuptial agreements in the American sense, because French marital property agreements already fulfill many of the same functions. This is why prenuptial agreements in contemplation of divorce may be seen as the "hidden face" of French marriage property agreements.

03-17.923, in. *Actualité Juridique Famille*, 2005, p. 232, commented on by DAVID; in *Defrénois* 2005, art. 38278, n° 83, commented on by MASSIP. *See* as well COURBE, *Droit de la famille*, Paris, 2008, p. 209.

([250]) *See* Cass. Civ. 1e, 8 février 2005, n. 03-17.923.

([251]) *See* the following report by the Senator Patrice Gélard: GÉLARD, *Rapport n° 120 (2003-2004), déposé le 17 décembre 2003*, in COMMISSION DES LOIS CONSTITUTIONNELLES, DE LÉGISLATION, DU SUFFRAGE UNIVERSEL, DU RÈGLEMENT ET D'ADMINISTRATION GÉNÉRALE, *Projet de loi relatif au divorce. Rapports législatifs*, available at https://www.senat.fr/rap/l03-120/l03-12011.html#toc509: "un certain nombre de notaires et d'avocats proposent de transposer en droit français les contrats pré-nuptiaux prévus aux Etats-Unis et rendus célèbres par les stars d'Hollywood. Cette suggestion, quoiqu'intéressante, ne parait pas adaptée à l'état actuel de la société. Elle fera cependant probablement l'objet de débats dans les années à venir."

([252]) *See* DEPONDT, *Pour un renouveau des contrats de mariage*, in *Gazette du Palais*, 16/17 mars 2012, p. 15.

([253]) THUEGAZ, *Le « contrat prénuptial », bientôt en France ?*, 2017, available at https://www.village-justice.com/articles/contrat-prenuptial-bientot-France,24630.html. *See* as well BITBOL, *Comment aménager son contrat de mariage pour éviter un conflit lors d'un divorce*, in *Recherches en Didactique des Langues et des Cultures*, 2012, n° 91, p. 71; LAROCHE-GISSEROT, *Organiser son divorce en se mariant : l'exemple des pays de* Common Law, in *Mélanges G. Champenois*, Lextenso, 2012, pp. 485 f.

([254]) *See* above, at para. 1.2.

([255]) *See* on this point OBERTO, *La comunione legale tra coniugi*, I, 385; OBERTO, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2012, 69, in particular the fns 42-47.

Finally, as previously noted, French courts have shown openness toward foreign prenuptial agreements. For instance, in a 2010 decision, the Court of Grasse upheld an English prenup in which the parties had agreed that, in the event of divorce, each spouse would retain their own assets, and the wife would receive £50,000 (indexed) for each year of marriage up to the filing of the divorce petition. The agreement also stated that this amount would cover any financial claim or remedy. At the time of the marriage, the husband had also purchased a flat in the wife's name on the Côte d'Azur, then worth approximately £300,000 ([256]).

9. Prenuptial Agreements in Contemplation of Divorce in Italy: Old Prejudices Die Hard.

9.1. Marriage Contracts in the Belpaese: Why Premarital Agreements Anticipating Divorce Are Not Fully Enforced by the Courts.

In Italy, as in other continental European countries, marriage contracts may be concluded either before or during the marriage by notarial deed (see Article 162 of the Italian Civil Code) ([257]).

However—as already discussed—such deeds are primarily intended as instruments for selecting a matrimonial property regime other than the default one, which is the *comunione legale* (community of acquests). It should be noted that the optional regime of *separazione dei beni* (separation of property) can be chosen at the time of the marriage ceremony by declaration before the civil registrar or the officiating priest. This option is currently chosen by the vast majority of Italian couples ([258])—a clear consequence of the fact that Italian courts do not enforce premarital agreements concerning alimony. As a result, many couples feel "forced" to protect themselves in the event of a breakup by opting for the simplest regime, aware that dissolving a community property regime in the context of divorce can be quite complex.

By notarial deed, spouses may also establish a *fondo patrimoniale*—a capital fund, somewhat similar to a trust—through which certain assets (real estate, securities, bonds, company shares, etc.) are subjected to special rules, with their income allocated to family needs. However, the parties' freedom to modify the default community of acquests regime is very limited. For example, they cannot alter the rules governing the management and administration of jointly owned assets, nor can they deviate from the principle that the community must be divided equally. This rigidity helps explain the declining popularity of the *comunione legale*, which is now rejected by three-quarters of newly married couples. As an alternative to both *comunione* and *separazione*, spouses may opt for a *comunione convenzionale*—a general community regime extended to (almost) all assets acquired before or after the marriage. However, this option is rarely chosen.

As previously noted, the Italian Civil Code does not include spousal support among the matters that may be regulated by a marriage contract. Moreover, the Supreme Court of Cassation has consistently held that any agreement made in contemplation of a future divorce—whether concluded at the time of legal separation or earlier—is null and void.

To understand the Court's position, one must consider that Italy was among the last countries in the world to allow divorce only after a prior judicial proceeding for legal separation. For many years, a three-year waiting period was required after initiating separation proceedings before divorce could be requested. This period was reduced in 2015 to six months for consensual separation and one year for contentious separation.

([256]) *See* CORNEC and BULL, *Recognition of English Pre-Marital Agreements*, in *Family Law*, 2010, vol. 40, pp. 767 ff., available at http://villardcornec.files.wordpress.com/2010/05/article-cornec-bull-family-law.pdf; CORNEC and BULL, *Another Step Towards Recognition of English Prenups; a French Court's decision before* Granatino v. Radmacher, available at http://villardcornec.wordpress.com/tag/enforcement-of-foreign-judgments.

([257]) OBERTO, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, http://giacomooberto.com/pollenzo2011/Oberto_Contratti_Prematrimoniali_e_Accordi_Preventivi.htm.

([258]) Official statistics show that, for instance, in 2023, 74,3% of the couples celebrating marriage in Italy chose the *separazione dei beni* regime (*see* OBERTO, *Nuove famiglie e vecchi regimi*, in *Famiglia e diritto*, 2025, p. 568).

Given this framework, it is easy to understand why couples who reach an agreement during separation proceedings often wish to avoid future disputes during the subsequent divorce process. However, most such agreements have been declared null and void by the Supreme Court, at least insofar as they contain provisions intended to apply in the event of divorce (e.g., a spouse waives any right to alimony after separation and pledges not to seek alimony or lump sums during future divorce proceedings).

According to Italian case law, such provisions may impair the parties' freedom to decide whether to divorce. In other words, any agreement made in anticipation of a possible divorce—whether before or after marriage—could influence a party's decision to initiate divorce proceedings, based on the expected financial consequences. This influence, whether motivated by fear or hope, is seen by the Supreme Court as contrary to public policy and thus renders the agreement null and void. In this view, the parties are "tampering" with their legal status as married persons—a status that is considered non-negotiable. Some scholars even cite the biblical example of Esau, who traded his birthright to Jacob for a plate of lentils ([259]).

In addition to the argument concerning personal status and public policy, the Supreme Court often invokes Article 160 of the Italian Civil Code as a further basis for rejecting premarital agreements. This provision states: "The spouses are not permitted to waive the rights and duties arising from marriage." According to the Court, this rule precludes any agreement between spouses concerning divorce allowances ([260]).

9.2. A Plea for the Validity (also in Italy) of Premarital Agreements in Contemplation of Divorce.

I have devoted considerable time and energy in my books and articles to demonstrating that the assumptions underlying the Italian courts' rejection of premarital agreements in contemplation of divorce are fundamentally flawed. Regarding the first argument—namely, that such agreements might impair the parties' freedom to decide whether to initiate divorce proceedings, due to the economic consequences they entail—it is important to distinguish between two very different types of agreements: *a*) An agreement in which parties pledge not to divorce (or not to seek legal separation), or to do so after a certain period of time; *b*) An agreement in which the parties merely regulate the patrimonial consequences of a possible future decision to divorce or separate.

Only the first type of agreements is clearly null and void, as it violates public policy. The second type, however, should not be considered unlawful. In fact, the Italian legal system itself provides clear examples of premarital agreements concerning the patrimonial consequences of a change in personal status. As in all continental legal systems, Italian law allows spouses to enter into marriage contracts by notarial deed before marriage, choosing among various property regimes: separation of property, universal community of property, *fondo patrimoniale*, etc. These contracts regulate the patrimonial consequences of the transition from single to married status. Therefore, if an agreement concerning

([259]) For a general overview of the Italian legal doctrine and case law on this issue *see* OBERTO, *Giubileo d'argento per i patti prematrimoniali. Venticinque anni di oscillazioni sul tema degli accordi preventivi in materia di crisi coniugale*, op. cit., pp. 1 ff.; *see* as well OBERTO, *Contratto e famiglia*, op. cit., pp. 274 ff.; MONTINARO, *Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective*, op. cit., pp. 83 ff.

([260]) "It would be illogical to confer upon the spouses inalienable rights, as provided for under Article 160, whilst simultaneously permitting them—either during the marriage or prior to its solemnisation—to freely and conventionally stipulate, in a manner *contra legem*, the terms (even of a purely patrimonial nature) of their potential divorce. Such a course of action would, in effect, alter the very nature of the marital institution, which is defined not only by the matrimonial property regime it establishes between the parties, but also by the manner in which said regime is to be dissolved"): *see* Cass., 11 giugno 1981, n. 3777, in *Giurisprudenza italiana*, 1981, I, 1, c. 1553. "Agreements whereby spouses, during their separation, seek to establish a matrimonial property regime in contemplation of a potential future divorce are rendered invalid by reason of the unlawfulness of their object, as they contravene the fundamental principle of the absolute non-negotiability of rights in matrimonial matters, as enshrined in Article 160 of the Civil Code"): *see*, e.g., Cass., 18 febbraio 2000, n. 1810, in *Corriere giuridico*, 2000, p. 1021; Cass., 14 giugno 2000, n. 8109, in *Foro italiano*, 2001, I, c. 1318; Cass., 30 gennaio 2017, n. 2224; Cass., 21 aprile 2021, n. 11012; Cass., 28 giugno 2022, n. 20745. For a detailed critique of this position, reference may be made to paragraph 9.2 below.

the patrimonial consequences of entering into marriage is perfectly valid, why should an agreement concerning the consequences of exiting marriage be deemed illegal?

Furthermore, Article 785 of the Italian Civil Code allows for donations between future spouses conditional upon the celebration of marriage (*si nuptiae sequantur*). This means that a change in personal status (from single to married) can influence the patrimonial effects of a contract. Why, then, should the same logic not apply to the reverse situation—a change in status from married to divorced?

I have often argued that the case law of the Supreme Court is "educationally harmful," as it fosters the false belief that, between spouses, *pacta non sunt servanda*—that agreements can be broken at will. In practice, it is not uncommon for one spouse to "pretend" to agree to certain terms during separation proceedings, only to reopen the discussion and assert new claims during the subsequent divorce proceedings.

As for the second argument—based on Article 160 of the Italian Civil Code—it is worth noting that all Italian provisions governing consensual separation and divorce leave ample room for private autonomy. At the conclusion of such proceedings, the judge is bound by the parties' agreement, which must be approved unless it violates specific mandatory rules. Since the 2014 reform ([261]), legal separation and divorce by mutual consent can even be finalized outside the courtroom, with the assistance of two lawyers (or of the civil registrar). In such cases, not only the patrimonial provisions but also the decision regarding personal status lies entirely in the hands of the parties.

Furthermore, the historical analysis of Article 160 reveals that it is the heir to Article 1379 of the Italian Civil Code of 1865: "The spouses may not derogate either from the rights that belong to the head of the family [the husband, *Note by the author*], or from those that are attributed by law to each of the spouses, or from the prohibitive provisions contained in this code."

This provision was borrowed from Article 1388 of the *Code Napoléon*, which sparked intense debate during its drafting. When, during a heated discussion in the *Conseil d'État*, it was suggested that no limits should be placed on the parties' freedom to negotiate the *contrat de mariage*, Consul Cambacérès replied that the purpose of the rule was solely to: "Prohibit any stipulation that could make the wife head of the family," thereby depriving the husband—"he to whom nature has given the greatest means to govern her well"—of his right to be "the master and chief" (*le maître et chef*) of the couple.

It is therefore clear that the original purpose of this provision was to preserve the husband's role as head of the family—an idea that is now entirely outdated. Moreover, the placement of Article 160 within the current Civil Code—immediately following the rules on matrimonial property regimes—indicates that it has nothing to do with the principles governing the dissolution of marriage.

Today, the only plausible interpretation of Article 160 is that it prohibits agreements between spouses that would alter their inalienable personal rights. This would include, for example, any attempt to reintroduce the concept of a "head" of the family or to relieve one spouse of their marital duties to contribute to family's needs ([262]).

The views expressed herein align with those of several Italian scholars ([263]), who recognise that regulating the financial consequences of marital breakdown does not equate to negotiating marital status, as such agreements preserve each spouse's freedom to withhold consent to divorce.

([261]) *See* articles 6 and 12 of the Law Decree of 12 September 2014, n. 132, converted with modifications into law 10 November 2014, n. 162, which introduced in Italy the so called proceeding of *negoziazione assistita* (assisted negotiation).

([262]) OBERTO, *Contratto e famiglia*, op. cit., pp. 253 ff., 260 ff. *See* as well OBERTO, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2012, pp. 69 ff. In agreement with my position *see* also V.T. RUSSO, *I contratti prematrimoniali*, in VITERBO and DELL'ANNA MISURALE (eds), *Nuove sfide del diritto di famiglia. Il ruolo dell'interprete*, Quaderni di *Diritto delle successioni e della famiglia*, Napoli, 2018, pp. 193 ff.; CHIAPPETTA, *La "semplificazione" della crisi familiare: dall'autorità all'autonomia*, in PERLINGIERI and GIOVA (eds), *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità*, Napoli, 2019, pp. 435 ff.

([263]) E.g., MONTINARO, *Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective*, op. cit., pp. 84 ff.

While party autonomy may expose vulnerabilities and imbalances in bargaining power, these risks are to be addressed through existing legal remedies. Since the introduction of "assisted negotiation" under Law No. 162/2014, agreements concerning the prerequisites for separation or divorce and the financial terms thereof are no longer inherently contrary to public policy. Spouses may express consent either before or after the onset of marital crisis.

A contract anticipating marital breakdown may only be voided on public policy grounds if it is proven that consent was not freely given, in accordance with general contract law. Consequently, spouses may validly agree on final financial arrangements for separation or divorce, which are not subject to later modification. They may also regulate both phases of marital breakdown—separation and divorce—which, although distinct under Italian law, have become more closely aligned following the 2015 reform (Law No. 55), which shortened the separation period required for divorce.

