

# Prenuptial Agreements in Contemplation of Divorce: European and Italian Perspectives

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“To leave poor me thou hast the strength of laws,  
Since why to love I can allege no cause.”  
(Shakespeare, Sonnet 49)

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## 1. Prenuptial Agreements in Contemplation of Divorce: an Historical Overview

A prenuptial agreement, antenuptial agreement, or premarital agreement, commonly abbreviated to prenup or prenupt, is a contract entered into prior to marriage by the people intending to marry<sup>1</sup>. The

<sup>1</sup> On prenuptial, antenuptial and premarital agreements, see references in G. OBERTO, *I contratti della crisi coniugale*, I, Milan, 1999, p. 387 and p. 483; ID, «Prenuptial agreements in contemplation of divorce» e disponibilità in via preventiva dei diritti connessi alla crisi coniugale, in *Rivista di diritto civile*, 1999, II, p. 171; ID, *Sulla natura disponibile degli assegni di separazione e divorzio: tra autonomia privata e intervento giudiziale*, in *Famiglia e diritto*, 2003, p. 389 and p. 495; ID, *Contratto e famiglia*, in V. ROPPO (ed.), *Trattato del contratto*, VI, Milan, 2006, p. 242 and p. 253; ID, *Gli accordi preventivi sulla crisi coniugale*, in *Famiglia*, 2008, p. 25. See as well M. COMPORTI, *Autonomia privata e convenzioni preventive di separazione, di divorzio e di annullamento del matrimonio*, in *Foro italiano*, 1995, I, p. 105, p. 113; G. GABRIELLI, *Indisponibilità preventiva degli effetti patrimoniali del divorzio: in difesa dell'orientamento adottato dalla giurisprudenza*, in *Rivista del diritto civile*, 1996, I, p. 699; G. GIAIMO, *I contratti paramatrimoniali in Common Law*, Palermo, 1997, p. 31; L. BALESTRA, *Gli accordi in vista del divorzio: la Cassazione conferma il proprio orientamento*, in *Corriere giuridico*, 2000, p. 1023; F. ANGELONI, *La cassazione attenua il*

content of a prenuptial agreement can vary widely, but commonly includes provisions for division of property and spousal support in the event of divorce or breakup of marriage. They may also include terms for the forfeiture of assets as a result of divorce on the grounds of adultery; further conditions of guardianship may be included as well.

Postnuptial agreements are similar to prenuptial agreements, except that they are entered into after a couple is married.

Coming to the history of prenups, I must point out that the widespread idea, according to which they are something “new” and foreign to our legal tradition, is not entirely true. Let me cite some examples.

Many rules of Roman Law referred to the agreements between prospective spouses (or their families), called *pacta nuptialia* (marriage agreements), very often called as well “*pacta antenuptialia*,” or “*pacta*

*proprio orientamento negativo nei confronti degli accordi preventivi di divorzio: distinguishing o perspective overruling?*, in *Contratto e impresa*, 2000, p. 1136; E. BARGELLI, *L'autonomia privata nella famiglia legittima: il caso degli accordi in occasione o in vista del divorzio*, in *Rivista critica di diritto privato*, 2001, p. 303 ff.; V. DI GREGORIO, *Divorzio e accordi patrimoniali tra coniugi*, in *Notariato*, 2001, p. 17; M. DELLACASA, *Accordi in previsione del divorzio, liceità e integrazione*, in *Contratti*, 2001, p. 46; G. FERRANDO, *Crisi coniugale e accordi intesi a definire gli aspetti economici*, in *Famiglia*, 2001, p. 245; A. PAZZAGLIA, *Riflessioni sugli accordi economici preventivi di divorzio*, in *Vita notarile*, 2001, p. 1017; G. PALMERI, *Il contenuto atipico dei negozi familiari*, Milan, 2001, p. 116; E. AL MUREDEN, *Le rinunce nell'interesse della famiglia e la tutela del coniuge debole tra legge e autonomia privata*, in *Famiglia*, 2002, p. 1014; ID., *I prenuptial agreements negli Stati Uniti e nella prospettiva del diritto italiano*, in *Famiglia e diritto*, 2005, p. 543; A. BUSACCA, *Autonomia privata dei coniugi ed accordi in vista del divorzio*, in *Diritto & Formazione*, 2002, p. 57; S. CATANOSSI, *Accordi in vista del divorzio e «ottica di genere». Uno sguardo oltre Cass. n. 8109/2000*, in *Rivista critica di diritto privato*, 2002, p. 169; M.R. MARELLA, *La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura*, in *Rivista critica di diritto privato*, 2003, p. 95; C. COPPOLA, *Gli accordi in vista della pronunzia di divorzio*, in G. BONILINI, F. TOMMASEO, *Lo scioglimento del matrimonio*, Art. 149, *Codice Civile. Commentario* (ed. by P. SCHLESINGER), Milan, 2004, p. 643; EAD., *Le rinunzie preventive all'assegno post-matrimoniale*, in *Famiglia, persone e successioni*, 2005, p. 54; D.G. RUGGIERO, *Gli accordi prematrimoniali*, Naples, 2005; E. QUADRI, *Autonomia dei coniugi e intervento giudiziale nella disciplina della crisi familiare*, in *Famiglia*, 2005, p. 6; A. MAIETTA, *Gli accordi prematrimoniali e gli accordi di convivenza. nel diritto italiano e negli altri ordinamenti*, <<http://www.uniese.it/pubblicazioni/gli-accordi-prematrimoniali-e-gli-accordi-di-convivenza-nel-diritto-italiano-e-negli-altri-ordinamenti.html>>; M. ROMANO, M. SGROI, *Gli accordi preventivi in vista della crisi coniugale. Come disciplinare i rapporti patrimoniali tra le parti*, in G. OBERTO (ed.), *Gli aspetti patrimoniali della famiglia. I rapporti patrimoniali tra coniugi e conviventi nella fase fisiologica ed in quella patologica*, Padua, 2011, p. 25.; A. FUSARO, *Marital contracts, Ehevertraege, convenzioni e accordi prematrimoniali. Linee di una ricerca comparatistica*, in *Nuove leggi civili commentate*, 2012, p. 475.

ante nuptias,” with a terminology which is very similar to some current expressions still in use nowadays, such as “antenuptial agreements.” One of the most recurring elements in such contracts was the right of spouses to provide for the restitution of the dowry. The dowry was the transfer of money and/or other kinds of assets (movable, real estate, etc.) from the bride (or, more often, her family) to the groom, at the moment of the marriage, in order to contribute a share of the costs involved in setting up a new household (*ad onera matrimonii ferenda*). The husband had the right to manage those assets, to perceive their fruits and interests (in order to use them for the family’s sake). He was not, however, their legal owner, at least in the full meaning of the word, as, at the moment of the dissolution of marriage, he (or his heirs) were required to give back the dowry.

