II.A.4. Contractualisation of Family Law – La Contractualisation du Droit de la Famille

General Report

Frederik SWENNE
University of Antwerp (Belgium)
Research Group Personal Rights & Property Rights

Table of Contents

ABSTRACT .................................................................................................................. 2
INTRODUCTION .......................................................................................................... 2
CHAPTER I. MAIN FEATURES OF FAMILY LAW .................................................. 3
CHAPTER II. SUBSTANTIVE FAMILY LAW ............................................................. 7
§ 1. A BIRD’S EYE VIEW .......................................................................................... 7
§ 2. PARENTS AND CHILDREN................................................................................ 9
   A. Introduction........................................................................................................... 9
   B. Legal parenthood................................................................................................ 9
      1. General............................................................................................................. 9
      2. Filiation.......................................................................................................... 10
      3. Adoption....................................................................................................... 13
   C. Parental responsibilities.................................................................................... 14
      1. Introduction.................................................................................................... 14
      2. Attribution and exercise............................................................................. 14
      3. Content......................................................................................................... 17
   D. Maintenance.................................................................................................... 18
§ 3. PARTNERS ......................................................................................................... 19
   A. Introduction...................................................................................................... 19
   B. General overview............................................................................................ 19
   C. Formation......................................................................................................... 22
   D. Content........................................................................................................... 24
      1. Personal content......................................................................................... 24
      2. Patrimonial content.................................................................................. 26
   E. Dissolution and its consequences.................................................................... 28
      1. Dissolution................................................................................................... 28
      2. Consequences of dissolution................................................................... 30
CHAPTER III. COURT JURISDICTION .................................................................... 32
INTRODUCTION............................................................................................................ 32
§ 1. PROCESS ............................................................................................................ 32
   A. General remarks............................................................................................ 32
   B. Legal framework of ADR............................................................................... 32
   C. Promotion of ADR.......................................................................................... 35
§ 2. PRODUCT ........................................................................................................... 36
   A. A priori scrutiny.............................................................................................. 36
   B. A posteriori scrutiny....................................................................................... 38
      1. Scrutiny of the execution of the agreement.............................................. 39
      2. Scrutiny of the performance of the agreement....................................... 40
      3. Scrutiny in the best interest of the child................................................. 42
CHAPTER IV. CONCLUSIONS..................................................................................... 44
Abstract

Throughout the world, the on-going pendular movement of family law between status and contract has gone in the direction of contract during the last decades. The topic Contractualisation of Family Law describes and analyses the increasing leeway given to families both in substantive and in procedural family law. In substantive law, both the law on parents and children and on partners is researched. In procedural law, both ADR-techniques and court scrutiny are reviewed. The conclusions are twofold. On the one hand, ‘private ordering’ would be the better denominator for contractualisation of family law, because domestic contracts or family pacts often are denied civil effect, particularly because those agreements are not considered to have binding effect. On the other hand, one might also question the exceptionalist position of family law because of the increasing government interventionism in private law in general. Children have a special position anyhow in the light of the parens patriae doctrine. With regard to ADR, arbitration in family disputes is in vogue.

Introduction

1 Subject and Objectives. This report aims at drawing the lines of convergence and divergence with regard to the contractualisation of family law throughout the world. The subject was chosen in the light of the blurring of lines between (the particular nature of) family law on the one hand and general characteristics of private and public law on the other hand.

The objectives of this report are to describe and analyse both substantive (Ch. II) and procedural (Ch. III) contractualisation of family law. The former refers to substantive arrangements about formation, content and dissolution of family relations, which deviate from the default legal regime. The latter encompasses the validity of procedural arrangements and the possibilities to oust state court jurisdiction. Chapter I will first present the main features of the national reporters’ family law systems. Conclusions will be drawn in Ch. IV.

2 Methodology. Drawing on preliminary research, the general reporter proposed a topic breakdown to the national reporters appointed by the national committees or invited by him. Taking into account their feedback, a questionnaire of 28 questions, both general and specific, was distributed. Of 34 promised national reports, 24 were submitted before the deadline. The current draft general report is based on these reports. Footnotes refer to the national reports and contain some additional references. The draft conclusions will present the issues that are particularly debated and that will be further discussed at the Congress.
Chapter I. Main features of family law

3 Legal families. A presentation of the main features of family law around the world according to the traditional divisions of legal systems in families has proved not to be functional. Similarities and differences in the different legal systems’ family law follow other lines of division on which the presentation hereinafter is based.

4 ‘Family law’. All national reports situate family law at the intersection of private law and public law, and many of them refer to the influence of religious and customary norms. For that reason family law is qualified as a particular field of law.

Family law in the narrow sense is considered a part of private or civil law, insofar it concerns the formation, exercise and termination (and some ‘ancillary issues’
) of ‘nuclear’ family relations of two types: parents and children on the one hand and sexual-affective partners on the other. Family relations in the extended family are rarely mentioned. This report mainly concerns family law in the narrow sense. It also encompasses (civil) family proceedings.

Family in its broad sense is considered a part of public law, insofar it concerns the effects of (private law) family relations in different branches of public law, for example social security law, tax law, labour law, criminal law, migration law.

The distinction between private and public family law however is not always clear-cut, e.g. with regard to child protection law.

5 Constitutionalisation. Different forms (and phases) of constitutionalisation of family law – with quite different currents – can be distinguished.

A closed system of family law existed – and in some legal systems still exists – in a first phase. Under such system, a numerus clausus of family relations is constitutionally or otherwise protected, by so-called institutional guarantees. Under those guarantees, a minimum protection must apply to certain family relations (for example marriage) and can neither be repealed nor applied to other family relations (for example registered partnership).

