Choosing a marriage contract

A translation of "Choisir son contrat de marriage" from the "Conseils par les notaires" series, by Jacques Bernard. (Conseils, 2002)

Without a marriage contract, people who get married do so under the default regime of community of acquisitions, often without realising. This regime was invented for the average case, but it has its limitations in the face of individual family or financial circumstances - particularly when a spouse's profession involves financial risks. In these cases people have to turn to a more suitable regime.

"Why do we need a marriage contract when we haven't any money?" Notaries often hear this question, almost as a joke. But engaged couples quickly come to understand the economic realities of life together. They are going to have to furnish and equip a home, maintain a bank account for household expenses, and they will have to start saving. The *Code civil* describes the household as a "conjugal enterprise". Isn't it best to start out by making arrangements about how it will work? The essential question at the time of the marriage – on the material level, that is – is the profession of the future spouses. What sort will it be – salaried, self-employed, running a business?? Will both work, or just the husband? Is it going to be a good idea to keep certain interests separate and to preserve each party's independence, bearing in mind the risks associated with the ups and downs of a business? And then one day – a very long time ahead, one hopes – the marriage will come to an end. It is well known that French law does not offer adequate protection to the surviving spouse. It is advisable to think at this stage about ways of protecting the survivor; gifts can be made at any stage, but some forms of protection can only be achieved in a marriage contract.

The default community regime

Fortunately those who marry without a marriage contract – vast numbers in France – are not abandoned to anarchy.

The law has given them a regime: the legal regime of community of acquisitions, introduced in 1965 as being the one best adapted to the aspirations and the views of marriage held by most of our citizens.

Freedom to make marriage contracts

But unusual situations are becoming more usual, and engaged couples are often led to consider alternative regimes. They are almost completely free, they can even use a regime from another country, provided that it doesn't contravene the basic rules of French law. The only limitation is that they must consult a notary. The *Code civil* offers a number of model contracts, which can again be modified to suit individual cases: separation of property, profit sharing, universal community. These cover a large range of circumstances. Let us look at some typical cases.

The legal community regime

Marc Dupois is 30; he is an engineer with a stable job in a large firm. He is going to marry Sandrine Durand, 24, who is hoping to be a housewife and to bring up the couple's children. Both Marc's and Sandrine's parents are relatively well-off.

The husband's salary is going to be the essential, indeed the only, resource for the household, at least for a while. Later on, investments may provide a supplementary income. The wife's activities won't be salaried, but are just as essential. She is going to be mistress of the house and to look after the children.

On two different, but equally important levels, the two spouses are going to contribute to their prosperity as a couple. It would be unfair if the husband were the only one to benefit, which is what would happen if this couple were to choose separation of property.

So these two will prefer a regime that allows them to hold their savings and investments in common, while allowing each to keep as their personal property anything they receive by way of inheritance or gift, for example from their parents.

Individual property and common property

This is the default legal regime, the regime of all married couples who have married without a marriage contract since 1st February 1966. That is not to say that it isn't useful to make a contract even when a decision is made to adopt the default regime. A number of optional extra clauses provided by the law can be immensely useful at the point when the community is dissolved. The main feature of the legal regime is to set apart three categories of goods:

- community goods
- the wife's personal property
- the husband's personal property.

The community goods include everything invested or bought during the marriage with the profits or salary of either spouse, with the benefits acquired from farming or business, or with the income of personal property.

Personal property includes everything that belonged to each individual at the point when they were married, and everything given or bequeathed to them thereafter. Thus, Mr and Mrs Dupuis will remain the sole owners of everything they eventually receive from the parents. If either of them sells an item of personal property during the marriage, they can invest the proceeds in a replacement which will, equally, be their personal property. Article 1404 of the *Code civil* lists other goods that are "personal by nature". Among them are the spouses' own clothes, and damages received for personal injury or defamation, including damages arising from an accident. The tools of a spouse's trade are their personal property, other than an investment fund, but as a result he may have to compensate the community (see below).

