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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

NATIONAL REPORT
SPAIN

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CHAPTER 1

MATRIMONIAL PROPERTY. INTERNAL LAW

1.1 GENERAL ISSUES

1.1.1 Sources

1.1.1.1 Description of the general legislative sources

Matrimonial property is governed by the Spanish Civil Code 1889 (*Gaceta de Madrid*, 25 July 1889), but the special civil laws (*derechos forales*) in force in some Autonomous Communities must also be taken into consideration. Spain is an example of a multiple legal system. The Civil Code is applicable only in those territories lacking a special civil law. The legislative competence over matters of civil law is governed by the Spanish Constitution 1978 and the system that has been constitutionally designed is that of a multiple legal system in which the State and some Autonomous Communities have competence over civil law. Not every Autonomous Community has legislative competence concerning civil law, only those Autonomous Communities with a special civil law legislation in force at the time of the enactment of the Spanish Constitution may preserve and develop their special civil law. In relation to matrimonial property this is the case of Catalonia, Aragon, Navarre, the Basque Country and the Balearic Islands.

1.1.1.2. Description of principal sources in court decisions and in customary law

Matrimonial property regime is codified in the Spanish Civil Code 1889, therefore the limited function developed by case law is that of the interpretation of the regulation embodied in the Civil Code. Reference to customary laws existing in some Autonomous Communities will be made *infra* under the heading 'Other remarks'.

1.1.1.3. Description of any law reforms which are under way

No proposal for reform is under way.

1.1.2 Historic development

The regulation in the Spanish Civil Code 1889 of a community of property regime is supposed to follow well established rules under pre-existing Castilian laws based on a germanistic tradition. The Spanish Civil Code has been subject to different reforms. The most relevant modifications concerning the subject-matter of this Report are those effectuated by the Reform of Certain Articles of the Civil Code Act, 2 May 1975 (*BOE*, 5 May 1975), making the transition from a system of immutability of the matrimonial property regime to one based on the principle of mutability, among other reforms, and the Modification of the Civil Code in Matters of Parentage, Parental Responsibility and Matrimonial Property Act, 13 May 1981 (*BOE*, 19 May 1981).

1.1.3 Primary regime

The Spanish Civil Code distinguishes between primary and secondary matrimonial property regimes. The primary regime is applicable to all marriages, whatever might be the applicable secondary regime. Regulation of the primary regime is contained in Arts. 1315-1324 Civil Code under the heading of 'General Dispositions' on matrimonial property regimes.

1.1.4 Secondary regimes

1.1.4.1 Legal matrimonial property regime

In cases where the spouses have not entered into a marriage contract the matrimonial property regime determined by law is that of community property (*comunidad de bienes* or *gananciales*) and is governed by Arts. 1344 to 1410 Civil Code.

1.1.4.2 Marriage contracts

Spanish law follows a principle of free stipulation by the spouses of their matrimonial property regime, only subject to the limitations established in the Civil Code (art. 1315 Civil Code), accordingly matrimonial settlements or *capitulaciones matrimoniales* are extensively regulated under Arts. 1325-1335 Civil Code.

1.1.4.3 Specific matrimonial property regimes regulated by law that can be chosen by the spouses

In most cases, marriage settlements are made as a consequence of the spouses' intention to avoid the legal matrimonial regime of community of property. Consequently, in such cases the matrimonial settlement does not set out very detailed clauses or agreements, but only contains a remission to the Spanish Civil Code regulation of the separation of property regime in Arts. 1435 to 1444 Civil Code. The spouses may prefer to choose another matrimonial regime denominated participation regime governed by Arts. 1411 to 1434 Civil Code. Main feature of this regime is the separation of property during the marriage limited by the existence of a right of participation in the property of the other spouse after the dissolution of the marriage

1.1.4.4 Whether the matrimonial property regime can change or not during marriage

Matrimonial settlements may be stipulated or changed at any time during the existence of marriage or made even prior to the marriage. Therefore the Spanish legal system follows a principle of mutability or changeability of the matrimonial property regime by the spouses.

1.2 TYPES OF REGIMES

1.2.1 Comments as to the primary regime

1.2.1.1 Presentation of the whole of the law regulating the fundamental rights and duties of spouses

The fundamental rights and duties of spouses belonging to the primary regime with regard to the matrimonial property are embodied in Arts. 1318 to 1324 Civil Code and are outlined in the following comments. Personal effects of marriage are left outside this description of the law.

1.2.1.2 Obligations to contribute to the costs and expenses of the household

The duty of the spouses to support with their separate property the burdens of the marriage is set out at Art. 1328 Civil Code. Among the costs and expenses which may be included under such heading are all those related to tuition and maintenance of the common children and children of any spouse living in the matrimonial home (Art. 1362 Civil Code). This duty towards the household economy also exists under the community of property regime, but in that case the community property is primarily subject to that duty, the contribution of separate property to the household costs and expenses being a consequence of the primary regime. Courts may impose on any of the spouses specific orders under the form of preliminary injunctions to comply with this obligation (Art. 1318.2 Civil Code).

1.2.1.3 Legal position of the matrimonial home

Selling or transfer of any interest in the habitual matrimonial home or in relation to home furnishings requires the consent of both spouses under Art. 1320 Civil Code, even if the matrimonial home is the separate property of any of the spouses. Contracts made against this rule are voidable (Art. 1322 Civil Code). After death of one of the spouses, Art. 1321 Civil Code attributes to the surviving spouse the property of the habitual matrimonial home furnishings, except those which may be characterized as jewels, artistic or historical objects and those of extraordinary value. This legal attribution *mortis causa* of the matrimonial home furnishings to the surviving spouse cannot be taken into account in the distribution of the decedent's estate among the heirs under succession laws, even if there is a testamentary disposition to that effect, which would be void.

1.2.1.4 Representation by the spouses, e.g. for domestic purposes

The powers conferred on any of the spouses to act or enter into any agreement in order to satisfy the ordinary necessities of the household for which they are responsible are governed by Art. 1319 Civil Code. Responsibilities for such acts or agreements affect primarily the common property and the separate property of the intervening spouse, but the separate property of the non-intervening spouse may be subsequently attached to such debts under the primary regime rules.

1.2.1.5 Protection against acts of one of the spouses which may endanger the family property

Powers are given to any of the spouses to claim the annulment of any acts or agreements entered into by any of the spouses without the consent of the other in cases where the consent of both spouses is necessary, as it is set out in Art. 1322 Civil Code.

1.2.2 Matrimonial property regime provided by law (statutory regimes)

1.2.2.1 Secondary regime applicable to spouses in case they have not entered into a marriage contract

The Spanish legal matrimonial property regime in absence of a matrimonial settlement (Art. 1316 Civil Code) is that of community of property (Arts. 1344 to 1410 Civil Code). According to this regime (*sociedad de gananciales*) all profits or gains obtained by any of the spouses during their marriage are community property of both husband and wife, and will be divided by half to them after the dissolution of marriage (Art. 1344 Civil Code).

1.2.2.2 Contents, organisation and composition of the community of property regime

The community of property regime begins immediately after the celebration of the marriage. It should be noted that it is not a system of universal community of property, but only of partial community of property or community of gains, similar to the existing regimes in France or Italy. All gains and profits made by any of the spouses during the marriage are considered community property (Art. 1347 Civil Code), but that community of gains and the property resulting from it may coexist with the separate property of any of the spouses. Basically, the separate property is that owned by any of the spouses before the celebration of marriage (premarital property), the property acquired by any of them by means of will, intestate succession or donation, the property acquired during marriage with separate property, damage awards, clothing and other personal objects, as well as the necessary instruments for the exercise of a professional activity or labour (Art. 1346 Civil Code).

Spouses may enter into agreements in order to determine the common or separate character of their property (Art. 1355 Civil Code), unilateral confession by any of the spouses is

also admitted (Art. 1324 Civil Code). There is also a general rebuttable presumption in favour of the community of property characterization of the property owned by any of the spouses (Art. 1361 Civil Code). This *iuris tantum* presumption does not affect property acquired prior to the marriage, premarital property is separate property of the spouses. Any of the spouses, but also third parties, i.e., creditors and heirs, may rely on the community of property presumption.

Debts incurred by any of the spouses and the subsequent rights of creditors may affect the community property if the separate property of the spouse responsible under the contract is not sufficient to satisfy the creditors (Art. 1373 Civil Code). Community property is subject to debts incurred in order to meet the household and common children necessities (Art. 1362 Civil Code). It is also responsible for any obligation entered into by both spouses (Art. 1367 Civil Code) or by any of them in the exercise of the household powers of administration (Art. 1365 Civil Code), in cases of *de facto* separation, but only in relation to expenses concerning the common children (Art. 1368 Civil Code), deferred payments (Art. 1370 Civil Code) and acts of commerce in the manner prescribed by the Code of Commerce (Art. 1365 Civil Code).

1.2.3 Marital settlements (contractual regimes)

1.2.3.1 Description of the contents of well defined matrimonial property regimes

The spouses may stipulate, modify or substitute their matrimonial property regime in a matrimonial settlement (Arts. 1315 and 1325 Civil Code). They can do so by reference to one of the matrimonial property regimes regulated in the Civil Code (community property, separation of property, participation regime) or expressly designing the particular rules under which their matrimonial property is to be governed. The legal matrimonial property regime of community property is only applicable where the spouses have not entered into a matrimonial settlement in which they have declared their intention to govern their matrimonial property in accordance with rules different from those of the community property regime (Art. 1316 Civil Code).

1.2.3.2 Marriage contracts: Conditions for validity

Freedom of the spouses to regulate their matrimonial property regime by means of a matrimonial property agreement or *capitulaciones matrimoniales* is only limited in those cases where the Civil Code imposes a restriction, otherwise their autonomy is unlimited. Most general restrictions are set out in Art. 1328 where it is laid down that marriage settlements must be made in accordance with the laws and respecting the equality of rights of both spouses.

Matrimonial settlements can be made after the celebration of marriage, but also prior to the celebration of marriage (Art. 1326 Civil Code). As a condition of formal validity the matrimonial settlement must be made in an authentic act intervened by a notary public or *escritura pública* (Art. 1327 Civil Code), otherwise the agreement will not be valid and not only in relation to third parties but also between the spouses.

1.3 CHANGE OF MATRIMONIAL PROPERTY REGIMES

1.3.1 Principles

Spanish law follows the principle of mutability or changeability of the matrimonial property regime during marriage, what obviously means that the property regime may be changed or substituted by another if the concurring free will of the spouses so determines. Modifications cannot result in any detriment to the rights of third parties already acquired under the matrimonial property regime existing prior to its modification (Art. 1317 Civil Code).

1.3.2 Modalities for change

The competent authority as a consequence of formal validity requirements is the notary public and the modification must be made in an authentic act or *escritura pública* (Art. 1327 Civil Code). The existence of a modification must be mentioned in the authentic act containing the previous matrimonial settlement and the notary public must so specify in any copy of the original act (Art. 1332 Civil Code).

1.4 PUBLICATION OF THE REGIME

1.4.1 Principles

1.4.1.1 Existence of a system which makes publication of the matrimonial property regime possible

The publication scheme in Spanish law deals with the publication of the matrimonial settlement between the spouses (Art. 1333 Civil Code). So, the conventional regime is made public, but there is no means of publication as to the applicable legal regime. It is true that in Spanish law the legal matrimonial property regime is that of community of property and that in the absence of publication of a matrimonial settlement it should be presumed that the legal matrimonial property regime of community of property is applicable, but the fact that there are different legal regimes in Spain as a consequence of the existence of the legal orders of some Autonomous Communities makes the question of knowing the legal property regime of a marriage more difficult.

1.4.1.2 Justification of the existence of such a system: protection of third parties

Protection of third parties, i.e., creditors of the household, requires a system of publication of the matrimonial property regime in cases where the spouses have opted for a regime which is different from the legal matrimonial property regime of community of property.

1.4.2 Modalities for publication

1.4.2.1 Competent authorities

The existence of a matrimonial settlement between the spouses and the conventional regime which has been agreed by the spouses must be mentioned in the Family Book awarded to all married couples and should be annotated in the Civil Register next to the inscription of the marriage to be fully effective against *bona fide* third parties. If the matrimonial settlement concerns proprietary rights over immovable property the inscription will also be made in the Real Property Register (Art. 1333 Civil Code).

1.5 ADMINISTRATION OF ESTATES

1.5.1 Under the regime provided by law (statutory regime)

Under the community of property regime the acts of disposition or administration over community property require the consent of both spouses under the joint-intervention rule in Art. 1375 Civil Code. Nevertheless, the judge may authorize one of the spouses to be the only intervening spouse in cases where the other spouse is prevented from intervention or is not willing to intervene, provided that the judge considers the petition reasonable (Arts. 1376 and 1377 Civil Code). If one of the spouses is legal guardian or legal representative of the other there is no basis for the need of a joint intervention. Any of the spouses may dispose over his/her half of the community property by will (Art. 1379 Civil Code). Apart from this general rules, there are special exceptions

to the joint-intervention rule for cases of lesser importance. Among others, we may refer to the advancement of money for the exercise of the profession or acts of administration in relation to separate property for which expenditure of community property money may be necessary (Art. 1382 Civil Code), actions seeking the protection of rights and goods belonging to the community property (Art. 1385 Civil Code), urgent obligations (Art. 1386 Civil Code), acts over money or documents of title made by any of the spouses in possession or nominally entitled to make them (Art. 1384 Civil Code) and acts concerning money held in banking accounts, which may be in the name of only one spouse (Art. 1385 Civil Code).