Whereas formation and dissolution of family relations are regulated by imperative norms, government usually abstained from intervening in the exercise of those relations. The content of the relation parent-child and (formerly) husband-wife was left to family autonomy – that is: the father-husband until well in the 20th C – with minimal government intervention. The internal dimension of the family is thus protected through a non-interventionist approach under which government interference must be justified. Some Constitutions more particular-

---

1 For example Denmark: Q1; Poland: Q2.
2 For example Taiwan: Q2; Scotland: Q2.
3 USA [Basic Framework for US Family Law].
4 For example Belgium: Q2; Canada: Q2; Croatia: Q2; Finland: Q2; Germany: Q2; Greece: Q2; Netherlands: Q2; Puerto Rico [II. General Introduction]; Romania: Q2; Scotland: Q2.
5 See Burden v United Kingdom, (App. 13378/05), 28 April 2008 [GC], ECHR 2008-III.
6 E.g. Canada: Q2; Scotland: Q2.
7 Denmark: Q1; Poland: Q2.
8 Greece: Q2; Turkey: Q2.
9 Germany, art. 6(1) Basic Law; Ireland: Q2; Portugal: Q2.
10 E.g. Croatia: Q2; Greece: Q2.
11 Portugal: Q2. Also see Malaysia: Q6.
ly explicitly protect the right for parents to provide for the education of their children\textsuperscript{12} (under government control however, see hereinafter).

Institutional protection is also provided for with regard to the external dimension of the family, which is protected as entity – yet not as a legal person\textsuperscript{13} – in different branches of public law. This external dimension of family relations is more strongly protected in legal systems where constitutional protection of the family\textsuperscript{14} (and marriage)\textsuperscript{15} applies and particularly so where government must develop a family policy in the light of the constitutional socio-economic protection of the family.\textsuperscript{16} In systems with no constitutional protection of the family, private family law merely ‘affects’ public family law.\textsuperscript{17} One example is the reduction of social security benefits in function of private law family solidarity (support duties).\textsuperscript{18} For this reason, also private family law is sometimes considered to concern public policy.\textsuperscript{19}

A second phase of constitutionalisation is the constitutional review of family law in the narrow sense. Almost all legal systems provide for a system whereby a Constitutional Court,\textsuperscript{20} the Supreme Court\textsuperscript{21}, or even any Court\textsuperscript{22}, may assess the compatibility of norms of family law with constitutional civil rights, upon petition by the parties in a case. This had led to various para legem reforms in family law. Other legal systems only organise an (a priori) assessment if so required by the executive branch.\textsuperscript{23} In some legal systems, it is impossible for the judiciary to constitutionally review legislation.\textsuperscript{24}

In a third phase, judicial review of family law is carried out in function of international human rights instruments. The traditional divide between monist\textsuperscript{25} and dualist legal systems, concerning the direct applicability of human rights instruments, seems to fade away. Most dualist legal systems either have incorporated human rights instruments in their national law\textsuperscript{26} or anyhow allow judicial interpretation of national law in function of international instruments to some extent.\textsuperscript{27} International and regional human rights bodies moreover seem to gain importance.\textsuperscript{28}

The second and third phases of constitutionalisation have caused quite discordant evolutions in family law.

\textsuperscript{12} Germany, art. 6(2) Basic Law; Ireland, art. 42 Constitution; Malaysia: art. 12(5) Constitution; Poland, art. 48 and 53.3 Constitution; Romania, art. 48 Constitution.

\textsuperscript{13} Romania: Q2.

\textsuperscript{14} Brazil, art. 226 Constitution; Cameroon: Preamble to the 1996 Constitution; France: Preamble to the 1946 Constitution; Spain, art. 39 Constitution.

\textsuperscript{15} Croatia: Q2; Germany: art. 6(1) Basic Law; Greece, art. 21 Constitution; Ireland, art. 41 Constitution; Poland: Q2.

\textsuperscript{16} Finland: art. 19 Constitution; Poland: art. 71 Constitution; Portugal: Q2; Turkey: art. 41 Constitution.

\textsuperscript{17} Belgium: Q2; Denmark: Q2; Finland: Q2; Greece: Q2.

\textsuperscript{18} Canada: Q2; Denmark: Q2.

\textsuperscript{19} E.g. Quèbec: Q1.

\textsuperscript{20} Belgium: Q1; Croatia: Q1; France: Q1 and Q2; Germany: Q1; Poland: Q1; Portugal: Q1; ROC (Taiwan): Q1; Romania: Q1; Spain: Q1; Turkey: Q1.

\textsuperscript{21} Brazil: Q1; Ireland: Q1; Malaysia: Q1; USA [Basic Framework for US Family Law].

\textsuperscript{22} Canada: Q1; Denmark: Q1; Finland: Q1; Greece: Q1.

\textsuperscript{23} Cameroon: Ch. 1.

\textsuperscript{24} Netherlands: Q1.

\textsuperscript{25} Belgium: Q3; Brazil: Q3; Cameroon, § 2 (except vis-à-vis the Constitution); Croatia: Q3; France: Q3; Germany: Q3; Greece: Q3; Netherlands: Q1 and Q3; Poland: Q3; Portugal: Q3; ROC (Taiwan): Q3; Spain: Q3; Turkey: Q3.

\textsuperscript{26} Denmark: Q3; England & Wales: Q1; Ireland: Q3; Malaysia: Q3; Romania: Q3; Scotland: Q3.

\textsuperscript{27} Canada: Q3; England & Wales: Q3; Finland: Q3.