The management of community goods

The husband used to be "the lord and master of the community". He alone had the power to manage and to dispose of the community's goods; and there were provisions to protect the wife. In these days of equality such a situation could not last. The law of 13th July 1865, and later of 23rd December 1985, put the two spouses on a completely equal footing. Each had the power to manage the community property alone, and even to dispose of it. This is the principle known as "concurrent management". It has its difficulties – notably in the area of debt, as we shall see – but that is inevitable where the couple are not getting on well.

The agreement of both spouses is needed, in any event, for certain important steps: the sale or acquisition of land, investment, rights to social security, mortgages, gifts, commercial or agricultural leases. In these cases we say that there is "joint management". But note that a residential lease can be signed by one spouse alone.

The management of personal property
Each spouse has absolute power of management and disposition over his or her own property. There is just one restriction: if the family home belongs personally to one of the two, he cannot sell or mortgage it without the other's consent.

Debts
Depending upon their origin, debts are the responsibility of one spouse personally or of the community; debts may, of course, have been contracted by one individual or by both.
Individual liability The debts of each party at the date of the marriage, or debts charged upon property inherited during the marriage, remain personal debts. Creditors can have access to the personal property of the individual, and also to his income, whether a salary or the profits of a business, even though the latter belong to the community.
Community liability The question here is which goods are vulnerable when the debt was contracted by just one spouse. Put another way, to which goods can creditors have access? The answer is clear, at least in principle: the signature of one spouse engages all the community goods. This is the logical consequence of the equality of powers proclaimed in the law of 23 December 1985. The individual's own goods are also engaged, but not those of his/her partner (*article 1418 of the Code civil*). The rigour of this rule is attenuated somewhat:

- the income of one spouse can not be seized by the creditors of the other, unless the debt was incurred "for the upkeep of the household or the education of the children" (*article 1414 of the Code civil*) (other than excessive expenditure or hire purchase transactions).
- debts arising from a guarantee given, or a loan taken on by a spouse without the consent of the other will not engage the community goods but only personal ones and the revenue from them (*article 1415*); however, creditors – especially lending companies – tend to demand the agreement of both spouses to a loan or guarantee, so that the debts engages the community goods and the personal property of both. In any event certain transactions (see above under "management") are void unless signed by both spouses.

The dissolution of the regime.
The community is dissolved by the death of one spouse, by divorce, by physical separation, by judicial separation, or by a change of matrimonial regime. Article 1441 of the *Code civil* adds that it can also be dissolved "by desertion". Then the community property has to be shared – both the property, and the liability to debts – between the surviving spouse and the heirs, in the case of death, and between the two spouses in the other instances.
Half each The essential feature of the regime is to give to each spouse (or his heirs) half of all the goods acquired during the marriage, regardless of the recipient's financial contribution to any investments. So Mme Dupois, even though she has not

carried out any professional activity, will share on an equal footing with her husband in the profits of their marriage.
Compensation Strict equality will be preserved by "compensation". This is a technical term, describing the sums due from an individual to the community, or vice versa, because of the movement of resources, during the marriage, between the community and the individuals' personal property. So the community may have paid a personal debt for one of the spouses; or a house may have been built with the community's money on land belonging to one spouse personally. The house will belong to the landowner, but he will have to compensate the community.
Personal property At the same time as the community is shared, each party retrieves their personal property. Among other things, M and Mme Dupois will each keep what they inherited from their parents, as that will have remained their personal property.

"Matrimonial privileges"
It is possible to insert clauses in the marriage contract in favour of the survivor of the two spouses. Such clauses might permit the latter, for example, to take some of the community goods before the community is divided up (with or without compensation to the community): the house, furnishings, investment funds, a sum of money.
Unequal shares clause It is even possible to derogate from the principle of equal sharing, so that the survivor gets more than half. Such a provision is not regarded as a gift [for tax purposes], unless the deceased leaves children from a previous marriage. An important consequence of making such a provision is that it is not subject to the laws of succession. We would not advise M and Mme Dupois to make such a provision, bearing in mind its irrevocability. They might consider it later, in the context of a change of regime if, for example, they do not have children.

Separate property
In the two cases we are going to examine, the regime of separate property might be chosen.

Vincent Delarue, 35, is thinking of acquiring (by means of a loan) the transport business in which he has been working as director for 11 years. Agnes Chambrun, 32, his fiancée, is the head of public relations in a major shipping company. She may later on take on this role in her husband's company. She has some savings, and the flat in which the couple are going to live belongs to her. She expects to be able to sell it, if the need arises, without any restriction.