Such agreements may serve as essential tools for pre-emptively managing the consequences of marital dissolution, as recognised in other jurisdictions. They may include property transfers or financial support exceeding statutory entitlements, compensating for disparities in earning capacity due to unequal burdens in child-rearing and family care. In this way, contractual arrangements offer a more predictable alternative to judicial adjudication in contentious proceedings.

9.3. "Winds of Change" in the Italian Prenups' Scenario.

Despite the critical remarks previously discussed, I would like to conclude this section on Italy with a more optimistic note.

In recent years, many scholars have expressed support for the view I have long advocated—namely, that prenuptial agreements in contemplation of separation and/or divorce should be considered valid and enforceable. Moreover, some judicial decisions have begun to challenge the "traditional" case law. To cite a few examples: in 2012, a decision by my own court ([264]) (the first of its kind in Italy) held that agreements reached by spouses at the time of their legal separation are valid and enforceable, even with respect to provisions made in contemplation of divorce. In that case, the President of the Court of Turin denied interim alimony (*pendente lite*) to a woman who had requested it at the outset of divorce proceedings, on the grounds that she had explicitly waived any such claim—also in view of a future divorce—in the agreement signed with her husband during their legal separation three years earlier.

Moreover, "winds of change" have occasionally reached even the venerable halls of Rome's *Palazzaccio* (the seat of the Supreme Court of Cassation) ([265]).

Among the many relevant cases, one may recall a 1984 decision in which the Court held that a postnuptial agreement made by an American couple in contemplation of a possible future divorce, although contrary to Italian domestic public policy, was not contrary to Italian international *ordre public*, and was therefore enforceable in Italy ([266]). In 2004, the same Court stated—albeit

([264]) Trib. Torino, 20 aprile 2012, in *Famiglia e diritto*, 2012, pp. 803 ff. At the material time, prior to my retirement, I served as one of the judges of that Court; I was not, however, the judge who rendered the decision in question. On this and similar judgments by Italian courts *see* also MARELLA, *The Contractualisation of Family Law in Italy*, op. cit., pp. 249 ff.

([265]) For a comprehensive information about the history of the building hosting the Italian Cassation Court—colloquially nicknamed "il palazzaccio" (literally translated: the Awful Palace)—*see* https://www.cortedicassazione.it/it/storia_del_palazzo.page; for an explanation in English *see* https://en.wikipedia.org/wiki/Palace_of_Justice,_Rome.

([266]) Cass., 3 maggio 1984, n. 2682, in *Rivista di diritto internazionale privato e processuale*, 1985, p. 579; in *Il diritto di famiglia e delle persone*, 1984, p. 521: "An agreement which (a) is intended to regulate, in contemplation of a future divorce, the patrimonial relations between spouses; (b) has been entered into by foreign nationals (in this case, United States citizens) who were married abroad and are resident in Italy; and (c) is valid under the national law of the spouses themselves (being the applicable law in Italy, pursuant to Articles 19 and 20 of the Italian Provisions on the Law in General), shall be enforceable within the Italian jurisdiction without the need for judicial approval or incorporation of its terms into any subsequent judgments. It must be noted that the principle of *ordre public* (public policy), set out in Article 31 of the aforementioned Provisions and serving as a limitation on the enforceability of agreements between foreign nationals, refers exclusively to the concept of international public policy, and not to domestic *ordre public*. Accordingly,

incidentally—that a prenuptial agreement in contemplation of divorce could be valid in the context of a marriage between two Italian nationals governed by the law of the Principality of Monaco, where the couple resided and had married, expressly opting for the law of that jurisdiction ([267]).

In 2012, the Supreme Court ruled that its "traditional" case law did not apply to a situation in which an Italian couple had agreed—just one day before their wedding—that, in the event of divorce or legal separation, the wife would transfer ownership of a flat to her future husband as compensation for expenses he had incurred in renovating another of her properties ([268]). In 2013, the same Court held that two *fiancés* could agree that a loan made by one to the other would be repayable only if their future marriage ended in legal separation ([269]).

In both cases, the Court insisted that these decisions did not overturn its traditional view, arguing that "prenuptial agreements in contemplation of divorce" refer only to pre-emptive agreements concerning maintenance or alimony. This rationale is clearly flawed: what defines a prenuptial agreement in contemplation of divorce is not the nature of the obligation (e.g., alimony, property transfer, reimbursement), but the fact that it regulates the pecuniary consequences of a future divorce.

Even the most recent Italian case law, though often ambiguous and at times disconcerting, shows occasional signs of openness.

In 2015, the Supreme Court ruled on a case involving an agreement concluded at the time of separation, declaring it valid even though it had been stipulated *a latere* (i.e., outside the formal

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the principle of Italian law which renders void any pre-divorce agreement between spouses concerning post-divorce patrimonial arrangements falls within the scope of internal public policy, and is therefore applicable solely to marriages solemnised in accordance with Italian law and between Italian citizens." ("L'accordo, rivolto a regolamentare, in previsione di futuro divorzio, i rapporti patrimoniali fra coniugi, che sia stato stipulato fra cittadini stranieri (nella specie, statunitensi) sposati all'estero e residenti in Italia, e che risulti valido secondo la legge nazionale dei medesimi (applicabile ai sensi degli artt. 19 e 20 delle disposizioni sulla legge in generale), è operante in Italia, senza necessità di omologazione o recepimento delle sue clausole in un provvedimento giurisdizionale, tenuto conto che l'ordine pubblico, posto dall'art. 31 delle citate disposizioni come limite all'efficacia delle convenzioni fra stranieri, riguarda l'ordine pubblico cosiddetto internazionale, e che in tale nozione non può essere incluso il principio dell'ordinamento italiano, circa l'invalidità di un accordo di tipo preventivo fra i coniugi sui rapporti patrimoniali successivi al divorzio, il quale attiene all'ordine pubblico interno e trova conseguente applicazione solo per il matrimonio celebrato secondo l'ordinamento italiano e fra cittadini italiani"). Reference has already been made to this precedent above, at paragraph 4. It need only be added that, at the time, the rules governing Italian private international law were enshrined in the Civil Code. Subsequently, a comprehensive reform of the Italian conflict-of-laws system was enacted by Parliament in 1995. However, that reform has itself been superseded by the current framework of EU Regulations (see below, at paragraph 11 *et seq*.).

([267]) *See* Cass., 28 maggio 2004, n. 10378, in 10378, in *Rivista di diritto internazionale privato e processuale*, 2005, pp. 129 ff. The case concerned the recognition and enforcement in Italy of a divorce judgment rendered by the appellate court of the Principality of Monaco. One of the grounds upon which one of the parties opposed such recognition was that the judgment had upheld a prenuptial agreement made in contemplation of divorce—although the contents of said agreement were not disclosed in the decision—and of a kind not recognised as valid under Italian case law. The Italian Supreme Court, rather than dismissing this argument on the basis that the litigation did not concern the validity of the agreement itself but rather the recognition and enforceability of the divorce judgment in Italy, proceeded to reject the appeal on the merits. In doing so, the Court observed that the couple had chosen the law of the Principality of Monaco and that, pursuant to the Italian rules on private international law (at that time, EU Regulations were not yet applicable), the parties were entitled to elect the law of the country in which they were resident as the governing law of their matrimonial property relations—which, in this case, they had effectively done.

([268]) Cass., 21 dicembre 2012, n. 23713, http://giacomooberto.com/cass_n_23713_2012.htm.

([269]) Cass., 21 agosto 2013, n. 19304: "The non-negotiability of spousal rights and duties does not preclude the spouses from entering into a loan agreement whereby one party, upon receiving the funds, undertakes to repay them in the event of a separation. The suggestion that such an arrangement might exert psychological pressure on the borrowing spouse, thereby unduly influencing his or her freedom to pursue separation, has not, in this particular instance, been substantiated by any evidential findings. Moreover, even assuming such pressure were to exist, it would not, in and of itself, constitute sufficient grounds to invalidate the agreement." ("L'inderogabilità dei diritti e dei doveri che scaturiscono dal matrimonio non viene meno per il fatto che uno dei coniugi, avendo ricevuto un prestito dall'altro, si impegni a restituirlo per il caso della separazione. Che poi l'esistenza di un simile accordo si possa tradurre in una pressione psicologica sul coniuge debitore al fine di scoraggiarne la libertà di scelta per la separazione è questione che nel caso specifico non ha trovato alcun riscontro probatorio; e che comunque, ove pure sussistesse, non si tradurrebbe di per sé nella nullità di un contratto come quello in esame").

agreement submitted for court approval). While the case did not concern a future divorce, the Court incidentally noted in its reasoning that agreements made in contemplation of divorce are not, *per se*, contrary to public policy ([270]).

Two years later, however, the same Court reaffirmed the traditional view, holding that maintenance in the event of divorce is a right not subject to waiver, and that any agreement concerning it, if concluded before the divorce, is null and void as contrary to public policy ([271]).

However, in 2021 we had to witness, to our astonishment, to two completely opposite judgements issued by the same Chamber of the Supreme Court of Cassation.

In the first, published in February, the Court declared: "We must now consider as outdated (...) the principle (...) according to which agreements entered into before marriage or perhaps in the context of separation by mutual consent with a view to the future divorce are always null and void because of the unlawfulness of the cause, being contrary to the principles of unavailability of status and of the divorce allowance" ([272]). Yet, just two months later, in April, the same Chamber ruled that an agreement made during the settlement of legal separation was null and void because it sought to regulate the parties' rights in the event of divorce ([273]). Astonishingly, four of the five justices on the two panels (including the President of the Chamber) were the same; only the *consigliere relatore* (rapporteur justice) differed.

In 2022, the Supreme Court issued two further decisions reaffirming the traditional rationale against any agreement concerning a future divorce ([274]). However, in 2023, the Court upheld the validity of an agreement made during legal separation in contemplation of a possible future divorce, in which the husband undertook to pay his wife a "lifetime annuity." Perhaps the parties' strategic use of the term "lifetime annuity" (instead of "divorce allowance" or "alimony") helped preserve the

([270]) Cass. 3 dicembre 2015, n. 24621.

([271]) Cass. 13 gennaio 2017, n. 788; Cass. 30 gennaio 2017, n. 2224.

([272]) *See* Cass., 24 febbraio 2021, n. 5065.

([273]) *See* Cass., 16 aprile 2021, n. 11012: "The case law of this Court has consistently held that agreements concluded during a period of separation, in contemplation of a future divorce, are null and void. In particular, judgment no. 2224 of 30 January 2017 (see also Cass., 3 October 2006, no. 5302) affirmed the legal principle whereby agreements made by spouses during their separation, with the aim of regulating their legal and patrimonial relations in anticipation of a potential divorce, are invalid by reason of the unlawfulness of their *causa*. Such agreements are concluded in breach of the fundamental principle of the absolute unavailability of rights in matrimonial matters, as provided under Article 160 of the Italian Civil Code. It follows that such agreements must be disregarded not only where they purport to limit or exclude the right of the economically disadvantaged spouse to receive what is necessary to meet their basic needs, but also where they purport to fully satisfy such needs. This is because a pre-existing agreement of this nature could serve to induce consent to the declaration of the dissolution of the civil effects of marriage" ("La giurisprudenza di questa Corte è costante nel sanzionare con la nullità gli accordi conclusi in sede di separazione in vista del futuro divorzio. In particolare, nella sentenza n. 2224 del 30/01/2017 (vedi anche Cass. 5302 del 10/03/2006) è stato enunciato il principio di diritto secondo cui gli accordi con i quali i coniugi fissano, in sede di separazione, il regime giuridico-patrimoniale in vista di un futuro ed eventuale divorzio sono invalidi per illiceità della causa, perché stipulati in violazione del principio fondamentale di radicale indisponibilità dei diritti in materia matrimoniale di cui all'art. 160 c.c.. Ne consegue che di tali accordi non può tenersi conto non solo quando limitino o addirittura escludano il diritto del coniuge economicamente più debole al conseguimento di quanto necessario a soddisfare le esigenze della vita, ma anche quando soddisfino pienamente tali esigenze, in quanto una preventiva pattuizione potrebbe determinare il consenso alla dichiarazione della cessazione degli effetti civili del matrimonio").

([274]) In Cass. no. 11923 of 13 April 2022, the Supreme Court declared null and void a private covenant whereby one spouse undertook to pay the other the sum of half a million euros in the event of divorce. The agreement had been concluded within the context of legal separation proceedings and in contemplation of the divorce that was subsequently declared a few months later. In Cass. no. 20745 of 28 June 2022, the Court reiterated that any agreement entered into by spouses during the course of legal separation proceedings cannot bind the conditions of the ensuing divorce, insofar as it contravenes Article 160 of the Civil Code. According to the unwavering position of the Supreme Court, said provision embodies the principle of the non-negotiability of the rights and duties arising from marriage. Consequently, the judge retains the authority to reassess and determine the amount of post-divorce maintenance (alimony), even where the sum has previously been agreed by the parties, and may establish a monthly payment that diverges from the amount stipulated in such a prior agreement.

agreement's validity ([275]). By refraining from explicitly stipulating that the sum would also be payable in the event of divorce, the parties effectively circumvented the prohibition on agreements made in anticipation of such occurrence. Yet, it is manifestly evident that establishing a lifelong maintenance obligation at the time of separation essentially entails providing that the amount shall also be owed following a future divorce.

Also in 2023, the Supreme Court issued a decision—though not directly concerning prenuptial agreements—that may have a positive impact on their future recognition. The Court held that, under a procedural reform that entered into force that same year ([276]), Italian courts must accept petitions for legal separation by mutual consent that also include a joint petition for divorce ([277]). This practical solution aims to streamline proceedings, allowing couples to file for both separation and divorce in a single application and avoid unnecessary duplication ([278]).

To conclude this overview of judicial precedents on the subject, it is worth adding that a very recent ruling delivered in July of this year by the Supreme Court of Cassation ([279]) reaffirmed the above-mentioned decisions in support of the validity of certain kinds of agreements entered into by spouses in anticipation of a possible marital breakdown. Accordingly, a private deed signed by both parties during the subsistence of their marriage was upheld as valid. In that deed, it was agreed that, in the event of personal separation, the husband would pay the wife the sum of €146,400.00, by way of compensation for her contribution towards the renovation of the husband's flat; the wife, in turn, would renounce certain movable assets (namely, a boat, household furnishings from the flat, and monetary amounts held in a bank account) in favour of the husband.