\textsuperscript{28} E.g. USA [Basic Framework for US Family Law].
On the one hand, governments seem to have taken a non-interventionist stance. Family law is no longer a closed system in most legal systems and new family forms are also protected legally or even constitutionally. With regard to the internal dimension of the family, autonomy is interpreted individually rather than collectively. The emancipation of formerly dependent family members allows relaxing the laws on formation and termination of family relations. The institutional protection of the external dimension of the family also seems to have diminished, without having disappeared. Individualisation in socio-economic branches of public law (particularly social security law and tax law) however has not yet been achieved.

On the other hand, interventionism has increased. The individualisation of family relations has caused government to more actively interfere with the internal dimension of the family. Rather than leaving the exercise of family relations to party autonomy, government intervenes to secure dignity and to palliate unequal positions. This is particularly the case in parent-child relations, in the light of the extraordinary success of the Convention of the Rights of the Child and the focus on children rights’ protection in many legal systems, though the direct applicability of the CRC is controversial. Government in some legal systems also comes to the rescue of the weaker party in partner relations. This evolution applies to both private and public family law. The criminalisation of domestic violence is the foremost example.

With GLENDON, one may therefore conclude that government withdraws from the classic areas of regulation (formation and termination of family relations) and more actively intervenes in new areas (exercise of family relations).

6 Incongruities. The above-mentioned evolutions have not yet been tackled in a congruent way in many legal systems.

First, incongruities exist within family law in the narrow sense, for example in the legal regulation of new family forms in comparison to the former numerus clausus.

Second, family law in the narrow sense sometimes is incongruent with family law in the broad sense. Sometimes, family relations are only taken into account either in private family law or in public family law, or are taken into account subject to different conditions. For example de facto cohabitation sometimes is not regulated in private family law, but taken into account with regard to social benefits. The other way round, the organisation of absence of leave in labour law for example does not always take into account the realities of recomposed families.

Third, (vertical or horizontal) multi-level governance of families also causes incongruities. In many legal systems, vertical multi-level governance implies that different govern-

29 E.g. Greece: Q2; Puerto Rico [I Introduction and II. General Part]; Romania: Q2.
30 E.g. Brazil: Q2; Ireland: Q2.
31 USA [Basic Framework for US Family Law].
32 Denmark: Q2; Poland: Q2.
33 Poland: Q7.
34 Belgium: art. 22bis Constitution; Croatia: Q2; Denmark: Q2; Finland, art. 19 Constitution; Greece: art. 21 Constitution; Ireland, Twenty-First Amendment of the Constitution (Children) Bill 2012; Poland: art. 72 Constitution; Romania, art. 49 Constitution; Scotland: Q3; Spain: art. 39 Constitution.
35 Belgium: Q3; France: Q3.
36 Germany: Q2 and BVerfG 103, 89.
37 Croatia: Q2; Greece: Q2; Ireland: Q2; Taiwan: Q2; USA [Basic Framework for US Family Law].
39 Finland: Q2; Romania: Q2.
40 Finland: Q6; Netherlands: Q2.
41 Hereto Portugal: Q2.
mental levels are competent to regulate private versus public family law, or even share competences in both private and public family law. This may also lead to incongruent court orders. In other legal systems, family relations are governed differently at a same level according to religion or ethnicity ('horizontal multi-level governance).

---

42 Belgium: Q1; Scotland: Q1; USA [Basic Framework for US Family Law].
43 Canada: Q2; England & Wales: Q2; Spain: Q1.
44 Canada: Q1.
45 Cameroon, § 2; Malaysia: Q1 and Q2.
Chapter II. Substantive Family Law

§ 1. A bird’s eye view

7 Contract: Private Autonomy. In all legal systems, the principle of private autonomy governs private law, and contractual freedom is the default rule.46

Contracts may not derive from imperative legal provisions nor may they infringe public policy (ordre public) or be contra bona mores.47 Such limits aim at protecting either general interests or the private interests of the weakest party in a contractual relation. The nature of the sanction depends on the interest that is protected.48 More generally, a covenant of good faith and fair dealing applies throughout all (pre- and post)contractual phases. Some legal systems provide so explicitly,49 whereas other legal systems contain specific obligations thereto. Examples are the duty of information in the pre-contractual phase, the prohibition of abuse of rights in the phase of execution of a contract and the prohibition of exoneration clauses in the post-contractual phase.50 Particularly relevant in relation to the subject of this report, some legal systems provide for the revocability (subject to damages), if not the invalidity, of contracts pertaining to personal rights.51 Some national reporters in this regard refer to terms and conditions in contracts that would encourage or discourage family relations (for example virility) or behaviour (for example chastity) and that are considered void (also see infra para 34).52

There seems to be a trend of increasing government intervention in contractual relations, with a view of protecting both collective interests and the interests of vulnerable parties and whereby a ‘social public order’ (‘ordre public social’) seems to emerge.53 The foremost areas of government intervention are consumer law, tenancy and labour law.54 Beside, the above-mentioned evolution of constitutionalisation leads to increasing government intervention in private law in general.

8 Status: No Private Autonomy. Further reaching and contrary to the basic assumption in general private law, private autonomy is even not the default rule in private family law. Under the qualification of “status” – as opposite to “contract”, private family law is traditionally withdrawn from the realm of private autonomy in two respects.