The future husband's plans involve some commercial and financial risk, whereas his future wife is already in a very secure position. They need as much autonomy as possible, and their individual wealth must remain separate as far as possible. They would definitely be advised to adopt the regime of separate property. As stated above, the *Code civil* provides a model contract, which will have to be notarised. The regime is simple, at least in principle: there are just two categories of property, his and hers.

No community goods
Everything that each spouse owns at the date of marriage, or will inherit, or will buy during the marriage, will remain his or her own. He or she can rent it out, give it away or sell it without restriction.

There is just one exception: the future wife in this case will be disappointed to learn that she will not be able to sell her flat without her husband's consent, even

though it belongs to her personally, once it becomes the couple's home (article 215 of the *Code civil*). Anything the couple purchase jointly will not be community property, but will be subject to the normal rules of joint ownership.

No community debts but…
Just as there is no common property, so there is no common liability. Each spouse is solely liable for debts he or she has incurred, and the other is not responsible and cannot be pursued for them. There are two exceptions to this principle. The spouses are jointly liable, for the most part, for tax, whatever their matrimonial regime; and also for debts incurred for the maintenance of their household or for the upbringing of their children, provided the expenditure is not excessive and is not a hire-purchase transaction (article 220 of the *Code civil*).

The traps of the regime
A spouse who has his own business is sometimes tempted to make a purchase – particularly of land – in his wife's name, using funds generated by the business, so as to protect the property from his creditors. But if his business does badly, his creditors have the right to prove that he financed his wife's purchase in order to defraud his creditors.
Voidable gifts The regime of separate property is the usual context for gifts from one spouse to the other. When one spouse buys something in the name of the other, not to avoid his creditors but just for the sake of the other spouse, the transaction is really a gift. Gifts between spouses are revocable. If the relationship runs into difficulties later, the giver will be able to recover cash to the value of the property he bought in the other's name (*Code civil*, article 1099-1). When the gift is deemed to be a disguised one, it is regarded as a nullity because of article 1099, subsection 2, of the *Code civil*, and that nullity can be relied on by the giver or his heirs.
Case law : The courts try to mitigate the harshness of these rules. On occasion the courts take the view that the husband (as it usually is) was in fact making a payment for his wife's activities, whether in his business or as a homemaker.

The wife who works in her husband's business
If Mme Delarue eventually works, as she hopes to, in her husband's business, she will find that the regime of separate property brings some tax advantages.
Her remuneration will be tax-deductible for the business – provided, of course, that it represents real work and is not out of proportion to the services she renders. Under the community regime, her salary would only be deductible in excess of E2,600 per annum (the amount has remained the same since 1982), or 36 times the relevant minimum wage in certain circumstances.[1]

The rules of the game We can see that in this sort of case the regime of separate property needs to be applied rigorously. For a wife who plans to devote herself to the household – and who took no interest in the household's finances – this regime would be a real danger. The husband would prosper, and the wife would run the risk of ending up as poor as she started. Mme Delarue is clearly not in this category and does not run this risk.

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[1] The translation is a little free here as this is a rather technical issue of French taxation. Details of the minimum wage for various profession (the *SMIC*: salaire mensuelle interprofessionelle de croissance) can be found at http://www.tripalium.com/chiffres/smic/chiffre2.htm

Another case for separation

Jean Claude Pradal, 58, is a widower after his first marriage, with two children. He is thinking of marrying Monique Lafarge, of the same age, also a widow, with three children. Both are reasonably well off and still employed. They do not want their children to be deprived after their deaths, as a result of their remarriage.

This is quite a different case, but the solution is the same. Monique Lafarge and Jean-Claude Pradal have some possessions and are likely to acquire others since they are both still earning. Their wish not to put complications in the way of their children's inheritance points to the separate property regime.

Separation of property again

As we have seen, it is only the regime of separate property that allows the spouses to keep their respective wealth separate. In this case, the children of the husband should not share the wife's fortune, and vice versa, so as to avoid conflict. There must not be a community of property. However, as Professor Cornu has said, "the matrimonial regime has to adapt itself to family life."