1.5.2 Under marital settlements (contractual regimes)

An agreement between the parties in a matrimonial settlement may change the general rules applicable to the administration of the matrimonial estate that are included in the legal matrimonial property regime, even the joint-intervention rule in Art. 1375 Civil Code. Consequently, the matrimonial agreement may foresee that any of the spouses can validly act on behalf of the community of property. The validity of the agreement is more questionable if the matrimonial agreement does not authorize the separate intervention of any of the spouses, but only confers powers on one of them, since the constitutional right of equality of the spouses (Arts. 14 and 32 Spanish Constitution) might be jeopardized by such an agreement.

1.5.3 Contracts between spouses during marriage

1.5.3.1 Sales between spouses

Art. 1323 Civil Code sets out a general principle admitting the validity of acts of transmission and contracts between spouses. This provision is part of the rules of primary matrimonial regime.

1.5.3.2 Gifts between spouses

The general rule in Art. 1323 Civil Code admits the validity of gifts between spouses. Particular rules exist in relation to gifts between spouses made prior to the celebration of marriage under Arts. 1336-1343 Civil Code (*propter nuptias* donations). These gifts are also valid, provided that the marriage is celebrated in a year's time (Art. 1342 Civil Code), but not if the object of the gift is a future thing or good (Art. 1341 Civil Code). Donations of future things can only be made *mortis causa*, in the form of a matrimonial settlement and in accordance with the rules on testamentary dispositions, especially those on forced heirship (Art. 1341.2 Civil Code).

1.6 DISSOLUTION, LIQUIDATION AND DIVISION OF THE MATRIMONIAL PROPERTY REGIME

1.6.1 Proof of ownership

It is permitted for the spouses to determine the separate or community of property characterization of the different elements constituting their estate, provided that it is not done against the interests of creditors or forced heirs (Art. 1355 Civil Code). Proof of confession is also admitted under Art. 1324 Civil Code. Other means of proof can also be accepted.

1.6.2 Methods for division

The dissolution of marriage as a consequence of nullity, separation or divorce or as the result of the death of any of the spouses implies the dissolution of the community property regime and entitles any of the spouses or their heirs to claim the division of the community of property. The division requires certain operations as the making of an inventory in which all assets and liabilities

of the community property are to be listed (Art. 1396-1398 Civil Code). Secondly, debts of the community property (*sociedad de gananciales*) must be paid, beginning with maintenance obligations (Art. 1399 Civil Code). After all the necessary deductions have been made, the remaining property will be divided and transferred by half between the spouses or their respective heirs (Art. 1404 Civil Code).

1.7 OTHER REMARKS

The preceding description of the matrimonial property regulation in Spain is based exclusively on the Spanish Civil law, but as it was said above there are other regulations in force in the laws of some Autonomous Communities. It is not the object of this report to comment on such foral laws in a detailed fashion, but a precision as to the legal matrimonial regime in absence of a matrimonial settlement seems necessary.

In Catalonia, the legal matrimonial property regime is that of absolute separation of property (Family Code Act, 15 July 1998). The same solution is in force in the laws of the Balearic Islands (Civil Law Compilation of the Balearic Islands Legislative Decree 79/1990, 6 September). In the laws of Aragon the legal matrimonial property regime is of community of property of movables and gains (Civil Law Compilation of Aragon Act, 8 April 1967). In Navarre, the legal regime is denominated conquests regime (*régimen de conquistas*) and under that name we find a community of gains regime (Compilation of Foral Law of Navarre Act, 1 March 1973, as modified by Foral Act of 1 April 1987). In the Basque Country the legal regime applicable in the provinces of Alava and Biscay (regime of *comunicación foral de bienes*) may be characterized as universal community property (Basque Country Civil Law Act, 1 July 1992). In some territories of the Autonomous Community of Extremadura, the so-called *Fuero de Baylío*, customary rules not yet codified or compiled, establishes a system of universal community of property.

CHAPTER 2

MATRIMONIAL PROPERTY. PRIVATE INTERNATIONAL LAW

2.1 GENERAL REMARKS

2.1.1 Sources

2.1.1.1 Principal international sources (Conventions)

Spain is not a party to any multilateral international convention on the law applicable to matrimonial property, therefore the private international law sources remain within the frame of internal statutory sources. The exception to this rule would be the rules on recognition and enforcement of foreign judgments, since Spain is a party to a good number of bilateral conventions which may be applicable to judicial foreign decisions on marital property. As to The Hague Convention on the Applicable Law to Matrimonial Property, Spain did not sign the Convention and there have been no attempts to adhere to it.

2.1.1.2 Principal statutory sources

The Spanish statutory rules on conflict of laws can be primarily found in the Preliminary Title to the Civil Code (Arts. 8 to 16) enacted by Decree 1836/1974, May 31 (*BOE*, July 9, 1974), but since 1974 many of its provisions have been modified, particularly in the field of the law applicable to the effects of marriage (Art. 9.2), to matrimonial property arrangements (Art. 9.3) and to the rights of the surviving spouse (Art. 9.8) by means of the Reform of the Civil Code to Avoid Sex Discrimination Act 1990 (*BOE*, October 18, 1990). Not all of the Spanish conflict of laws rules are included in the Preliminary Title to the Civil Code, other rules can be found in other sections of the Civil Code (e.g., Arts. 49-51 on the law applicable to the marriage celebration, Art. 107 on the law applicable to separation and divorce, etc.) or in other statutory sources since the Spanish system of private international law is not codified in a single body of law, but is dispersed through different statutory sources.

2.1.2 Historic Development

2.1.2.1 Historic Development of private international law

Spanish Civil Code 1889 did not contain many provisions on private international law. Therefore the system of private international law has historically consisted mainly of case law and legal doctrine. It was not until 1974 that a well developed set of choice of law rules was adopted by means of the introduction of a Preliminary Title to the Civil Code by Decree 1846/1976 (*BOE*, July 9, 1974). As to rules on international jurisdiction the first systematic regulation was provided by Arts. 21 et seq. of the Judicial Power Organic Act 1985 (*Ley Orgánica del Poder Judicial*, *BOE*, July 2, 1985) and prior to that date only scarce authority and case law were available. The rules governing recognition and enforcement of foreign judgments were adopted in Arts. 951 et seq. of the Civil Procedure Act 1881 (*Ley de Enjuiciamiento Civil*, *Gaceta de Madrid*, February 5 to 22, 1881) and are still in force.

2.1.2.2 Conflicts resulting from changes in the system of private international law rules

For most legal writers, the problem posed by the coexistence of consecutive choice of law rules is solved with resort to the principle of prohibition of retroactivity (as stated in the first

transitory disposition of the Civil Code). Thus, new conflict of laws rules cannot affect the validity or effects of acts or relationships already entered into under the previously applicable choice of law rule.

Another transitory problem is the effect that can be given to a change in the *lex causae*. To solve this question the principle of the integral remission to the *lex causae* may be of some help, since the reference to the *lex causae* should be a reference to that law in its entirety, including any changes that may have occurred in that law after the event or issue took place, though that reference is also extended to the transitory rules of the *lex causae*. Transitory rules of the *lex materialis fori* would only be applicable if those of the foreign *lex causae* cannot be ascertained or are against the public policy of the forum ¹.

2.1.2.3 Evolution of private international law rules with respect to matrimonial regimes

Spanish choice of law rules on matrimonial property were subject to legislative reform in two occasions. The current regulation of the applicable law to matrimonial property regime in Arts. 9.2 and 9.3 of the Civil Code was laid down by the Reform of the Civil Code to avoid sex discrimination Act, October, 15, 1990. This regulation replaced the wording of Arts. 9.2 and 9.3 of the Civil Code as originally formulated in the Preliminary Title to the Civil Code Act, 1974 ². Prior to this regulation, choice of law issues to matrimonial property regime were solved according to the original Art. 1325 of the Civil Code, 1889.

It should be added that the entry into force of the Spanish Constitution 1978 did have a direct impact on Arts. 9.2 and 9.3 of the Civil Code in force since 1974. Constitutional provisions granting the fundamental right of equal protection and no discrimination (Art. 14) and equality of the spouses (Art. 32.1) were against some of the connecting factors employed by the choice of law rules developed in 1974, since the husband's personal law was applicable as the closing connecting factor for both personal and property effects of the marriage. To solve the problem of constitutionality of the closing connecting factor of Arts. 9.2 and 9.3 of the Civil Code favouring the application of the husband's personal law it was commonly held that the direct enforceability of the Constitution rendered such connecting factor inapplicable after the promulgation of the Spanish Constitution, even to marriages celebrated prior to 1978, since the constitutional provisions should also be retroactively applied. The opinion of legal writers was almost unanimous to that effect ³. Decision of the Spanish Constitutional Court, 14 February 2002, has held the unconstitutionality of the preference for the husband's nationality law on grounds of sex discrimination according to Arts. 14 and 32 of the Spanish Constitution, a decision that is relevant for transitory choice of law purposes.

¹ In Resolution of the General Direction of the Notary and Registry, March 10, 1978, it was held that the transitory rules of the Rumanian law, common nationality of the spouses at the time of marriage, were inapplicable because both spouses had been deprived of their nationality before the entry into force of a Rumanian reform of Family law that might otherwise have been applied.

² M. A. AMORES CONRADI, 'Las relaciones entre cónyuges en el nuevo Derecho internacional privado de la familia: valores jurídicos y técnicas de reglamentación', *ADC*, 1987, pp. 89-138.

³ M. AMORES CONRADI, 'La nueva ordenación de la ley aplicable a los efectos del matrimonio', *Revista Jurídica de Castilla-La Mancha*, 1991, pp. 46-47 and comments to the decision by the Supreme Court of October 6, 1986, *REDI*, 1987, pp. 239-248; A. BORRÁS RODRÍGUEZ, 'La Ley 11/1990 de 15 de octubre: de la no discriminación por razón de sexo a la discriminación entre ordenamientos jurídicos', *REDI*, vol. XLIII, 1991, pp. 272-275; *id.*, 'No discriminación por razón de sexo: Derecho internacional privado español', *ADC*, 1991, pp. 233-249; *id.*, 'Non discrimination à raison de sexe et modification du droit international privé espagnol', *Rev. crit. dr. int. pr.*, 1991, pp. 626-634; J. A. CARRILLO SALCEDO, 'L'évolution du droit international privé espagnol depuis la réforme de 1974', *Travaux com. fr. dr. int. pr.*, 1991-1993, pp. 122-127.

The successive coexistence of different choice of law rules requires the determination of transitory rules for choice of law purposes. To this effect, the general prohibition of retroactive application of laws means that the current wording of Arts. 9.2 and 9.3 Civil Code is applicable to marriages celebrated after November 7, 1990. As to marriages celebrated between 1974 and 1990 the applicable choice law rules should be those adopted in Arts. 9.2 and 9.3 Civil Code of the Preliminary Title to the Civil Code introduced by Decree 1836/1974, with the exception that the closing connecting factor based on the husband's personal law may no longer be applicable for constitutional reasons outlined above. For marriages celebrated before 1974 the choice of law rule would be the original Art. 1325 of the Civil Code, 1889. As to the validity of matrimonial property agreements the applicable legal order must be that in force when the agreement was entered into⁴.

2.1.3 General notions of private international law

2.1.3.1 Characterization

The Spanish system of conflict of laws adheres to the *lex fori* theory regarding issues of characterization, as expressly stated at Art. 12.1 Civil Code:

'Characterization to determine the applicable choice of law rule shall be done according to the Spanish law'.

Most commentators agree that this solution is only partial. There can be no doubt that Art. 12.1 Civil Code deals only with the classification of facts and legal concepts and categories necessary to find and select the appropriate choice of law rule for the issue at hand, but once the choice of law rule has designated the applicable law the problem of characterization reappears when trying to identify the material law of the *lex causae* that may be applied to the issue. Therefore, a second rule of classification according to the *lex causae* would be necessary at the second stage of the application of the choice of law rule.

Since Spanish courts will characterize the issues before them according to their own legal notions, other problem that may be encountered dealing with issues of characterization is that of those legal institutions unknown to the forum. In such a case, Art. 12.1 Civil Code offers no useful guidance and characterization should proceed according to functional criteria for the selection of the equivalent institution from a comparative perspective.

2.1.3.2 Renvoi

Renvoi is admitted only if the final result of its application is a remission back to Spanish law, therefore it is to be excluded if it produces a transmission to the law of a third state. The rule is clearly stated at Art. 12.2 Civil Code:

'Remission to a foreign law shall be understood made to its substantial law, without consideration to the renvoi that its choice of law rules can make to any other law that is not the Spanish law.'

While most Spanish legal writers oppose renvoi on theoretical and practical grounds, as it is most commonly accepted worldwide, there is considerable jurisprudence applying renvoi, especially in the area of succession and family law. However, renvoi is not automatically admitted by courts and other criteria, such as the respect for the will of the testator or the unity and universality of the succession, may result in renvoi's rejection as can be extracted from decisions on

⁴M. AMORES CONRADI, 'La nueva ordenación...', *loc. cit.*, pp. 48-51. For case law on the transitory rules for choice of law purposes see Decision of the Provincial Court (*Audiencia Provincial*) of Málaga, May 17, 1995 and note by P. MAESTRE CASAS, *REDI*, 1997, pp. 260-264; also decision of the Provincial Court of Palma de Mallorca, December 23, 1994, *REDI*, vol. XLVIII, 1996, pp. 302-306 and comments by R. ARENAS GARCÍA, pp. 302-306.

the law applicable to testamentary succession by the Spanish Supreme Court from November 15, 1996 and May 21, 1999 ⁵.

2.1.3.3 Public Policy

The exclusion of the applicable law in cases where its content is against to what may be considered or characterized as public policy in the Spanish legal order is also expressly stated at Art. 12.3 Civil Code:

'In no case shall the foreign law be applied if it is contrary to public policy.'