On the one hand, most legal systems consider private family law as imperative law as a whole, and to derive by contract from rules on formation and termination of family relations

46 E.g. Greece: Q4; Taiwan: Q4.
47 Belgium: Q4; Canada: Ch. II, § 1; Croatia: Q4; Denmark: Q4; England & Wales: Q4; Finland: Q4; France: Q4; Germany: Q4; Greece: Q4; Ireland: Q4; Netherlands: Q4; Portugal: Q4; Puerto Rico [III. Substantive Contractualisation in General]; Québec: Ch. II, § 1; Romania: Q4; Spain: Q4; Taiwan: Q4; Turkey: Q4.
49 Germany: Q4 (’Treu und Glauben’); Québec: Ch. II, § 1.
50 Portugal: Q4; Puerto Rico [III. Substantive Contractualisation in General].
51 Portugal: Q4; Turkey: Q4 and Q5.
52 Canada: Ch. II, § 1; Croatia: Q4; Portugal: Q4.
53 Finland: Q4 (’welfarist contract law’ or ’social civil law’); Portugal: Q4; Romania: Q4 (’ordre public économique’).
54 Germany: Q4; Greece: Q4.
55 E.g. Belgium: Q5; Cameroon: Ch. 2, par 1; Finland: Q5.
is not accepted. This prohibition also applies to the basic rules on the content of those relations.\textsuperscript{56}

The prohibition applies in both directions. First, opting in family protection was prohibited, and still is to some extent. The principle of a \textit{numerus clausus}\textsuperscript{57} of family relations has long stood in the way of the validity of contracts between cohabiting partners with regard to their pecuniary rights and duties. Such contracts were long considered \textit{contra bona mores} because they would organise sexual relations (‘\textit{pretium stupri}’).\textsuperscript{58} Today, cohabiting partners still may not opt in the personal rights and duties of spouses or registered partners, such as cohabitation and fidelity.\textsuperscript{59} Opting in pecuniary rights and duties however is generally accepted.\textsuperscript{60}

Second, opting out from the norms on family institutions is not allowed either.\textsuperscript{61} Systems influenced by the \textit{Code napoleon} for example explicitly provide that spouses or registered partners may not derive from some minimal statutory rights and obligations between them or from the norms on parental responsibility in their (prenuptial) contracts on (matrimonial) property.\textsuperscript{62}

Only few legal systems accept greater party autonomy as a default rule.\textsuperscript{63}

On the other hand, whereas the internal institutional protection of family relations implies respect for family autonomy, there seems to exist great restraint to consider agreements between family members on the exercise of their relation as parents (and children) or as partners as legally binding \textit{contracts}.\textsuperscript{64} The Scottish report qualifies this evolution as “\textit{consensualisation}” of family law.\textsuperscript{65} In some legal systems such agreement is also referred to with other legal terms than is the case in contract law.\textsuperscript{66} Remarkably, the qualification as non-law of family agreements only seems to apply in the assumption of the family ‘going concern’. To the contrary, agreements seem to be considered legally binding in case the family relation is dissolved.\textsuperscript{67}

9  Mapping Family Law Exceptionalism. It is not an objective of this report to research the origins and \textit{rationale} of “family law exceptionalism”.\textsuperscript{68}

The analysis hereinafter may rather serve as a mapping of the growing number of deviations from the general exceptionalist position,\textsuperscript{69} whereby

\textsuperscript{56} E.g. Brazil: Q4; Croatia: Q5; France: Q4; Malaysia: Q5; Netherlands: Q5; Poland: Q5; Portugal: Q5.
\textsuperscript{57} Comp. Greece: Q4; Turkey: Q5.
\textsuperscript{58} England & Wales: Q5; Romania: Q5; Scotland: Q5.
\textsuperscript{59} Belgium: Q5.
\textsuperscript{60} Canada: Ch. II, § 1; Belgium: Q5; Romania: Q5; Scotland: Q5.
\textsuperscript{61} Greece: Q4.
\textsuperscript{62} E.g. Belgium: art. 1388 and 1478 CC; Cameroon: art. 1388 CC; France: art. 1388 CC; Portugal: art. 1618, 2\textdegree and 1699 CC); Puerto Rico: art. 1268 CCPR and \textit{Albanese D’Imperio v Secretary of the Treasury}, 223 F 2d 413 (1955) (single joint tax return); Québec: art. 391 Civil Code; Romania: art. 332 para 2 Civil Code. Comp. Germany: Q5; Greece: Q5.
\textsuperscript{63} Canada: Ch. II, § 1; Spain: Q5; Scotland: Q5. To a lesser extent: Malaysia: Q5; Netherlands: Q5.
\textsuperscript{64} England & Wales: Q5; Finland: Q5; Germany: Q5; Greece: Q5; Romania: Q5; Scotland: Q5 and \textit{Radmacher v Granatino} [2010] UKSC 42; Taiwan: Q5.
\textsuperscript{65} Scotland: Q5.
\textsuperscript{66} Germany: Q5.
\textsuperscript{67} Belgium: Q5. England & Wales: \textit{Merritt v Meritt} [1970] EWCA Civ 6, retrieved at http://www.bailii.org/ew/cases/EWCA/Civ/ on 21 June 2014, as distinguished from \textit{Balfour v Balfour} [1919] 2 KB 571 and also see Q5; Greece: Q5.
\textsuperscript{69} France: Q4; Greece: Q5.
- either opting in or out private family law is allowed
- or family agreements on the content of family relations are considered legally binding contracts.

Whereas the general private law principle of party autonomy is increasingly applied to family law, the general limits to contractual freedom nevertheless also apply.\(^{70}\)

The principle of dignity\(^{71}\) and the best interest of a child for example serve as general parameters for government control of contractual freedom, usually through judicial discretion.\(^{72}\) Some legal systems for example explicitly forbid corporal punishment of children in application thereof.\(^{73}\) In other systems such punishment is still explicitly allowed.\(^{74}\) The theory of undue influence for example is a parameter for government intervention in (ex-)spousal relations.\(^{75}\) Some legal systems more generally safeguard the ‘fair balance’ between spouses.\(^{76}\)

§ 2. Parents and Children

A. Introduction

10 ‘Parents and Children’. The first subject area for which we will map contractualisation is vertical (or intergenerational) family law, of which only the relation between parents and children will be researched as the most relevant part. We will not elaborate other intergenerational relationships. Hereinafter, we will subsequently discuss
- legal parenthood,
- parental responsibilities and the exercise thereof, and
- maintenance obligations.