Furniture

His and her furniture will get mixed up in their future home. It is useful to annex an inventory to the marriage contract. A clause dealing with a "presumption of ownership" should be set out to for furniture, jewellery or silverware bought later, so as to avoid argument after the death of either party (or in case of a divorce).

Other goods

The couple should avoid joint bank accounts and joint purchases of land. The wealth of each should be managed separately.

Gifts

M and Mme Pradal will perhaps want to ensure that the survivor of them can still live in the family home. They can do this in the form of a life-interest, and will make the gift in a way that can be revoked.[2]

Profit-sharing[3]

Bertrand Vidal, 40, landowner and land manager, is going to marry Marine Buc, 34. She is planning to buy a pharmacy, which has been badly managed but is in a good area and which she plans to "revitalise". She expects to be able to manage and dispose of it freely. The regime of separate property will achieve this for her, but its other implications seem unfair for this couple.

Couples who choose separate property so as to preserve their financial independence and limit their financial risks often regret that they cannot automatically share each other's business success, as they could under the legal community regime. They would like the advantages both of community and of separation.

A separate property regime

The law of 13 July 1965, as amended by that of 23 December 1985, brought in a new regime which can meet this "desire both for independence and for sharing of

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[2] This goes without saying for an English will, but not for a French one; the point here is that each gives the other a life-interest in their joint home, but the gift can be revoked while the two are still alive if their marriage gets into difficulties.

[3] "Participation aux acquests" – the German regime.

prosperity". This is the regime of profit-sharing. Our German and Swiss neighbours know it well since it is their default legal regime. It has not been an unqualified success in France.

Sharing prosperity
During marriage, this regime works as if the spouses had separate property. But on its dissolution, individual property rights are liquidated, much as they are under the community of acquisitions. But there is no body of sharable goods. The spouses retain ownership of everything they have acquired during the marriage, or owned at the date of marriage, or have inherited. Simply, the enrichment of each party is calculated, by comparing their wealth at the start of the marriage and at the end (including the goods which the legal community regime would regard as individual). This is called taking an account of profits. If either party has ended up richer, the enrichment is shared. If either has a deficit, it is not shared. The final total for each spouse is worked out from the state and the value of his property at the date of the liquidation of the regime. The original value of his property is worked out from its value at that date, but from its condition at the date of the marriage (or at the date of death of the person from whom he inherited it).

Professional property
The profit-sharing regime is very attractive in principle and has some fervent advocates (J-F Pillebout, *La participation aux acquets. Precedents with commentary* Litec 188). But it can involve some difficulty, particularly on divorce, with property purchased by one spouse in the course of his profession. The value of such property is included when the account of profits is taken on liquidation of the regime. Suppose that M and Mme Vidal were to divorce after a few years of marriage. The pharmacy acquired by the wife might then be worth E750,000, whereas the husband's wealth might not have changed during the marriage. She is going to have to pay him E375,000; will she be able to find the cash?

A clause to limit the risk.
To avoid the risk of depriving one party of the "tools of his trade", couples are sometimes advised to limit the profit-sharing exercise so as to exclude professional or business property (see *Juris Classeur Notarial Formulaire V Participation aux acquests, pp 10 and 45*). The spouse who is not in business will not be disadvantaged by such a clause because he or she will still share in property purchased by the other with the profits of the business.
If they adopt this regime, the spouses need to be fully aware of its implications; the husband, in this case, must be clear that he will not have any right to the pharmacy.

Universal community

M Ludovic Lacroix, 63, retired, and Mlle Colette Delamare, 61 and also retired, and going to get married. Neither has been married before, and they have no children. Their nearest relatives are distant cousins. Each is relatively well-off, and each would like the other to inherit their wealth. They are hoping that when the first of them dies, the survivor will not have to pay too much tax.

M Lacroix and Mme Delamare could simply get married without a contract and mutually agree to give each other property they acquire later, as well as making the

other their universal legatee, in their will. Since neither has legal heirs[4] (i.e. neither has children or direct ascendants, who cannot legally be excluded from succession), gifts and legacies can be put into effect in their entirety, and the couple's primary wish can be granted (unless either revokes a gift, which is unlikely at their age).

