Marriage Contracts and Prenuptial Agreements in French law

Alexandre BOICHE

1 –Rules which determine recognition of foreign pre-nuptial agreement /marriage contracts

France has ratified the Hague Convention dated 14th March 1978 on applicable law to matrimonial regime (attached).
The Convention has been ratified only by Netherlands, Luxembourg and France, but it is universal and contained the rules of conflict of law applicable in France on this matter. The convention became applicable on the 1st of September 1992 and its therefore applicable to all couples married after this date.
For spouses married before the 1st September 1992, the French rules of conflict of law are applicable. These rules are based on the principle of the freedom of choice of the applicable law to the matrimonial regime. Spouses were free to choose the law they wanted without limitation.
For example, a French and English couple married in Cape Town could decide to make a matrimonial contract based on the Australian law.

In the Hague Convention the principle is still freedom of choice but the choice is limited to laws designated at the article 3.

Therefore the French court would have to apply foreign law designated by the spouses in their marriage contract. For example, I had a case recently in which I have to liquidate a marriage South African regime of accrual designated by a Canadian who married a Philippine woman in South Africa.

But, even when the spouse did not sign a marriage contract, a French court could have to apply a foreign law to the spouse matrimonial property because the article 4 of the Hague Convention designated the law of the spouse first habitual residence after the marriage as applicable to their matrimonial regime.
For the spouse married before the 1st September 1992, the rules of conflict designated the law with the strongest connection with the family and in particular with a presumption to the law of their first domicile of the spouses.
Therefore often a French judge could have to apply a foreign law to the matrimonial regime and often spouses are not aware a foreign law is applicable to their matrimonial regime

2 - Marriage contract and prenuptial agreement :

In French law, the spouses have the possibility to sign a marriage contract prior or during the marriage.
A French marriage contract deals with the consequence or non consequence of the marriage on the spouses properties acquired before or during the marriage. This is the reason why in French law we use the expression “matrimonial regime”, the word "regime" means “rule” in French language. A matrimonial regime is a body of rules about the effect of the marriage on the administration, the enjoyment, the disposal of their property by the spouses during the marriage.
In French law, the choice of the matrimonial regime is made in a marriage contract. The sole object of a marriage contract is to determine the matrimonial regime chosen by the spouses.
Title IV bis of the French civil code is entitled "Of marriage contract and matrimonial

regime". Therefore in French legal language it is the same thing to speak about “marriage contract” and “matrimonial regime”. The first refers necessarily to the second.
There are three main types of matrimonial regime defined in the French civil Code : community regime, regime of separation in acquisitions, separation of the assets.
But the spouse are free to agree on an other type or contract, for example they could choose a community contract and decide this community will be divide unequally.

But a marriage contract in French law only relates to the spouses’ properties, normally it does not contain any stipulation about the amount of maintenance in case of divorce or separation. A French court will be probably reluctant to enforce this kind of stipulation from a foreign prenuptial agreement. This kind of stipulation could be interpreted as contrary to the French public policy. There is no case law on this matter. To avoid any risk, between European countries, I advise the parties to designate a jurisdiction to deal with the maintenance issue in application of the prenuptial agreement, this designation is possible and binding in application of the article 23 of the European regulation on jurisdiction, recognition and enforcement in civil and commercial matters (Brussels I).

In an international case, I am very reluctant to advise the parties to sign more than one prenuptial agreement, because if the French courts would have to hear the case, they would not take into account the French prenuptial agreement but the more recent one. The Hague Convention allows the spouse to sign a specific contract to designate the law of a country in which they have some immovable, for these properties and the ones they may acquire.
This is sole situation in which the Hague Convention gives to the spouse the opportunity to sign more than one contract and to designate more than one applicable law.

The Hague Convention contains also some rules about the automatic change of applicable law (articles 4 and 7) which makes me strongly recommend signing a prenuptial agreement to every potential international couple who wants to get married.

Alexandre BOICHE
Docteur en Droit – Avocat à la Cour
Cabinet CHAUVEAU
8, boulevard Sébastopol -75005 PARIS
Tél. 33 1 55 42 55 25 Fax 33 1 55 42 55 29
Email : a.boiche@droitfamille.com

CONVENTION ON THE LAW APPLICABLE TO MATRIMONIAL PROPERTY REGIMES

(Concluded 14 March 1978)
(Entered into force 1 September 1992)

The States signatory to this Convention,
Desiring to establish common provisions concerning the law applicable to matrimonial property regimes,
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions –

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

This Convention determines the law applicable to matrimonial property regimes.
The Convention does not apply to –
(1) maintenance obligations between spouses;
(2) succession rights of a surviving spouse;
(3) the capacity of the spouses.