*Pacta nuptialia* could therefore include agreements concerning, among other things, the person to whom the dowry had to be given back (either the wife, or her family: father, brothers, heirs, etc.). Grounds of dissolution of marriage in Roman Law were not only death or *capitis deminutio maxima* (e.g. if the spouse was taken as a prisoner of war and was sold as a slave), but also divorce. Therefore Roman sources inform us extensively on this matter and we may find many rules there on how, to whom, in what time, etc. the dowry should be given back in case of divorce. Moreover, many laws of the Digest and of the *Codex* of Justinian show that the envisaged scenario “*par excellence*” of dissolution of marriage was divorce. This was as the event that parties had in mind in most cases while concluding an agreement on patrimonial consequences of their future marriage<sup>2</sup>.

In the following centuries we also find evidence of prenuptial agreements aimed at setting patrimonial rules on the assets of the par-

2 “*Cum quaerebatur, an verbum: Soluta matrimonio dotem reddi, non tantum divortium, sed et mortem contineret, hoc est, an de hoc quoque casu contrahentes sentiant? Et multi putabant hoc sensisse; et quibusdam aliis contra videbatur: secundum hoc motus Imperator pronunciavit, id actum eo pacto, ut nullo casu remaneret dos apud maritum*” (D. 50, 16, 240). “It was asked, whether the expression ‘dowry to be given back in case of *dissolution of marriage*’ should encompass not only divorce, but also the case of death: which is to say, whether parties to such an agreement would intend that this contract also refers to this latter case [*i.e.* to death and not only to divorce]. Many (jurists) thought this was the case, but some others had a different mind. The Emperor decided that in no case should a dowry stay with the husband” (D. 50, 16, 240).

ties in case of marital crisis (legal separation, in this case, as, of course, divorce was not allowed by the Catholic Church).

The first case I would like to mention deals with a decision issued at the end of the 16<sup>th</sup> century by the *Rota Romana* on the validity of a marriage contract that we could surely describe, in modern terms, as a prenuptial agreement in contemplation of the marriage crisis<sup>3</sup>. In this case the *Rota Romana* (second instance and supreme court in the Papal States) decided to uphold the first instance court decision, taken by the *Rota* of Bologna, that had declared valid and enforceable the agreement concluded before the marriage by a couple of that city. According to this premarital contract, the husband had promised to pay a certain amount of money every year in case of legal separation. He also had promised that, should he breach that obligation for one year, his wife could sue him and ask for restitution of the whole of her dowry. As he failed to pay alimony for the year 1589, he was sentenced to give back the dowry.

Even more interesting is a case decided on 20 June 1612 by the Supreme Court of Sicily<sup>4</sup>. Here, in a curious mixture of Italian and Latin,

3 “*Placuit Dominis, sententiam esse confirmanda: quia cum convenerit, ut in eventum separationis tori, D. Constantius teneretur D. Lisiae eius uxori praestare scuta 270, pro alimentis, et si in solutione eorum cessaverit per annum, ipsa possit agere ad restitutionem totius dotis: & D. Constantius dictam summam non solverit anno 1589. necessario sequitur, quod dos eidem D. Lisiae debeat restitui*”. “The Judges [of the *Rota Romana*] decided to uphold the [first instance] judgement: as it had been agreed upon that, in case of legal separation, (a) Mr. Constantine would be obliged [every year] to pay Mrs. Lisia, his wife, 270 *scuta* [silver currency unity of the time, in the Papal States, the current value of one *scutum* being of about € 75.00], as alimony, and (b) should Mr. Constantine stop paying the said amount for one year, she could sue him and ask the Court to oblige him to give back all the dowry; [it happened that] Mr. Constantine did not pay that amount for the year 1589; therefore it was decided that he had to give back the dowry to Mrs. Lisia.” (*Bononien. restitutionis dotis*, 16 May 1595, in *MANTICA, Decisiones Rotae Romanae*, Romae, 1618, 539).

4 “*Sanctorus Pagano matrimonium contraxit cum Cornelia de Pactis, Nullo expresse contrahendi more, Graecorum, vel Messanensium: Sed cum pacto, Item che lo presenti matrimonio si intenda con patto, che casu (quod absit) di separatione di matrimonio, tanto senza figli come nati figli, et quelli morti in minori età, vel maiori ab intestato, che ogni uno stia con le suoi doti, et beni, che ha portato, et non aliter, et detta sposa non possa disporre, nisi tantum di unzi trenta*”. “Mr. Santoro Pagano married Mrs. Cornelia de Pactis, without making any kind of express choice for the ‘Greek’ or ‘Messina’ marriage [i.e. the system of separation of assets, with the consequence that the marriage had to be considered as ruled by the ‘Latin’ system of universal community of assets]. But with the following clause: That this marriage should be intended that, in case (God forbid) of legal separation of marriage, without

the Sicilian notary had provided for the customary community of goods (this form of general co-ownership of goods being the regular default system of asset regulations between husband and wife in the Sicilian city of Messina at those times) in case of separation, to be considered as if it had never existed for that couple.

This is not the only example of an agreement of this kind in Europe. The French tradition knows very well the so called “*Clause Alsacienne*” (Alsatian Clause), according to which a couple can choose a system of general community of assets (comprising, among other things, real estate and goods acquired by each of the spouses before the marriage). In case of divorce, however, the dissolution of marriage will operate as a resolutive condition.

The final result is that if the couple does not part and the marriage ends in death, the rules of co-ownership shall apply and the surviving spouse will keep his/her share (and of course will add the share coming from the heritage). If, on the contrary, the marriage is a “failure,” the system of community (that logically presupposes a couple in which husband and wife are not at odds) will be “annulled,” as if the two of them had never been married: which, of course, makes a lot of sense!<sup>5</sup>.

## 2. Prenuptial Agreements in Contemplation of Divorce in the U.S.A.

Coming to the present state of the situation, we know that such agreements are widely known and practised in the United States.

children, or, should children be born, should they die while minors, or, if come of age, die without having made last will and testament, anyone [husband, wife and children] will keep his/her dowries and assets he/she brought in the marriage, and nothing more, and the said bride will have only the amount of thirty *unzi* [*unzo*, *onza*, or *oncia* was the golden currency unit of the Kingdom of Sicily at those times, its current value being of about € 180.00].” (See GIURBA, *Decisionum novissimarum Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, I, Panormi, 1621, 399).

5 For further information on the “Alsatian Clause” see G. OBERTO, *La comunione legale tra coniugi*, in *Trattato di diritto civile e commerciale Cicu-Messineo*, I, Milan, 2010, p. 386, footnote 171; II, Milano, 2010, p. 1671, footnote 198; ID, *Suggerimenti per un intervento in tema di accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2014, p. 90, footnote 11.