However, as well as the legal fees, the survivor of the couple will have to pay inheritance tax on the estate of the first one to die. They will easily get into the 20% tax band, the maximum being 40% (*See Memo de Conseils, "Receiving an Inheritance"*). There is a way of avoiding this – and the treasury will get just as much tax in the long run because tax will be payable on the second of the two deaths. This can be done by making everything community property, on the basis that the survivor will take it all.

The survivor receives all the property

This regime has the virtue of simplicity: no individual property, no compensation. The authors of the *Code civil* only needed one section in which to set it out.

The principle All the property the couple possess at the date of the marriage, everything they acquire later or inherit, all gifts or legacies, form one single body of community property. Equally, all their debts are the liability of the whole community, whatever their nature or their origin. Each spouse has the same powers he would have under the legal community regime (see above).

The exceptions Certain goods are declared by article 1404 of the *Code civil* to be "essentially individual" and are excluded from the community unless the couple stipulate for their inclusion. As we have seen (in the first case discussed above) these include damages for personal injury or for defamation, and also "debts owed to the individual, inalienable pensions, and, more generally, all goods that have a personal character and all rights linked exclusively to one person." If the parties want the community to be truly universal, they will have to derogate from this rule in their marriage contract, as article 1526 permits.

Attribution clause

The community property and community debts are normally shared 50/50 between the two spouses. But it can be agreed in the marriage contract that the survivor will take all the community property (as well as the responsibility for all the debts). This agreement is not regarded as a legacy or gift, unless the deceased has left children from a previous marriage.

No succession rights An interesting consequence of this arrangement, on the tax front, is that the survivor is not subject to the normal rules of inheritance. Hence the considerable interest in this regime and in the attribution clause where the spouses are elderly and do not have children, as is the case for this couple.

Other succession rights The relatives of the spouse who dies first (however remote) will not be able to reclaim anything that he that spouse contributed to the community, provided that the right to reclaim his contribution has been eliminated in the marriage contract – as is possible even if there were children of the marriage.

A regime of limited application

This regime should not be taken on without a lot of thought. Young couples hardly ever adopt it, except in the three counties of the Rhine and Moselle for historical reasons. One has to bear in mind that the succession rights of the eventual children of

[4] This is a reference to the French system whereby certain relatives MUST inherit,

the marriage will be sacrificed to the surviving spouse, who is free to dispose of the entire community. Even if the surviving spouse keeps the family wealth safe, the inheritance tax payable by the children when the second parent dies will be particularly heavy because they will only benefit once from the exempt slice of the estate (300,000F before 2002) and from the lower rate tax bands. On the other hand, childless couples at the end of their lives often change regimes and adopt this one. Note that although the attribution clause is usually made in favour of both spouses, it can be used to benefit one spouse only, for example the wife. This is an interesting way of managing the situation where one spouse has children from a previous marriage.

An informed choice

Choosing a marriage contract necessitates an interview with the notary. He will talk to the engaged couple about their family and financial situation, their plans, and their current and future professional activity. This enables the couple to make an informed choice on the basis of full information about the different regimes available and the effect of all the possible contractual provisions.

Jacques BERNARD
Hon. President of the Conseil Superieur of notaries.

Tr. EJC March 2005.