The definition of those rules and legal concepts of the Spanish Law that may be declared as pertaining to public policy and therefore might be used as grounds for rejection of the foreign applicable law is a difficult question. It is commonly agreed that fundamental rights, values or interests of constitutional relevance according to the Spanish Constitution of 1978 are the core of the public policy exception, but it is a matter for debate and jurisprudential development what other rules may be encompassed within the public policy concept.

2.1.3.4 Evasion of the law

The relevant rule for evasion of the choice of law rule or fraud to the applicable law is also included in the Preliminary Title of the Civil Code, Art. 12.4:

'It shall be considered as fraud to the law the employment of a choice of law rule in order to evade an imperative Spanish law.'

For those questions on evasion of the law that are not regulated by Art. 12.4 Civil Code, most importantly the sanction against the conduct defined as evasion by Art. 12.4 or the regime for the evasion of an imperative foreign law, since Art. 12.4 only deals with evasion of Spanish imperative rules, resort can be made to Art. 6, as the general rule on evasion of the law in the Spanish Civil Code.

The foregoing rules should be put into question after proper consideration is given to the existing jurisprudence, since in most cases the public policy exception has attracted all cases where the fraud exception would have been applicable, and therefore it can be said that there is scarce authority as to what cases would fall under the scope of Art. 12.4 Civil Code ⁶.

2.1.3.5 Remission to a multiple legal order

In case the Spanish choice of law rule designates as the applicable law the law of a state where there are different territories which possess their own legal system for civil matters (e.g., United Kingdom, Canada, United States of America, Australia, etc.), the application of the choice of law rule needs additional criteria to single out a concrete applicable legal order. To that effect, Art. 12.5 Civil Code reads as follows:

'Where a choice of law rule designates the law of a state in which different legal system coexist, the determination of the applicable one among them shall be made according to the law of that state.'

⁵ As to the most recent decision by the Spanish Supreme Court, see the comments by E. RODRÍGUEZ PINEAU, *REDI*, 1999, pp. 757-760; M. A. AMORES CONRADI, *CCJC*, 1999, pp. 1130-1139. For previous decisions, E. RODRÍGUEZ PINEAU, 'Estates in Spain Inheritance According to Spanish Conflict Rules. A Judgment of the Spanish Tribunal Supremo', *IPRax*, 1998, pp. 135-138; A. PEREZ VOITURIEZ, 'El reenvío en el Derecho internacional privado español: una interpretación actualizada', *RJN*, 1995, pp. 257-337; M. SAINZ LOPEZ NEGRETE, 'El Derecho de sucesiones inglés. Conflicto entre la ley española y la inglesa', *RJN*, 1994, pp. 119-156; V. L. SIMO SANTONJA y B. LÖBER, 'Herencias de extranjeros en España', *RDN*, 1977, pp. 91-169.

⁶ J. C. FERNANDEZ ROZAS and S. SÁNCHEZ LORENZO, *Derecho internacional privado*, 2nd edition, Madrid, Civitas, 2001, p. 212.

This rule adopts the criterion of indirect remission, since the connecting factors employed by the Spanish choice of law rules cannot be directly applied to the different legal orders that coexist in a multiple legal state, but instead, the remission to such a complex legal system raises a second choice of law process that must be done according to the conflict of laws rules of that state for interstate or interregional conflicts of laws. This solution can be severely criticized since in most cases in those states there are no common, federal or unitary interstate or interregional choice of law rules (e.g., the United States of America), what renders the solution included in Art. 12.5 Civil Code mostly useless.

2.1.4 General problems of private international law

2.1.4.1 Connecting factors

The main personal connecting factors employed by the Spanish system on conflict of laws are nationality and residence, while domicile is only relevant in the rules on international jurisdiction.

With respect to nationality as a connecting factor the situations of double nationality are covered by Art. 9.9 Civil Code (positive conflicts of nationality), stating the preference for the law of the nationality that coincides with the law of the last habitual residence, and in absence of that coincidence, the law of the last nationality acquired is applied. But that rule only applies to situations of double nationality that arise under international conventions in force in Spain or are contemplated by Spanish law, if the double nationality is not recognized under those rules and one of them is Spanish the Spanish nationality will prevail as the connecting factor ⁷. In situations of lack of nationality or impossibility to ascertain nationality (negative conflicts of nationality) the law of the place of habitual residence will be applied (Art. 9.10 Civil Code).

Residence or habitual residence are factual situations of presence or regular presence in a certain country, and are not ruled by any specific provision. On the contrary, domicile of natural persons is the object of Art. 40 Civil Code, which establishes a concept of domicile that equates to habitual residence, but jurisprudence adds the requirement of a subjective second element of permanence based on the intention to stay indefinitely (*animus manendi*); other additional criteria for determination of domicile for procedural issues are regulated in Arts. 50-52 of the Civil Procedure Act, January 7, 2000.

2.1.4.2 Interregional conflict of laws rules

Spain is an example of a state with a multiple legal system, since in addition to the Spanish Civil Code there are other special civil legal orders in some territories or autonomous communities with their own regulations on matrimonial property (Catalonia, Aragon, Balearic Isles, Navarre and the Basque Country). The coexistence of those regulations may result in interregional conflict of laws ⁸.

⁷ M. VIRGOS SORIANO, 'Nationality and Double Nationality: Principles in the Spanish Private International Law System', in E. JAYME and H. P. MANSEL, *Nation und Staat im internationalem Privatrecht*, Heidelberg, Müller, 1990, pp. 237-258. RODRÍGUEZ MATEOS, 'La doble nacionalidad en la sistemática del Derecho internacional privado', *REDI*, 1990, pp. 463-493.

⁸ In general, A. BORRAS RODRIGUEZ, 'Les ordres plurilégislatifs dans le droit international privé actuel', *R. des C.*, 194, pp. 145-368; M^a. E. ZABALO ESCUDERO, 'Pluralidad legislativa y conflictos de leyes internos en el ordenamiento español', *Cursos de Derecho internacional de Vitoria-Gasteiz*, Madrid, Tecnos, 1994, pp. 257-259; J. J. ALVAREZ RUBIO, *Las normas de Derecho interregional de la Ley 3/1992, de 1 de julio, Derecho foral civil del País Vasco*, Oñati, Instituto Vasco de Administración Pública, 1995; E. M. RODRÍGUEZ GAYAN, 'Heterogeneidad y sistema en las relaciones entre Derecho internacional privado y Derecho interregional', *RGD*, 1996, pp. 8069-8091.

Those conflict of laws are addressed by Art. 16 Civil Code which subjects the question to the same conflict of laws rules that govern international conflict of laws, with the exception that the connecting factor based on nationality will be substituted by civil vicinity or *vecindad civil* (Art. 16.1.1), which is a specific personal connecting factor for interregional conflict of laws regulated in a detailed fashion by Arts. 14 and 15 of the Civil Code⁹. Other exceptions for interregional conflict of laws deal with the exclusion of the Spanish Civil Code rules on characterization, renvoi and public policy exception (Art. 16.1.2). The exclusion of the conflict of laws rules on characterization is doubtful since there are no unitary or common classification criteria for the different civil legal systems that coexist in Spain, what may result in difficult situations when trying to discern the applicable conflict of laws rule.

The solution of Art. 16 Civil Code will also be applicable to all those cases in which a foreign or conventional conflict of laws rule designates the Spanish law as applicable. In the absence of any specific rule on remissions to a multiple legal system in the foreign private international law legal system or conflict of laws international convention the designation of Spanish law must be understood as a general remission and therefore the identification of the specific applicable civil law system should be the result of the application of the Spanish interregional conflict of laws rules, which are essentially those applicable to international conflict of laws¹⁰.

2.2 INTERNATIONAL JURISDICTION OVER MATRIMONIAL PROPERTY ISSUES

2.2.1 The general rules on international jurisdiction as applied to matrimonial property regimes

2.2.1.1 Sources and contents of these rules

Spanish statutory rules on international jurisdiction are to be found in Arts. 21 et seq. of the Judicial Power Act (*Ley Orgánica del Poder Judicial*), 1985. No international convention in force in Spain deals with the international jurisdiction rules applicable to matrimonial property.

The question of international jurisdiction has not been until quite recently treated in an appropriate fashion by both jurisprudence and legal writers, being considered until then a matter of lesser importance when compared to choice of law problems. However, the enactment of the international jurisdiction criteria of the Judicial Power Act 1985, and the entry into force in Spain of the Brussels and Lugano Conventions have led to the development of extensive legal writing, which may even have predominated over choice of law issues during the last ten years in Spanish legal writing. Also jurisprudence is increasingly reflecting the importance of international jurisdictional issues as evidenced by the growing number of decisions of lower and upper courts that deal with the question.

⁹ The proof of *vecindad civil* can be made relying on evidence supported by the Civil Registry of the place of birth or the place of domicile, because the legal criteria set out in Arts. 14 and 15 Civil Code also include the possibility of declaring the will of the interested party to maintain, acquire or choose a certain *vecindad civil*, see Arts. 1-7, 46, 63-65 of the Civil Registry Act, June 8, 1957 and Arts. 225-237 Civil Registry Regulation, November 14, 1958, for inscription of *vecindad civil*. For a general description on the legal regime of *vecindad civil* see R. BERCOVITZ RODRÍGUEZ - CANO, 'La regulación de la *vecindad civil* derivada de la Ley 11/1990, de 15 de octubre, sobre reforma del Código Civil, en aplicación del principio de no discriminación por razón de sexo, y de la Ley 18/1990, de 17 de diciembre, sobre reforma del Código Civil en materia de nacionalidad', *Revista Jurídica de Castilla-La Mancha*, 1991, pp. 169-199.

¹⁰ S. SÁNCHEZ LORENZO, 'La aplicación de los Convenios de la Conferencia de La Haya de Derecho internacional privado a los conflictos de leyes internos: perspectiva española', *REDI*, 1993, pp. 131-148.

The different criteria used by the Spanish Law on the Judicial Power to grant jurisdiction to the Spanish courts are the following. As general rules on international jurisdiction, the Spanish courts will have jurisdiction over controversies in which the domicile of the defendant is situated in Spain or when both parties have submitted voluntarily or tacitly to the jurisdiction of the Spanish courts (Art. 22.2) ¹¹. Besides those general rules of jurisdiction there are specific international jurisdictional rules applicable to matrimonial property granting jurisdiction to the Spanish courts when both spouses have habitual residence in Spain at the time of the claim, or when the plaintiff is of Spanish nationality and has habitual residence in Spain, or when both spouses are of Spanish nationality, irrespective of their place of residence, provided that their petition is filed with mutual agreement or by one with the consent of the other (art. 22.3) ¹².

2.3 LAW APPLICABLE TO THE MATRIMONIAL PROPERTY REGIME

2.3.1 Determination of the law applicable to the matrimonial property regime

2.3.1.1 In case spouses have entered into a marriage agreement

2.3.1.1.1

Main choice-of-law rules

In case the spouses have entered into a marriage agreement (*capitulación matrimonial* as set out at Art. 1325 Civil Code) the applicable law to matrimonial property is determined by Art. 9.3 of the Civil Code, redrafted by Act 11/1990, October 15, for the reform of the Civil Code to avoid sex discriminations (BOE, October 18, 1990). The content of Art. 9.3 is as follows:

‘the pacts or agreements by which the matrimonial property regime is stipulated, modified or substituted shall be valid if they conform to the law that governs the effects of marriage, or to the law of nationality or residence of the parties at the time of their conclusion’

2.3.1.1.2

Particular problems of the marriage agreement: party autonomy.

Party autonomy for choice of law purposes is not expressly included in Art. 9.3 Civil Code. Therefore, the question is whether a choice of law clause would be admissible in a matrimonial property agreement. Of course, the spouses are free to draft the matrimonial property agreement in compliance with any of the laws mentioned in Art. 9.3 Civil Code, but that is an expression of material party autonomy, whose admissibility is undoubtedly recognized by Art. 9.3 Civil Code. The true question is the validity of a choice of law clause inserted in the matrimonial property agreement, i.e., party autonomy for a choice of law purpose. Such hypothesis is also admitted by most Spanish legal writers ¹³. This means that, according to Art. 9.3 Civil Code, the spouses may choose the applicable law to the matrimonial property agreement by reference to the law applicable to the effects of marriage in the absence of a matrimonial property agreement (as

¹¹ With respect to the admissibility of the express or tacit submission by the parties see M. A. AMORES CONRADI, ‘La nueva estructura del sistema español de competencia judicial internacional en el orden civil: art. 22 LOPJ, *REDI*, vol. XLI, 1989, pp. 139-140 and note by R. ARENAS GARCÍA to the decision of the Provincial Court (*Audiencia Provincial*) of Baleares, July 18, 1995, *REDI*, 1996, pp. 266-269.

¹² For a comment on Art. 22.3 LOPJ and decision of the Provincial Court of La Coruña, March 5, 1997, see R. RUEDA VALDIVIA, *REDI*, 1998, pp. 288-291.

¹³ M. AMORES CONRADI, ‘La nueva regulación...’, *loc. cit.*, pp. 53-54; *id.*, ‘Arts. 9.2 y 9.3’, in M. ALBALADEJO/S. DIAZ ALABART, *Comentarios al Código Civil y Compilaciones forales*, Madrid, Edersa, 1995, pp. 187-188; M. AGUILAR BENÍTEZ DE IUGO, *Lecciones de Derecho civil internacional*, Madrid, Tecnos, 1996, p. 165, P. ABARCA JUNCO, *Derecho internacional privado*, vol. II, Madrid, UNED, 2000, pp. 121-124.

determined by Art. 9.2 Civil Code), or to the law of the nationality or residence of any of the spouses at the time of the agreement. Along a choice of law clause the spouses may include any material provision in the matrimonial settlement, as long as it is made in conformity with the law that has been chosen, since Art. 9.3 Civil Code embodies both dimensions of party autonomy¹⁴. The limitation on party autonomy, the possible choice is limited to the laws designated in Art. 9.3, is not satisfactory and concerns over choice of law clauses whose purpose is the evasion of the law otherwise applicable are not sufficient to justify the limitation imposed by Art. 9.3 Civil Code.