Historically, judges in the United States accepted the view that prenuptial agreements were corrupting what marriage was supposed to stand for, and often they would not recognize them. It was not until 1976, in fact, that two Supreme Courts<sup>6</sup> decided to uphold and enforce two prenups. This happened only after State legislations got rid of the old rule of divorce based on the fault of one of the spouses. Before such reforms, which occurred in the mid-1970s, premarital agreements in contemplation of divorce were seen as a way for the husband «*to buy himself out the marriage, regardless of the circumstances of the divorce*»<sup>7</sup>.

Currently prenups are recognized, although they may not always be enforced. Both parties should have lawyers represent them to ensure that the agreement is enforceable. Some attorneys recommend videotaping the signing, although this is optional. Some States such as California require that the parties be represented by counsel if spousal support (alimony) is limited or waived.

Prenuptial agreements are, at best, a partial solution to obviating some of the risks of marital property disputes in times of divorce. They protect minimal assets and are not the final word. Nevertheless, they can be very powerful and limit parties' property rights and alimony. It may be impossible to set aside a properly drafted and executed prenup. A prenup can dictate not only what happens if the parties divorce, but also what happens when they die, as Common Law systems do not know the Civil Law principle which forbids agreements on the future heritage of a living person. Therefore, American prenups can act as contracts to make a will and/or eliminate all one's rights to property, probate homestead, probate allowance, the right to take as a predetermined heir, and the right to act as an executor and administrator of a deceased spouse's estate.

In the United States, prenuptial agreements are recognized in all fifty States and the District of Columbia. Likewise, in most jurisdictions, some elements are required for a valid prenuptial agreement: i)

<sup>6</sup> California: *in Re Marriage of Dawley*, 17 Cal. 3d 342, S.F. No. 23418, Supreme Court of California (June 29, 1976). Connecticut: *Parniawski v. Parniawski*, 33 Conn. Sup. 44, 359 A. 2d 719 (1976).

<sup>7</sup> See the Supreme Court of Maryland in the 1956 case *Cohn v. Cohn*: further information in G. OBERTO, *I contratti della crisi coniugale*, Milano, 1999, p. 494.

the agreement must be in writing (oral prenups are generally unenforceable); ii) there must be full and/or fair disclosure at the time of execution; iii) the agreement cannot be unconscionable.

With respect to financial issues ancillary to divorce, prenuptial agreements are routinely upheld and enforced by courts in virtually all States. There are circumstances in which courts have refused to enforce certain portions/provisions of such agreements. For example, in an April, 2007 decision by the Appellate Division in New Jersey, the court refused to enforce a provision of a prenuptial agreement relating to the wife's waiver of her interest in the husband's savings plan. The New Jersey court held that when the parties executed their prenuptial agreement, it was not foreseeable that the husband would later increase his contributions toward the savings plan.

In California, parties can waive disclosure beyond that which is provided, and there is no requirement of notarization, but it is good practice. There are special requirements if parties sign the agreement without attorney, and the parties must have independent counsel if they limit spousal support (also known as alimony or spousal maintenance in other States). Parties must wait seven days after the premartial agreement is first presented for review before they sign it, but there is no requirement that this be done a certain number of days prior to the marriage. Prenups often take months to negotiate so they should not be left until the last minute (as they often are). If the prenup calls for the payment of a lump sum at the time of divorce, it may be deemed to promote divorce. This concept has come under attack recently and a lawyer should be consulted to make sure that the prenup does not violate this provision.

In California, Registered Domestic Partners may also enter into a prenup. Prenups for Domestic Partners can have added complexities because the federal tax treatment of Domestic Partners differs from that of married couples.

A sunset provision may be inserted into a prenuptial agreement, specifying that after a certain amount of time, the agreement will expire. In a few States, such as Maine, the agreement will automatically lapse after the birth of a child, unless the parties renew the agreement. In other States, a certain number of years of marriage will cause a prenuptial agreement to lapse. In States that have adopted the UPAA

(Uniform Premarital Agreement Act<sup>8</sup>), no sunset provision is provided by statute, but one could be privately contracted for. Note that States have different versions of the UPAA.

In drafting an agreement, it is important to recognize that there are two types of State laws that govern divorce – equitable distribution, in force in 41 States and some variation of community property in force in 9 States. An agreement written in a community property State may not be designed to govern what occurs in an equitable distribution State and vice versa. Parties living in a State other than the one in which they were married may need to retain attorneys in both States. Often people have more than one home in different States or they move a lot because of their work, so it is important to take that into account in the drafting process.

### **3. Prenuptial Agreements in Contemplation of Divorce in the United Kingdom**

Prenuptial agreements have historically not been considered legally valid in Britain. This was true until the test case between the German heiress Katrin Radmacher and Nicolas Granatino<sup>9</sup> indicated that such agreements can “in the right case” have decisive weight in a divorce settlement. The judgments of the Appeal Court and of the Supreme Court of Britain in *Radmacher v. Granatino* stand as a landmark in the history of English matrimonial and divorce law. They clearly established that, contrary to the previous line of authority holding that pre-nuptial agreements were against public policy, they were now to be given effect to as long as they had been entered into by both parties freely and with full appreciation of their consequences.

The parties were both foreign nationals, the wife German (whose assets are assessed at about £ 100,000,000) and the husband French. They had signed a pre-nuptial agreement valid under German law, but

8 <[http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012am\\_pmaa\\_draft.pdf](http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012am_pmaa_draft.pdf)>.

9 <<http://www.bailii.org/ew/cases/EWCA/Civ/2009/649.html>> (see also: <<http://www.dailymail.co.uk/news/article-1322117/Judges-pre-nuptial-agreements-Britain-Katrin-Radmacher-wins-landmark-case.html>>).



then got divorced in the UK. In the High Court, Baron J had awarded the husband £ 5.6m even though the pre-nuptial agreement had stated that neither party would seek maintenance from the other in the event of divorce. The wife therefore appealed.

Giving the lead judgment, Thorpe LJ allowed the wife's appeal broadly on the grounds that Baron J had not given sufficient weight to the existence of agreement in her initial award, though still providing the husband with some housing and other funds to reflect the shared residence of the couple's children. At paragraph 53 of the judgment he also made the following statement *«in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings»*.