Article 2

The Convention applies even if the nationality or the habitual residence of the spouses or the law to be applied by virtue of the following Articles is not that of a Contracting State.

CHAPTER II – APPLICABLE LAW

Article 3

The matrimonial property regime is governed by the internal law designated by the spouses before marriage.
The spouses may designate only one of the following laws –
(1) the law of any State of which either spouse is a national at the time of designation;
(2) the law of the State in which either spouse has his habitual residence at the time of designation;
(3) the law of the first State where one of the spouses establishes a new habitual residence after marriage.
The law thus designated applies to the whole of their property.
Nonetheless, the spouses, whether or not they have designated a law under the previous paragraphs, may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated.

Article 4

If the spouses, before marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State in which both spouses establish their first habitual residence after marriage.
Nonetheless, in the following cases, the matrimonial property regime is governed by the internal law of the State of the common nationality of the spouses –
(1) where the declaration provided for in Article 5 has been made by that State and its application to the spouses is not excluded by the provisions of the second paragraph of that Article;
(2) where that State is not a Party to the Convention and according to the rules of private international law of that State its internal law is applicable, and the spouses establish their first habitual residence after marriage –
a) in a State which has made the declaration provided for in Article 5, or
b) in a State which is not a Party to the Convention and whose rules of private international law also provide for the application of the law of their nationality;

(3) where the spouses do not establish their first habitual residence after marriage in the same State.
If the spouses do not have their habitual residence in the same State, nor have a common nationality, their matrimonial property regime is governed by the internal law of the State with which, taking all circumstances into account, it is most closely connected.

Article 5
Any State may, not later than the moment of ratification, acceptance, approval or accession, make a declaration requiring the application of its internal law according to sub-paragraph 1 of the second paragraph of Article 4.
This declaration shall not apply to spouses who both retain their habitual residence in the State in which they have both had their habitual residence at the time of marriage for a period of not less than five years, unless that State is a Contracting State which has made the declaration provided for in the first paragraph of this Article, or is a State which is not a Party to the Convention and whose rules of private international law require the application of the national law.

Article 6
During marriage the spouses may subject their matrimonial property regime to an internal law other than that previously applicable.
The spouses may designate only one of the following laws –
(1) the law of any State of which either spouse is a national at the time of designation;
(2) the law of the State in which either spouse has his habitual residence at the time of designation.
The law thus designated applies to the whole of their property.
Nonetheless, the spouses, whether or not they have designated a law under the previous paragraphs or under Article 3, may designate with respect to all or some of the immovables, the law of the place where these immovables are situated. They may also provide that any immovables which may subsequently be acquired shall be governed by the law of the place where such immovables are situated.

Article 7
The law applicable under the Convention continues to apply so long as the spouses have not designated a different applicable law and notwithstanding any change of their nationality or habitual residence.
Nonetheless, if the spouses have neither designated the applicable law nor concluded a marriage contract, the internal law of the State in which they both have their habitual residence shall become applicable, in place of the law previously applicable –
(1) when that habitual residence is established in that State, if the nationality of that State is their common nationality, or otherwise from the moment they become nationals of that State, or
(2) when, after the marriage, that habitual residence has endured for a period of not less than ten years, or
(3) when that habitual residence is established, in cases when the matrimonial property regime was subject to the law of the State of the common nationality solely by virtue of sub-paragraph 3 of the second paragraph of Article 4.

Article 8
A change of applicable law pursuant to the second paragraph of Article 7 shall have effect only for the future, and property belonging to the spouses before the change is not subject to the new applicable law.
Nonetheless, the spouses may at any time, employing the forms available under Article 13, subject the whole of their property to the new law, without prejudice, with respect to immovables, to the provisions of the fourth paragraph of Article 3 and the fourth paragraph of Article 6. The exercise of this option shall not adversely affect the rights of third parties.
Article 9
The effects of the matrimonial property regime on the legal relations between a spouse and a third party are governed by the law applicable to the matrimonial property regime in accordance with the Convention.

Nonetheless, the law of a Contracting State may provide that the law applicable to the matrimonial property regime may not be relied upon by a spouse against a third party where either that spouse or the third party has his habitual residence in its territory, unless
(1) any requirements of publicity or registration specified by that law have been complied with, or
(2) the legal relations between that spouse and the third party arose at a time when the third party either knew or should have known of the law applicable to the matrimonial property regime.
The law of a Contracting State where an immovable is situated may provide an analogous rule for the legal relations between a spouse and a third party as regards that immovable.
A Contracting State may specify by declaration the scope of the second and third paragraphs of this Article.