If, as most common opinion suggests, choice of law clauses are admitted in the matrimonial property agreement, with the aforesaid limitations as to the law that can be validly chosen, another question to be solved is the relationship between the choice of law included in an authentic document prior to marriage, as ruled in Art. 9.2 Civil Code, and a choice of law clause inserted in a matrimonial property agreement concluded after marriage under Art. 9.3 Civil Code. In such a case the choice of law in the matrimonial property agreement would render the previous agreement to the law applicable to the effects of marriage almost useless, since all matrimonial property issues would be subject to the law chosen in the matrimonial agreement and the agreement prior to the marriage would only govern the personal effects of marriage¹⁵.

2.3.1.2 In case spouses have not entered into a marriage agreement

2.3.1.2.1

Main choice-of-law rules

In case the spouses have not concluded any agreement with respect to their property (*capitulación matrimonial*) the applicable law to matrimonial property is determined by Art. 9.2 of the Civil Code, as it was redrafted pursuant to Act 11/1990, October 15, for the reform of the Civil Code to avoid sex-based discriminations (*BOE*, October 18, 1990):

‘The effects of marriage shall be governed by the personal common law of the spouses at the time of marriage; where this is not applicable, by the personal law or law of residence of any of the spouses, chosen by both of them in an authentic document prior to the celebration of the marriage; in absence of this choice, by the law of habitual common residence immediately after marriage, and, in absence of such residence, by the law of place of celebration of the marriage’

The first connecting factor used by Art. 9.2 of the Civil Code is the ‘common personal law of the spouses at the time of celebration of their marriage’, personal law being determined by nationality. Only in case the spouses are of a different nationality at the time of celebration of their marriage may the subsidiary connecting factors be applied, but always in a hierarchical way.

The second connecting factor is party autonomy. The spouses may choose the applicable law to their matrimonial property relations, but their freedom will be limited. Those limitations come, firstly, from the subsidiary character of party autonomy as a connecting factor, since party autonomy can only be applied if the spouses are of a different nationality at the time of their marriage. But secondly, the laws that may be chosen by the spouses are limited to either the laws of the nationality or to the laws of habitual residence of any of the spouses. Thirdly, the choice of law by the parties must take place before the marriage and needs to be formulated in an authentic document. With respect to this stringent regime for party autonomy one may wonder what reasons led the Spanish legislator to such a limited admission of party autonomy to govern the effects of marriage. In this respect, it is highly doubtful why it is not allowed to the spouses to choose the

¹⁴ M^a P. DIAGO DIAGO, *Pactos o capitulaciones matrimoniales en Derecho internacional privado*, Zaragoza, Justicia de Aragón, 1999, pp. 115-124; E. RODRÍGUEZ PINEAU, *Régimen económico matrimonial. Aspectos internacionales*, Granada, Comares, 2002, pp. 51-58.

¹⁵ M. AGUILAR BENITEZ DE LUGO, *op. cit.*, p. 156.

applicable the law in cases where both of them are of the same nationality, since the interest in their integration in their habitual place of residence should favour the validity of such a choice of law ¹⁶.

If the above mentioned connecting factors are not applicable, because spouses are of a different nationality and have not made a choice of law prior to the marriage, the next connecting factor according to Art. 9.2 is the place of habitual common residence immediately after marriage. The place of habitual common residence should not be criticized, but the time element to which the connecting factor is associated (i.e., the first place of common habitual residence), though quite common from a comparative perspective ¹⁷, may in certain cases be clearly unreasonable, since it can lead to the application of the law of first common habitual residence of the spouses after marriage even in cases where the common life of the spouses shows a closer relationship with the law of some other place of residence after marriage. Such rigidity could have been avoided by using instead a more flexible formulation based on the idea of the closest relationship of the common life of the spouses, as it is the case in Art. 4.3 of the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes, or by means of an escape clause centred around the same idea of favouring the application of the law most closely connected to the matrimonial life of the spouses ¹⁸.

In cases where the preceding connecting factors are of no use, because spouses are of a different nationality, have not chosen the applicable law before the marriage and there has not been any habitual common residence immediately after marriage, the last connecting factor leading to the determination of the law that governs matrimonial property according to Art. 9.2 is the place of celebration of the marriage (*lex loci celebrationis*). The reason supporting this rule seems to be the need for a final connecting factor which might be easily applied to cases which would be otherwise quite difficult to be solved by a single connecting factor. Nevertheless, the criticism as to the rigidity of the solution can also be put forward and it is doubtful again that its application in certain cases may not lead to absurd results, let us think of the cases in which the place of celebration of marriage has been merely fortuitous and is in no way expression of the legal and social environment most closely connected with the matrimony ¹⁹.

2.3.1.2.2

Problems in applying the choice of law rules

2.3.1.2.2.1

Interregional Conflict of Laws

In Spain there may be conflicts of laws as a result of the coexistence of different civil legal orders. Thus, the Spanish Civil Code is not the only regulation, but there are also regulations of matrimonial property in Catalonia, Aragon, Balearic Isles, Navarre and the Basque Country. Those conflicts of laws must be solved, according to Art. 16.3 Civil Code, in the following way:

‘The effects of marriage between Spaniards shall be governed by the Spanish law that is applicable according to the criteria set out in Art. 9, and where inapplicable, by the Civil Code.

¹⁶ That is the criticism made by those who, admitting the need to respect the cultural identity of origin of the spouses, believe that the voluntary integration of spouses of the same nationality in the legal environment of their habitual place of common residence should be favoured by a more flexible regulation of party autonomy (J. C. FERNANDEZ ROZAS and S. SANCHEZ LORENZO, *op. cit.*, pp. 452-453).

¹⁷ M. REVILLARD, *Droit international privé et pratique notariale*, Paris, Defrenois, 1998, pp. 69-70.

¹⁸ M. A. AMORES CONRADI, ‘La nueva ordenación...’, *loc. cit.*, p. 70.

¹⁹ J. C. FERNANDEZ ROZAS y S. SÁNCHEZ LORENZO, *op. cit.*, p. 453; M. A. AMORES CONRADI, ‘La nueva ordenación...’, *loc. cit.*, p. 71.

In the latter case it shall be applied the separation regime of the Civil Code if pursuant to both personal laws of the spouses a separation regimen should be applied.'

So that in order to find the law applicable to interregional conflicts of laws the choice of law rules for international conflicts of laws are also applicable. That means that Art. 9.2 Civil Code is applicable to the matrimonial property regime if the spouses have not entered into a property agreement, but the possibility of applying a foreign law is excluded, since Art. 16.3 only refers to one of the Spanish laws that may be applicable ²⁰.

It must be added that according to Art. 16.1 Civil Code the civil vicinity or *vecindad civil* is the substitute for the connecting factor based on nationality. So that, the first connecting factor arising out of Art. 9.2 Civil Code is the common civil vicinity or *vecindad civil* of the spouses. If such a common *vecindad civil* is absent, comes into consideration the possibility that the spouses may have chosen the law applicable to their matrimonial property relations but that should have been made prior to the marriage and in an authentic document and only will be valid the choice of either the law of the *vecindad civil* or the law of the place of residence of any of the spouses. If there is not such a choice by the spouses, the law of the first habitual residence after marriage will be applied, and in case that connecting factor cannot be applied, i.e., because there was no common residence immediately after marriage, the applicable law will be that of place of the celebration of the marriage (*lex loci celebrationis*).

It is worth noting that in the case of different civil vicinity of the spouses and if the first habitual residence and the place of celebration of the marriage were abroad, Art. 16.3 sets out a preference for the application of the legal regime included in the Spanish Civil Code, though in case both personal laws of the spouses, as determined by *vecindad civil*, adopt a separation of property regime (that is the case in Catalonia and Balearic Isles), the rules of the Civil Code to be applied will be those on separation of property and not those on community of property. The fact that the Spanish Civil Code is the last connecting factor in Art. 16.3 has been challenged on constitutional grounds because it does not respect a principle of equality among the different civil legal orders that coexist in Spain. However, a decision by the Spanish Constitutional Court, July 8, 1993, justified the preference given to the Spanish Civil Code for the reason that legal certainty would require a closing and objective connection factor ²¹.

Art. 16.3 Civil Code deals only with cases in which both spouses are of Spanish nationality, but in case just one of the spouses is Spanish and has a special *vecindad civil* not subject to the Spanish Civil Code, we encounter more difficulties in the existing choice of law rules. That case would also fall under Art. 9.2 Civil Code which may lead to the application of the Spanish law on grounds of being, not the common personal law of the spouses, since in this case one of them would be a foreigner, but because the spouses could have chosen either the personal law or the law of residence of anyone of them in an authentic document prior to the marriage. In such a case, personal law could be understood as comprising also a special *vecindad civil*, in so far as Art. 14.1 Civil Code expresses that the question of being subject to the *Civil* Code or to special civil laws must be solved according to *vecindad civil*, and that Art. 16.1 Civil Code clearly states that the personal law will be that of the *vecindad civil*. But if Art. 9.2 leads to the application of Spanish law as the first habitual common residence after marriage or as the law of the place of celebration of the

²⁰ For some comments on that article see M^a. E. ZABALO ESCUDERO, 'Art. 16.3', *Comentarios al Código Civil y Compilaciones Forales*, *op. cit.*, pp. 1301-1315.; C. I. ASUA GONZALEZ, 'Algunas cuestiones en relación al régimen civil aplicable a los efectos del matrimonio entre personas de distinta vecindad civil: el párrafo tercero del art. 16 del Código Civil', *Revista Jurídica de Castilla-La Mancha*, 1991, pp. 73-88.

²¹ In a dissenting opinion, Magistrate J. D. GONZALEZ CAMPOS insisted on the need for a different closing connecting factor that would have been compatible with the principle of equality between the diverse legal orders that coexist in Spain, in conformity with rules laid down in Art. 149.1.8 of the Spanish Constitution (*BOE*, August, 2, 1993).

marriage it is highly questionable that those connecting factors might give way to the application of a special civil legal order instead of the Civil Code.

2.3.1.2.2.2

Remission to a multiple legal order

The foregoing solutions to interregional conflicts of laws may also be applicable by foreign courts when the choice of law rule of the forum leads to the application of Spanish law, since that designation would be that of a multiple legal order. That is the case in the Hague Convention on the applicable law to matrimonial property regimes 1978 in force in France, The Netherlands and Luxembourg, which in Art. 16 lays down the rule that the reference made to the law of a multiple legal order should be understood as made to the specific legal order designated by the rules of that country, what leads to the application of Arts. 16 and 9.2 Civil Code in order to single out the applicable legal order if the Spanish Law is applicable under the Hague Convention.

2.3.1.2.2.3

Renvoi

With respect to the practical relevance of renvoi to the matrimonial property regime it will be observed that Art. 12.2 Civil Code generically admits the remission or first grade renvoi that eventually leads to the application of Spanish Law. Case law shows the application of renvoi in cases of marriages of foreign nationality and residence in Spain. This is the case in the decision rendered by the Provincial Court of Malaga (*Audiencia Provincial*), February 7, 1994, with the consequence that an English matrimony, in principle subject to the separation of property regime of the English law as common personal law of the spouses (Art. 9.2 Civil Code), was finally considered subject to the community of property regime of the Spanish Civil Code by way of renvoi, since the spouses had not entered into a matrimonial property agreement and their domicile of choice was Spain, being domicile the connecting factor employed by the English choice of law rules to matrimonial property ²².

However, admission of renvoi should not be an automatic consequence of the rule set out in Art. 12.2 Civil Code, but quite on the contrary, and far from a merely formal approach to renvoi, the hypothesis of renvoi should be sufficiently grounded on reasons of substantial justice to the parties. In fact, the admission of renvoi results mostly in greater inconveniences than benefits to the directly concerned parties. Let us think of the increasing number of married couples from northern Europe that because of tourism purposes or at the age of retirement choose to locate in the warmer climate of southern Europe taking a new residence in Spain, Portugal or Greece. In those cases spouses would in no way be aware that such a relocation may affect the legal regime applicable to their matrimonial property and certainly it should not do so against the expectations of the parties. Admission of renvoi can also be contested from the notary perspective, since renvoi creates uncertainty as to the legal regime under which a Spanish notary may authorize a matrimonial property agreement concluded in Spain.

2.3.2 Scope of the law applicable to the matrimonial property regime

2.3.2.1 During Marriage

²² For a critical commentary on that decision see A. PEREZ VOITURIEZ, *REDI*, 1995, PP. 233-235.

2.3.2.1.1

Matters governed by the law which is applicable to the matrimonial property regime

The applicable law designated by Art. 9.2 Civil Code will govern the so-called ‘effects of marriage’, which is a much wider concept than the matrimonial property regime, since those effects of marriage of a personal nature should also be considered under that legal category. This unitary solution to the personal and property effects of marriage avoids conflicts of characterization, but the expression ‘effects of marriage’ can be criticized for the reason that its origin can be traced back to Canon Law and includes those personal duties deriving from marriage (Arts. 66 to 71 Civil Code) whose enforceability would be against the principle of individual freedom of the spouses and are therefore not enforceable in the Spanish legal system²³.