Other relevant parts of the reasoning by Lord Justice Thorpe: *«There are many instances in which mature couples, perhaps each contemplating a second marriage, wish to regulate the future enjoyment of their assets and perhaps to protect the interests of the children of the earlier marriages upon dissolution of a second marriage. They may not unreasonably seek that clarity before making the commitment to a second marriage. Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion»*. *«I also hold my opinion because: i) In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace»*. *«As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe. Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts»*. *«In the circumstances, I agree in effect*

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

The decision by the Court of Appeals has been confirmed by the Supreme Court, in 2010.<sup>10</sup>

Relevant parts of the S.C. reasoning: «“We would advance the following proposition, to be applied in the case of both ante- and post-nuptial agreements, in preference to that suggested by the Board in *MacLeod*: ‘The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement’». «On 1 August, 1998 the parties attended at the office of Dr Magis near Düsseldorf. Their meeting with him lasted for between two and three hours. The husband told Dr Magis that he had seen the draft agreement but that he did not have a translation of it. Dr Magis was angry when he learned of the absence of a translation, which he considered to be important for the purpose of ensuring that the husband had had a proper opportunity to consider its terms. Dr Magis indicated that he was minded to postpone its execution but, when told that the parties were unlikely again to be in Germany prior to the marriage, he was persuaded to continue. Dr Magis, speaking English, then took the parties through the terms of the agreement in detail and explained them clearly; but he did not offer a verbatim translation of every line. The parties executed the agreement (which bears the date of 4 August, 1998) in his presence».

<sup>10</sup> <<http://www.bailii.org/uk/cases/UKSC/2010/42.html>>.

*«The agreement stated (in recital 2) that (a) the husband was a French citizen and, according to his own statement, did not have a good command of German, although he did, according to his own statement and in the opinion of the officiating notary (Dr Magis), have an adequate command of English; (b) the document was therefore read out by the notary in German and then translated by him into English; (c) the parties to the agreement declared that they wished to waive the use of an interpreter or a second notary as well as a written translation; and (d) a draft of the text of the agreement had been submitted to the parties two weeks before the execution of the document». «Clause 1 stated the intention of the parties to get married in London and to establish their first matrimonial residence there. By clause 2 the parties agreed that the effects of their marriage in general, as well as in terms of matrimonial property and the law of succession, would be governed by German law. Clause 3 provided for separation of property, and the parties stated: "Despite advice from the notary, we waive the possibility of having a schedule of our respective current assets appended to this deed».*

Clause 5 provided for the mutual waiver of claims for maintenance of any kind whatsoever following divorce: *«The waiver shall apply to the fullest extent permitted by law even should one of us – whether or not for reasons attributable to fault on that person's part – be in serious difficulties. The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above. Each of us is aware that there may be significant adverse consequences as a result of the above waiver».*

The Supreme Court further dismisses the argument of the First Instance Judge, according to which parties had not received independent legal advice, remarking that the Notary had provided sufficient information on the consequences of that agreement.

*«The Court of Appeal differed from the finding of the trial judge that the ante-nuptial agreement was tainted by the circumstances in which it was made. Wilson LJ, with whom the other two members of the court agree, dealt with these matters in detail. The judge had found that the husband had lacked independent legal advice. Wilson LJ held that he had well understood the effect of the agreement, had*

*had the opportunity to take independent advice, but had failed to do so. In these circumstances he could not pray in aid the fact that he had not taken independent legal advice. The judge held that the wife had failed to disclose the approximate value of her assets. Wilson LJ observed that the husband knew that the wife had substantial wealth and had shown no interest in ascertaining its approximate extent. More significantly, he had made no suggestion that this would have had any effect on his readiness to enter into the agreement. The judge held that the absence of negotiations was a third vitiating factor. Wilson LJ observed that the judge had given no explanation as to why this was a vitiating factor, and that the absence of negotiations merely reflected the fact that the background of the parties rendered the entry into such an agreement commonplace. We agree with the Court of Appeal that the judge was wrong to find that the ante-nuptial agreement had been tainted in these ways. We also agree that it is not apparent that the judge made any significant reduction in her award to reflect the fact of the agreement. In these circumstances, the Court of Appeal was entitled to replace her award with its own assessment, and the issue for this court is whether the Court of Appeal erred in principle».*

As a conclusion on this case, we can further read in the reasoning of the judgment that *«Our conclusion is that in the circumstances of this case it is fair that he should be held to that agreement and that it would be unfair to depart from it. We detect no error of principle on the part of the Court of Appeal. For these reasons we would dismiss this appeal».*

After this benchmark case, the Law Commission,<sup>11</sup> a statutory independent body that advises on law reform, recommended that prenups should become legally binding subject to stringent qualifications. One requirement should be that at the time of signing both parties must disclose material information about their financial situation and have received legal advice. A further restriction, under the commission's proposals, is that agreements would only be enforceable *«after both partner's financial needs, and any financial responsibilities towards children, have been met»*. Introducing prenuptial agreements without protection of the parties' needs *«would be very damag-*

<sup>11</sup> <<http://lawcommission.justice.gov.uk>>.

ing» the commission warns. That key provision suggests tortuous legal disputes over the fairness of maintenance payments and financial needs would still have to be brought before courts.

The Commission has also called on the Family Justice Council, whose members include judges and lawyers, to produce “authoritative guidance on financial needs” to enable couples to reach an agreement that recognises their financial responsibilities to each other. The Government, the Commission said, should also fund a *«long-term study to assess whether a workable, non-statutory formula could be produced that would give couples a clearer idea of the amounts that might need to be paid to meet needs»*.

The Law Commission’s proposals will be sent to the Ministry of Justice, which will examine whether it wishes to draw up legislation on the basis of the suggestions. Past Governments have shown reluctance to revise marriage laws.

Legal doctrine has welcomed such recommendations, underlying that qualifying nuptial agreements would give couples autonomy and control, and make the financial outcome of separation more predictable. It has been remarked furthermore that these recommendations constitute a welcome stride towards greater autonomy and certainty for couples. If implemented, then a prenup fulfilling certain conditions will be legally binding. However, it has been remarked that it will not be possible to avoid meeting the financial needs of partners and children and, as always, the question is what falls under the definition of ‘needs’? In any case, scholars and practitioners agree on the positive effect of limiting judges’ discretion and of allowing couples greater certainty and pre-agreed financial control should their relationship disintegrate.

In the meantime, British Courts seem to follow the precedent of *Radmacher v. Granatino*, as is shown, for instance, by a judgment of 2014<sup>12</sup>, in which the (Dutch) husband contended that the parties were bound by a Dutch pre-marital agreement and the (British) wife argued for a compensatory payment by virtue of her having given up a high powered career. The Court upheld the agreement (signed in The Neth-

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

erlands by both parties before a Dutch notary) which contained provisions on spousal assets, with exclusion of the immediate community (*i.e.* joint ownership) of all property on marriage, which is the default marriage regime of Dutch law. On the contrary, the contract provided for the equal sharing of the marital acquest inasmuch as it provided for the joint sharing of surplus joint income. The contract did not provide for what maintenance, if any, should be paid on divorce, in contrast to the German agreement in *Granatino*. In any case, the *rationale* of this decision is clearly the same of that precedent, as the “core” of it contains the following sentence: «*The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement*».

#### 4. Prenuptial Agreements in Contemplation of Divorce in Continental Europe: Catalonia and Germany

We saw that at the basis of the *rationale* of *Radmacher v. Granatino* lies the assumption that, had such a prenup been brought before a court in France or in Germany, it would have been considered as valid and enforceable. This remark is certainly true if we consider what we, in Continental Europe, call the choice of the *régime*, with particular reference to the choice of a system of separation of assets.