Although the reasoning of the judgment made reference to the aforementioned case law, it entirely avoided addressing the key points which, for decades, led the Supreme Court to reject the validity of agreements entered into in contemplation of marital crises, namely:

- the argument of the alleged "trading of marital status;" and
- the claim of conflict with Article 160 of the Civil Code.

In other words—despite some hasty and enthusiastic commentary hailing the decision as "revolutionary in scope," akin to a "genuine cultural and legal earthquake," and claiming it had "opened the floodgates to prenuptial agreements" ([280])—it appears that the Court deliberately confined its decision to patrimonial agreements that do not pertain to maintenance for the separated spouse or to spousal support post-divorce. It is therefore entirely reasonable to infer that the

([275]) Cass. no. 10031 of 14 April 2023. Under Italian law, a contract of "lifetime annuity" (see Articles 1872 et seq. of the Italian Civil Code) may only be concluded where the annuity—i.e. a periodic monetary payment—is exchanged for the transfer of ownership of a specific asset, whether immovable property or capital, from the beneficiary of the annuity to the counterparty. In the case at hand, the wife had transferred to her husband shares in a company, the value of which was grossly disproportionate to that of the annuity. The appellate judge therefore described the arrangement as a "donation" made in favour of the wife, failing to appreciate that, in such circumstances, the donation would be null and void for failure to comply with formal requirements: under Italian law, a valid donation must be made by notarial deed in the presence of two witnesses—formalities that had not been observed by the parties. These considerations strongly suggest that the Supreme Court's use of the term "lifetime annuity" was a rhetorical expedient—a linguistic device employed to avoid declaring the agreement null and void, given its characterisation, under the Court's established case law, as a pre-emptive arrangement regarding the divorce allowance.

([276]) *See* art. 473-*bis*.49 of the Italian Code of Civil Procedure, as introduced by the so-called "Cartabia" reform, of the year 2022, in force since 28 February 2023. That Article is part of the rules concerning the contentious divorce, but the Supreme Court declared it applicable also to the divorce by mutual consent.

([277]) *See* Cass., 16 ottobre 2023, n. 28727, in *Guida al diritto*, 2023, n. 42, p. 28.

([278]) Naturally, divorce proceedings may commence only following the homologation of the legal separation by way of a court judgment and, in any event, upon the expiry of six months from the date on which the petition was filed with the court. Nonetheless, the divorce proceedings no longer require the filing of a new application, as the second set of proceedings is initiated *ex officio*.

([279]) *See* Cass., 21 luglio 2025, n. 20415.

([280]) *See*, for example, GRECO, *Accordi pre-divorzio, la Cassazione finalmente dice sì: validi i patti tra coniugi in vista della crisi*, in https://laleggepertutti.it, 22 luglio 2025.

established position declaring the invalidity of pre-nuptial agreements concerning post-marital maintenance regrettably remains unchanged.

However, it is equally evident that the recent jurisprudential developments logically imply the possibility of entering into advance agreements of all kinds concerning the financial consequences of marital breakdown—thus (at least in part) contradicting the prevailing and inconsistent jurisprudence that has long regarded such agreements as void. Moreover, it is reasonable to predict that the negative stance on preemptive agreements regarding maintenance or post-divorce support will also come to an end sooner or later ([281]).

10. Contracts between Cohabiting Partners: Historical Precedents and Modern "Dialogues" between Prenuptial Agreements and Cohabitation Contracts.

As previously noted, another important category of family-related agreements is represented by contracts concerning cohabitation outside of marriage. We have already outlined the deep historical roots of this form of contractualisation ([282]). However, it is only in recent decades—due to the massive increase in non-marital cohabitation across Europe—that the legal challenges arising from living together have come to the fore, prompting both practitioners and scholars to seek solutions through negotiation and private agreements.

From the second half of the 20th century—well before the rise of registered partnerships and same-sex marriage—there was a growing body of both theoretical and practical literature encouraging cohabiting couples (*more uxorio*) to plan their shared lives through specific agreements (cohabitation contracts, *Partnerschaftsverträge*, *contrats de ménage*, *contratti di convivenza*, *contratos de pareja*, etc.) ([283]), often accompanied by proposed models and standard clauses ([284]).

([281]) All of these arguments, offered in commentary on the aforementioned 2025 decision of the Court of Cassation, are discussed in OBERTO, *Giubileo d'argento per i patti prematrimoniali. Venticinque anni di oscillazioni sul tema degli accordi preventivi in materia di crisi coniugale*, op. cit., pp. 17 ff.

([282]) *See* above, at para. 1.2.

([283]) It is impossible to present here an exhaustive list of the contributions on this topic. References may be found in OBERTO, *I regimi patrimoniali della famiglia di fatto*, Milano, 1991, pp. 8 ff., 151 ff.; OBERTO, *I contratti di convivenza tra autonomia privata e modelli legislativi*, in *Contratto e impresa / Europa*, 2004, pp. 17 ff.; OBERTO, *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa*, Padova, 2012, pp. 81 ff. With particular reference to cohabitation outside marriage in the U.S.A. *see* WEITZMAN, *Legal Regulation of Marriage*: *Tradition and Change*, in *California Law Review*, 62, 1974, pp. 1249 ff.; GLENDON, *State*, *Law and Family - Family Law in transition in the United States and Western Europe*, Amsterdam, 1977; WEITZMAN and LENOU, *The marriage contract*, *spouses*, *lovers and the law*, New York, 1981; WEYRAUCH and KATZ, *American Family Law in Transition*, Washington, 1983, pp. 171 ff.; BRUCH, *Nonmarital Cohabitation in the Common Law Countries*: *A Study in Judicial-Legislative Interaction*, in *The American Journal of Comparative Law*, 1981, pp. 221 ff.; SMITH, *Property Rights arising from Relationship of Couple Cohabiting without Marriage*, in *American Law Review*, 3, 4th ed., pp. 13, 20. With particular reference to European countries, in a comparative perspective, *see* GARRISON, *Cohabitant Obligations: Contract versus Status*, in BOELE-WOELKI, MILES and SCHERPE (eds), *The Future of Family Property in Europe*, op. cit., pp. 115 ff. As to contractualisation of *de facto* couples in France *see* FENOUILLET, *Couple hors mariage et contrat*, in FENOUILLET and DE VAREILLES-SOMMIÈRES (eds), *La contractualisation de la famille*, Paris, 2001, pp. 81 ff. As for Spain, *see* FOSAR BENLLOCH, *Estudios de derecho de familia*, III, *Las uniones libres*, op. cit., pp. 36 ff. (with a comprehensive comparative overview of other European systems).

([284]) *See* e.g. BARTON, *Cohabitation Contracts*. *Extra-marital partnership and law reform*, Aldershot, 1985, pp. 37 ff., 59 ff.; WEITZMAN, *Legal Regulation of Marriage*, op. cit., pp. 250 ff. In Belgium and in the Netherlands a great contribution was provided by local notaries and notarial associations. In Belgium the national notarial association drafted, back in the 1970s, a very first collection of model contracts and templates: *see Feitelijke scheiding*, *Feitelijk samenleven*, *Koninklijke Federatie van Belgische notarissen - Notariele dagen*, *Gent*, 1978; the French text is in annex to UNION INTERNATIONALE DU NOTARIAT LATIN, *Problèmes juridiques du couple non marié*, Amsterdam, 1987, pp. 20 ff.; *see* as well CASMAN and DE WYNTER, *National report*, submitted to the 18th congress of the said *Union Internationale du Notariat Latin*, held in Montréal on 21-26 September 1986 on the subject: "The Influence of Public Law on Family" (*see* MAZZOCCA, *La famiglia di fatto*. *Realtà attuale e prospettive*, Roma, 1989, pp. 8 ff.). Between 1981 and 1983, approximately 12,000 cohabitation agreements were executed by notarial deed in the Netherlands: *see* VAN DE WIEL,

In several European and non-European jurisdictions, the contractualisation of family relationships also served as a legal framework for same-sex couples before the recognition of same-sex marriage. A notable example is the Catalan law of 1998: "Ley 10/1998, de 15 de julio, de uniones estables de pareja." This law was divided into two chapters: one for heterosexual couples and one for homosexual couples. A key principle of this reform was precisely contractualisation. Articles 3 and 22 (respectively for heterosexual and homosexual couples) provided that couples could validly regulate "the personal and property relationships derived from cohabitation as well as the respective rights and duties." They were also permitted to "regulate the economic compensation due in the event of cessation of cohabitation," with some rights considered by the law as being inalienable until claimed.

As already pointed out ([285]), these provisions were later incorporated into the Catalan Family Law Code (*Codi de família*) and subsequently into the Civil Code of Catalonia ([286]), showing as well the interaction that can exist between marriage (both heterosexual and homosexual) and *de facto* cohabitation of unmarried couple. Notably, the detailed regulation of prenuptial agreements in contemplation of divorce found in the Civil Code ([287]) is expressly extended to unmarried couples who enter into agreements in contemplation of their breakup ([288]). The Catalan model was soon followed by five other Spanish autonomous communities ([289]).

Even more striking is the Australian example. In New South Wales, the 1984 *De Facto Relationships Act* allowed for cohabitation contracts "made in contemplation of the termination of a domestic relationship." This provision—now part of the *Property (Relationships) Act*—led Australian legislators to conclude that it was "illogical" to allow enforceable contractual rights to *de facto* couples while denying the same to married couples ([290]). As a result, the *Family Law Reform Act 2000* amended the *Family Law Act 1975* to allow married couples to enter into "financial agreements before marriage." These agreements may regulate: *a*) The division of property and

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Cohabitation outside Marriage in Dutch Law, in EEKELAAR and KATZ (eds), *Marriage and Cohabitation in Contemporary Societies*, Toronto, 1980, p. 226, fn. 21. In Germany, as early as 1978, Kunigk proposed a contractual model for the regulation of cohabitation between partners, both marital and non-marital, to be executed in writing and with the assistance of legal counsel: KUNIGK, *Die Lebensgemeinschaft*, *Rechtliche Gestaltung von ehelichem und eheähnlichem Zusammenleben*, Stuttgart, 1978, pp. 128 ff. A few years later, Langenfeld presented two types of cohabitation contracts (*Partnerschaftsverträge*) in his contribution to the *Münchener Vertragshandbuch*, (LANGENFELD, *Die nichteheliche Lebensgemeinschaft*, in *Münchener Vertragshandbuch*, 4, *Bürgerliches Recht*, München, 1986, pp. 927 ff.): one designed to govern a form of cohabitation intended as preparatory to marriage (a "trial marriage," or *Ehe auf Probe*), and another aimed at regulating a more stable, long-term partnership. *See* also GRZIWOTZ, *Partnerschaftsvertrag*, *für die nichteheliche Lebensgemeinschaft*, München, 1994.

([285]) *See* above, at para. 7.1.

([286]) *See* the *Llei 25/2010, del 29 de juliol, del llibre segon del Codi civil de Catalunya, relatiu a la persona i la família*.

([287]) *Pactes en previsió d'una ruptura matrimonial*: *see* art. 231-20, of the *Codi civil de Catalunya*.

([288]) *Pactes en previsió del cessament de la convivència*: *see* Article 234-5 of the same Code, which declares applicable in this situation all the rules relating to marital agreements in contemplation of divorce: "In anticipation of the cessation of cohabitation, the cohabitants may agree in a public deed the effects of the termination of the stable partnership. Article 231-20 applies to these agreements" ("En previsió del cessament de la convivència, els convivents poden pactar en escriptura pública els efectes de l'extinció de la parella estable. A aquests pactes se'ls aplica l'article 231-20").

([289]) *See* https://psfes.euro-family.eu/atlas_scheda-es. Information on the validity in Spain of cohabitation agreements is available in DE VERDA Y BEAMONTE, *Pactos de carácter patrimonial en las uniones de hecho: un estudio de la cuestión desde la perspectiva de la experiencia jurídica española*, in LANDINI and PALAZZO (eds), *Accordi in vista della crisi dei rapporti familiari*, op. cit., pp. 379 ff.; DE VERDA Y BEAMONTE, *La solidarietà postconiugale tra autosufficienza economica e istanze compensative*, in AL MUREDEN and BALESTRA (eds), Liber amicorum *per Michele Sesta*, I, Milano, 2025, pp. 722 ff.

([290]) *See* the report on the "Bills Digest No. 88 1999-2000, Family Law Amendment Bill 1999", drafted in 1999 by the Department of the Parliamentary Library of the Parliament of Australia, available at https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/digest/flab1999204/flab1999204.html. The report informs that "In 1991, the Law Society stated that it seemed 'illogical' that parties to a de facto relationship may have contractual rights or entitlements enforceable by a court, whereas agreements by parties who intend to marry will generally after marriage not be recognised as binding or enforceable by the Family Court" (*see*: LAW SOCIETY, *Binding and Enforceable Pre-marital Agreements*, in *Law Society Journal*, 29, 1991, 27).

financial resources in the event of divorce; *b*) Spousal maintenance during or after marriage; *c*) Any incidental or ancillary matters ([291]).

In Italy, too, cohabitation contracts were recognized as valid and enforceable by legal doctrine and case law well before the 2016 statutory regulation ([292]). A significant contribution came from the Italian notariat, with the publication in 2013—under the direction of Professor Luigi Balestra and myself—of the *Guida operativa in tema di convivenza. Vademecum sulla tutela patrimoniale del convivente* more uxorio *in sede di esplicazione dell'autonomia negoziale* ("Operational guide on cohabitation. *Vademecum* on the patrimonial protection of the *more uxorio* cohabitants, through the implementation of their private autonomy"), a collection of model clauses and commentary edited by the National Council of Italian Notaries ([293]). This work remains relevant today. Indeed, the 2016 Italian law on *de facto* relationships ([294]) introduced new formal requirements: cohabitation contracts must be executed either by notarial deed or by a written agreement authenticated by a notary or a lawyer. However, the law is vague regarding the content of such agreements, leaving considerable discretion to interpreters.

In this evolving framework, a fruitful "dialogue" can emerge between marriage contracts (including prenuptial agreements) and cohabitation contracts.

For example, a clause could be drafted identically for both married and unmarried couples to pre-emptively define the legal nature of future transfers of money or assets made during the relationship. Indeed, it is common for one partner to provide funds or assets to the other, or to finance the purchase of real estate registered in the other's name ([295]). Upon breakup, the contributing party may seek recognition as the true or co-owner, or at least request reimbursement ([296]). In common law systems, such issues are often resolved by the courts through constructive, resulting, or implied trusts ([297]).