Within the scope of the *lex causae* designated by Art. 9.2 C.c. and as far as matrimonial property is concerned, that law should govern, in the absence of a matrimonial property agreement, the legal regime applicable to the matrimonial property relations between the spouses and its effects on third parties, the composition of the estate, the determination of common or separate property, the powers to dispose of and administer the estate wherever situated and the contractual responsibility of one of the spouses for debts incurred by the other²⁴. The same issues would be under the applicable law chosen by the spouses in case they have entered into a marriage agreement inserting a choice of law clause in their agreement under Art. 9.3 Civil Code. In any case, the applicable law will govern conditions of validity and effects of the matrimonial property agreement. It must be noted that the *lex causae* will govern the scope of party autonomy of the spouses to regulate their matrimonial property relations in a matrimonial agreement and therefore it will also determine the imperative rules that cannot be excluded by agreement, as well as the rules to be applied to issues not covered by the matrimonial property agreement.

2.3.2.1.2

Matters governed by another law

2.3.2.1.2.1

Effects within the scope of personal law

The consequences of marriage upon the name of the spouses or their contractual capacity or, more generally, their legal capacity to act, are issues outside the scope of the law applicable to the matrimonial property regime. Those questions will be solved according to the personal law determined by Art. 9.1 Civil Code and therefore to the law of the nationality of the spouse whose name or legal capacity to act may be subject to change as a result of marriage. But, if capacity of the wife is denied or diminished as a consequence of that rule, resort to the public policy exception of the *lex fori* is likely and may signify the exclusion of the foreign law that introduces unjustified sex discriminations from the Spanish constitutional perspective.

2.3.2.1.2.2

Maintenance obligations

Maintenance obligations between spouses are also subject to specific choice of law rules and cannot be considered under the scope of the law applicable to the matrimonial property regime. This issue is covered by the Hague Convention on the applicable law to maintenance obligations

²³ For all those reasons some writers prefer the expression ‘relations between spouses’ to that of ‘Effects of marriage’, see M. AMORES CONRADI, ‘Art. 9, 2º y 3º’, *loc. cit.*, pp. 182-185; *id.*, ‘La nueva ordenación...’, *loc. cit.*, pp. 39-42.

²⁴ V. SIMÓ SANTONJA, ‘Espagne’, in M. VERWILGHEN, *Régimes matrimoniaux, successions et libéralités*, vol. I, Neuchâtel, Editions de la Baconnière, 1979, p. 717.

1973 (*BOE*, September 16, 1986), in force in Spain since October 1, 1986. This Convention, given its universal scope of application as defined in Art. 3, results in the inapplicability of the Spanish statutory conflict of laws rule for maintenance obligations in Art. 9.7 Civil Code.

2.3.2.1.2.3

Form of the marriage agreement

Formal validity of the matrimonial property agreement is not governed by Art. 9.3 Civil Code which deals only with substantial validity and effects of the agreement. The determination of the law applicable to the form of the agreement is under the scope of application of Art. 11 Civil Code, general collision rule on matters of formal validity. This conflicts rule is inspired on the principle of *favor negotii* and to that effect it sets out a series of alternative connecting factors, so that the formal validity may be ascertained by reference to anyone of the laws designated in that article. Art. 11.1 Civil Code reads as follows:

'Forms and solemnities of contracts, wills and other acts shall be governed by the law of the state in which they may be granted. Nevertheless, also shall be valid those celebrated according to the forms and solemnities required by the law applicable to its content, as well as those celebrated in conformity with the personal law of the grantor or the common law of the parties. Also valid shall be the acts and contracts relating to immovable property celebrated according to the forms and solemnities of the place where property is situated.'

Among the laws designated by Art. 11 Civil Code is the law applicable to the content or substance of the act, a rule which has the effect of also making applicable the laws designated by the alternative connecting factors included in Art. 9.3 Civil Code to govern the substantial validity and effects of the matrimonial property agreement, increasing the number of laws which may render the agreement valid.

Notwithstanding Art. 11.1, the second paragraph of Art. 11 states that:

'If the law governing the content of acts and contracts requires a certain form or solemnity for validity, this form shall always be complied with, even in case those acts and contracts are granted abroad.'

What means that if the law applicable to the substance and effects of the matrimonial property agreement designated by Art. 9.3 Civil Code requires a certain form, i.e., public or authentic act, this form will have to be complied with even if that formal validity requirement is not known at the place where the matrimonial property agreement is entered into. It should be borne in mind that in most countries that belong to the Civil Law or Latin Notary tradition there is a requirement for matrimonial property agreements to be formalized in an authentic document intervened by a public notary ²⁵.

In case the Spanish law is applicable to the substance of the matrimonial property agreement by virtue of Art. 9.3 Civil Code, an authentic document will be required as a consequence of what is established at Art. 11.2 Civil Code, since Art. 1327 Civil Code requires an authentic document for matrimonial property agreements subject to Spanish law. This is not equal to say that a public notary in a foreign country should proceed to comply with all the formalities required by the Spanish notary legislation, Regulation on Organization and Regime of the Notary, June 2, 1944 (*BOE*, July 7, 1944), if Spanish law is applicable to the substance of the agreement. In such a case the public notary in a foreign country should comply with the form that is equivalent to the authentic act required by Spanish law, but, apart from that, the foreign public notary may proceed according to its own notary legislation and the validity of the agreement should be upheld by a Spanish court.

²⁵ M. REVILLARD, *op. cit.*, p. 105.

2.3.2.1.2.4

Capacity to enter into a matrimonial property agreement

This is a matter outside the scope of the law applicable to the content or substance of the matrimonial property agreement. The capacity of natural persons is also excluded from the scope of application of the Rome Convention on the applicable law to contractual obligations (Art. 1.2). The question of what law governs capacity to conclude such an agreement is ruled by the general conflicts rule on capacity in Art. 9.1 Civil Code:

‘The personal law of the natural persons is determined by their nationality. That law shall govern capacity and civil status, family rights and duties and succession in case of death.’

Then, the law of the nationality of the spouses shall determine their capacity to enter into a matrimonial property agreement and to be bound by it. It will also govern cases in which a third party may complement or substitute the lack of capacity of one of the parties to the matrimonial property agreement.

The foregoing solution is criticized by some legal authors who defend the position that this is a question of special capacity (ruled by Arts. 1329 and 1330 Civil Code) and that therefore it is not appropriate to apply the conflicts rule on general capacity, but instead the question should be subject to the conflicts rule that governs the substantial validity of the matrimonial property agreement. In support of that proposition is the fact that the capacity rules on matrimonial property agreements are less strict than rules on general capacity and that it should therefore be convenient that the same law might be applicable to the substance of the matrimonial property agreement and to the capacity requirements to enter into a valid agreement ²⁶.

2.3.2.2 At the time of dissolution of marriage

2.3.2.2.1

Dissolution during the life of the spouses

2.3.2.2.1.1

Divorce, separation and nullity of marriage

The law applicable to divorce and separation also governs the effects of separation or divorce upon the property of the spouses. Law applicable to separation and divorce is set out in Art. 107 Civil Code:

‘Judicial separation and divorce shall be governed by the law of the common nationality of the spouses at the time of the claim; in absence of a common nationality, by the law of the common residence of the spouses and, if the spouses have habitual residence in different states, by the Spanish law, provided that the Spanish courts may have jurisdiction.’

But in case the law applicable to divorce or separation determines the dissolution of the matrimonial property regime of the spouses and the division of their common property, the rules for distribution should be those laid down in the law applicable to the matrimonial property regime ²⁷.

There is no express choice of law rule as to the law applicable to the annulment of marriage in Spanish conflict of laws. One opinion suggests that all the effects derived from nullity should be governed by the same law that is applicable to the cause of annulment, e.g., in case of annulment for reasons of lack of matrimonial capacity, the law applicable to capacity would also be applicable to the effects of matrimonial nullity on matrimonial property. That means that the law applicable to the nullity of marriage would also be applicable to the effects of that nullity. But

²⁶ M. A. AMORES CONRADI, ‘La nueva ordenación...’, *loc. cit.*, pp. 55-56.

²⁷ J. C. FERNANDEZ ROZAS and S. SANCHEZ LORENZO, *op. cit.*, p. 454.

another opinion holds that a different law could be applied to each effect or result that stems from the annulment, in so far as the issue can be characterized differently for conflict of laws purposes, e.g., the effects on property would be subject to the law applicable to matrimonial property, without regard to the cause of matrimonial annulment²⁸. In any case, the issue is far from settled in case law.

2.3.2.2.1.2

Maintenance obligations

This issue, even if the maintenance obligation to a spouse is a consequence of separation or divorce, should be characterized differently from a choice of law perspective, different from separation and divorce, but also different from matrimonial property regime. However, that is not the solution under Art. 8 of the Hague Convention on the law applicable to maintenance obligations 1973, in force in Spain, which requires that the law applicable to divorce will also be applicable to the maintenance obligations between divorced spouses. Therefore, the law applicable to the maintenance obligations and compensation payments between spouses in connection with a decision of separation or divorce will be governed by the law applicable to separation or divorce under Art. 107 Civil Code²⁹.

2.3.2.2.2

Dissolution upon the death of one of the spouses

The issue of classification of the rights of the surviving spouse according to either matrimonial property or to succession law has also been one of the pervasive questions on characterization and adaptation of conflict of laws in Spanish private international law. The question is now well settled in statutory choice of law rules after the enactment in 1990 of the last paragraph of Art. 9.8 Civil Code:

'Rights assigned by the law to the surviving spouse shall be governed by the same law that rules on the effects of marriage, but without prejudice to the forced heirship of the descendants.'

This solution means that the applicable law to matrimonial property under Arts. 9.2 and 9.3 Civil Code should entirely govern the rights of the surviving spouse, without any need for a previous characterization as to what questions might be of a matrimonial property or succession nature. Thus, the risk of applying different potentially incompatible regulations to matrimonial and succession issues is avoided, since the law applicable to the dissolution of the matrimonial property regime will also be applied to the succession rights of the surviving spouse. The only exception to this rule deals with the rights of the forced heirs of the decedent. This latter issue remains within the scope of the law applicable to succession. What means that the property of the decedent's estate assigned to the surviving spouse will have to respect the forced hereditary share of the descendants in case the law applicable to succession sets forth such limitations on the testator's free will³⁰. The Spanish conflict of laws rule for successions is at Art. 9.8 Civil Code and makes applicable the law of the decedent's nationality at the time of death to both movable and immovable property and wherever that property may be situated.

²⁸ P. ABARCA JUNCO, *op. cit.*, p. 107.

²⁹ In general, see S. ALVAREZ GONZALEZ, *Crisis matrimoniales internacionales y prestaciones alimenticias entre cónyuges*, Madrid, Civitas, 1996, pp. 180-194.

³⁰ M. E. ZABALO ESCUDERO, *La situación jurídica del cónyuge viudo. Estudio desde el Derecho internacional privado y el Derecho interregional*, Pamplona, Aranzadi, 1993; A. L. CALVO CARAVACA, 'Art. 9.8 C.c.', in *Comentarios al Código Civil y Compilaciones forales*, *op. cit.*, pp. 385-387.

2.3.3 Law applicable in case of change in the matrimonial property regime

2.3.3.1 Modifications of the connecting factor

2.3.3.1.1

Assumptions as to the *conflit mobile*

The possibility that the circumstances or criteria used as connecting factors by the conflict of laws rule may lead to a different identification of the applicable law along the time as a consequence of changes in the personal connecting factors employed in the field of matrimonial property choice of law is the problem characterized as *conflit mobile*. Indeed, the connecting factors are subject to different concretisations over time since nationality or residence of the spouses may change over the course of their marriage. This question requires specific solutions developed by statutory or case law regarding the temporal criteria for the application of the connecting factors included in the choice of law rules.

2.3.3.1.2

Laws applicable in case of *conflit mobile*

There is no general rule dealing with *conflit mobile* in Spanish conflict of laws. But the preventive solution consisting of a temporal concretisation for the application of the connecting factor is frequently included in the drafting of Spanish choice of law rules. This is the case in the choice of law rules for matrimonial property.

Changes in the nationality or residence of the spouses after the marriage will have no effect on the application of the connecting factors in Art. 9.2 Civil Code regarding the law applicable to the effects of marriage, since all the connecting factors used by that legal rule are referred to the time of the celebration of the marriage or the time immediately after celebration of the marriage. The first connecting factor in Art. 9.2 Civil Code is the common nationality of the spouses at the time of their marriage. Therefore a different nationality acquired after marriage, even if it is a newly acquired common nationality, will not mean any modification for choice of law purposes. The second connecting factor in Art. 9.2 Civil Code, only applicable where the spouses have a different nationality at the time of marriage, is the common residence of the spouses, but it is added that the only residence that can be taken into consideration is the common residence immediately after the celebration of the marriage. The closing connecting factor in Art. 9.2 Civil Code is the place of celebration of marriage, an immutable connecting factor which therefore requires no additional temporal specifications.

Since all subsequent changes in the spouses nationality or residence will have no reflection on the applicable law it can be assumed that the Spanish conflict of laws system on matrimonial property follows a rule of immutability. This solution affords predictability, but it can be criticized because that rigidity may lead to the application of a law that is not the most closely connected with the case. It is possible that the law of common nationality or common residence acquired well after the celebration of the marriage may have the most significant relationship with the spouses, but that circumstance cannot be taken into consideration by the Spanish conflict of laws rules on matrimonial property.

There is still another hypothesis of *conflit mobile* to deal with. All the previous comments on the question were made on the basis that a matrimonial property agreement is absent. But if indeed there is a matrimonial property agreement choice of law rules as to its validity and effects are laid down in Art. 9.3 which sets out that the pacts or agreements by which the matrimonial property regime is stipulated, modified or substituted shall be valid if they conform to the law that governs the effects of marriage, or to the law of nationality or residence of the parties at the time of

the agreement. That reference to the law that governs the effects of marriage is a remission to Art. 9.2 Civil Code and the connecting factors in that choice of law rule, connecting factors which are immutable as was said before, but the closing connecting factor in Art. 9.3 is the nationality or residence of any of the spouses at the time of conclusion of the matrimonial agreement. What means that subsequent changes in the nationality or residence of the spouses after marriage may be used to determine the validity, conditions and effects of the matrimonial property agreement or its modifications.