Whereas those three aspects of the relation between parents and children are closely linked, they nevertheless are based on different assumptions, in application whereof different persons may qualify as parents.\(^{77}\)

B. Legal parenthood

11 Definition. The legal parents of a child are the persons from whom he descends in the first degree in terms of legal kinship.\(^{78}\)

Both filiation and adoption qualify as bases for legal parenthood.\(^{79}\) Adoption is accepted in all reported legal systems, yet only some legal systems have both strong and weak adoption. Only one form of adoption exists in other systems.

\(^{70}\) Brazil: Q5.
\(^{71}\) France: Q4; Spain: Q4. Comp. Puerto Rico [III. Substantive Contractualisation in General].
\(^{72}\) Belgium: Q5; Canada: Ch. II, § 1; England & Wales: Q5; France: Q4; Ireland: Q5; Poland: Q4; Romania: Q5; Scotland: Q5; Spain: Q5; Turkey: Q5.
\(^{73}\) Denmark: Q6.
\(^{74}\) Taiwan: Q6.
\(^{75}\) Belgium: Supreme Court 9 November 2012, www.cass.be; Canada: Ch. II, § 1; Croatia: Q4; Denmark: Q4; England & Wales: Q4; Portugal: Q4; Scotland: Q4.
\(^{76}\) E.g. Romania: art. 332 para 2 CC and Q5; Spain: Q5 and art. 66 CC. Comp. Puerto Rico [III. Substantive Contractualisation in General] and 31 L.P.R.A. § 3552 (Westlaw).
\(^{77}\) E.g. Croatia: Q6; Finland: Q6; Scotland: Q6.
\(^{78}\) E.g. Romania: Q6.
The best interest of child serves much less as a decision parameter with regard to filiation than with regard to adoption. The reason thereof is the assumption that the establishment of filiation vis-à-vis the biological parents is in the best interest of a child per se.80

2. Filiation

12 Between Status and Contract. Many reporters stress that legal rules on filiation are imperative, as part of one’s status, and transfers of parenthood are outside the “perimeter”81 of contractual freedom.82 The link to public policy (‘ordre public’) for example is very clear in Denmark, where the regional state administration will itself institute parentage proceedings in case paternity is not registered at birth.83

In all legal systems, the imperative rules are at the least flavoured with a taste of self-determination, for example in the context of voluntary acknowledgment.84 Such forms of merely intentional parenthood however cannot be considered as contractualisation, for they are either unilateral, or non-enforceable or subject to government intervention.85 The Canadian reporter thus refers to intention and autonomy “rather than using the language of contract”.86

Most legal systems also accommodate agreements on parenthood to some extent, for example in the context of (medically) assisted reproduction.87 Contractual transfer of second or subsequent parenthood(s) thereby seems to be more easily accepted than the transfer of the ‘first parenthood’ of the birthmother. Such agreement, “however contractual in its core” according to the report on England & Wales88, mostly is not considered to be a civil contract89 because it only comprises the exercise of legally available options. It is strictly controlled and does not allow the parties to organise parenthood themselves.90 For example, Belgian sperm donors may opt to donate non-anonymously, but this will not allow the establishment of legal family ties between them and the children conceived with their sperm.

Sometimes, the intentional and biological parents may informally agree on the role the biological parents may play in the life of the child; but such agreements are not directly enforceable.91

13 First parent: mother. The default position in almost all legal systems is that the mother is the (legally) female person who gave birth to a child: mater semper certa est.92 Only in Ireland it is still debated whether the genetic link between a child and a woman should not prevail over giving birth as basis of maternity.93

79 E.g. Malaysia: Q6.
80 Portugal: Q6.
81 Romania: Q11.
82 Brazil: Q7; Cameroon: Ch. 2, par. 1; Canada: II § 2; Croatia: Q7; France: Q7; Germany: Q7; Greece: Q7; & Q11 Ireland: Q7; Malaysia: Q7; Netherlands: Q7; Québec: Ch. II, § 2; Romania: Q7 & Q11; Taiwan; Q11.
83 Denmark: Q7.
84 France: Q7.
85 Germany: Q7; Romania: Q7; Spain: Q7.
86 Canada: II § 2.
87 Québec: Ch. II, § 2; France: Q7.
89 Scotland: Q7.
90 Scotland: Q6; France: Q7.
91 Belgium: Q7; Finland: Q7; Netherlands: Q7.
92 Belgium: Q6; Brazil: Q6; Cameroon: Ch. 2, par. 1; Canada: II § 2; Finland: Q6; England & Wales: Q6; Germany: Q6; Greece: Q6; Poland: Q6; Scotland: Q6; Turkey: Q6; USA [Legal parentage by Biology or Marriage].
93 Ireland: Q6 & Q7.
Only some Western legal systems allow surrogacy agreements, whereby the maternity of the birthmother is either transferred to the genetic or intentional mother, or waived in favour of a single man or gay couple. As a consequence of such an agreement, the presumption of parenthood will not be applied to the birthmother’s partner, but to the prospective parent’s (male or female) partner. Surrogacy agreements however are not always enforceable in case the surrogate mother refuses to cede the child or the prospective parents refuse to accept the child.95

The judicial approach towards the consequences of informal surrogacy agreements, in systems where surrogacy is not explicitly regulated or even explicitly forbidden, is quite different. Such agreements will usually not be validated for the purposes of establishing parenthood.96 Adoption would be necessary in these cases. Various approaches also exist with regard to the recognition of surrogacy in private international law.97

Only some Western legal systems accept egg donation, whereby the birthmother will be considered the legal mother—in application of the mater semper certa est-rule. One example is ovum sharing98 in a lesbian couple, whereby the genetic mother will be the second parent (see infra para 14) of her genetic child to whom the gestational mother has given birth.