In Germany, case law classifies such transfers as "innominate patrimonial allocations" (*unbenannte Zuwendungen*), or as "*sui generis* quasi-matrimonial legal transactions" (*ehebezogene Rechtsgeschäfte eigener Art*), and orders their restitution pursuant to the doctrine of frustration of contract (*Wegfall der Geschäftsgrundlage*) ([298]). In other civil law systems, where such remedies are

([291]) *See* Part VIIIA, section 90B of the Family Law Act 1975, as amended in the year 2000. On premarital agreements in Australia *see* FEHLBERG and SMYTH, *Binding Pre-Nuptial Agreements in Australia: The First Year*, in *Int. Journal of Law, Policy and the Family*, 16, 2002, pp. 127 ff.; JESSEP, *Marital Agreements and Private Autonomy in Australia*, in SCHERPE (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective*, op. cit., pp. 17 ff. The author explains that, although separation agreements have been recognised and enforced in Australia for almost 50 years, agreements on financial matters entered into before marriage or while the marriage is still on foot have only been possible since the end of 2000.

([292]) *See* OBERTO, *I regimi patrimoniali della famiglia di fatto*, op. cit., pp. 151 ff.; OBERTO, *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa*, op. cit., pp. 81 ff. On the subject of cohabitation contracts in Italy *see* also MARELLA, *The Contractualisation of Family Law in Italy*, op. cit., pp. 249 f.; SESTA, *Manuale di diritto di famiglia*, op. cit., pp. 181 ff.

([293]) *See* CONSIGLIO NAZIONALE DEL NOTARIATO, *Guida operativa in tema di convivenza.* Vademecum *sulla tutela patrimoniale del convivente* more uxorio *in sede di esplicazione dell'autonomia negoziale. Contratti di convivenza* open day, 30 novembre 2013, Roma, 2013, available at https://www.giacomooberto.com/Guida%20operativa_Contratti%20di%20convivenza.pdf.

([294]) *See* the Italian act no. 76 of 20 May 2016.

([295]) Of course, applicable rules are quite different if the couple lived under the community property regime, where purchased assets generally become shared property, regardless who paid the price. However, as already explained (*see* above, at para. 9.1.), the large majority of Italian married couples live now under the separation of properties regime. Therefore, as to this particular problem, their legal situation is very similar to the position of an unmarried couple.

([296]) For a more exhaustive explanation *see* OBERTO, *I regimi patrimoniali della famiglia di fatto*, op. cit., pp. 280 ff.; OBERTO, *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa*, op. cit., pp. 78 ff.

([297]) OBERTO, *Il regime di separazione dei beni tra coniugi. Artt. 215-219*, in BUSNELLI and SCHLESINGER (eds), *Il codice civile. Commentario*, Milano, 2005, pp. 362 ff.

([298]) *See*, also for the references to the case law, GRABA, *Das Familienheim bei Scheitern der Ehe*, in *Neue Juristische Wochenschrift*, 1987, pp. 1721 ff.; HEINLE, *Zwanzig Jahre „unbenannte Zuwendung"*, in *Zeitschrift für das gesamte Familienrecht*, 1992, pp. 1256 ff.; HOLZHAUER, *Schuld- und güterrechtlicher Ausgleich von Zuwendungen unter Ehegatten*, in *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, 1982, pp. 227 ff., in *Juristische Schulung*, 1983, pp. 830 ff.; KOCH, *Schulden und Scheidung*, in *Zeitschrift für das gesamte Familienrecht*, 1994, pp. 537

unavailable, courts frequently reject such claims. A practical solution would be, therefore, to contractually define in advance whether such transfers are to be considered loans, gifts, or otherwise ([299]).

Another example involves the voluntary establishment by the parties of a family trust—where permitted—or similar legal instruments ([300]). Agreements on the exercise of parental responsibility are also conceivable, regardless of whether the children were born within or outside of marriage ([301]).

Finally, given the increasing prevalence of blended families and new relationships following the dissolution of previous ones, a wide range of contractual clauses can be envisaged to regulate the impact of new cohabitations or marriages on existing patrimonial obligations between former partners ([302]).

ff.; KOLLHOSSER, *Ehebezogene Zuwendungen und Schenkungen unter Ehegatten*, in *Neue Juristische Wochenschrift*, 1994, pp. 2313 ff.; KOTZUR, *Die Rechtsprechung zum Gesamtschuldnerausgleich unter Ehegatten*, *ibidem*, 1987, pp. 817 ff.; LIPP, *Ehegattenzuwendungen und Zugewinnausgleich*, in *Juristische Schulung*, 1993, pp. 89 ff.; WAAS, *Zur Dogmatik der sogenannten „ehebezogenen Zuwendungen"*, in *Zeitschrift für das gesamte Familienrecht*, 2000, pp. 453 ff.; PRIDIK, *Zuwendungen unter Ehegatten*, in *Juristische Arbeitsblätter*, 2004, pp. 318 ff.

([299]) For some concrete examples of this kind of contractual clauses *see* CONSIGLIO NAZIONALE DEL NOTARIATO, *Guida operativa in tema di convivenza. Vademecum sulla tutela patrimoniale del convivente* more uxorio *in sede di esplicazione dell'autonomia negoziale. Contratti di convivenza* open day, 30 novembre 2013, op. cit., p. 34.

([300]) CONSIGLIO NAZIONALE DEL NOTARIATO, *Guida operativa in tema di convivenza.* Vademecum *sulla tutela patrimoniale del convivente* more uxorio *in sede di esplicazione dell'autonomia negoziale. Contratti di convivenza open day*, op. cit., p. 71; *see* as well OBERTO, *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa*, op. cit., p. 137.

([301]) cfr. OBERTO, *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa*, op. cit., pp. 114 ff. For an analysis in parallel about cohabitation contracts and premarital agreements *see* OBERTO, *Per un intervento normativo in tema di accordi preventivi sulla crisi della famiglia*, in LANDINI and PALAZZO (eds), *Accordi in vista della crisi dei rapporti familiari*, op. cit., pp. 50 ff.

([302]) *See* on this particular aspect OBERTO, *Per un intervento normativo in tema di accordi preventivi sulla crisi della famiglia*, op. cit., pp. 57 ff.

PART III
CONTRACTUALISATION IN TRANSNATIONAL FAMILIES: TOWARDS A EUROPEAN UNIFORM SUBSTANTIVE FAMILY LAW

11. Contractualisation in Transnational Families: EU Instruments on Property Consequences of Marriage and Registered Partnership.

In today's globalised—or rather, post-globalised—world, the contractualisation of family relationships is finding new and broader fields of application. One of the most significant is that of transnational families: a new and growing category of "modern families" in which EU law has granted private autonomy a level of importance previously unknown. Indeed, party autonomy—long recognised as a key connecting factor in private international law ([303]) and now also acknowledged as a fundamental right within the European Union ([304])—has become one of the pillars of EU family law regulations ([305]).

To be precise, the idea of assigning a central role to private autonomy in family-related private international law is not entirely new. A historical analysis reveals that many classical jurists paid close attention to the role of party agreements in determining applicable law. Among them, we may

([303]) *See* KOHLER, *L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme*, in *Recueil des Cours*, 359, 2013, pp. 398 ff.; KROLL-LUDWIGS, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen, 2013; MAULTZSCH, *Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument?*, in *Journal of Private International Law*, 2016, pp. 466 ff. As it has been remarked by VIARENGO, *Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 50, parties' agreements can become a "variability factor", when they contain the choice of a new law. Numerous issues concerning the role of private autonomy within the sphere of family law are addressed by GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, Cambridge-Antwerp-Chicago, 2021. In particular, the author outlines the historical development of party autonomy in this branch of the law, commencing at page 5 et seq.

([304]) On this subject *see* COLOMBI CIACCHI, *Party Autonomy as a Fundamental Right in the European Union*, in *European Review of Contract Law*, 2010, 6(3), pp. 303 ff., available at https://doi.org/10.1515/ercl.2010.303.

([305]) In general on the principle of private autonomy in European family law *see* OBERTO, *Contratto e famiglia*, op. cit., pp. 133 ff. *See* as well CARRUTHERS, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law*, in *International and comparative law quarterly*, 2012, pp. 881 ff.; HENRICH, *Zur Parteiautonomie im europäisierten internationalen Familienrecht*, in VERBECKE, SCHERPE and DECLERCK, *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens*, vol. 1, Antwerp, 2012, pp. 701 ff.; HOOK, *Party Autonomy – Yes or No ? The "Commodification" of the Law Applicable to Matrimonial Property Relationships*, in *The Netherlands journal of private international law*, *Nederlands Internationaal Privaatrecht (NIPR)*, 2012, pp. 587 ff.; ISTVAN NAGY, *What Functions may party Autonomy have in International Family and Succession Law? An EU Perspective*, in *NIPR*, 2012, pp. 576ff; PEARI, *Choice-of-Law in Family Law: Kant, Savigny and the Parties' Autonomy Principle*, in *NIPR*, 2012, pp. 597 ff.; VIARENGO, *The Role of Party Autonomy in Cross-Border Divorces*, in *NIPR*, 2012, pp. 555 ff.; ANOVEROS TERRADAS, *La autonomia de la voluntad como principio rector de las normas de Derecho internacional privado comunitario de la familia*, in FORNER DELAYGUA, GONZÁLEZ BEILFUSS and VIÑAS FARRÉ, *Entre Bruselas y La Haye: estudios sobre la unificacion internacional y regional del Derecho interncional privado*. Liber Amicorum Alegría Borrás, Madrid-Barcelona-Buenos Aires-São Paulo, 2013, pp. 119 ff.; ÉGÉA, *La contractualisation du lien familial : l'apport du droit international privé*, in SIFFREIN-BLANC, AGRESTI and PUTMAN (eds), op. cit., pp. 103 ff.; WAUTELET, *Party autonomy in international family relationships: a research agenda*, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589980.

The principle of party autonomy also underpins an important informational instrument issued by the European Law Institute: *see* EUROPEAN LAW INSTITUTE, *Empowering European Families. Towards More Party Autonomy in European Family and Succession Law*, Vienna, 2019. Further guidance is provided in the accompanying toolkit prepared by the Institute: EUROPEAN LAW INSTITUTE, *Toolkit for Advising European Families. Married Couples*, Wien, 2019, particularly at pp. 5 et seq. (concerning the optional checklist for legal advisers), pp. 11 et seq. (outlining draft agreements for married couples), and pp. 13 et seq. (addressing the clause relating to the designation of the applicable law, expressly referring "to their property relations, maintenance, and any other economic consequences of their marriage or its dissolution, including pension rights (…), as far as the law applicable is subject to their choice," and adding that "This law shall also apply to the divorce or legal separation").

cite the well known 16th-century French civilist Charles Dumoulin, the famous19th-century German pandectist Friedrich Carl von Savigny and Pasquale Stanislao Mancini, the father of Italian private international law ([306]).

In the realm of family law, one of the earliest treatises on the subject—by 18th-century French jurist Louis Bullenois ([307])—acknowledged, albeit within the traditional dichotomy between *statut personnel* (citizenship-based) and *statut réel* (property-based) as decisive criteria for determining the applicable law, that party agreements (*convention des parties*) could "prevent the conflict of laws" ("prévenir la diversité des loix"), echoing earlier ideas from Dutch jurist Rodenburg ([308]).

It is also true that the recent evolution of EU law has been influenced by the well-established tradition of party autonomy in cross-border contracts. As some scholars have noted, there is a clear genealogy of rules extending from the Rome I Regulation and earlier instruments on international contracts ([309]). However, this "copy-paste" approach—both in legislation and scholarship—risks overlooking the unique features of party autonomy in cross-border family relationships ([310]).

Regardless, the number of cross-border families continues to grow. According to Eurostat: *a*) In 2011, nearly 51 million people residing in the EU-28 had been born outside the Member State in which they lived—about 10% of the population ([311]); *b*) In 2023, over a quarter of households in the EU had at least one foreign-born member or a member with one or more parents born abroad; *c*) in 2023, among multi-adult households, foreign-born households were more likely to have children than native-born and mixed households; *d*) among single-adult households with children, 58.8% of native-born adults with native-born parents were working full-time, compared with 49.2% of native-born adults with foreign-born parents and 38.2% of foreign-born adults ([312]).

Be that as it may, the adoption through enhanced cooperation of two EU Regulations in 2016—Regulation No. 2016/1103 (on matrimonial property regimes) and Regulation No. 2016/1104 (on the property consequences of registered partnerships)—marked a turning point. These instruments prompted European legal doctrine to unanimously highlight the central role of party autonomy in this domain ([313]). As one scholar aptly observed, the recognition of party autonomy in this context is a

([306]) *See* GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., pp. 5 ff.

([307]) BOULLENOIS, *Traité de la personnalité et de la réalité des loix, coutumes, ou statuts*, I, Paris, 1766, pp. 12 ff.

([308]) BOULLENOIS, *Traité de la personnalité et de la réalité des loix, coutumes, ou statuts*, II, Paris, 1766, pp. 366 ff.

([309]) WAUTELET, op. cit., p. 2 f.

([310]) WAUTELET, op. cit., p. 2 f.

([311]) EUROSTAT, *Statistical Books People in the EU: Who Are We and How Do We Live?*, Luxembourg, 2015, pp. 88 ff., available at https://ec.europa.eu/eurostat/documents/3217494/7089681/KS-04-15-567-EN-N.pdf.

([312]) EUROSTAT, *Foreign-born people and their descendants - household composition*, Data extracted in September 2024, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Foreign-born_people_and_their_descendants_-_household_composition#:~:text=At%20EU%20level%2C%2073.0%25%20of,migration%20background%20(Figure%206). According to that same report, "At EU level, 73.0% of multi-adult households consisted of native-born adults with a native background, 15.7% were mixed households, 9.6% were households of foreign-born adults, and 1.7% were households of native-born adults with a foreign background (Figure 5). In Poland and Hungary, households of native-born adults with a native background accounted for 95.1% and 92.7% of the total, respectively, followed by Lithuania, Czechia and Italy, where the proportion exceeded 80%. Luxembourg had the lowest share of households of native-born adults with a native background, at 19.6%, and the highest proportion of households of foreign-born adults, at 43.4%. Regarding other types of households, Latvia reported the highest share of mixed households (34.3%), while Estonia had the highest share of households of native-born adults with a foreign background (8.1%)."

([313]) *See* e.g. GRIECO, *The Role of Party Autonomy under the Regulations on Matrimonial Property Regimes and Property Consequences of Registered Partnerships. Some Remarks on the Coordination Between the Legal Regime Established by the New Regulations and Other Relevant Instruments of European Private International Law*, in *Cuadernos de Derecho Transnacional* (Octubre 2018), Vol. 10, Nº 2, pp. 457 ff. *See* also GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., pp. 78 ff., 156 ff., 220 ff., 223 ff., 229 ff.