Article 10
Any requirements relating to the consent of the spouses to the law designated as applicable shall be determined by that law.

Article 11
The designation of the applicable law shall be by express stipulation, or arise by necessary implication from the provisions of a marriage contract.

Article 12
The marriage contract is valid as to form if it complies either with the internal law applicable to the matrimonial property regime, or with the internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses.

Article 13
The designation of the applicable law by express stipulation shall comply with the form prescribed for marriage contracts, either by the internal law designated by the spouses, or by the internal law of the place where it is made. In any event, the designation shall be in writing, dated and signed by both spouses.

Article 14
The application of the law determined by the Convention may be refused only if it is manifestly incompatible with public policy ("ordre public").

CHAPTER III – MISCELLANEOUS PROVISIONS
Article 15
For the purposes of the Convention, a nationality shall be considered the common nationality of the spouses only in the following circumstances –
(1) where both spouses had that nationality before marriage;
(2) where one spouse voluntarily has acquired the nationality of the other at the time of marriage or later, either by a declaration to that effect or by not exercising a right known to him or her to decline the acquisition of the new nationality;
(3) where both spouses voluntarily have acquired that nationality after marriage.
Except in the cases referred to in sub-paragraph 1 of the second paragraph of Article 7, the provisions referring to the common nationality of the spouses are not applicable where the spouses have more than one common nationality.

Article 16
For the purposes of the Convention, where a State has two or more territorial units in which different systems of law apply to matrimonial property regimes, any reference to the national law of such a State shall be construed as referring to the system determined by the rules in force in that State.

In the absence of such rules, a reference to the State of which a spouse is a national shall be construed, for the purposes of sub-paragraph 1 of the second paragraph of Article 3 and sub-paragraph 1 of the second paragraph of Article 6, as referring to the territorial unit where that spouse had his or her last habitual residence; and, for the purposes of the second paragraph of Article 4, a reference to the State of the common nationality of the spouses shall be construed as referring to the last territorial unit, if any, where each has had a habitual residence.

Article 17

For the purposes of the Convention, where a State has two or more territorial units in which different systems of law apply to matrimonial property regimes, any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State.

Article 18

A Contracting State which has two or more territorial units in which different systems of law apply to matrimonial property regimes shall not be bound to apply the rules of the Convention to conflicts between the laws of such units where the law of no other State is applicable by virtue of the Convention.

Article 19

For the purposes of the Convention, where a State has two or more legal systems applicable to the matrimonial property regimes of different categories of persons, any reference to the law of such State shall be construed as referring to the system determined by the rules in force in that State.

In the absence of such rules, the internal law of the State of the common nationality of the spouses applies under the circumstances referred to in the first paragraph of Article 4, and the internal law of the State where each has had a habitual residence continues to apply under the circumstances referred to in sub-paragraph 2 of the second paragraph of Article 7. In the absence of a common nationality of the spouses, the third paragraph of Article 4 applies.

Article 20

The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

Article 21

The Convention applies, in each Contracting State, only to spouses who have married or who designate the law applicable to their matrimonial property regime after the Convention enters into force for that State.

A Contracting State may by declaration extend the application of the Convention to other spouses.

CHAPTER IV – FINAL CLAUSES

Article 22

The Convention is open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 23

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 24

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 25
A Contracting State which has two or more territorial units in which different systems of law apply to matrimonial property regimes may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter.
These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 26
A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify from time to time by declaration how a reference to its national law shall be construed for the purposes of the Convention.

Article 27
No reservation to the Convention shall be permitted.

Article 28
Any Contracting State desiring to make one of the declarations envisaged by Article 5, the fourth paragraph of Article 9, Article 21 or Article 26 shall notify such declaration to the Ministry of Foreign Affairs of the Netherlands.
Notice shall be given in the same manner of any modification or withdrawal of such a declaration.

Article 29
The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 22 and 23.
Thereafter the Convention shall enter into force –
(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
(2) for a territory to which the Convention has been extended in conformity with Article 24, on the first day of the third calendar month after the notification referred to in that Article.

Article 30
The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29, even for States which subsequently have ratified, accepted, approved it or acceded to it.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31
The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 23, of the following –
(1) the signatures and ratifications, acceptances and approvals referred to in Article 22;

(2) the accessions referred to in Article 23;
(3) the date on which the Convention enters into force in accordance with Article 29;
(4) the extensions referred to in Article 24;
(5) the denunciations referred to in Article 30;
(6) the declarations referred to in Articles 25, 26 and 28.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.
Done at The Hague, on the 14th day of March, 1978, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.