The situation is different if we have regard to the antenuptial regulation of alimony (maintenance) in case of divorce or separation. This possibility is excluded in countries such as France or Italy, whereas more and more countries in Continental Europe allow such provisions.

I cite here the case of the 1998 Family Law Code of Catalonia (*Codi de família*), whose art. 15<sup>13</sup> provided the possibility for spouses to agree on assets and patrimonial issues «*àdhuc en previsió d'una ruptura matrimonial*» (including in contemplation of a marriage cri-

13 «Article 15. Contingut. 1. En els capítols matrimonials, hom pot determinar el règim econòmic matrimonial, convenir heretaments, fer donacions i establir les estipulacions i els pactes lícits que es considerin convenients, *àdhuc en previsió d'una ruptura matrimonial*. 2. Els capítols matrimonials es poden atorgar abans o després del casament. Els atorgats abans només produeixen efectes a partir de la celebració del matrimoni».

sis). This provision was replaced in 2010<sup>14</sup> by art. 231-20 of the *Codi Civil de Catalunya*,<sup>15</sup> which now dictates some interesting rules on the way such agreements must be made and enforced. Here it is also interesting to remark that the same provisions are available to cohabiting partners, according to art. 234-5<sup>16</sup> of the same code.

As for Germany<sup>17</sup>, one should take into account that the contract autonomy of parties has always played a key role, which reflects the thoughts of the greatest German philosophers. Hegel, for instance<sup>18</sup>, once said that marriage contracts (*Ehepakten*) were intended to regulate relations between spouses “in case of separation of marriage for death, divorce or similar events” (*«gegen den Fall der Trennung der Ehe durch natürlichen Tod, Scheidung u. dergl.»*).

14 See *Llei 25/2010, del 29 de juliol, del llibre segon del Codi civil de Catalunya, relatiu a la persona i la família*.

15 «Article 231-20. Pactes en previsió d'una ruptura matrimonial. 1. Els pactes en previsió d'una ruptura matrimonial es poden atorgar en capítols matrimonials o en una escriptura pública. En cas que siguin avantnupcials, només són vàlids si s'atorguen abans dels trenta dies anteriors a la data de celebració del matrimoni. 2. El notari, abans d'autoritzar l'escriptura a què fa referència l'apartat 1, ha d'informar per separat cadascun dels atorgants sobre l'abast dels canvis que es pretenen introduir amb els pactes respecte al règim legal supletori i els ha d'advertir de llur deure recíproc de proporcionar-se la informació a què fa referència l'apartat 4. 3. Els pactes d'exclusió o limitació de drets han de tenir caràcter recíproc i precisar amb claredat els drets que limiten o als quals es renuncia. 4. El cònjuge que pretengui fer valer un pacte en previsió d'una ruptura matrimonial té la càrrega d'acreditar que l'altra part disposava, en el moment de signar-lo, d'informació suficient sobre el seu patrimoni, els seus ingressos i les seves expectatives econòmiques, sempre que aquesta informació fos rellevant amb relació al contingut del pacte. 5. Els pactes en previsió de ruptura que en el moment en què se'n pretén el compliment siguin greument perjudicials per a un cònjuge no són eficaços si aquest acredita que han sobrevingut circumstàncies rellevants que no es van preveure ni es podien raonablement preveure en el moment en què es van atorgar».

16 «Article 234-5. Pactes en previsió del cessament de la convivència. En previsió del cessament de la convivència, els convivents poden pactar en escriptura pública els efectes de l'extinció de la parella estable. A aquests pactes se'ls aplica l'article 231-20».

17 See references in G. OBERTO, *I contratti della crisi coniugale*, I, Milano, 1999, p. 529; ID, «Prenuptial agreements in contemplation of divorce» e disponibilità in via preventiva dei diritti connessi alla crisi coniugale, in *Rivista di diritto civile*, 1999, II, p. 171; ID, *Gli accordi preventivi sulla crisi coniugale*, in *Famiglia*, 2008, p. 25; ID, *Il futuro europeo del diritto patrimoniale della famiglia* (Conferenza in lingua italiana). *Prenuptial Agreements in Contemplation of Divorce* (Presentation in English). *Eheverträge anlässlich der Scheidung nach deutschem Recht* (Bericht auf Deutsch), Para. 9-11, <http://giacomoooberto.com/-Bozen2012/traccia.htm#para9>.

18 See G.W.F. HEGEL, *Grundlinien der Philosophie des Rechts*, Leipzig, 1930, p. 147.

When considering the German legal system we must always keep in mind two main factors. The first is since the early 16<sup>th</sup> century, Germany has known the insurgence of the Protestant doctrine, which denied that marriage could be considered a sacrament. It was therefore much easier for 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> century German jurists (such as Thomasius, Struvius, Leyser, Lauterbach, Boehmer, etc.) to develop a new doctrine of marriage. According to this new viewpoint, marriage could be seen as simply a contract, which, as any other contract, could be dissolved by mutual consent, with any kind of agreement on such dissolution. The second factor refers to Roman Law. We must not forget that in many regions of Germany, Roman Law was applied until 31<sup>st</sup> December, 1899. In the Roman legal system, as I have already pointed out, spouses were allowed to provide for the patrimonial consequences of a possible divorce as of the very day of the wedding.

As a consequence, German case law and German legal doctrine have always stated that such agreements should be seen as valid and enforceable, even when they foresaw a complete waiver of rights by spouses in case of divorce.

So e.g., according to a decision of the BGH (Federal Supreme Court of Germany) from 1995 *«for financial agreements, which spouses already make as a precaution during the marriage or even before the marriage ceremony in contemplation of a possible later divorce, there exists the full freedom of contract principle (§ 1408 Para. 1 and Para. 2 of the BGB-German Civil Code). No special review must take place on the contents of such agreements, or on whether the regulation is appropriate. The enforceability of the agreement does not depend on additional conditions, e.g. of the fact that for a maintenance renouncement or waiver of spousal support a return or a payment of a compensation is agreed upon»*<sup>19</sup>.

No effect on the enforceability of the agreement was exercised by the fact that *«in such a case the decision to divorce could turn out to be far more difficult economically for one spouse than for the other»*<sup>20</sup>.

19 see BGH 27.9.1995, [http://giacomooberto.com/prenuptial/bgh\\_27\\_9\\_1995.htm](http://giacomooberto.com/prenuptial/bgh_27_9_1995.htm).

20 BGH 19.12.1989, in *FamRZ* 1990, 372; see also BGH 2.10.1996, [http://giacomooberto.com/prenuptial/bgh\\_2\\_10\\_1996](http://giacomooberto.com/prenuptial/bgh_2_10_1996).