"beneficent solution": it promotes legal certainty and predictability while serving the substantive interests of the parties involved ([314]).

This is particularly relevant given that party autonomy is already well established in EU law on divorce, maintenance, and succession. Spouses and registered partners can now choose the applicable law in a way that optimises their overall patrimonial situation. This flexibility helps to overcome difficulties associated with objective connecting factors—such as determining habitual residence, dealing with mobile conflicts, or managing fragmented property regimes based on asset location ([315]).

As a preliminary point, both 2016 Regulations emphasise the role of party autonomy in matters of jurisdiction ([316]). Their preambles stress the importance of enabling spouses or partners to conclude choice-of-court agreements in favour of: *a*) The courts of the Member State whose law is applicable under the Regulation; *b*) The courts of the Member State where the marriage or registered partnership was concluded.

According to Article 7 of Regulation No. 2016/1103, parties may agree that the courts of the Member State whose law is applicable under: *a*) Article 22 (choice of applicable law), *b*) Article 26(1)(a) or (b) (default connecting factors), or *c*) the courts of the Member State of the marriage's conclusion, shall have exclusive jurisdiction over matters relating to their matrimonial property regime ([317]). Moreover, to ensure the concentration of jurisdiction in related proceedings, a court seized under the Brussels II-*ter* Regulation for legal separation or divorce may also have jurisdiction over matrimonial property matters—provided the parties agree, as per Article 5(2) of Regulation 2016/1103 ([318]). Once again, party autonomy is decisive ([319]).

Much in the same way, as regards rules concerning the applicable law ([320]), both Regulations also provide broad scope for party autonomy ([321]). As already mentioned, under such Regulations parties are granted the possibility to choose the law applicable to the matrimonial property regime and to the property consequences of registered partnerships ([322]).

([314]) *See* OPREA, *Party Autonomy and the Law Applicable to the Matrimonial Property Regimes in Europe*, in *Cuadernos de Derecho Transnacional* (Octubre 2018), Vol. 10, Nº 2, pp. 579 ff.

([315]) *See* OPREA, *Party Autonomy and the Law Applicable to the Matrimonial Property Regimes in Europe*, op. cit., pp. 579 ff.

([316]) *See* KRAMBERGER ŠKERL, *Party autonomy regarding jurisdiction under the property regimes regulations*,in *Actualidad Jurídica Iberoamericana*, Nº 15, agosto 2021, ISSN: 2386-4567, pp. 274 ff.

([317]) Partially different is the provision contained in Article 7 of Regulation No. 2016/1104, where it is specified that the parties may agree, in cases which are covered by Article 6, that the courts of the Member State whose law is applicable pursuant to Article 22 (choice of law agreement) or Article 26(1) (which, in the absence of a choice-of-law agreement, provide for a different connecting factor) or the courts of the Member State under whose law the registered partnership was created, shall have exclusive jurisdiction to rule on the property consequences of their registered partnership.

([318]) E.g.: the court 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, etc.

([319]) *See* GARETTO, *Dissolution of same- sex marriage: international jurisdiction and possible exercise of party autonomy*, in CAZORLA GONZÁLEZ and RUGGERI (eds), *Cross-Border Couples Property Regimes in Action Before Courts. Understanding the EU Regulations 1103 and 1104/2016 in Practice*, Madrid, 2022, p. 231.

([320]) Rules that, according to both EU said Regulations (*see* their respective articles 20), have universal application: "The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State."

([321]) These provisions, in alignment with the Succession Regulation, embody the so-called monist principle. Pursuant to this principle, and in order to ensure legal certainty and to avoid the fragmentation of the matrimonial property regime or the property consequences of registered partnerships, the applicable law is to govern such regimes or consequences comprehensively. Accordingly, all relevant property—regardless of the nature of the assets or their location, whether in another Member State or in a third country—shall, in principle, be subject to the same governing law.

([322]) *See* DE SOUSA GONÇALVES, *O princípio da autonomia da vontade no Regulamento Europeu sobre Regimes Matrimoniais*, in *Revista Eletrónica de Direito*, 2020, pp. 76 ff., 87: "A admissibilidade dos acordos de eleição de lei, permite a valorizar o espaço de liberdade do indivíduo na regulamentação das relações jurídico-privadas que lhe dizem respeito. É também uma forma de flexibilizar a norma pela intervenção do interesse concreto das partes. Adicionalmente, permite a previsibilidade da lei aplicável, o que favorece a certeza e segurança jurídica, com vantagens óbvias para as partes que, a partir do momento da celebração do acordo de eleição de lei, sabem por que lei devem conformar o seu comportamento. A facilidade que resulta na determinação da lei aplicável em caso de litígio, reduz o tempo e os custos na resolução do litígio e facilita a tarefa do julgador. A electio iuris permite, ainda, obter a neutralidade da conexão

As stated in Recital 45 of Regulation No. 2016/1103 and Recital 44 of Regulation No. 2016/1104, spouses or partners may choose the law applicable to their matrimonial property regime or the property consequences of their registered partnership, regardless of the nature or location of the property. The choice must be connected to the parties' habitual residence or nationality. Importantly, the choice may be made: *a*) Before the marriage or registration, or *b*) At the time of marriage or registration, or *c*) During the course of the marriage or partnership ([323]). This flexibility reflects the broader principle of freedom in managing personal relationships, which characterises many domestic legal systems.

Beyond the EU framework, two additional instruments deserve mention: *a*) The Nordic Convention on Marriage (1931), applicable among Nordic countries ([324]); *b*) The Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes ([325]). Both instruments, though geographically limited, underscore the importance of private autonomy. he 1978 Hague Convention explicitly recognises premarital agreements, stating: "The matrimonial property regime is governed by the internal law designated by the spouses before marriage" ([326]). This emphasis on

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naquelas situações em que não existem interesses de política legislativa ou outras considerações que aconselhem a valorização de umas conexões em detrimento de outras e pode complementar o princípio de proximidade naquelas situações mais difíceis de localizar, entre outras vantagens." ("The admissibility of choice-of-law agreements serves to enhance the individual's sphere of autonomy in regulating the private legal relationships that concern them. It also functions as a means of rendering legal norms more flexible, through the intervention of the concrete interests of the parties. Furthermore, it enables foreseeability regarding the applicable law, thereby promoting legal certainty and security—clear advantages for the parties who, from the moment of concluding the choice-of-law agreement, are aware of the legal framework by which their conduct is to be governed. The ease with which the applicable law is determined in the event of a dispute reduces both the time and cost of litigation and facilitates the task of the adjudicator. Moreover, *electio iuris* allows for the neutrality of the connecting factor in those circumstances where no legislative policy interest or other considerations justify preferring one connection over another, and may complement the principle of proximity in more complex jurisdictional scenarios, among other benefits").

([323]) Therefore, according to Article 22 of Regulation No. 2016/1103, the spouses or the future spouses may choose, or change their earlier choice, between two alternatives: "(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." Although both Regulations recognise the possibility of modifying the matrimonial or partnership regime, Article 22(2) provides that, unless the spouses agree otherwise, any change to the law applicable to the matrimonial property regime made during the marriage shall produce only prospective effects. Even where retroactive effect is expressly agreed, Article 22(3) stipulates that such agreement must not prejudice the rights of third parties arising under the law previously applicable. Regulation No. 2016/1104 establishes analogous provisions with one additional criterion. Specifically, pursuant to Article 22, partners or future partners may agree to designate or modify the law applicable to the property consequences of their registered partnership, provided that the chosen law confers such property effects upon the institution of registered partnership. The choice may be made from among the following laws: "(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded; (b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or (c) the law of the State under whose law the registered partnership was created. This choice may be made at any moment, before the registration of the partnership, at the time of the registration of the partnership or during the course of the registered partnership." On these rules *see* GRIECO, *The Role of Party Autonomy under the Regulations on Matrimonial Property Regimes and Property Consequences of Registered Partnerships. Some Remarks on the Coordination Between the Legal Regime Established by the New Regulations and Other Relevant Instruments of European Private International Law*, in *Cuadernos de Derecho Transnacional* (Octubre 2018), Vol. 10, Nº 2, pp. 473 f.

([324]) *See* the "International Convention Between Norway, Denmark, Finland, Iceland And Sweden Containing International-Private Law Provisions On Marriage, Adoption And Guardianship." On this instrument *see* MAUNSBACH, *Party Autonomy in European Family and Succession Law*, available at https://heiup.uni-heidelberg.de/catalog/view/853/1423/95410, pp. 38 ff.

([325]) *See* WATTÉ, *L'autonomie de la volonté dans les Conventions de La Haye*, in *Revue belge de droit international*, 1991, Vol. 24, 1991, No 1, pp. 413 ff.

([326]) *See* art. 3, para. 1, of said convention.

party autonomy was intended to bridge the gap between legal systems based on nationality and those based on habitual residence ([327]).

12. Contractualisation in Transnational Families: EU Instruments on Maintenance Obligations, Separation and Divorce.

Party autonomy and contractualisation are further reinforced by other European instruments governing family law. Indeed, all EU private international law regulations proceed from the premise that parties to legal relationships involving a "foreign element" should—at least to some extent—be able to choose the law applicable to their relationship. Such freedom promotes legal certainty, predictability, and flexibility in both commercial and non-commercial contexts.

The EU Maintenance Regulation ([328]) in conjunction with the corresponding Hague 2007 Protocol ([329]), enables party autonomy by allowing the parties to choose "at any time" the applicable law for international maintenance obligations ([330]). Although the Regulation does not define the term "maintenance," both the Court of Justice of the European Union ([331]) and various national courts ([332]) have interpreted it broadly in the international context. It encompasses not only alimony or periodic payments but also any financial provision intended for support, as opposed to property-sharing claims.

With regard to proceedings related to marital breakdown, Article 5 of the "Rome III" Regulation ([333]) allows spouses to choose the law applicable to their divorce or legal separation, provided that the chosen law is either: *a*) The law of a State with a substantial connection to the marriage, or *b*) The law of the forum, and that the agreement complies with the formal requirements set out in Article 7

([327]) *See* PFEIFFER, LOBACH and RAPP, *Facilitating Cross-Border Family Life – Towards a Common European Understanding. EUFams II and Beyond*, 2021, available at https://heiup.uni-heidelberg.de/catalog/view/853/1425/95738#content/footnote_reference_75.

([328]) *See* Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

([329]) *See* Hague Conference on Private International Law, Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, 2007, available at https://www.hcch.net/index_en.php?act=conventions.text&cid=133.

([330]) Protocol art. 8 gives a limited choice for the maintenance creditor and the debtor as to the applicable law. According to para. 1 of this Article, "Article 8—Designation of the applicable law (1) Notwithstanding articles 3 to 6, the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation - a) the law of any State of which either party is a national at the time of the designation; b) the law of the State of the habitual residence of either party at the time of designation; c) the law designated by the parties as applicable, or the law in fact applied, to their property regime; d) the law designated by the parties as applicable, or the law in fact applied, to their divorce or legal separation." The above rule is referred to by Article 15 of the EU Regulation No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

([331]) *See* ECJ case of *Van den Boogaard v Laumen* c-220/95 [1997] 2 FLR 399. ECJ 27 February 1997-Case C-220/95 (van den Boogaard) [1997] ECR I-1147, para 22 et seg.: "if (...) a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention (...). It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income."

([332]) *See* for England the Court of Appeal Judgment in *Moore v Moore* [2007] EWCA Civ 261. As for Italy *see* Cass., Sez. Un., 1 ottobre 2009, n. 21053.

([333]) Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. On the legislative evolution of the "Rome III" Regulation, *see* FIORINI, *Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation As the Way Forward?*, in *International and Comparative Law Quarterly*, (59) 2010, pp. 1143 ff.; QUEIROLO, *EU Law and Family Relationships. Principles, Rules and Cases*, Roma, 2016, pp. 225 ff.

of the same Regulation ([334]). Legal scholars have noted that this legislation is designed to determine the applicable law in divorces with international elements. One such element may be the fact that the marriage was celebrated abroad. By recognising foreign marriages for the purpose of divorce proceedings, the Regulation opens the door for couples to choose a more liberal marriage regime abroad and later seek divorce in their home country ([335]).

As for jurisdiction in matrimonial matters and parental responsibility, Article 10 of the "Brussels II-*ter*" Regulation grants significant space to choice-of-court agreements ([336]).

Recital 14 of the same Regulation clarifies that, "according to the case-law of the Court of Justice, the term 'court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'. Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation. This Regulation should not allow free circulation of mere private agreements. However, agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession" ([337]).

As a result of these provisions, we can confidently affirm that party autonomy has gained a firm foothold in modern European private international family law ([338]). It appears that Europe has rediscovered principles rooted in Roman and medieval law, which historically granted broad scope to private autonomy in regulating patrimonial relations within families of all kinds ([339]).

In a sense, EU private international law has served as a "legal Trojan horse" for reintroducing long-forgotten principles of contractualisation into European legal systems. And this should come as no surprise. As a French scholar has aptly remarked: "Today, we must reject the idea of neutrality in private international law. At least in family matters, recent developments in this discipline clearly show that it is a law committed to the protection of fundamental rights—and that this commitment goes beyond the mere corrective function of *ordre public*" ([340]).

Indeed, EU private international law has become a vehicle for introducing legal instruments—such as prenuptial agreements in contemplation of divorce—even into jurisdictions that do not formally recognise or easily accept them ([341]). As a result, party autonomy, private ordering, and contractualisation are not only encouraged but actively facilitated. This evolution paves the way for

([334]) However, the scheme of the Rome III Regulation provides for several additional safeguards, which have been put in place in order to ensure that the exercise of party autonomy by the spouses will not contradict certain fundamental values of the forum state: *see* TORGA, *Party autonomy of the spouses under the Rome III. Regulation in Estonia – Can private international law change substantive law?*, in *Nederlands International Privaatrecht* 4, 2012, pp. 547 ff.

([335]) TORGA, op. cit., pp. 547 ff.

([336]) Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). Sul rilievo dell'autonomia privata nel settore della parental responsibility *see* GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., pp. 92 ff.

([337]) *See* MAUNSBACH, *Party Autonomy in European Family and Succession Law*, op. cit., p. 29: "The 'Brussels II-*ter*' Regulation does not entail any substantive amendments as regards party autonomy."

([338]) TORGA, op. cit., pp. 547 ff.

([339]) *See* above, at para. 1.2.