The main types of marriage contract

For	Against
The legal regime of community of acquisitions	
Matches the wishes of most engaged couples. Each spouse benefits from the wages/salary and financial gains made by the other, even where he or she is not in paid employment. Anything received as a gift or inheritance remains individual property. Husband and wife have equal powers. Both signatures are needed for important transactions. Useful for young couples where only one is going to be earning.	It can be difficult to share out the community goods in cases of dispute. It can be difficult to calculate the compensation (due from either spouse to the community or vice versa) at the end of the regime. Tax penalties if one spouse is employed by the other. Financial difficulties of one spouse can endanger the community property. Joint management powers can lead to deadlock in case of disagreement.
Total community (with attribution clause for the survivor)	
The simplest regime, achieving a community of life and of interests. The survivor can take all the property, and gets tax advantages. Often recommended for elderly childless couples.	The children's succession rights are sacrificed if the surviving spouse disposes of the community property. The children suffer heavy taxation on the death of the second parent. The attribution clause is irrevocable.
Profit-sharing	
Brings the advantages of separate property during the marriage, without its inconveniences at the end of the regime. Satisfies the "combined desire for independence and for the sharing of benefits". It is possible to limit the property to be shared so as to exclude business property.	Hybrid regime. Difficult to value the parties' original wealth at the end of the regime. Uncertainty linked with the "corrective equity" provided for by article 1578 of the *Code civil*. [5] A spouse with his or her own business will have a cash flow problem in sharing out business property, unless there is a clause excluding this.
Separate property	
The spouses have complete financial independence. Each spouse is protected form the other's creditors. Joint ownership of property is possible. Relatively simple to dissolve the regime. Can be convenient for business people, where both spouses are well-paid, or where the couples have children from a previous marriage.	Neither spouse benefits from the wages/salary and financial gains of the other. Dangerous for a wife who is not earning. Financial independence does not (generally) extend to taxation. Difficulties with the normal arrangements for co-ownership where property is bought jointly. Risk of revocation or nullity of secret gifts (i.e. purchase of property by one party in the name of the other).

[5] Wot??

Can we change regime during the marriage?
The well-known rule that marriage contracts are immutable was relaxed considerably by the law of 13 July 1965. Since then it has been possible to modify one's regime, or even change it completely during the marriage provided that:

- Two years have passed since the wedding – or since the last change of regime if this one isn't the first.
- The change must be in the interests of the family, nad must not be a way of getting the better of third party – such as creditors.
- The document changing the regime must be drafted by a notary and submitted for the approval of the court (*un tribunal de grande instance*) – bear in mind that these are "non-contentious" proceedings.
- Various rules about publicity must be complied with (notices have to be put in legal bulletins, there are registration requirements, and the new regime has to be noted on the previous contract).

Community of furnishings and acquisitions (the old legal regime)
Even today, couples who got married without a contract before 1st February 1966 are subject to the old regime, unless they have opted in to the new one. The old regime can now be adopted by contract, but the statistics show that few couples are interested in it. The community, under the old regime, included all the couple's movable property, whatever its source. This meant that inherited goods were included in the community, as well as purchased items. So when a married person inherited from his parents a house and an investment fund, the house would belong to him personally but the fund would become part of the community. Under today's legal regime, both would belong to the individual personally.

Professional independence
Whatever one's matrimonial regime, someone who has a profession can do his job without his partner's permission. Articles 223 and 1421 of the *Code civil* affirm the principle of the professional independence of each spouse. Of course, under the legal regime, a salary or business belong to the community.

Absence
A spouse may disappear, and it may even be uncertain whether or not he or she is alive. It is possible to get a declaration of presumed absence from the court; ten years later the judgment becomes absolute and the community can be dissolved

Matrimonial regimes and inter-spousal gifts.
The matrimonial regime affects the rights of a surviving spouse. The legal regime of community of gains gives the survivor, in the absence of any contrary provision, half the community goods.
Provisions known as survivorship clauses in a marriage contract can give the survivor considerable additional advantages. It can be particularly helpful, if the couple want to protect the survivor still further, to make the survivor the beneficiary of the other's part of the community and of his or her personal goods, by the method known as inter-spousal gift, or by their will. Such gifts can equally be provided for in the marriage contract, but in that case they are irrevocable. Generally, therefore, people prefer to make such gifts during the marriage, so that they are revocable at any time, for example if the relationship runs into difficulties. Inter-spousal gift can enable the survivor to receive the whole of the other's property, provided he or she has no legal heirs (descendants or, if none, ascendants). If there are children, the survivor can be given a life-estate in the other's property.

The dangers of giving a guarantee
Obviously, when a bank or other financial institution grants a loan to someone who is married under a separate property regime, they often ask the borrower's spouse to guarantee the debt. Mme Delarue (see the example above) should not give one when her husband buys his transport business. If she does, her own property will become liable for the debt, and one of the advantages of her regime will disappear.

The wishes someone who gives or bequeaths property
When property is given or bequeathed to a married person on condition that it should not form part of the community, it will remain the separate property of the recipient. The wishes of the deceased, or of the donor, prevail over the marriage contract.