2.3.3.2 Modifications of the applicable law

2.3.3.3 Changes in the matrimonial property regime by consent of spouses

2.3.3.3.1

Law governing admissibility for change of regime

It is submitted that the Spanish choice of law rule in Art. 9.3 Civil Code reflects a principle of mutability of the matrimonial property regime of the spouses.

A material change or modification in an agreement previously concluded or an agreed modification as to the legal regime applicable to matrimonial property can be possible if it is admissible according to the applicable law set out in Art. 9.3. Civil Code which governs the law applicable to the matrimonial property agreement (*capitulaciones matrimoniales*). That article lays down the rule that the pacts or agreements by which the matrimonial property regime is stipulated, modified or substituted shall be valid if they conform to the law that governs the effects of marriage (as ruled out in Art. 9.2 Civil Code) or to the law of nationality or residence of the parties at the time of their agreement.

The same rule of mutability can be said in relation with a change in the applicable law by means of a choice of law clause in the matrimonial agreement or modification thereof. The only obstacle to this affirmation is that it could be understood that choice of law or the subsequent choice of a different law by the parties would be limited to the law of the nationality or residence of any of the spouses at the time of celebration of marriage, since freedom to choose the applicable law to the effects of marriage is limited in Art 9.2 as was discussed earlier. Nonetheless, most common opinion is that a choice of law clause in a matrimonial property agreement would also be valid if the chosen law corresponds to the law of nationality or residence of any of the spouses at the time of the agreement, as it is said at Art. 9.3 Civil Code, since that opinion holds that limitations on freedom to choose the applicable law in Art. 9.2 Civil Code should only be applicable without exception where there is no matrimonial property agreement and that freedom to choose the applicable law in a matrimonial property agreement is far greater since the laws that can be chosen are those that result from Art. 9.2 Civil Code and the laws of the nationality or residence of any of the spouses at the time of their agreement.

2.3.3.3.2

Law governing the marriage contract which changes the regime

The law applicable according to Art. 9.3 Civil Code will govern the substantial validity of the matrimonial property agreement, its contents and effects, as well as the modifications or changes that may be agreed by the spouses over the time of existence of their marriage. The same law is applicable to the conditions that must be met for a change of the matrimonial agreement, as for example, those regarding possible legal deadlines, the need for a public instrument or authentic act, or even requirements for judicial intervention as conditions of validity for the agreed modification of the matrimonial property regime of the spouses.

This means that the Spanish nationality or habitual residence in Spain of one of the spouses at the time of the agreement will be sufficient to make a change in the matrimonial property regime possible, even after the celebration of marriage and even if the law applicable to the effects of marriage according to Art. 9.2 Civil Code establishes a system of immutability of the matrimonial property regime. Thus, if a Spanish woman marries an Argentinean and their first common residence after marriage is in Argentina, the law applicable to the effects of marriage, according to Art. 9.2 Civil Code, will be the Argentinean, unless there is a choice of law in a public document before the marriage. Argentinean law follows a rule of immutability of the matrimonial property regime (as many other South American countries: Bolivia, Cuba, Brasil, Colombia, Venezuela...). But from the Spanish perspective, if the spouses want to rule their matrimonial regime in an agreement concluded in Spain (*capitulación matrimonial*) after marriage, that modification can be possible according to Art. 9.3 Civil Code which alternatively also subjects the issue to the law of nationality or residence of any of the spouses. Since one of them is of Spanish nationality and Arts. 1325 and 1326 Civil Code allow modifications of the property regime, the matrimonial agreement would be a valid one.

2.3.4 Law applicable to publication of the matrimonial property regime

2.3.4.1 Law applicable to the publication of the initial regime

2.3.4.1.1

Obligation to register in a public register

A registry inscription (Civil Registry, Commercial Registry or Real Property Registry) of the matrimonial property agreement may be a condition upon which depends the validity of the agreement towards *bona fide* third parties, as it is the case in Art. 1333 of the Spanish Civil Code. The requirement of publicity that should be given to the matrimonial property agreement also falls within the scope of the law applicable to the content and validity of the matrimonial agreement as designated by Art. 9.3 Civil Code. But access to the registry inscription can only be regulated by the law of the registry (*lex autoritatis*)³¹.

2.3.4.1.2

System for publication

Although obligation of publicity of the matrimonial property agreement is also governed by the *lex causae* designated by Art. 9.3 Civil Code, the regulation of the conditions for granting access to registry inscription and publication systems can only be done by the Law of the Registry (*lex autoritatis*). In case the spouses intend to formalize an inscription of their matrimonial property agreement in a Spanish registry the following legal provisions may apply. As to a marginal inscription next to the marriage inscription in the Spanish Civil Registry the statutory rules to be observed are Art. 77 of the Civil Registry Act and Art. 266 of the Civil Registry Regulation. If the matrimonial agreement affects property over immovable property the inscription in the Property Registry of the place where the property is situated will be subject to Arts. 2 and 26 of the Hypothecation Act³².

³¹ M. AMORES CONRADI, 'La nueva ordenación...', *loc. cit.*, p. 57.

³² M. BALLESTEROS ALONSO, 'El Registro de la Propiedad y los regímenes económicos matrimoniales extranjeros', *RCDI*, 1990, pp. 9-26; J-L. GIMENO Y GÓMEZ -LAFUENTE, 'La publicidad de las capitulaciones matrimoniales en Derecho internacional privado', *RCDI*, 1979, pp. 769-786.

2.4 RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS AND 'PUBLIC' ACTS IN RESPECT OF MATRIMONIAL PROPERTY REGIMES

2.4.1 The General Rules on the effectiveness of foreign public acts and court decisions as applied in the area of matrimonial property regimes

2.4.1.1 Overview of sources and contents of the rules

The statutory Spanish rules on recognition and enforcement of foreign judgments are included in Arts. 951 et seq. of the 1881 Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*). There is a new Spanish code on civil procedure, Act 1/2000, January 7, in force since January 2001, but it contains no provisions on recognition and enforcement of foreign decisions, to that effect there is a prevision in one of its final dispositions for the enactment of an Act on international judicial cooperation for civil matters which would address that issue among others belonging to the area of international civil cooperation. Until that Act becomes a reality rules of enforcement and recognition under the 1881 Civil Procedure Act remain applicable. A draft of legislation on International Civil Jurisdictional Cooperation was made public in the year 1999, but was later abandoned by the Spanish Ministry of Justice and to date there is no other draft proposal available, although eventually the Ministry of Justice will have to come out with a new draft of legislation as it is required by the new Spanish Civil Procedure Act. The situation is, therefore, in a state of change required by law.

The conventional sources applicable to the recognition and enforcement of foreign judgments in the area of matrimonial property include a number of bilateral conventions. Among the bilateral conventions concluded by Spain on judicial assistance and recognition and enforcement of decisions many of them do not exclude from their material scope of application the issue of matrimonial property and therefore are applicable for that matter. Some of those international bilateral conventions bind Spain with other European Union countries:

a-Convention with Germany on recognition and enforcement of decisions, judicial transactions and public acts in civil and commercial matters, November 14, 1983 (*BOE*, September 24, 1992).

b-Convention with Austria on recognition and enforcement of decisions, judicial transactions and public acts in civil and commercial matters, February 17, 1984 (*BOE*, August 29, 1985).

c-Convention with France on recognition of judicial and arbitral decisions and public acts in civil and commercial matters, May 28, 1969 (*BOE*, March 14, 1970).

d-Convention with Italy on judicial assistance and recognition and enforcement of judicial decisions in civil and commercial matters, May 22, 1973 (*BOE*, November 15, 1977).

The rest of those bilateral conventions, outside the European Union area, would be the following:

a-Convention with Bulgaria on judicial assistance in civil matters, May 23, 1993 (*BOE*, June 30, 1994).

b-Convention with Colombia on the enforcement of civil decisions, May 30, 1908 (*Gaceta de Madrid*, April 18, 1909).

c-Convention with the Czech Republic on judicial assistance, recognition and enforcement of civil decisions, May 4, 1987 (*BOE*, December 3, 1988).

d-Convention with the Popular Republic of China on judicial assistance in civil and commercial matters, May 2, 1992 (*BOE*, January 31, 1994).

e-Convention with Morocco on judicial cooperation in civil, commercial and administrative matters, May 20, 1997 (*BOE*, June 25, 1997).

f-Convention with Switzerland on enforcement of decisions in civil and commercial matters, November 19, 1896 (*Gaceta de Madrid*, July 9, 1898).

g-Convention with the Russian Federation on judicial assistance in civil matters, October 26, 1990 (*BOE*, June 25, 1997).

CHAPTER 3

UNMARRIED COUPLES. INTERNAL LAW

3.1 SOURCES OF THE LAW ON UNMARRIED COUPLES

3.1.1 Description of the general legislative sources

Spanish Constitution 1978 does not expressly recognize cohabitation or unmarried couples, but lays down a wide or plural concept of family relations under which constitutional protection can be given to those situations.

Statutory sources on cohabitation are in force in different Autonomous Communities. In Catalonia, Act on Situations of Common Living and Mutual Help, 15 July 1998. In Aragon, Unmarried Stable Couples Act, 26 March 1999. In Navarre, Equal Protection of Stable Couples Act, 3 July 2000. In Valencia, Unmarried Couples Act, 6 April 2001. In the Balearic Islands, Stable Couples Act, 19 December 2001. In Madrid, Unmarried Couples Act, 19 December 2001. These statutes can be divided into two groups, the first one (Catalonia, Aragon, Navarre and Balearic Islands) is expression of the competence of those Autonomous Communities to rule on civil legislation. The second group (Madrid, Valencia) provides a minimum regulation in the absence of a Spanish statute dealing with the question, the application of the statutes of the latter Autonomous Communities to unmarried couples or cohabitants depends on the voluntary inscription of the couple in a special administrative Register.

3.1.2 Description of principal sources in court decisions

Decisions by the Spanish Constitutional Court have played a key role in the recognition and protection of the legal status of unmarried cohabitants. Although Art. 32 Spanish Constitution 1978 only mentions marriages between a man and a woman, the constitutional jurisprudence, e.g., Decision of the Constitutional Court 222/1992, December 11 (*BOE*, January 19, 1992), holds that there is not just one single concept of family (matrimonial family), but that, on the contrary, also other forms of family or family relations, i.e., different from the matrimonial family, can be given protection under the constitutional policy of family protection set out in Art. 39 Spanish Constitution³³. This Decision, and the previous Decision 184/1990, November 15 (*BOE* December 3) held that unmarried couples cannot be excluded from that protection, although the degree of legal protection for marriages and unmarried couples may differ since those two situations are not entirely equivalent, as long as the stronger legal protection afforded to married couples does not hinder or limit unreasonably the choice of other forms of family relations.

The absence of a national statute on unmarried couples in Spain has led to the development of case law governing the effects of unmarried couples. Spanish courts have had to face the lack of specific legal provisions and the need to answer the increasing number of cases dealing with unmarried couples. The consequence is that most of the legal regime applicable to unmarried couples in Spain has been developed by case law and the criticism towards this situation is that of unpredictability, since it is an area in a permanent state of change and development. Spanish Supreme Court has dealt with a number of cases concerning unmarried couples, mainly in

³³ To this effect, also most legal writers, CHINCHILLA MARIN, C., 'La familia en la jurisprudencia del Tribunal Constitucional', *Aranzadi Civil*, 1995, p. 11; J. M. MARTINELL, *Las uniones matrimoniales de hecho*, Madrid, Marcial Pons, 1996, p. 64. RALLO LOMBARTE, A., "'Uniones conyugales de hecho y Constitución'", *RGD*, 1995, pp. 1759-1779; ROCA TRIAS, E. 'Familia, familias y Derecho de familia', *ADC*, 1990, p. 1067.

the areas of pension rights and division of property after separation or death. Basically, the Supreme Court holds the view that marriage regulations are not applicable to unmarried couples, that resort to legal analogy is not possible to justify the application of the matrimonial property regime to the property of unmarried couples in the absence of an agreement to that effect, that contracts between the members of the unmarried couple are permitted and that those agreements or contracts can make reference to the application of the rules on matrimonial property, that joint or common property may be a consequence of the tacit agreement of the parties as evidenced by their acts, and that protection can be given to the members of unmarried couples in case of separation on the basis of legal provisions on unjust enrichment ³⁴.

3.1.3 Description of legal reforms

Attempts have been made at the national level during the last decade towards the enactment of a Bill on Unmarried Couples, but there is no statutory source applicable for the whole of the Spanish territory for the moment. Nonetheless, there is a growing trend in the Autonomous Communities to pass legislation on this subject as has been said above.

3.2 HISTORIC DEVELOPMENT OF THE LAW ON UNMARRIED COUPLES

3.2.1 Stages of the historic development

Spanish law in the Middle Ages (*Siete partidas* promulgated by Alphonse X in 1265, generally considered the most important law code of the Middle Ages and the largest legislative compilation since Roman times) ruled conditions and effects of concubinate, but the influence of the catholic counter-reformation led to the enactment of a Royal Decree by Phillip II against concubinate in 1564. This hostility against concubinate did not change with the enactment of the Spanish Civil Code in 1889 which does not govern concubinate or cohabitation or any other form of unmarried couple ³⁵.

3.2.2 Actual situation

The Spanish Constitution of 1978 does not set forth an express protection or recognition of cohabitation or unmarried couples, but under its new concept of family relations a growing number of judicial decisions and statutory sources of different Autonomous Communities reflect a policy of legal recognition.