([340]) *See* FARGE, *La gestation d'un droit fondamental au divorce en Europe ? L'apport du droit privé*, in *Revue des droits et libertés fondamentaux*, 2012, chron., n. 19, pp. 1 ff.: "il faut aujourd'hui démentir l'idée de neutralité du droit international privé. Au moins en matière familiale, les dernières évolutions de la discipline révèlent clairement qu'il s'agit d'un droit engagé en faveur de la défense des droits fondamentaux et que cet engagement ne passe plus seulement par le correctif de l'ordre public."

([341]) *See* above, at para. 8 and 9, as far as France and Italy are concerned.

further developments. In other words, under the aegis of private autonomy, the time may be ripe for a transition from European uniform private international law to European uniform substantive family law—as we shall explore in the final paragraph of this work ([342]).

13. The Need for an Harmonisation of Substantive National Laws—and its Limits.

"In a Europe that is growing together, family ties increasingly cross one or more national boundaries" ([343]). This observation is more relevant than ever. Despite recent and regrettable setbacks in the application of the Schengen Agreement, the European Union continues to guarantee freedom of movement for individuals. For years, Europe has promoted intensive study and training programs abroad—especially for young people—which have helped shape a generation of European citizens increasingly intolerant of barriers to personal exchange between Member States. In this context, part of the legal doctrine has rightly observed that "substantive differences between national legislations within Europe may have serious negative consequences on cross-border families, resulting in the breach of fundamental human rights, or, in the case of the EU, may even form an obstacle to the free movement of persons" ([344]).

An increased mobility of persons requires, therefore, "special attention to ensure clarity and coherence about the nature of family law regulations such as divorce agreements, child custody dealings, inheritance, etc." ([345]).

Scholars also emphasize that the recognition—or lack thereof—of a family status can have serious consequences, including: *a*) Residence permits; *b*) Acquisition or loss of citizenship; *c*) Access to social assistance; *d*) Tax obligations. Thus, the recognition or denial of a personal status in a country other than the one in which it was created or modified may also affect the property rights of the individuals concerned. Similarly, divergent rules on matrimonial property regimes can negatively impact the rights of former spouses in the event of divorce ([346]). As a result, "diverging national legal systems in family matters may negatively affect cross border movement of families", thereby restricting the free movement of persons.

Many scholars therefore argue that we must find "the ways to harmonise substantive family law in Europe" ([347]), noting that "The circumstances which shaped the notion of a European Union drive national systems towards convergence in family law as well. The construction of the European Union

([342]) *See* below, at para. 15.

([343]) DETHLOFF, *Arguments for the Unification and Harmonization of Family Law in Europe*, in BOELE-WOELKI, *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerp, Oxford, New York, 2003, p. 37. The total number of international couples should be today of about 16 million: *see* https://europeansting.com/2019/01/31/property-regimes-for-international-couples-in-europe-new-rules-apply-in-18-member-states-as-of-today/.

([344]) DETHLOFF, *Arguments for the Unification and Harmonization of Family Law in Europe*, op. cit., p. 37.

([345]) Cfr. EUROBAROMETER, *Family law Analitical report 2006*, http://ec.europa.eu/public_opinion/flash/fl188b_en.pdf, p. 3.

([346]) According to MARELLA, *The Contractualisation of Family Law in Italy*, op. cit., p. 87, "the persons who established the family relationships in one country, moved to another country and later decided to divorce, may lose their rights to claim a certain property, if the receiving State has different regulation concerning the matrimonial property regime, therefore the examples show how the lack of a harmonised certain aspects of family matters can be the source of severe discrimination among European citizens."

([347]) MARELLA, op. cit., p. 87. Also DE OLIVEIRA, op. cit., p. 1095 s. underlines the need to uniform, or at least to harmonise European family law, pointing out that "Long gone are the days when citizens were born and married and died in the same place, getting married in their villages, and working on the land where the sparrows of their childhood kept on chirping. Social mobility and the abolition of borders have increased bi-national marriages. People live in different countries throughout their lives; they get married here and 'unmarried' elsewhere. And ever more frequently, they get together again and again as the increase in 'reassembled' families clearly shows. Within this framework, the old and dear notion of the certainty of law—the aim of knowing all the legal effects of our actions—is dying out with obvious individual losses under the resigned eyes of the national legal community."

gives national systems the opportunity, the means and the motives to attempt the unification of family law more than ever before" ([348]).

However, in my view, a "simple" harmonisation of substantive law would be of limited utility. If by "harmonisation" we mean merely the adoption of common general principles to be implemented by each Member State through national legislation, I fear we would not make much progress. In fact, many such principles are already recognised and shared across European legal systems ([349]).

To give a first example: if, in the field of divorce, the EU were to merely transform the CEFL's *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* ([350]) into a directive—something that is not currently possible, as the unification of substantive law exceeds the scope of legal cooperation under Article 81 of the Lisbon Treaty ([351])—we would not advance significantly. Judicial practice in cross-border family disputes clearly shows that conflicts arise not over general principles, but over the interpretation and application of detailed rules.

Der Teufel steckt im Detail—the devil is in the details—and this is a situation where all of us Europeans could truly see ourselves!

Consider, for instance, how the concept of "deferred sharing of acquisitions" during marriage is implemented in vastly different ways: from the German *Zugewinngemeinschaft*, to the Italian *comunione de residuo*, to the Scandinavian *giftorättsgods*, and the French *participation aux acquêts*. While all these regimes are based on the same principle—deferred participation in assets acquired during marriage—they differ profoundly in their legal structure and practical consequences, when we look at the details of each legal system ([352]).

([348]) DE OLIVEIRA, op. cit., p. 1101 s.

([349]) For a list of such common principles, *see* OBERTO, *Il divorzio in Europa*, op. cit., pp. 125 ff.

([350]) The official web site of the Commission on European Family Law (CEFL) is the following: https://ceflonline.net/. On the history of the creation of such commission *see* BOELE-WOELKI, *The Principles of European Family Law: its Aims and Prospects*, in *Utrecht Law Review*, 2005, pp. 160 ff.; CUBEDDU, *I contributi al diritto europeo della famiglia*, in PATTI e CUBEDDU (eds), *Introduzione al diritto della famiglia in Europa*, Milano, 2008, pp. 14 ff. The CEFL web site contains a very rich data base of national reports from the different EU countries on the subject of divorce maintenance: https://ceflonline.net/divorce-maintenance-reports-by-jurisdiction/. Another comparative data base on divorce systems is available at https://idcel.univ-lyon3.fr/fileadmin/medias/Documents_IDCEL/IDCEL-La_rupture_du_mariage_en_droit_compare__-2015.pdf.

([351]) Article 81 (ex Article 65 TEC): "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff. 3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

([352]) For a comparative study *see* OBERTO, *La comunione legale tra coniugi*, I, op. cit., pp. 849 ff. For a comparative analysis in English *see* BOELE-WOELKI *et al.*, *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit.

The CEFL's European principles of family law ([353]), drafted with great care and wisdom, can surely serve as a "common core" of values. But how would each Member State implement such principles?

Take, for example, the CEFL principle allowing a "competent authority" (judicial authority?) to "at least scrutinize the validity" of a divorce maintenance agreement ([354]). This principle could be interpreted and applied in radically different ways: *a*) In Scandinavia, where full contractual freedom is often favoured; *b*) In common law countries, where courts exercise broad discretion over spousal relations; *c*) In Germany, where *Treu und Glauben* (good faith) is sometimes stretched beyond its traditional scope ([355]); *d*) In Italy, where a paternalistic (and, I would dare to say, Jesuitical) judicial approach continues to suppress attempts by spouses to predefine the consequences of a marital breakdown. Therefore, if each legal system were to "implement" such general principles in its own way, the result could be an even more fragmented legal landscape than the one we currently face.

Moreover, the risk of a "minimalist" harmonisation remains. Even with the best intentions, the process of translating general principles into binding rules may open the door to regressive interpretations. This has already occurred in the fields of contract and tort law, where harmonisation efforts have sometimes led to diluted or backward-looking results ([356]).

The truth is that, if we are to address these challenges effectively, we must acknowledge that conflicts of laws within Europe can only be resolved through the adoption of a single *jus europaeum familiae*. Only a true, uniform European family code—substantive and material, not merely concerning the conflict law—applicable across all Member States, could decisively cut the Gordian knot we have attempted to untangle in this essay. Such a development would be comparable to what occurred over two centuries ago, when the *Code Napoléon* definitively resolved the centuries-old French disputes over matrimonial regimes, which had previously varied depending on whether one married in a region governed by *droit écrit* or by a local *coutume* ([357]).

14. Marital and Premarital Agreements in a "More Harmonized" Private International Law.

14.1. Risks Connected to Fragmentation and Dépeçage.

Since the utopian scenario of a uniform European substantive family law remains (regrettably) out of reach, the only realistic and potentially effective solution must—for the time being—be sought at the level of private international and procedural law. In short, if mere harmonisation of substantive law is insufficient and full unification remains a distant dream, then the resolution of the countless conflicts of law must be pursued through a coherent and functional private international law framework ([358]).

Yet here, too, we encounter a formidable obstacle: the excessive fragmentation of the EU's private international family law system. While some argue that complexity is the inevitable price of reconciling regional and international codifications, and that a piecemeal approach is the only viable

([353]) *See* above, within the present paragraph.

([354]) Principle 2:10 (3), in BOELE-WOELKI *et al*., *Principles of Family Law Regarding Divorce and Maintenance Between Former Spouses*, Antwerp-Oxford, 2004, p. 125.

([355]) For a critique to this idea *see* OBERTO, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2012, pp. 89 f. On this same issue *see* also above, at para. 7.4.

([356]) This worry is expressed by MARELLA, op. cit., p. 105.

([357]) OBERTO, *La comunione legale tra coniugi*, I, op. cit., pp. 59 ff.

([358]) This position is not universally accepted among scholars. For instance, DETHLOFF, *Arguments for the Unification and Harmonization of Family Law in Europe*, op. cit., pp. 51 ff., expresses concern that a mere unification of conflict-of-law rules may expose parties to strategic manipulation—such as engaging in "forum shopping" or seeking to benefit from frequent changes in habitual residence. Nonetheless, such risks may be effectively mitigated by the careful design of a coherent and robust system of private international law. For example, the legal effects of a change in habitual residence—or of excessively frequent changes—could be restricted through appropriate legislative safeguards.

path under the EU's decision-making process, this complexity comes at a high cost—especially considering that the original aim of EU intervention was to simplify people's lives.

In practice, the more complex and opaque the applicable rules become, the less time and energy can be devoted to resolving the substantive issues in dispute. Errors become more likely, and the cost of obtaining expert legal advice increases. International family law is no longer a niche subject: it affects a growing number of people, including many who cannot afford complexity. Third-country nationals, to whom EU rules also apply, often rely on legal aid and are assisted by ordinary family lawyers working under difficult conditions. In many cases, the application of private international law rules falls to administrative authorities operating under severe constraints. Whether the current level of complexity is workable under such conditions is highly questionable ([359]).

One of the most problematic aspects of this fragmentation is the phenomenon known in French as *dépeçage*—the "dismemberment" of a single case into multiple legal regimes. This is particularly evident in the current EU family law framework. For example: *a*) Proceedings related to marital breakdown (divorce, legal separation, annulment) are governed by two different regulations: *a.1*) *Brussels II-ter* for jurisdiction and parental responsibility; *a.2*) *Rome III* for applicable law (though it does not apply to annulment). *b*) Closely related matters—such as *b.1*) maintenance obligations and *b.2*) matrimonial property—are governed by entirely separate instruments. This "legislative Balkanisation" prevents the existence of a single, coherent instrument to which interpreters can refer in family matters ([360]).

Moreover, the problem is not limited to fragmentation.

Significant areas of family law remain entirely unregulated by EU instruments. For example, the law applicable to the annulment of marriage is not addressed by *Rome III*, which only covers divorce and legal separation. While *Brussels II-ter* governs jurisdiction and recognition of judgments, the applicable law must be determined by national private international law, with all the attendant risks of *Rückverweisung* (remission), *Weiterverweisung* (transmission), and lack of coordination ([361]).

Even more serious are the gaps in the field of filiation.

No EU regulation determines the law applicable to the relational aspects of parental responsibility—such as custody arrangements, parental authority, placement of the child, or visitation rights. "Brussels II-*ter*" addresses only jurisdiction and the circulation of decisions, as well as international child abduction. Regulation 4/2009 governs maintenance obligations but not parental responsibility. "Rome III" expressly excludes parental responsibility from its scope. The only relevant instrument is the 1996 Hague Convention, whose Article 15 refers to the law of the forum (Article 21), unless another law has a closer connection to the case.

Even more glaring is the absence of any EU regulation on the establishment or contestation of filiation. This issue is explicitly excluded from the 1996 Hague Convention and is left entirely to the domestic law (including private international law) of each Member State. Consider, for example: *a*) Children of same-sex couples, who may be legally recognised as children of both parents in some Member States but not in others; *b*) Children born through surrogacy, whose legal status varies dramatically across jurisdictions.

([359]) GONZÁLEZ BEILFUSS, *The Unification of Private International Law in Europe: A Success Story?*, in BOELE-WOELKI, MILES and SCHERPE (eds), *The Future of Family Property in Europe*, op. cit., p. 335.

([360]) Cfr. per tutti OBERTO, *I patti prematrimoniali nel quadro del diritto europeo*, in *Corriere giuridico*, 2020, pp. 800 ff. The issue of fragmentation of the family related provisions of the various EU regulations on this topic is underlined also by GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., pp. 246 ff.; *see* as well KRUGER, *Fragmentation of European Private International Law: Family Matters*, in FOGT (ed.), *Private International Law In An Era Of Change*, Cheltenham, 2024, pp. 169 ff.

([361]) Where a conflict-of-laws rule of the second jurisdiction refers back to the law of the forum, the phenomenon is termed "remission" (German: *Rückverweisung*); conversely, where the reference is directed towards the law of a third jurisdiction, it is known as "transmission" (German: *Weiterverweisung*): LORENZEN, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country"*, in *Yale Law Journal*, 1917, 27, pp. 509 ff.

These issues have recently been addressed by the European Court of Human Rights (notably in the Grand Chamber opinion of 8 May 2019, issued under Protocol No. 16). Since the EU has acceded to the ECHR, these developments are highly relevant. Yet the EU legal system still lacks coherent answers to these questions, which are regulated inconsistently across Member States. The result is unequal treatment of identical situations within the EU and a restriction on the free movement of rights, persons, and statuses—an outcome that directly contravenes the EU Treaties.