14 Second parenthood. “Contenders”99 for second parenthood are manifold in Western legal systems. In other systems, the traditional rule of paternity of the husband still and almost exclusively applies.

In all legal systems, a legal presumption of paternity applies to the (legally) male husband of the mother at the time of the birth or of the conception of the child: pater is est quem iustae nuptiae demonstrant.100 He probably is the genitor of the child – in the light of the duty of fidelity – or at the least has chosen to be the parent.

In some legal systems this presumption also applies to the (legally) male registered partner101 of the mother.

The presumption of paternity generally is rebuttable.102 Self-determination applies to some extent in this regard. The father appointed in application of the presumption may decide not to rebut his parenthood, even if he knows he is not the genitor. In some legal systems, the genitor himself moreover may not contest the paternity of the husband. The father appointed in application of the presumption also is excluded from contesting his paternity in many legal systems in case he has agreed to donor insemination.103

---

94 Canada: II § 2; England & Wales: Q6 & Q7; Greece: Q6 & Q7; USA [Surrogacy Contracts].
95 Canada: II § 2; England & Wales: Q7; Netherlands: Q7; Scotland: Q7; USA [Contracting Assisted Reproduction Parentage] and [Surrogacy Contracts].
96 Belgium: Q7; Germany: Q7. See however Ireland: Q7: the issue will be resolved in the best interest of the child.
98 USA [Contracting Assisted Reproduction Parentage].
99 Term used in USA [Contracting Assisted Reproduction Parentage].
100 E.g. Belgium: Q6; Brazil: Q6; England & Wales: Q6; Finland: Q6; Germany: Q6; Ireland: Q6; Poland: Q6; Scotland: Q6; Turkey: Q6; USA [Legal parentage by Biology or Marriage].
101 Canada: II § 2; Greece: Q6. Also see such proposal in the Netherlands: Q6.
102 E.g. Belgium: Q6.
103 For example Denmark: Q7; England & Wales: Q7; Finland: Q7; Poland: Q7; Spain: Q7.
Further away from biological foundations, a presumption of second motherhood, second female parenthood or co-motherhood also applies to the female spouse or female registered partner of the mother in some Western legal systems (‘paren is est’). In these cases, the foundation of parenthood is social, or even merely intentional, rather than biological. This also why legislatures apparently wrestle with semantics in this regard.

Voluntary acknowledgment of parenthood is possible in case the mater semper certa est- or paren is est-rules cannot be applied.

This “route to parenthood” de facto mostly applies to determine male paternity. There is no uniform application of the rules on acknowledgment in the few systems where same-sex parenthood exists. In the Netherlands, the female partner of the birthmother can acknowledge a child as second mother; in Belgium the same is possible under the term “co-mother”. In both legal systems, acknowledgment as a second parent is not possible for the male partner of the father; he must adopt the child. In the USA, the male partner of the father can be appointed as second parent.

In most legal systems, acknowledgment is not subjected to any proof other than a confirmation by the other parent. Other systems require a biological or social proof of parenthood. In Taiwan, implicit acknowledgment moreover results from financially maintaining a child as a parent. Such parenthood is further reaching than the in loco parentis-doctrine in other legal systems.

The decision to voluntarily acknowledge a child even if there is no biological or social foundation for parenthood is protected to some extent. For example the mother who consents to the acknowledgment of a child by a man whom she knows is not the genitor, cannot contest his paternity later under Belgian law. As mentioned above, this can hardly be considered as contractualisation. The same applies to the decision of a child to (no) rebut a parenthood presumption or to (not) use his veto against an acknowledgment.

Some legal systems also contain specific provisions regarding (medically) assisted reproduction, whereby the intentional parents are appointed as legal parents without them or the genetic or biological parents being allowed to contest the parenthood so established.

Some systems also apply this in favour of the single parenthood of the mother. The Canadian and Irish reporters however refer to case law whereby the known donor was nevertheless recognised as the father. The same applies in Denmark in case of “informal” in-
In Finland, the parties to artificial insemination may agree that the donor to a single mother will be considered to be the father.¹²¹

15 Third parenthood. Only Canada and the USA accept triple parenthood, whereby the birthmother, the intentional second male or female parent and the genitor are considered the legal parents, subject to their agreement thereto.¹²²

16 Transfers and waivers. Beside the above-mentioned contractual transfers or waivers, a default parent in almost all legal systems cannot waive or dissolve his parenthood otherwise than giving the child up for adoption (see below).¹²³ Only the Finnish reporter mentions one out-court possibility for a married couple to transfer the husband’s paternity to the biological father.¹²⁴

The possibility to give birth discretely or anonymously only exists in few legal systems,¹²⁶ and is forbidden in most.¹²⁷ In case of discrete birth, the identity of the mother may exceptionally be disclosed to the child if so decided after a balancing of interests by an independent administrative or judicial body. In case of anonymous birth, the identity of the mother may never be disclosed to the child (or vice versa).

3. Adoption

17 Adoption. All legal systems consider adoption as a child protection measure, under strict government control in the best interest of the child. It is thus institutional rather than contractual.¹²⁸ This also applies – albeit to a lesser extent¹²⁹ – to joint adoption, second-parent adoption or stepparent adoption (by same-sex partners where possible)¹³⁰ aimed at (re-)organising parenthood in atypical families.