According to this case law, German notaries have been developing different models of marriage contracts, which I describe in my book about the “Contracts of Marriage Crisis<sup>21</sup>”. They may contain clauses in which one party (or both) waive any right to alimony<sup>22</sup>, such as: *«the husband [or the wife, or both] gives up to any pretension concerning alimonies in case of divorce, even in a situation of need»*. Among the many other different possibilities, we may find agreements in which alimony or divorce support are not waived, but are determined precisely<sup>23</sup>, for instance by setting a limit (no more than € ...

21 G. OBERTO, *I contratti della crisi coniugale*, cit. (presentation of the book available in <http://giacomoooberto.com/crisi/indice.htm>).

22 «III. Nachehelicher Unterhalt 1. Der Ehemann verzichtet gegenüber seiner Ehefrau vollständig auf die Gewährung nachehelichen Unterhalts (auch für den Fall der Not). 2. Für den Unterhaltsanspruch der Ehefrau verbleibt es bei der gesetzlichen Regelung, jedoch mit folgenden Maßgaben: a) Der Anspruch auf Unterhalt wird auf höchstens ... DM monatlich begrenzt. Die Ehefrau verzichtet auf einen etwa weitergehenden Unterhaltsanspruch. b) Die Ehefrau ist verpflichtet, die zu einem Steuer-vorteil für ihren Ehemann erforderlichen Erklärungen abzugeben, wenn ihr die hieraus entstehenden Nachteile ersetzt werden. Der obige Höchstbetrag ist al-so immer als Nettobetrag zu verstehen. c) Der Höchstbetrag ist nach den heutigen Lebenshaltungskosten festgelegt. Wir vereinbaren deshalb, daß der Höchstbetrag noch oben oder nach unten im gleichen prozentualen Verhältnis verändert, wie sich der von statistischen Bundesamt festgestellte Preisindex für die Lebenshaltung aller privaten Haushalte nach oben oder unten verändert. Die erste Anpassung erfolgt nach Rechtskraft der Ehescheidung durch Vergleich des für den Monat des Vertragsschlusses festgestellten Preisindex mit dem dann festgestellten Preisindex. Jede weitere Anpassung erfolgt dann je-weils für den Januar eines Jahres. d) Durch die Vereinbarung einer Höchstgrenze bleiben die gesetzlichen Vorschriften über den nachehelichen Unterhalt im übrigen unberührt». (Ehevertrag template model provided by Notary Dr. Reimann: see G. OBERTO, *I contratti della crisi coniugale*, Milano, cit., p. 540).

23 «III. Nachehelicher Unterhalt. 1. Für den Fall der Scheidung der von uns beabsichtigten Ehe vereinbaren wir in Bezug auf den nachehelichen Unterhalt: a) Der Unterhaltsanspruch wird insgesamt ausgeschlossen, wenn die Ehe nicht länger als fünf Jahre Bestand hatte. b) Dieser Ausschluß gilt jedoch nicht, wenn und soweit der Unterhaltstatbestand des § 1570 BGB (Pflege oder Erziehung eines gemeinschaftlichen Kindes) vorliegt. c) Im übrigen verbleibt es bei den gesetzlichen Bestimmungen. 2. Der Unterhaltsanspruch wird, sofern er gemäß den vorstehenden Vereinbarungen besteht, der Höhe nach wie folgt begrenzt: a) Für den Ehe-teil, der ein gemeinschaftliches Kind betreut, beträgt der Unterhaltsanspruch höchstens pro Monat DM 1.800.--. b) In allen anderen Fällen, in denen ein Unterhaltsanspruch kraft Gesetzes nach Maßgabe der vorstehend vorgenommenen Beschränkungen besteht, beträgt der Unterhaltsanspruch die Hälfte des vorgenannten Betrages. c) Tritt eine Änderung in der Höhe des Lebensbedarfs infolge der allgemeinen wirtschaftlichen Verhältnisse ein, so ist der genannte Betrag entsprechend zu ändern. Er soll sich dabei im gleichen Prozentverhältnis erhöhen oder vermindern, in dem sich der vom Statistischen Bundesamt festgestellte durchschnittliche jährliche Preisindex für die Gesamtlebenshaltung aller privaten Haushalte – berechnet auf der Basis 1980 = 100 – im Vergleich zu demselben Index für den Monat des Ver-

for each month), or by fixing the amount of alimony as a *ratio* of the income of the “richest” party (e.g.: 20% of the net income of the party who will have the highest income), or by setting a time limit (sunset provision) for such alimonies (e.g.: for no longer than 5 years after dissolution of the marriage). German marriage contracts (*Eheverträge*) can also contain provisions in case of the death<sup>24</sup> of one of the spouses.

Some changes were brought about by a decision of the Federal Constitutional Court in 2001<sup>25</sup>, followed by a decision of the Federal Supreme Court<sup>26</sup>. These two judgments ruled that notarized prenuptial agreements that seriously disadvantage one party in a marriage could

*tragsabschlusses erhöht oder vermindert. Die Neufestsetzung findet jeweils im April eines Kalenderjahres statt, wobei dann jeweils der Index für das vergangene Kalenderjahr mit dem Index für den Monat des Vertragsabschlusses verglichen wird. Die Beträge gelten in ihrer veränderten Höhe jeweils vom ersten Januar an als geschuldet, der dem Monat der planmäßigen Neufeststellung vorangegangen ist. Bei einer Umstellung auf eine neue Indexbasis gilt die neue Indexreihe von ihrer amtlichen Veröffentlichung an. Die Vertragsteile beantragen die Genehmigung dieser Wertsicherungsvereinbarung gemäß § 3 des Währungsgesetzes durch die Landeszentralbank. d) Die Anwendung der Vorschrift des 323 ZPO wird im übrigen ausgeschlossen. 3. Für den Fall, daß ein Unterhaltsanspruch nach den vorstehenden Vereinbarungen besteht, gelten im übrigen die gesetzlichen Bestimmungen» (Ehevertrag template model provided by Notary Dr. Reimann: see G. OBERTO, *I contratti della crisi coniugale*, cit., p. 541).*

24 «IV. Erbrechtliche Regelungen. Die Vertragsteile verzichten hiermit gegenseitig auf Pflichtteils- und Pflichtteilsergänzungsansprüche, die ihnen beim Ableben des jeweils anderen Ehepartners zustehen könnten. Der Verzicht ist jedoch gegenständlich beschränkt und bezieht sich nur auf a) das jeweilige voreheliche Vermögen der Vertragsteile, b) dasjenige Vermögen, daß ein Vertragsteil während der Ehe durch Erbschaft, Schenkung oder vorweggenommene Erbfolge erhält, c) die Surrogate der vorgenannten Gegenstände. Der vorstehend erklärte Verzicht der Ehefrau gilt aber nur für den Fall abgegeben, daß durch ihn ein gemeinsamer Abkömmling der Vertragsteile begünstigt wird. Der vorstehend erklärte Verzicht gilt nur für den Fall als abgegeben, daß durch ihn ein gemeinsamer Abkömmling der Vertragsteile, die Eltern der Ehefrau oder deren Geschwister begünstigt werden. Im letztgenannten Fall -Begünstigung der Eltern bzw. der Geschwister der Ehefrau durch den Pflichtteilsverzicht- gilt der Verzicht auch nur als abgegeben, wenn dem Ehemann, solange er nicht wieder verheiratet ist, ein unentgeltlicher Nießbrauch an dem Hause ... in ... eingeräumt wird, das die Ehefrau von ihren Eltern übergeben erhalten hat» (Ehevertrag template model provided by Notary Dr. Reimann: see G. OBERTO, *I contratti della crisi coniugale*, cit., p. 545).