14.2. Marital and Premarital Agreements within the Prism of Private International Law.

The problems caused by the aforementioned fragmentation become particularly evident in the field of marital and premarital agreements—especially when such agreements are entered into in contemplation of a possible future divorce ([362]). In this context, the phenomenon of *dépeçage* is not merely theoretical but manifestly concrete. Indeed, no EU legislative instrument currently encompasses at the same time all the legal issues relating to these types of contracts. In many cases, such agreements include a choice of matrimonial property regime—thus falling within the scope of Regulation (EU) No. 1103/2016 on matrimonial property regimes. However, they are often concluded in contemplation of divorce, potentially triggering the application of the "Brussels II-*ter*" and "Rome III" Regulations. These agreements may also contain provisions on alimony or spousal maintenance, which fall under the scope of the Maintenance Regulation and the 2007 Hague Protocol.

Part of the legal doctrine is aware of these risks and has proposed various solutions. Unfortunately, very few of these proposals are compatible with the current EU legal framework. For example, some Spanish and Italian scholars have suggested that the conflict-of-law rules on matrimonial property regimes (Regulation 1103/2016) should also govern issues such as legal separation, divorce, and maintenance obligations when they are addressed in a prenuptial agreement ([363]). This approach, however, is not supported by the current structure of EU law. Other scholars have proposed that Rome III should govern all aspects of prenuptial agreements, including patrimonial and maintenance provisions ([364]). Yet this, too, is incompatible with the Regulation's limited scope.

In fact, the relevant EU instruments are explicit in excluding from their scope matters that fall under the domain of other instruments: *a*) The "Brussels II-*ter*" Regulation (see Article 1(4)(e)) expressly excludes maintenance obligations. *b*) Recital 9 of the same Regulation clarifies that it applies only to the dissolution of matrimonial ties and not to ancillary issues such as property consequences or maintenance. *c*) The "Rome III" Regulation (Article 1(2)(e) and (g)) excludes both the patrimonial effects of marriage and maintenance obligations. *d*) Regulation 1103/2016 on matrimonial property regimes (Article 1(2)(c)) also excludes maintenance obligations from its scope. In short, each of the family law Regulations declares itself inapplicable to areas governed by the others, thereby reinforcing the fragmentation rather than resolving it.

Nonetheless, some provisions within these Regulations offer potential avenues for mitigating this fragmentation. For example, there is an opportunity to achieve temporal and jurisdictional cohesion between: *a*) Article 7 of the Property Regulations (Regulations 1103/2016 and 1104/2016), which allows for party autonomy in choosing the competent court for matters of matrimonial or partnership property; and *b*) Article 4 of the Maintenance Regulation, which similarly allows for choice-of-court agreements. A coordinated approach could be achieved if the parties align their jurisdictional choices under both instruments. For instance, by selecting the courts of the Member State whose law is designated under Article 22 of the Property Regulation, the parties can ensure that the same court has jurisdiction over both property and maintenance matters. This would allow the court of either party's habitual residence or nationality to serve as a unified forum, thereby reducing the risk of conflicting judgments and procedural inefficiencies.

([362]) On the subject of international premarital agreements *see* SALTER, BUTRUILLE-CARDEW and GRANT (eds), *International Pre-Nuptial and Post-Nuptial Agreements*, Bristol, 2011.

([363]) ANTÓN JUÁREZ, op. cit., pp. 67 ff.; SILVESTRI, *Il* contrat de mariage *in Francia e la circolazione UE degli accordi prematrimoniali*, in LANDINI and PALAZZO (eds), *Accordi in vista della crisi dei rapporti familiari*, op. cit., pp. 497 f.

([364]) NASCIMBENE, *Divorzio. Diritto internazionale privato e dell'Unione Europea*, Milano, 2011, p. 47.

Such coordination, while not a complete solution to the problem of *dépeçage*, represents a pragmatic step toward greater coherence in the treatment of marital and premarital agreements within the EU's fragmented legal landscape.

14.3. Contractualisation as a Way to Better Harmonise Private International Family Law—Also in the Field of Marital and Premarital Contracts.

The problems of fragmentation and *dépeçage* discussed above are not the only challenges affecting this complex area of law. Some scholars have even questioned whether future spouses or partners may validly choose the applicable law for maintenance obligations. Their argument is that the 2007 Hague Protocol refers only to "creditors" and "debtors," thereby excluding "future" creditors or debtors ([365]).

In my view, this objection is easily dismissed. Article 8 of the 2007 Hague Protocol—incorporated by reference in Article 15 of Regulation (EC) No. 4/2009 on maintenance obligations—clearly allows the parties to choose the applicable law "at any time." The argument that the Protocol's terminology excludes future parties is unconvincing. Analogy is a legal reasoning tool as old as law itself ([366]), and its applicability to EU law is widely accepted ([367]). Moreover, the Explanatory Report to the Protocol explicitly affirms that the choice of applicable law may be made even before marriage ([368]).

A similar objection has been raised with respect to the "Rome III" Regulation. Article 5 refers only to "spouses" (and not "prospective spouses") ([369]) and includes options such as the parties' current or last common habitual residence—suggesting that the agreement must be concluded after marriage ([370]). However, this interpretation is overly restrictive. Article 5(2) states that: "An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized." The absence of a starting point (*a quo*) and the presence of only a final deadline (*ad quem*) implies that the agreement may indeed be concluded before marriage ([371]).

([365]) GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., p. 249.

([366]) For a 16th century reference work on analogy *see* RAUDENSIS, *De analogis, univocis et aequivocis*, Venetiis, 1587. According to this ancient author (*see* pp. 1 f.), "analogorum cognitio affert (…) non parum lucis quamplurimis tenebricosis, lucrosis, et quotidianis articulis, de quibus disceptari solet in causis dependentibus a contentiosis verbis testamentorum (…), contractuum, rescriptorum ac statutorum" ("knowledge of the analogical method brings (…) a not negligible light to many obscure, profitable and daily issues, which are commonly disputed, in cases that depend on words of testaments (…), contracts, rescripts and statutes").

([367]) *See* e.g. LANGENBUCHER, *Argument by Analogy in European Law*, in *The Cambridge Law Journal*, Vol. 57, No. 3 (Nov., 1998), pp. 481 ff.

([368]) "71. The choice of applicable law is particularly useful in the relationship between the spouses when they conclude, before or during the marriage, an agreement relating to maintenance obligations and / or ownership of their respective property. Thanks to this choice, the law applicable to the maintenance obligation is set in advance, which avoids any questioning of the agreement later": BONOMI, *Preliminary Draft Protocol on the Law Applicable to Maintenance Obligations. Explanatory Report*, No. 71, available at https://assets.hcch.net/docs/04c6c594-cbb8-453f-b977-6d4e39c3a6a9.pdf (Italian version available at https://assets.hcch.net/docs/a20ac557-f94d-42da-b625-776e7de69f01.pdf). For several remarks on the role of private autonomy in the field of maintenance obligations *see* GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, pp. 84 ff.; *see* as well OBERTO, *Crisi della famiglia e obblighi di mantenimento nella UE – I rimedi all'inadempimento*, in ROPPO and SAVORANI (eds), *Crisi della famiglia e obblighi di mantenimento nell'Unione Europea*, Torino, 2008, pp. 85 ff.; OBERTO, *Gli obblighi di mantenimento e il recupero dei crediti alimentari in diritto comunitario: la nozione comunitaria di "alimenti" e i principi in tema di competenza giurisdizionale*, in https://www.giacomooberto.com/milano2009/relazione.htm.

([369]) QUEIROLO, *EU Law and Family Relationships. Principles, Rules and Cases*, Roma, 2016, pp. 247 f.

([370]) VIARENGO, *Choice of Law Agreements in Property Regimes, Divorce, and Succession: Stress-Testing the New EU Regulations*, in *ERA Forum*, (2016) 17, p. 549.

([371]) This view was likewise expressed in the commentary on the draft Regulation by RIMINI, *Arrivano i patti prematrimoniali*, in *La Stampa*, 23 novembre 2006, p. 25. See also CAMPIGLIO, *Prime applicazioni delle norme europee sui divorzi «internazionali»*, in *Nuova giurisprudenza civile commentata*, 2015, II, p. 182, where the author notes: "The Regulation contains no provision on the *dies a quo*, and in particular no indication as to whether the choice may be validly made prior to the marriage, as is increasingly the case through prenuptial agreements. It is true that, at that stage, one

Moreover, from a practical standpoint, denying the possibility of choosing the applicable law in a prenuptial agreement undermines the very purpose of party autonomy. As one scholar has noted, it is entirely reasonable for parties to agree in advance on the law applicable to their divorce and its financial consequences. Otherwise, the goal of submitting all aspects of the marital breakdown to a single legal system would be frustrated ([372]).

Another potential source of confusion lies in the classification of the compensatory allowance (or *prestation compensatoire*). If it is treated as a maintenance obligation, it falls under the 2007 Hague Protocol and is connected to the habitual residence of the creditor. If, instead, it is considered part of the matrimonial property regime, it would fall under Regulation 1103/2016. This would make quite uncertain the connection with the State of the creditor's habitual residence provided by the 2007 Hague Protocol ([373]). Fortunately, the European legislator has anticipated this issue by allowing a "dependent" choice of law under Article 8(1)(c) and (d) of the Hague Protocol. This enables parties to align the law applicable to maintenance with that chosen for their property regime or for divorce.

It is therefore the responsibility of notaries and legal professionals assisting the parties to ensure that the choice of law for property consequences is coordinated with the choice of law for separation, divorce, and maintenance obligations. Failing to do so risks legal uncertainty and fragmentation. A unitary treatment of these matters is not only desirable but necessary. Indeed, the risk of legal uncertainty and fragmentation may arise if the parties do not conclude such a comprehensive choice-of-law agreement ([374]).

By agreeing on the applicable law, the parties can anticipate how their property relations will be governed under various legal systems and select the one that best serves their shared interests. Proper legal advice is essential to guide them in this process. EU institutions could also contribute by publishing model clauses and templates—following the example of the European Law Institute (ELI), which has developed a toolkit with optional checklists, draft agreements, and model clauses for designating the applicable law ([375]).

Temporal coordination is also possible. Under Article 5 of Rome III, Article 22 of the Matrimonial Property Regulation, and Article 8 of the Hague Maintenance Protocol, parties may designate in advance the law of their common habitual residence, their last common habitual residence, or one of their nationalities.

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cannot yet speak of 'spouses'; nevertheless, there appears to be no reason to deem the choice invalid. The only concern is that the passage of time may erode the connection with the chosen law (for instance, if the spouses subsequently establish residence in a State other than the one whose law they had originally selected), thereby undermining the spirit of the Regulation." ("Nulla dispone invece il regolamento quanto al *dies a quo* e, in particolare, in ordine alla possibilità di effettuare la scelta già prima della celebrazione delle nozze, in occasione dei sempre più frequenti *prenuptial agreements*. È bensì vero che a quell'epoca non può parlarsi ancora di «coniugi», ma non sembrano esservi ragioni per ritenere invalida la scelta. L'unico rischio è che il trascorrere del tempo faccia venir meno il collegamento con la legge scelta (ad esempio, perché i coniugi hanno stabilito la loro residenza in uno Stato diverso da quello la cui legge avevano scelto) e si finisca così per tradire lo spirito del regolamento"). In any event, it is submitted that the foregoing doubt may readily be resolved by observing that, at least where there is mutual consent, the spouses may subsequently amend the agreement initially concluded concerning the choice of the applicable law.

([372]) VIARENGO, *Choice of Law Agreements in Property Regimes, Divorce, and Succession: Stress-Testing the New EU Regulations*, in *ERA Forum*, op. cit., p. 549.

([373]) Such a doubt is expressed by VITERBO and GARETTO, *Choosing Law and Jurisdiction for Matrimonial Property and Property Consequences of Registered Partnerships: Associated Risks*, in RUGGERI, LIMANTĖ and POGORELČNIK VOGRINC (eds.), *The EU Regulations on Matrimonial Property and Property of Registered Partnerships*, Intersentia Online, 2022, https://www.intersentiaonline.com/permalink/dcdb1821c6743b6e9043065c24e3cc08, pp. 212 ff.

([374]) VITERBO and GARETTO, op. cit., pp. 212 ff.

([375]) ELI, *Toolkit for Advising European Families. Married Couples*, Wien, 2019, esp. pp. 5 ff., on the optional checklist for legal advisers; pp. 11 ff. for some draft agreements for married couples; pp. 13 for the clause relating to the designation of the applicable law, expressely referring to "to their property relations, maintenance, and any other economic consequences of their marriage or its dissolution, including pension rights (…), as far as the law applicable is subject to their choice", adding that "This law shall also apply to the divorce or legal separation."

The Hague Protocol even allows the law applicable to maintenance to be linked to the law chosen under the Property Regulations or Rome III. These linkages can be maintained over time, ensuring consistency across related proceedings ([376]).

Such coordination is best achieved within a broader framework of intensified contractualisation of family law relations ([377]). One of the most distinctive features of EU family law instruments is their recognition of party autonomy: parties are permitted to conclude agreements designating the applicable law. This means they may derogate from the law that would otherwise apply on objective grounds—including its mandatory provisions—by entering into a valid choice-of-law agreement ([378]).

Thus, even if EU Regulations in family law do not always function seamlessly together, they all recognise party autonomy. As a result, it is the parties themselves who can achieve coherence by exercising that autonomy. In the context of choice of law, coordination means that different aspects of a legal dispute may be governed by the same legal system. These considerations also provide a compelling legal argument in favour of recognising prenuptial agreements in contemplation of divorce—even in jurisdictions where they are not formally acknowledged ([379]).

In any case, it is abundantly clear that better coordination of the various aspects of family law—especially in the context of family breakdown—is urgently needed at the EU legislative level, in order to provide citizens and professionals with higher standards of legal certainty.

As a proposal *de iure condendo*, it would be highly desirable for the rules of private international law contained in the "Rome III" Regulation to govern all aspects of the dissolution of cross-border marriages: from the judgment (or public deed) that effects the dissolution, to all related personal and patrimonial consequences. Such a solution would therefore include:

a) Maintenance obligations;
b) Lump sum settlements;
c) Property allocation;
d) Divorce-related torts;
e) Claims for unjust enrichment;
f) Common or individual property claims;
g) Liquidation of matrimonial regimes;
h) Issues arising from prenuptial agreements of any kind.