A contractual approach towards adoption may indeed endanger the child’s dignity.¹³¹ Some legal systems however legally protect contractual forms of adoption. First, courts seem to take into account informal adoption contracts when assessing whether formal adoption is in the best interest of the child.¹³² Second, some forms of informal adoption seem to be recognised in Canada¹³³ and Malaysia.¹³⁴ Third, some legal systems accommodate open adoption, where the parties agree on the contact that will be maintained between the family of origin and the child.¹³⁵

¹²¹ Denmark: Q7.
¹²² Finland: Q7.
¹²³ Canada: II § 2 (British Columbia and Ontario); USA [Contracting Assisted Reproduction Parentage].
¹²⁴ For example England & Wales: Q7 & Q11; Ireland: Q7.
¹²⁵ Finland: Q11, with reference to article 16 Paternity Act.
¹²⁶ France; Luxembourg. Proposals are also made in Belgium, see Q6 and in Brazil, see Q7.
¹²⁷ Croatia: Q7; England & Wales: Q7; Germany: Q7; Poland: Q7; Portugal: Q7; Spain: Q7. Also see Romania: Q7.
¹²⁸ Belgium: Q7; Brazil: Q7; Cameroon: Ch. 2, par. 1; Canada: II § 2; England & Wales: Q7; Finland: Q7; Germany: Q7; Greece: Q7; Portugal: Q7; Quebec: Ch. II, § 2; Romania: Q7; Scotland: Q7; Spain: Q7 & Q11; Turkey: Q7; USA [Legal parentage by Adoption].
¹²⁹ USA [Legal parentage by Adoption]
¹³⁰ See ECtHR (Grand Chamber), X. and others v Austria (2013), § 100.
¹³¹ Cameroon: Ch. 2, par. 1.
¹³² USA [Legal parentage by Adoption]
¹³³ Customary contractual adoption forms of aboriginal peoples: Canada: II § 2.
¹³⁴ Malaysia: Q7 & Q8.
¹³⁵ England & Wales: Q7; Finland: Q7. This is the default system in Poland: Q7.
C. Parental responsibilities

1. Introduction

18 **Context.** Parental responsibilities (also: parental authority\textsuperscript{136}, custody\textsuperscript{137} or guardianship\textsuperscript{138}) on the one hand imply rights and duties with regard to the care for a child, which encompasses both the right to make educational choices (‘legal custody’, yet the other aspects of custody of course also are ‘legal’) and residence, contact and information rights (‘physical custody’).

On the other hand, parental responsibilities encompass the management of the child’s property, which usually also comprises usufructuary rights on the child’s property.\textsuperscript{139}

Again, the imperative nature of the legal regulations on attribution, exercise and content of parental responsibilities is pointed at.\textsuperscript{140} Agreements between the parents and between the parents and third parties however are possible to some extent with regard to those aspects. Such agreements are not considered to be contracts with civil effect however.\textsuperscript{141}

19 **Religious and philosophical education.** Particularly the religious and philosophical education of children by their parents is explicitly protected throughout child law. For example in Spanish law, the parents’ instructions on religious and philosophical education must be respected in case the child is taken into foster care.\textsuperscript{142} For example, article 32 of the Irish Adoption Act requires that the parents knowingly consent to adoption by an applicant who is not of the same religion (if any) as the parents and the child.

2. Attribution and exercise

20 **Default rules.** The default position is the attribution of parental responsibilities to the legal parents.\textsuperscript{143} This attribution sometimes is guaranteed by the Constitution\textsuperscript{144} and stripping a parent from his parental responsibilities is under strict scrutiny by the courts.\textsuperscript{145}

Again, mater semper certa est and the mother of a child always has parental responsibilities.

In most legal systems, the second parent will acquire parental responsibilities in case his parenthood is established at the time of the birth of the child or soon after, or in case he is (still) partnered to the mother. Some legal systems do not automatically vest the second parent with parental responsibilities in other cases.\textsuperscript{146} The ECHR has however found that this is dis-
criminatory from the perspective of the father who is not married to the mother. An agreement with the mother or a court order would be required in order to vest these parents with parental responsibilities. Separation or divorce will not strip the second parent from his parental responsibility.

Some Western legal systems provide for the attribution of parental responsibilities to non-legal parents.

Some legal systems accommodate social (step)parents who were or are partnered with a parent, and also biological parents.

In the Netherlands, parental responsibilities can only be granted as a whole and cannot be granted to more than two persons. Stepparent parental responsibilities then only are possible in absence of a second parent with parental responsibility.

In different common law and mixed legal systems and in Finland the attribution of parental responsibilities is also possible in part and without a maximum of two persons applying. For example sperm donors may be vested with some parenting rights such as access. Such system seems in line with recent case law of the ECHR and of the Dutch Supreme Court, whereby the position of the genitor of a child is protected in terms of the right to information and contact. In Canada

"Feminist scholars have criticized the obstacles to women’s becoming ‘autonomous mothers’, including courts’ willingness to attribute parental status or visitation rights to a man (other than an anonymous donor) on account of the genetic link between him and a child."

Joint exercise of parental responsibilities applies in most legal systems as a default system, particularly for important decisions. In common law systems, it may however be allowed for persons vested with parental responsibility to act alone anyhow. This is also the case in all legal systems for daily and urgent matters. The courts may also decide on sole exercise of parental responsibilities in the best interest of the child.

In Cameroon, only the father exercises parental responsibility over his marital children.