25 BVerfG 6.2.2001, <[https://www.bundesverfassungsgericht.de/entscheidungen/rs20010206\\_1bvr001292.html](https://www.bundesverfassungsgericht.de/entscheidungen/rs20010206_1bvr001292.html)>.

26 BGH 11.2.2004, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d45ce16fe9b926a5ab4635a5807d5aa6&nr=28453&pos=14&anz=15>.

be deemed invalid. The judges stated that while, in principle, a contract may state that one of the partners has renounced his or her right to receive alimony, if the agreement were one-sided it would be morally unacceptable and could therefore be challenged. The court also ruled that a spouse is free to contest the contract in instances of imbalance where his/her partner's income has risen dramatically during the marriage because, for example, s/he was home caring for children.

Many scholars have criticised this view, according to which the traditional freedom of parties in a contract is "patronized" by judges' personal views. Moreover, powers of judges in the Civil Law legal system do not allow this kind of intervention on the "fairness" of an agreement, if parties do not breach certain rules of the civil code. These rules, however, do not provide parties (who freely and knowingly concluded an agreement) with the right to get rid of their contractual engagements, simply because they have changed their minds.

## **5. The Case of France**

In France, as in any other country in Continental Europe, spouses have the possibility to sign a marriage contract prior to or during the marriage. A French marriage contract (*contrat de mariage*) deals (as in Italy, Spain, Germany, etc.) with the possible consequences of the marriage on the spouses' properties acquired before or during the marriage. This is the reason why in French law, as in Italy, Spain or Portugal, we use the expression "matrimonial regime," the word "regime" meaning "rule" in languages of Latin origin (in Latin language *regimen* means "governance," "management," or "administration"). A matrimonial regime is a body of rules about the effect of the marriage on the administration, enjoyment and disposal of their property by the spouses during the marriage.

In French law (as in that of Italy, Spain, Portugal, etc.), the scope of a marriage contract is to determine the matrimonial regime chosen by the spouses, without any reference to spousal support (maintenance or alimony) in case of legal separation or divorce. So, marital agreements are legally valid and binding, but concern the arm's length division of assets and enrichment without setting any "equitable element" to try

and pre-empt the divorce court right to “tip the scale”. In England, on the other hand (as well as in Common Law countries), they are essentially linked to divorce and promoting equitable distribution. According to many scholars, under French law, one cannot exclude the right to a “compensatory payment” on the occasion of divorce, contrary to German law, where it can be waived (as in *Radmacher v. Granatino*).

However, I must point out that – differently from in Italy – French notaries, while drafting a marriage contract, have great power to “tailor” the property regime chosen by the spouses on their needs, wishes and expectations. As an example, French courts deem the already mentioned “Alsace Clause” perfectly valid and enforceable. Parties can furthermore provide a community of acquests regime in which the shares of the spouses are not equal, or the rights of one of the parties can be paid off with a lump sum, or through the conveyance of movable assets or real estate, etc.<sup>27</sup>.

Furthermore, some decisions issued in cases concerning international couples are showing that French judges are not against foreign prenuptial agreements, as is shown, for instance, by a 2010 judgement of the Court of Grasse<sup>28</sup>. Here the judge upheld an English prenup, in which the parties had agreed upon the fact that each spouse would keep his or her assets in case of breakdown of the marriage. She would get £ 50,000.00 (indexed) for each year of marriage (until the filing of a divorce petition) and this amount was to cover any financial claim or remedy of any sort. At the time of marriage, he also bought her a flat in her name on the Cote d’Azur, then worth about £ 300,000.00.

27 See on this G. OBERTO, *La comunione legale tra coniugi*, I, cit., p. 385; ID, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, in *Famiglia e diritto*, 2012, p. 69, in part., footnotes 42-47.

28 See <http://villardcornec.files.wordpress.com/2010/05/article-cornec-bull-family-law.pdf>; <http://villardcornec.wordpress.com/tag/enforcement-of-foreign-judgments>.

## 6. Prenuptial Agreements in Contemplation of Divorce in Italy

In Italy<sup>29</sup> marriage contracts can be concluded either before or during the marriage by notary deed (see article 162 of the Italian Civil Code).

However – as I have already explained – such deeds are mainly intended as instruments to choose a “marriage regime” other than the default *comunione legale* (community of acquests). However, the optional system of *separazione dei beni* (separation of assets) can be chosen at the very moment of the celebration of marriage through a declaration of the spouses to the mayor or to the parish priest officiating the marriage.

By notary deed spouses can also elect a *fondo patrimoniale* (capital fund, in some ways similar to a trust, by which spouses can choose to submit some assets – real estate or negotiable instruments, such as securities, bonds, company shares, etc. – to special rules, in order to allocate their revenues to the family needs), but the parties’ freedom of movement in shaping the default community of acquests regime is very narrow. No variation may be made in the power to manage and administer the assets belonging to the *comunione* and parties cannot depart from the rule that the partition of the community must be made in equal portions. As an alternative to the *comunione* and *separazione* regimes, spouses can choose a system of general community, extended to (almost) all their assets acquired either before or after the celebration of the marriage (*comunione convenzionale*).

However, as already explained, the Italian Civil Code does not mention the matter of spousal support among the subjects that a marriage contract can deal with. Furthermore, the Supreme Court of Cassation has always deemed null and void any agreement made in contemplation of a future divorce, either concluded during the time of legal separation, or before.

In order to better understand the position of the Court, one has to keep in mind that Italy is one of the last countries in the world that

29 G. OBERTO, *Contratti prematrimoniali e accordi preventivi sulla crisi coniugale*, available at <[http://giacomoober.to.com/pollenzo2011/Oberto\\_Contratti\\_Prematrimoniali\\_e\\_Accordi\\_Preventivi.htm](http://giacomoober.to.com/pollenzo2011/Oberto_Contratti_Prematrimoniali_e_Accordi_Preventivi.htm)>.

still allows divorce only to those couples who have previously undergone a judicial proceeding of legal separation. Currently, three years must elapse after the judicial proceeding of legal separation has been initiated before starting the procedure for divorce, even though a government bill, currently discussed by the Parliament, could reduce this timeframe to one year.