In such a "more harmonised" EU private international family law, the role of contractualisation should—and could—be further enhanced, granting parties even greater freedom to choose the courts and legal systems most suited to their family relationships. Concerns about "forum shopping" can be addressed by recognising that widespread preference for certain legal systems would encourage less "popular" jurisdictions to modernise their laws and align them with contemporary needs.

([376]) It should be noted that where a choice of law has been made by future spouses pursuant to Article 22 of Regulation (EU) 2016/1103 (the Matrimonial Property Regulation), and that connecting factor subsequently changes following the marriage—for example, by virtue of relocation to another Member State—the agreement may require amendment in order to ensure proper alignment with other applicable instruments, notably Regulation (EU) No. 1259/2010 (Rome III) and the Hague Protocol of 23 November 2007 on Maintenance Obligations. Such coordination is necessary to avoid potential divergences between the law governing matrimonial property regimes, the law applicable to divorce and legal separation, and that applicable to maintenance obligations (GRAY, *Party Autonomy in EU Private International Law Relating to Family Matters and Succession: Evaluating Coherence in the Union Context*, op. cit., p. 247).

([377]) For a detailed analysis of issues related to the different forms of choice of applicable law in the EU regulations concerning family, as well as for their possible interactions, *see* PIAZZONI, *Le famiglie transnazionali nell'Unione Europea*, 2019, available at https://www.rivistafamilia.it.

([378]) GONZÁLEZ BEILFUSS, *The Role of Party Autonomy in Pursuing Coordination*, in VIARENGO and VILLATA (eds), *Planning the Future of Cross Border Families*, Oxford, 2020, p. 243.

([379]) Support for such an interpretation of the EU Regulations in the domain of family law may also be found in VELLETTI and CALÒ, *La disciplina europea del divorzio*, in *Corriere giuridico*, 2011, p. 733, where the authors speak of an "open door" to prenuptial agreements, even within the Italian legal framework.

15. A Final Proposal: Contractualisation as the Cornerstone of a (Possible) European Uniform Substantive Family Law.

15.1. Contractualisation as the Key to a "Mild" Uniformisation of European Substantive Family Law.

I would like to conclude this work by returning to the idea—perhaps utopian—of a uniform European substantive family law.

As previously demonstrated, a common denominator across contemporary Europe is the growing importance of contractualisation and party autonomy. If this is true, then it seems both logical and promising to focus on this dimension as a foundation for advocating a "mild" uniformisation of European substantive family law. In other words, while the time is not yet ripe for the enactment of a supranational, binding family code governing marriage, cohabitation, dissolution, patrimonial relations, and property regimes, we can already envision a more flexible and voluntary alternative.

Specifically, we could imagine the creation of an "optional substantive European family law," governed by uniform supranational rules—perhaps through an *ad hoc* European convention—applicable to cross-border couples, but also to any couple (married or cohabiting) even in the absence of a foreign element. This new set of rules would apply solely on the basis of a joint opt-in by the parties, ideally at the time of the formation of their relationship (whether marriage, civil partnership, or *de facto* cohabitation).

This approach is not entirely new. Decades ago, a Dutch scholar proposed an "optional European family law" that couples could choose in lieu of their national laws ([380]). More recently, a German author suggested the creation of an optional model of European civil marriage (*einheitlicher Rechtsrahmen für transnationale Paare*) containing a complete regulation of the marital bond, from formation to dissolution ([381]).

What I propose here is to take an even more ambitious step. Specifically, I envision the establishment of a European convention that would enable couples of any kind—even in the absence of any cross-border element—to opt into a unified set of legal rules governing all aspects of family life. This framework would apply uniformly across the continent, offering an alternative to the national family law systems currently determined by the domestic legislation applicable to each couple. Such a convention would encompass the full spectrum of family law, including but not limited to: the conditions for entering into marriage or partnership; the procedures for the legal recognition of cohabitation; the personal and financial consequences of marriage, civil partnership, or *de facto* unions; the legal relationships between couples and their children; and the processes for the dissolution of these bonds.

Such an option could be exercised at the outset of the relationship, thereby constituting a true prenuptial (or "pre-partnership" or "pre-cohabitation") agreement. It should also be available to existing couples, who could choose to abandon their current legal framework and adopt the new one. The result would be a "mild" uniformisation of European family law—one that does not replace national systems but coexists with them as an optional alternative ([382]).

The current EU private international law rules would continue to govern conflicts of law in the absence of such an option, provided they are better harmonised, as previously discussed. Even in

([380]) Cfr. DE GROOT, *Op weg naar een Europees personen- en familierecht?*, in *Ars Aequi*, 1995, vol. 44, no. 1, pp. 32 ff.

([381]) Cfr. DETHLOFF, *Europäische Vereinheitlichung des Familienrechts*, in *Archiv für die civilistische Praxis*, 2004, pp. 544 ff.; DETHLOFF, *Die Europäische Ehe. Ein optionales Modell für transnationale Partnerschaften*, in *Beiträge zur Rechtsgeschichte Österreichs*, 2012, pp. 138 ff.

([382]) By "optional", one may understand the requirement that the choice must arise from a clear and express agreement between the spouses (or prospective spouses), or, in the case of a civil union, between the partners or prospective partners thereof.

cases involving non-European elements, the parties could be allowed to opt into the European uniform system, provided there is a minimal connection to the EU (e.g. habitual residence within the Union).

As for the matrimonial property regimes under this hypothetical European family law, preference could be given to the system of deferred participation in acquisitions. This model is already reflected in the 2010 Franco-German bilateral convention, which draws from both the French *participation aux acquêts* (Articles 1569–1581 of the French Civil Code) and the German *Zugewinngemeinschaft* (§§ 1363–1390 BGB) ([383]).

The work of the Commission on European Family Law (CEFL) would be particularly useful here. The CEFL has conducted extensive comparative research and proposed a coherent set of uniform principles for matrimonial property regimes ([384]). It identifies both deferred participation and community of acquests as viable default regimes, but expresses a clear preference for the former.

According to the CEFL, deferred participation best reconciles, on the one hand, the attempt "to promote self-sufficiency, gender equality and the autonomy of the spouses", with the attention paid, on the other, "to the need of inter-spousal solidarity and fairness between the spouses, both during the regime, and upon its dissolution" ([385]). Moreover, in the introductive remarks to its study, the CEFL notes that "the participation regime is better choice from the both of the spouses' prospective as after divorce there will not be any question how the property should be divided, at the moment of divorce both spouses know for sure what property belongs to each of the spouses. The participation of matrimonial property regime is easy to implement itself" ([386]).

Legal scholars have also observed that English law, despite lacking a formal matrimonial property regime, is increasingly moving toward a model resembling deferred community. Judges retain broad discretion, but the outcomes often mirror those of deferred participation systems ([387]). This convergence between common law and civil law traditions could further support the adoption of deferred participation as the default regime in a future European framework.

This vision also aligns with two older instruments of the Council of Europe.

The first of them is the 1978 Resolution on Equality of Spouses in Civil Law, which recommends to "ensure that, where a matrimonial property regime of separation of goods arises by the operation

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([383]) *See* the bilateral convention called *Abkommen vom 4. Februar 2010 zwischen der Bundesrepublik Deutschland und der Französischen Republik über den Güterstand der Wahl-Zugewinngemeinschaft* (*WZGA*). The convention, signed on 4 February 2010 has entered into force on 1 May 2013, after having been ratifyed by Germany on 15 March 2012 and by France on 28 January 2013, through two acts adopted by the respective parliaments. On such an agreement *see* NAUDIN, *Les instruments optionnels destinés à régler les difficultés de la famille européenne*, in *Les petites affiches*, 29 juin 2012, n. 130, pp. 47 ff.; MEIER-BOURDEAU, *Le nouveau régime matrimonial franco-allemand*, in *La semaine juridique*, 2013, pp. 163 ff. The aforementioned bilateral convention has already achieved an initial measure of success in advancing the so-called "soft uniformisation" of European family law. Notably, the international agreement has exerted a discernible influence upon Belgium's reform of matrimonial property regimes under the Law of 22 July 2018. Under this legislation, Belgian couples opting for a regime of separation of property may include in their *contrat de mariage* a clause providing for *participation aux acquêts*—i.e. participation in the acquisitions made by each spouse during the marriage. Moreover, the notary executing the marriage contract is under a legal obligation to inform the spouses or prospective spouses of the possibility of incorporating such a clause. The notary must further advise the parties of the option to provide for a *correction judiciaire en équité*—that is, a judicial adjustment of the agreement on grounds of equity—in the event that unforeseeable circumstances at the time of dissolution of the marital bond would otherwise give rise to manifestly unfair consequences for one of the spouses. On these points *see* HESBOIS, *Epoux séparatistes et collaborations économiques : quels sont les apports de la réforme des régimes matrimoniaux du 22 juillet 2018 quant au préjudice de carrière de l'un des époux ?*, available at https://matheo.uliege.be/bitstream/2268.2/6924/4/TFE-M%C3%A9gane%20HESBOIS.pdf. *See* as well STÜRNER, *Il regime patrimoniale convenzionale franco-tedesco come modello per l'armonizzazione del diritto europeo*, in *Rivista trimestrale di diritto e procedura civile*, 2015, pp. 888 ff.

([384]) *See* BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., in partic., for a comparative analysis of the different systems of participation in acquisitions, *see* pp. 139 ff.; general principles on such kind of regime are avaialable at pp. 348 ff.

([385]) Cfr. BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., p. 147.

([386]) BOELE-WOELKI *et al*., *Principles of Family Law Regarding Property Relations Between Spouses*, op. cit., p. 27.

([387]) PINTENS, *Matrimonial Property Law in Europe*, op. cit., pp. 42 f.

of law, a spouse, on the termination of the marriage by a judicial decree of divorce or nullity, has a legal right to obtain a fair share in the property of his former spouse, or a fixed sum, for any financial inequalities which have arisen during the course of the marriage" ([388]). The second instrument is the 1989 Recommendation on Contributions Following Divorce, which urges Member States to "enact appropriate rules relating to, *inter alia*, matrimonial property regimes, in particular by granting to a former spouse the right to obtain a fair share of the property of the other" ([389]).

15.2. The "European Prenuptial Agreement" (EPA) as an Example of Family Law Uniformisation.

An intriguing proposal aligned with the vision outlined above is the introduction of a "European Prenuptial Agreement" (EPA): a comprehensive model of prenuptial agreement—covering both asset division and maintenance—that would be effective and enforceable throughout Europe. This ambitious idea, originally proposed by a British scholar ([390]), envisions a completely new type of premarital agreement in which the spouses opt into a "European Marriage." The EPA would be "stateless," upheld in all Member States regardless of the couple's nationality, residence, or location of assets—without the need to determine applicable law.

The EPA could become the "Esperanto" of family law—only more successful than its linguistic precedent. Rather than choosing a specific national law, the parties would agree on substantive terms regarding property and maintenance, which would then be enforced (subject to safeguards) by whichever court has jurisdiction over the divorce. To ensure consistency and fairness, a supranational European regulation or convention would be needed to establish minimum standards—particularly to protect the economically weaker spouse. In this regard, the EPA could draw inspiration from the U.S. Uniform Premarital Agreement Act (UPAA), adopted by numerous states to ensure cross-state enforceability ([391]). The Catalan experience, with its early and structured approach to cohabitation and marital agreements, could also serve as a valuable model ([392]).

To ensure fairness, the EPA could include provisions guaranteeing that, regardless of the parties' respective wealth or contributions at the time of marriage, each party would be able to secure housing for themselves (and any children) after divorce. The agreement could specify how this housing need is to be met—perhaps by referencing a minimum value or a share in the matrimonial home.

The amount of maintenance payable by one party on divorce (if any) could be calculated with reference to a formula based on expenditure during the marriage (say the last 3 years). Child maintenance and any financial claims on behalf of children should be excluded from the ambit of the agreement.

To ensure validity and enforceability, the following formal requirements should be met: *a*) The agreement must be in writing and signed by both parties. *b*) Each party must receive full and independent legal advice. In civil law systems, this could be provided by a notary acting as a neutral professional; in common law systems, by separate lawyers for each party. *c*) There must be some level of financial disclosure—at least a general declaration of assets and income sufficient to allow informed consent. *d*) The agreement should be signed sufficiently in advance of the marriage to avoid duress (a minimum number of days should be specified). *e*) The agreement should be translated into a language understood by each party, with a declaration that both have read and understood its contents.

It is self-evident that the driving force behind this innovation is, once again, contractualisation and private autonomy in family relations. As highlighted throughout this study, contractualisation is

([388]) COUNCIL OF EUROPE, *Resolution 78 (37) on Equality of Spouses in Civil Law*, adopted by the Council of Ministers of Member States on 27 September 1978.

([389]) COUNCIL OF EUROPE, *Recommendation No. R (89) on Contributions Following Divorce*, adopted by the Council of Ministers of Member States on 18 January 1989.

([390]) WOOD, *The Technical Problems, and Possible Solutions, in Drafting International Marriage Contracts and Pre-nuptial Agreements*, in *International Academy of Family Lawyers*, 2012, pp. 5 ff.

([391]) *See* above, at para. 5.

([392]) *See* above, at para. 7.1.

gaining increasing prominence in the public regulation of families. This rationale is echoed in the Bonomi Report to the 2007 Hague Maintenance Protocol, which affirms that party autonomy promotes stability and foreseeability ([393]). It is a principle established in the interest of individuals, who need a legal framework that allows them to anticipate the applicable law. This interpretation is confirmed by Recitals 45 and 44 of the EU Regulations on (respectively) Matrimonial Property and the Property Consequences of Registered Partnerships, which explicitly state that party autonomy is intended to facilitate the management of property by spouses or partners.

As noted in French legal doctrine, contract allows individuals to free themselves from a general and relatively rigid legal framework. The first virtue of contractualisation is thus the individualisation of legal situations ([394]). Moreover, contractualisation responds to a social need: it gives legal relevance to social realities that may not yet be formally recognised by law. As one scholar provocatively observed, some suburbs are not lawless zones—but zones governed by a law different from that of the rest of the territory ([395]).

To return to the metaphor inspired by Jules Renard at the beginning of this essay: contractualisation may well be the path by which more people finally leave the waiting room—and enter, at last, the house of happiness!

([393]) BONOMI, *Preliminary Draft Protocol on the Law Applicable to Maintenance Obligations. Explanatory Report*, No. 71, op. cit., Article 8., para. 70, p. 17.

([394]) MORACCHINI-ZEIDENBERG, op. cit., p. 6 (of the online version).

([395]) "Certaines banlieues ne sont pas des zones de non droit, mais des périmètres d'un droit autre que celui en vigueur sur le reste du territoire": PANSIER, op. cit., p. 6.

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