3.3 THE LEGAL CHARACTER OF RELATIONS OTHER THAN TRADITIONAL MARRIAGE

3.3.1 The concept of legal marriage

The concept of legal marriage is defined by reference to the elements of heterosexuality, matrimonial capacity, matrimonial consent of the spouses expressed in the legally required form and indefinite duration of the marriage ³⁶. Spanish Constitution in Art. 32 protects the marriage between a man and a woman, other forms of family relations (same-sex relations) may also be protected but not as marriages. Spanish law is also based on the free will of the spouses to celebrate their marriage, a principle which is against the legal assimilation to marriage of other factual relations where there is no consent of the spouses to be married.

³⁴ Decisions by Supreme Court 15 July 1986, 11 December 1992, 18 February 1993, 22 July 1993, 11 October 1994, 27 May 1994, 30 December 1994

³⁵ See the reasons for that hostility in I. LÁZARO GONZÁLEZ, *Las Uniones de Hecho en el Derecho internacional privado español*, Madrid, Tecnos, 1999, pp. 175-176.

³⁶ I. LÁZARO GONZÁLEZ, *op. cit.*, pp. 306-315.

3.3.2 The couple of fact

The legal definition of unmarried couples is non-existent in Spanish Law. Only case law is trying to cope with the problem of definition of the concept of unmarried couple. Thus, Decision of the Supreme Court of 18 May 1992 defines the concept by reference to stable daily cohabitation *more uxorio* consolidated over the years and practised in an open and public manner. There are definitions in the laws of some Autonomous Communities, but those definitions differ and are limited to the scope of application of the existing regional laws. Differences in those definitions concern the requirements of heterosexuality (most of those laws also govern homosexual couples, e.g. in Catalonia, but giving them a different regime to that of the heterosexual couple), monogamy, legal capacity, stable coexistence *more uxorio* during a certain number of years (in most cases one or two years are required, unless there has been a voluntary declaration to create a stable couple in a public act), etc.

3.3.3 Partnership registration

Municipal regulations in many Spanish cities have established a Municipal or Local Registry for unmarried couples as a means to facilitate a means of proof of the existence of those relations and initial date thereof. But this administrative intervention on the issue can be misleading. The effects of such municipal regulations cannot result in anything beyond the establishment of an evidentiary means, even if those local regulations lay down, as it is often the case, a rule on equality between married and unmarried couples, and even homosexual and heterosexual couples. Such affirmations and registers can only have administrative effects and cannot hinder the exclusive competence of statutory sources on civil legislation. Therefore, these registration procedures can in no way be assimilated to those existing in other countries where civil legislation allows the creation of legal relations different from marriage through the intervention of a public authority.

More importantly, there are also Registries established by Autonomous Communities in the context of or as conditions for the application of the regional statutes on the subject. The regulation of the Civil Register is an exclusive competence of the State (Art. 149.1.8 Spanish Constitution), but most of Autonomous Communities statutes have created Autonomic Registers for Unmarried Couples. In some cases as a non-exclusive evidentiary means of the existence of the unmarried couple, other means of proof would also be available (Catalonia, Navarre). In other group of cases, the inscription of the couple in the Autonomous Community Register (Madrid, Valencia, Aragon, Balearic Islands, etc.) is a prerequisite for the application of the statute on the subject. There are even cases of Autonomous Communities which have not regulated the issue of unmarried couples, but which have established an administrative register for unmarried couples (e.g., Decree of Junta de Castilla-La Mancha 124/2000, 11 July).

3.3.4 Contract to cohabit

Contracts between the members of the unmarried couple are not specifically regulated in Spanish Law, but are considered valid. The contract is seen as the most effective method to rule the relations between the members of the couple, given the absence of Spanish legislation specifically concerning unmarried couples. Case law is abundant to the effect of considering such contracts lawful and legally enforceable³⁷.

Contracts to cohabit for both heterosexuals and homosexuals have been governed by most of the statutes of Autonomous Communities on unmarried couples. These statutes deal with the possible object and contents of such contracts, also establishing some specific limitations. Among them, the need to respect the imperative rules, the protection of the dignity and intimacy of

³⁷ See Decisions of the Supreme Court of 18 May 1992, 4 June 1988, 18 November 1994.

the members of the couple, the principle of equality of the sexes, the prohibition of agreements of a temporary nature or subject to certain conditions (Aragon, Navarre, Valencia, Madrid, etc.).

The remaining question concerns the contents of these contracts under general Spanish Law. Freedom of the will of the parties to develop a special regime is recognized under the general rule in Art. 1255 Civil Code to the extent permitted by public policy and accepted by moral and customs standards. The couple can also subject their relation to the legal regimes on matrimonial property (joint property, separation of property, etc.) or to other general civil law schemes such as joint property (*comunidad de bienes* in Art. 392 Civil Code) or partnership (*contrato de sociedad* in Art. 1665 Civil Code). A voluntary remission to the legal regime established in the Autonomous Communities statutes on the subject (Catalonia, Aragon, Navarre, etc.) could also be possible.

3.4 PROPERTY RELATIONS OTHER THAN TRADITIONAL MARRIAGE

Property effects during the existence of the unmarried couple cover the question of how the burdens of the household economy and common expenses are to be shared between the members of the couple. It also covers the extent of responsibility of the members' property for acts done by one of the members for the benefit of the couple. Both questions are normally regulated in the Autonomous Communities statutes. Art. 3.2 of the Catalonian statute lays down a rule for sharing the cost of common expenses that is proportional to the relative income of the members of the couple, while each member retains full title and administration of his own property. And Art. 5 sets out that in relation to third parties both members of the couple are jointly responsible for debts incurred in relation to the common expenses of the household.

3.5 PROPERTY ISSUES IN CASE OF SEPARATION OF UNMARRIED COUPLES

3.5.1 The separation of the couple

No formality is required for the separation of the unmarried couple in Spanish law. The dissolution of the unmarried couple does not require a judicial declaration either, although an action seeking that judicial declaration could be possible under the existing general procedural rules.

The statutes of some Autonomous Communities lay down rules determining the conditions under which the unmarried couple has ceased to exist, but those circumstances are mostly factual: common agreement of the *de facto* partners, unilateral decision of one of them legally notified to the other, death of one of the members, separation of fact for more than one year, marriage of one of the members, etc.

3.5.2 Effects of the separation upon the property of the members

Spanish Courts have awarded compensation payments after separation of the couple with resort to the theory of unjust enrichment in cases where one of the members has contributed to the couple supporting the activities of the other member. Housework and children care are to be included under this rule developed by case law.

In the Autonomous Communities statutes compensation payments as a consequence of separation follow the same reasoning grounded on the doctrine of unjust enrichment (Catalonia, Aragon, Navarre). Therefore the agreements or contracts to cohabit subject to those laws which may have been entered into by the members of the couple cannot validly include a waiver of such a right.

Different from the question of compensation payments is the granting of maintenance payments to the other member of the couple. Maintenance rights take the form of periodic payments after separation, but case law has denied this right in cases of unmarried couples, unmarried

cohabitation does not in itself give rise to that responsibility³⁸. On the contrary, this right is considered an imperative rule in the statutes of some Autonomous Communities (Catalonia, Aragon, Navarre). It is established in cases in which one of the members is in charge of the care of the common children or if his/her earning capacity has been greatly diminished as a result of the existence of the couple.

The right of occupation of the cohabitants' dwelling-house in cases of separation is attributed to the member that is economically most severely impaired by the separation. The legal reasoning in cases of existence of common children is made by analogy to the regulation in Art. 96 Civil Code on the similar question regarding separation of marriages, but case law has also arrived at the same conclusion in cases where there is no common child involved³⁹.

3.6 PROPERTY ISSUES IN CASE A MEMBER OF THE UNMARRIED COUPLE DIES

3.6.1 In relation to the surviving member

Legal consequences of the death of one of the members of the unmarried couple is an area where debate has been extensive over the latest decade in case law. Most cases concern the award of pension rights under the existing laws on social security and have been decided by the Constitutional Court ruling out that possibility in the case of unmarried cohabitants⁴⁰. On the contrary, the existing Spanish statute on landlord and tenant relationships (Ley de Arrendamientos Urbanos) specifically governs the question of the eventual subrogation of the surviving partner in the lease or tenancy contract of the deceased requiring two years of common living, unless there is a common child in which case no specific time is required (Art 16).

Intestacy rights of the surviving cohabitant are entirely excluded under the ordinary rules of intestacy in Spanish case law. The unmarried partner may make a testamentary disposition in which property is devised to the other partner, provided that the will is in conformity with the rules on forced heirship. Nonetheless, testamentary regulations and also intestate succession rights of the surviving cohabitant have been established in some of the Autonomous Communities statutes on the subject. In the case of Catalonia intestate succession rights have been recognized, but only for the benefit of the homosexual surviving partner and not for the benefit of a heterosexual surviving partner (Art. 34). In Navarre, the statute on the subject does not differentiate between homosexual and heterosexual couples and awards intestate succession rights to the surviving member which are equal to those awarded to surviving spouses (Art. 11).

Rights of the surviving member have been increased as a consequence of legislation passed by the different Autonomous Communities on unmarried couples. Among those rights we can mention the right of occupation of the dwelling-house for one year after the death of the deceased cohabitant and the property of the surviving cohabitant over the movable goods affected to the service of the dwelling-house (Art. 18 of the Catalonian statute, Art. 9 of the Aragon statute).

3.6.2 In relation to third parties

The surviving member is entitled, under general tortious liability rules in Art. 1902 Civil Code, to sue third parties for damages suffered as a consequence of tortious actions committed by tortfeasors on the deceased member of the couple.

³⁸ See I. LÁZARO GONZÁLEZ, *op. cit.*, p. 224.

³⁹ See Decisions of the Supreme Court of 16 December 1996, 10 March 1998, 27 March 2001.

⁴⁰ See Decisions of the Constitutional Court 184/1990, 66/1994, 126/1994.

It is more questionable whether the surviving member is entitled to the benefits of a life insurance in the same circumstances as a spouse or by analogy to the situation of a surviving spouse, case law has ruled out such possibility ⁴¹.

⁴¹ See Decision of Audiencia Provincial, Málaga, 22 April 1996.

CHAPTER 4

UNMARRIED COUPLES. PRIVATE INTERNATIONAL LAW

4.1 GENERAL ISSUES OF PRIVATE INTERNATIONAL LAW

4.1.1 Public Policy. Characterization

The public policy exception to the applicability of the foreign law designated by the conflicts rule cannot be invoked against unmarried couples. The Spanish Constitution (Art. 39) also affords protection to other forms of family relations, i.e., different from marriage. Legislation passed in the Autonomous Communities of Catalonia, Aragon, Navarre, Balearic Islands, Valencia and Madrid is expression of that policy of recognition towards unmarried stable couples. This affirmation is not only applicable to different-sex unmarried couples but also to same-sex unmarried couples. The Catalan statute on the subject lays down a similar but different regime for homosexual and heterosexual unmarried couples. The statute passed in Navarre goes further and equates the regime applicable to homosexual and heterosexual couples. On the contrary, the public policy exception could be invoked against same-sex marriages. In the Spanish Constitution only the marriage between a man and a woman is recognized (Art. 32) and given express constitutional protection. This should mean that unions or couples of the same sex cannot be treated as marriages and this conclusion is part of the public policy exception.

Issues of characterization are the core of legal analysis in the determination of the law applicable to unmarried couples. Recourse to the conflicts rules on marriage or marital relations could be possible by analogy, but such rules are inadequate to govern unmarried couples and their application would be against the will of the members of the unmarried couple who decided not to be married and adopted other form of family relationship. The absence of a unitary characterization and regulation of the unmarried couple in Spanish law leads to a fractioning or scission of the applicable law, a process in which recourse may be made to the conflicts rules on contracts (Art. 10.5 Civil Code), personal status (Art. 9.1 Civil Code), extra-contractual obligations (Art. 10.9 Civil Code) proprietary rights (Art. 10.1 Civil Code) and successions (Art. 9.8 Civil Code).

4.1.2 Recognition of the relation between an unmarried couple

Unmarried couples subject to the laws of foreign states should be recognized in Spain. The exception to this would be those cases of same-sex couples in which the characterization of the relation would be that of marriage according to Spanish Law. The answer to this question depends on the different models existing in comparative law. The laws on registered partnerships in force in the Nordic countries (Norway, Sweden and Denmark) cannot be characterized as marriages, even if under those laws most of the effects of marriage are attributed to these unions. Since a registered partnership is not a marriage there would be no obstacle to their recognition in Spain, at least if the effects to be recognized cannot be characterized as specifically matrimonial, e.g., incapacity to marry. The solution is different in the case of same-sex marriages, such as those permitted in the Dutch law, whose recognition can be entirely rejected from the Spanish perspective.

4.1.3 Admissibility of the celebration of same-sex marriages or other relations

It would be impossible to accept the celebration in Spain of a same-sex marriage even if it is possible according to the personal law of the spouses. Art. 50 Civil Code sets out the rule that the form of celebration of marriage in Spain in cases where the spouses are foreigners can be subject to the Spanish law or to the personal law of any of the spouses. But such marriages would not be

recognized by Spanish Law as a consequence of the Spanish definition of public policy concerning same-sex marriages.