Having said this, it is easily understandable that very often couples who have reached an agreement in the process of legal separation would like to avoid any future possible dispute during the divorce process. However, most agreements of that kind have been declared null and void by the Supreme Court of Cassation, at least in the part in which they set forth provisions to be applicable in case of divorce (*e.g.*: the wife gives up any right to alimony and pledges not to claim alimony or lump sums during the future divorce process). The reason is that such provisions could impair the freedom of both parties to decide whether to divorce or not. Such influence by possible pecuniary consequences on the “personal” freedom of choice to divorce (or to remain married) would render the agreement contrary to public order and therefore null and void. In other words, from this viewpoint, parties making this agreement envisage a contract whose object is their legal married *status*, whereas personal legal *status* is non-negotiable (some scholars cite here the biblical example of Esau, who traded his birthright to Jacob for a bowl of lentil soup!).

I have spent a lot of energy and time in my articles and books trying to give evidence that this assumption is basically wrong, as it causes confusion between: i) an agreement in which a party would theoretically pledge not to divorce (or not to request legal separation), as well as to divorce (or to request legal separation), which would be surely against *ordre public*, and ii) an agreement in which parties only provide for patrimonial consequences of the (possible) decision to divorce.

Moreover, the Italian legal system provides for examples of pre-emptive agreements on the patrimonial consequences of a new *status*. Therefore in Italy (as everywhere in the world), marriage contracts – which, can be concluded before the marriage according to the Civil Code – deal with patrimonial consequences of the new prospective *status* of married people. Some examples are: distribution of assets

acquired by spouses before or after the marriage, making a choice among community of acquests, general community of all goods, separation of assets, etc. Given this, why should an agreement on the future consequences of another possible change of *status* (divorce) be deemed illegal?

A donation by future spouses can be made dependant on the prospective marriage (see art. 785 of the Italian Civil Code), which means that the alteration of a personal *status* (from single to married) can influence property right consequences of a contract (such as a donation). Why should we not apply the same rule to the very similar situation in which we have another alteration of a personal *status* (from married to divorced)?

I usually say as well that the above mentioned case law of our Supreme Court is “educationally harmful”, because it engenders the false idea that among spouses “*pacta non sunt servanda*” (agreements can be broken). Actually, it happens very often that one spouse “feigns” agreement with the other in the framework of the legal separation process, with the mental reservation to re-open the discussion (and to set forth new claims) three years after, during the divorce proceedings.

However, I would like to conclude with some more optimistic notes.

Actually, in recent times many scholars have declared that they subscribe to my viewpoint, deeming prenuptial agreements in contemplation of separation and/or divorce valid and enforceable, whereas some judicial decisions are starting to overturn the “traditional” case law.

For instance, in 2012 a decision by my Court<sup>30</sup> (the first of this kind in Italy) stated that agreements reached by married couples at the moment of their separation are valid and enforceable even as far as their provisions in contemplation of divorce are concerned. Therefore, the President of the Court of Turin refused to allocate alimony *lite pendente* to a woman who had claimed this money from her husband at the start of litigation on divorce, whereas she had given up any such claim (explicitly mentioning the case of future divorce) in the agree-

30 Trib. Turin 20 Aprile 2012, in *Famiglia e diritto*, p. 2012, 803.

ment she had made with her husband during the process of legal separation three years earlier.

But a new wind is blowing in the Supreme Court.

Among the many cases to describe, I would like to make reference to a decision from thirty years ago in which, the Court decided that a postnuptial agreement of an American couple, although contrary to Italian domestic public order, was not against the Italian international public order and therefore was enforceable in Italy<sup>31</sup>.

Many years later, in 2012, the Italian Supreme Court of Cassation ruled that the “traditional” case law was not applicable to a situation in which an Italian couple had agreed – just one day before the marriage – that, in case of divorce (or of legal separation), the wife would convey the property of a flat of hers to her prospective husband, as a compensation for expenses he had made to restore another flat she owned<sup>32</sup>.

In 2013, the same Court decided that two *fiancés* can agree that the sum of money that one of them has lent to the other can be claimed back only if their future marriage ends in legal separation<sup>33</sup>.

31 Cass., 3 May 1984, n. 2682, in *Rivista di diritto internazionale privato e processuale*, 1985, 579; *Il diritto di famiglia e delle persone*, 1984, 521: «L'accordo, rivolto a regolamentare, in previsione di futuro divorzio, i rapporti patrimoniali fra coniugi, che sia stato stipulato fra cittadini stranieri (nella specie, statunitensi) sposati all'estero e residenti in Italia, e che risulti valido secondo la legge nazionale dei medesimi (applicabile ai sensi degli artt. 19 e 20 delle disposizioni sulla legge in generale), è operante in Italia, senza necessità di omologazione o recepimento delle sue clausole in un provvedimento giurisdizionale, tenuto conto che l'ordine pubblico, posto dall'art. 31 delle citate disposizioni come limite all'efficacia delle convenzioni fra stranieri, riguarda l'ordine pubblico cosiddetto internazionale, e che in tale nozione non può essere incluso il principio dell'ordinamento italiano, circa l'invalidità di un accordo di tipo preventivo fra i coniugi sui rapporti patrimoniali successivi al divorzio, il quale attiene all'ordine pubblico interno e trova conseguente applicazione solo per il matrimonio celebrato secondo l'ordinamento italiano e fra cittadini italiani»

32 Cass., 21 December 2012, n. 23713, [http://giacomooberto.com/cass\\_n\\_23713\\_20-12.htm](http://giacomooberto.com/cass_n_23713_20-12.htm).

33 Cass., 21 August 2013, n. 19304: «l'inderogabilità dei diritti e dei doveri che scaturiscono dal matrimonio non viene meno per il fatto che uno dei coniugi, avendo ricevuto un prestito dall'altro, si impegni a restituirlo per il caso della separazione. Che poi l'esistenza di un simile accordo si possa tradurre in una pressione psicologica sul coniuge debitore al fine di scoraggiarne la libertà di scelta per la separazione è questione che nel caso specifico non ha trovato alcun riscontro probatorio; e che comunque, ove pure sussistesse, non si tradurrebbe di per sé nella nullità di un contratto come quello in esame».



In both such cases the Court claimed that these decisions would not overturn the “traditional” viewpoint, because “prenuptial agreements in contemplation of divorce” could be considered only pre-emptive agreements *concerning maintenance obligations or spousal support (alimony)*. Of course this rationale is flawed, as what pertains to the essence of prenuptial agreements in contemplation of divorce is the notion to agree on pecuniary consequences of divorce, regardless of the nature and scope of such consequences: whether conveyance of real estate, delivery of any kind of goods, return of borrowed money, reimbursement of expenses, or payment of alimony, etc.