4.1.4 Interregional conflict of laws

The coexistence of different civil legislations concerning unmarried couples in Spain creates interregional conflict of laws that should be dealt with by reference to the conflict of laws rules for international conflict of laws (Art. 16.1 Civil Code). With the exception that the connecting factor based on nationality must be replaced by *vecindad civil* or civil vicinity. The State has an exclusive competence to govern choice of law rules (Art. 149.1.8 Civil Code) and that exclusiveness not only affects bilateral conflict of laws rules but also unilateral choice of law rules. This is one of the reasons why the Equal Protection of Stable Couples Act, 3 July 2000, of Navarre has been challenged before the Constitutional Court (Unconstitutionality Question number 5297/2000, *BOE* 15 November 2000). The Act of Navarre lays down the rule in Art. 2.3 that its scope of application covers all stable couples provided that one of its members has the civil vicinity of Navarre. This unilateral rule governing the scope of application of the Act may be considered contrary to the exclusiveness of the State to govern choice of law rules. A similar problem can be found in Art. 1.1 of the Catalanian statute and some other Autonomous Communities statutes which require the *vecindad civil* or civil vicinity of their territory of at least one of the members of the couple. From this situation arises a constitutional debate as to the extent to which the different Autonomous Communities may define the scope of application of their own laws in absence of a special conflicts rule on unmarried couples in the Spanish conflict of laws. Undoubtedly the question will have to be addressed by the Constitutional Court in the awaited decision on the unconstitutionality question against the Navarre statute.

4.2 INTERNATIONAL JURISDICTION

4.2.1 Separation of unmarried couples

There are no special rules on international jurisdiction on unmarried couples. International jurisdiction should be determined according to the general rules in the Judicial Power Act 1985. Art. 22.2 confers jurisdiction on the courts of the place of domicile of the defendant and also on the Spanish courts if the parties have expressly submitted to them.

4.2.2 Property aspects of the separation

Actions which may be characterized as proprietary (*derechos reales*) fall under the exclusive international jurisdiction rule in Art. 22.1 Judicial Power Act 1985 which lays down the rule of the exclusive jurisdiction of the Spanish courts over immovable property located in Spain. In case of movables there is a specific international jurisdiction rule in Art. 22.3 Judicial Power Act 1985 conferring jurisdiction on Spanish Courts if the property is situated in Spain at the time of the claim. An action seeking the division of joint property after separation of the unmarried couple should be considered under those jurisdictional criteria⁴².

⁴²S. SÁNCHEZ LORENZO, 'Las parejas no casadas ante el Derecho internacional privado', *REDI*, 1989, pp. 518-519.

4.3 APPLICABLE LAW

4.3.1 Determination of the law applicable to property regime

4.3.1.1 In case the couple has entered into a contract

The contracts entered into between the members of an unmarried couple to govern their property relations will be subject to the conflicts rules in Art. 10.5 Civil Code. The entry into force of the Rome Convention on the law applicable to contractual obligations 19 June 1980 in Spain is not relevant to this issue. Art. 1.2 of the Rome Convention excludes non commercial contracts from its scope of application, such as contracts relating to wills and succession, rights in property arising out of a matrimonial relationship, rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of illegitimate children. Even if there is no express exclusion of the contracts to cohabitante, the exclusion of all contracts concerning matters of family law leads to the same result⁴³. The conflicts rules set out at Art. 10.5 Civil Code are the following:

‘To contractual obligations shall be applied the law to which the parties have expressly submitted, provided that it is somehow connected with the transaction. In absence of a choice of law, the law of the common nationality of the parties; in its defect, the law of the common habitual residence and, lastly, the law of the place of conclusion of the contract’.

The connecting factors used by art. 10.5 Civil Code are mostly of a personal nature (common nationality, common habitual residence) and therefore suitable to govern contracts within the context of family relations. The closing connecting factor based on the place of conclusion of the contract (*lex loci celebrationis*) is indeed rigid and may lead in certain circumstances to the application of a law only vaguely connected with a business contract, but in contracts to cohabitante the place of the contract will also be in most cases the place of common habitual residence of the members of the unmarried couple.

Conflicts between the laws of the different territorial units of Spain governing contracts to cohabitante are possible, since most Autonomous Communities statutes specifically rule such contracts. Those interregional conflicts of laws will also be subject to Art. 10.5 Civil Code, but the first connecting factor based on the common nationality of the members will be replaced by the common civil vicinity or *vecindad civil*.

4.3.1.2 In case there is no contract between the members of the couple

There is no specific statutory conflicts rule in Spanish law, case law is also non existent for the time being (Court cases are abundant but limited to internal situations for the moment). Consequently, it is the doctrine developed by legal writers the only help we can find in the process of determining the law applicable to unmarried couples in absence of a contract to cohabitante. This situation should be solved by the Spanish legislator through the enactment of special rules to determine the applicable law to unmarried couples. The unification of this rules at the international level is also desirable.

Most writers reject the idea that conflicts rules for marital relations or matrimonial property in Art. 9.2 Civil Code may also be applicable to unmarried couples by analogy. The rejection is based on the idea that marriage requires matrimonial consent and that in the absence of

⁴³ A wide interpretation of the exclusion to cover all matters related to family law is held in the GIULIANO/LAGARDE Report on the Rome Convention on the law applicable to contractual obligations, *DOCE*, C282, 31 October 1980.

such a consent the need to respect the free will of the members of the unmarried couple should exclude the possibility of applying matrimonial rules to their relations ⁴⁴.

If it is submitted that matrimonial conflicts rules are not to be applied other possibilities must be explored. One of them is recourse to the law applicable to civil or personal status governed by Art. 9.1 Civil Code ⁴⁵. The application of this conflicts rule seems entirely justified in cases where the foreign law creates a legal institution of civil status (e.g., registered partnerships in the laws of the Nordic countries) ⁴⁶. Personal status is subject to the personal law determined by nationality. Such a solution can be useful when both members share the same nationality. If that is not the case, the applicable law would be the law of the common habitual residence of the members, since residence is the connecting factor to be used when nationality is not applicable in the Spanish conflict of laws system (Art. 9.10 Civil Code). This solution would also be applicable to interregional conflicts with the exception that *vecindad civil* or civil vicinity would replace nationality. This conflicts rule would have the complementary advantage of its compatibility with the unilateral rules on scope of application in the Autonomous Communities statutes on the subject. That is, the law chosen by the conflicts rule (law of the common *vecindad civil* or common residence) should also comply with the unilateral scope of application requirement in the legislation of the Autonomous Community (at least one of the members of the couple must be of *vecindad civil*, or resident as the case may be, in that Autonomous Community).

A second possible approach would be the application of the conflicts rule on extra-contractual obligations in Art. 10.9 Civil Code, which governs the question by reference to the law of the place where the fact which is the cause of liability happened (*lex loci commissi*). This solution will normally lead to the application of the law of the residence of the unmarried couple ⁴⁷.

4.3.2 Scope of the applicable law

4.3.2.1 During the existence of the couple

The rejection of a unitary approach based on the application of the conflicts rules on the effects of marriage has an important consequence, the applicable law must be determined through a fragmentary approach depending on the specific issue to be decided ⁴⁸. The law applicable to personal status in Art. 9.1 Civil Code may be employed as the conflicts rule of first recourse, but application of Art. 10.9 Civil Code cannot be entirely rejected. In addition and as a consequence of a different characterization other questions such as property or hereditary rights may be subject to other conflicts rules.

The legal regime applicable to property relations (existence of a joint property or of a separation of property regime, determination of property assigned to the household, rights of one member over the property of the other, etc.) is also under the influence of the *lex rei sitae* in art. 10.1 Civil Code, applicable to both movable and immovable property.

⁴⁴ S. SÁNCHEZ LORENZO, 'Las parejas no casadas...', *loc. cit.*, pp. 508-511; J. D. GONZÁLEZ CAMPOS, *Derecho internacional privado. Parte especial*, 6th edition, Madrid, Eurolex, 1996, p. 293; I. LÁZARO GONZÁLEZ, *op. cit.*, pp. 344-346.

⁴⁵ J. M. FONTANELLES I MORELL, 'Noves perspectives per una regulació de les unions de fet en el dret internacional privat espanyol', in J. M. MARTINELL, M.ª T. ARECES PIÑOL, *Uniones de Hecho*, Universidad de Lérida, 1998, pp. 236-245.

⁴⁶ I. LÁZARO GONZÁLEZ, *op. cit.* pp. 361-362.

⁴⁷ S. SÁNCHEZ LORENZO, *loc. cit.*, p. 523.

⁴⁸ S. SÁNCHEZ LORENZO, *loc. cit.* pp. 507-529; I. LÁZARO GONZALEZ, *op. cit.* p. 262; J. C. FERNÁNDEZ ROZAS, S. SÁNCHEZ LORENZO, *op. cit.*, pp. 488-489.

4.3.2.2 At the time of separation

4.3.2.2.1

While the members are alive

The actions seeking to indemnify or compensate one of the members for services rendered to the other during the existence of the unmarried couple are characterised in Spanish law under the rules on unjust enrichment. Consequently, the applicable law should be ascertained according to Art. 10.9 Civil Code on extra-contractual obligations. Art. 10.9, 3rd paragraph, Civil Code governs the applicable law to unjust enrichment subjecting the question to the 'law by virtue of which the transfer of property value was made in favour of the enriched party', but this rule is not applicable to unmarried couples. In the case of services voluntarily made by one member of the unmarried couple toward the other there is no previous legal relationship operating or requiring a transfer of property, and therefore the applicable law to situations of unjust enrichment must be ascertained by reference to the general conflicts rule on torts, i.e., Art. 10.9, 1st paragraph (*lex loci delicti commissi* rule). The same characterization would be applicable to maintenance obligations between members of the unmarried couple (this issue is outside the scope of application of the Hague Convention on the law applicable to maintenance obligations and also outside the scope of Art. 9.7 Civil Code, since both regimes are only applicable to maintenance obligations based on kinship or marriage).

The determination of joint property (*comunidad de bienes* under Arts. 392-406 Civil Code) and its division between the members of the unmarried couple after separation will be governed by Art. 10.1 Civil Code on the law applicable to movable and immovable property. The *lex rei sitae* will determine the rules applicable to the liquidation and division of property of the members of the couple ⁴⁹.

4.3.2.2.2

Upon death of one of the members

The hereditary rights of the surviving member will be governed by the law applicable to successions. In Art. 9.8 Civil Code the law applicable to both testamentary and intestate succession is governed by the law of the nationality of the deceased at the time of death. That law is applicable to movable and immovable property (principle of unity) and whatever might be the country where that property is situated (principle of universality). Gifts or donations made inter vivos between the members of the couple can be subject to actions seeking a reduction to comply with the heirs' indefeasible shares in case the decedent's law of nationality establishes rules on forced heirship. Gifts or donations mortis causa are characterized in Spanish law as succession matters and their substantial validity is subject to the law applicable to succession.

The existence of testamentary and intestate rights for the benefit of the surviving member in the statutes of some of the Autonomous Communities on the subject (Catalonia, Navarre) is a situation from which interregional conflict of laws may arise. The rules determining the unilateral scope of application of those statutes cannot solve such conflicts cases and instead the conflict rules for international situations are to be applied (Art. 16 Civil Code). Consequently, the *vecindad civil* or civil vicinity of the deceased will be the connecting factor under Art. 9.8 Civil Code.

4.3.3 Applicable law and changes of the property regime

If it is submitted that Art. 10.1. Civil Code and the *lex rei sitae* rule govern the applicable law to the determination of joint property of the unmarried couple and the division of that property after separation, hypothesis of *conflict mobile* could be possible. In cases where the property has

⁴⁹S. SÁNCHEZ LORENZO, 'Las parejas no casadas...', loc. cit., p. 519.

been moved to another state after its acquisition, general *conflit mobile* rules relating to property should also be applicable. The relevance of the situation of the property at the time of separation could be considered against fraudulent attempts to locate property in another jurisdiction ⁵⁰.

4.3.4 Law applicable to publication of the property regime of the unmarried couple

Requirements of publication of the property regime of the unmarried couple are subject to the law governing their regime, but conditions of access to Civil or Public Registers on the subject depend on the law of the place of the Register (*lex auctoritatis*). In Spanish law the Civil Register is not available for the inscription of contracts to cohabitante, but only for matrimonial property agreements (Art. 1333 Civil Code). Administrative Registers of unmarried couples established by Autonomous Communities and local entities are available, but their effects are different and mostly of an administrative nature.

⁵⁰ *Ibid.*, p. 519.

ANNEXES TO THE REPORT

1 List of Abbreviations

AAMN: *Anales de la Academia Matritense del Notariado*
Act. Civ.: *Actualidad Civil*
ADC: *Anuario de Derecho Civil*
BOE: *Boletín Oficial del Estado*
C.c.: Código Civil
CCJC: *Cuadernos Civitas de Jurisprudencia Civil*
CE: Constitución española
DGRN: Dirección General de los Registros y del Notariado
IPRax: *Praxis des internationalen Privat- und Verfahrensrecht*
LEC: Ley de Enjuiciamiento Civil
LH: Ley Hipotecaria
LOPJ: Ley Orgánica del Poder Judicial
RAJ: *Repertorio Aranzadi de Jurisprudencia*
RCDI: *Revista Crítica de Derecho Inmobiliario*
R. des C.: *Recueil des Cours de l'Académie de droit international de La Haye*
REDI: *Revista española de Derecho internacional*
Res.: Resolución
Rev. crit. dr. int. pr.: *Revue critique droit international privé*
RDN: *Revista de Derecho Notarial*
RDP: *Revista de Derecho Privado*
RGD: *Revista General del Derecho*
Riv. dir. int. pr. proc.: *Rivista di diritto internazionale privato e processuale*
RJC: *Revista Jurídica de Cataluña*
RJN: *Revista Jurídica del Notariado*
RN: Reglamento Notarial
Sent.: Sentencia
STS: Sentencia Tribunal Supremo
STC: Sentencia Tribunal Constitucional
TC: Tribunal Constitucional
Travaux Com. fr. dr. int. pr.: *Travaux du Comité français de droit international privé*
TS: Tribunal Supremo

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