21 Contractualisation. Waivers & transfers. Contractual waivers or transfers of parental responsibilities (as a whole or partially) generally are not accepted and often explicitly forbidden by law:

---

147 ECtHR (Fifth Section), Zaunegger v Germany (2013), § 63.
148 See for example Scotland: Q8.
149 Finland: Q6; France: Q6; Netherlands: Q6.
150 England & Wales: Q6; France: Q8; Netherlands: Q6; Scotland: Q8 (father of second female parent, not step-parent).
151 England & Wales: Q6; France: Q8; Netherlands: Q6; Scotland: Q8 (father of second female parent, not step-parent).
152 USA [Contracting Assisted Reproduction Parentage].
153 For example Ahrens v Germany (App. 45071/09), 22 March 2012, ECHR.
155 Canada: II § 2; England & Wales: Q6; Scotland: Q6.
156 Belgium: Q6; Brazil: Q6; France: Q6; Netherlands: Q6; Greece: Q6; Puerto Rico [IV. Vertical Family Law]; Québec: Ch. II, § 2; Taiwan: Q6; Turkey: Q6.
158 Cameroon: Ch. 2, par. 1.
159 E.g. Belgium: Q8 & Q11; Cameroon: Ch. 2, par. 1; Germany: Q10 & Q11; Greece: Q8; Ireland: Q7; Netherlands: Q8; Poland: Q8; Portugal: Q8 & Q11; Québec: Ch. II, § 2; Turkey: Q6 & Q11.
II.A.4. Contractualisation of family law

For example it usually is not possible for parents to contract on parental responsibilities in case they live together (‘going concern’), for example to agree on sole instead of joint custody.\textsuperscript{162}

A non-parent also cannot waive the qualification of standing \textit{in loco parentis}.\textsuperscript{163}

Only some legal systems however contain a \textit{duty} to exercise e.g. residence or contact rights.\textsuperscript{164}

\textbf{22 (Cont’d). Not going concern.} Transfers of parental responsibilities are accepted to some extent however.

In case of separation or divorce, agreements on the attribution of (sole or shared) parental responsibilities are possible\textsuperscript{165} and sometimes even obliged.\textsuperscript{166} The court will only impose an arrangement in case the parents do not reach an agreement. Agreements are however usually under the scrutiny of government bodies (see Ch. 3). The Dutch reporters consider the parenting plan required upon separation quite contrary to contractual freedom, since the civil code imposes both the plan and its content.\textsuperscript{167}

Besides, some legal systems accommodate so-called co-parenting agreements between parents and non-parents\textsuperscript{168} or openness agreements between adoptive parents and the biological parents (also see above),\textsuperscript{169} sometimes subject to judicial approval.\textsuperscript{170}

Some legal systems furthermore allow persons with parental responsibilities to transfer the ‘factual custody’ or other aspects of the parental responsibilities to a third party.\textsuperscript{171} The third parties concerned however would only acquire precarious privileges.\textsuperscript{172}

Finally, delegation of parental responsibilities is also possible under court supervision.\textsuperscript{173} Interestingly, in France also shared delegation is possible. This is a court order under which a parent or both parents share (some) parental responsibilities with a third party, who

\textsuperscript{161} Romania: Q11 also refers to a statutory provision, sc art. 31 (2) Act n° 272/2004 of 21 June 2004.
\textsuperscript{162} Belgium: Q6; Canada: II § 2; Denmark: Q6.
\textsuperscript{163} Canada: II § 2, with reference to \textit{Doe v Alberta}, 2007 ABCA 50 [http://canlii.ca/t/1qhjr] (with regard to maintenance).
\textsuperscript{164} E.g. Croatia: Q6; Poland: Q6.
\textsuperscript{165} For example Denmark: Q8 & Q11; Finland: Q8; Greece: Q8; Malaysia: Q8; Portugal: Q8; Romania: Q8.
\textsuperscript{166} In most cases when parents want to divorce by mutual consent (for example France: Q9; Greece: Q10; Romania: Q10; Spain: Q10), but in the Netherlands in all cases of parental separation or divorce. Netherlands: Q8.
\textsuperscript{167} Netherlands: Q8.
\textsuperscript{168} England & Wales: Q8; USA [Non-Legal Parents].
\textsuperscript{169} Canada: II § 2.
\textsuperscript{170} Cameroon: Ch. 2, par. 1; France: Q6; Portugal: Q7; Romania: Q8.
\textsuperscript{171} For example Belgium: Q9; s. 2(9) Children [England, Wales Scotland and Northern Ireland] Act 1989; Finland: Q8; Greece: Q8; Poland: Q8; Romania: Q8; Taiwan: Q8.
\textsuperscript{172} For example Québec: Ch. II, § 2.
\textsuperscript{173} For example Denmark: Q11.
can be family member or other trustworthy next-of-kin, or a child protection service or institution (art. 377 CC).

The relation between the third party and the child may sometimes be judicially protected against the will of the parents. The foundation thereof is the family life that has been built up, rather than the former agreement that existed between the parents and the third party.

Parents finally may give up their children for foster care or adoption; in some countries emancipation of the child is also possible. What is decisive in these cases is the best interest of the child, and certainly not the right to self-determination of the parent(s). We will not further elaborate on child protection law in this report.

3. Content

23 Agreements. Some legal systems explicitly or implicitly allow parents who are ‘going concern’ to reach an understanding on future practices regarding their parental responsibilities.

For example the Ontario Family Law Act (R.S.O. 1990, c. F.3, s. 52 (1)) explicitly provides that “[t]wo persons who are married to each other or intend to marry may enter into an agreement in which they agree on […] (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; Article 376-1 of the French Civil Code more implicitly states that “the Family Court may […] take into consideration the pacts which the father and mother may have freely concluded between them […]”

Such private arrangements also sometimes are encouraged, for example in (law-)packs in Scotland and in England & Wales and by the courts in France. In some legal systems, it seems unusual for parents to conclude arrangements of this kind.

As aforementioned, the situation is different in case of separating or divorcing parents. These parents may, and sometimes must, reach an agreement on the joint or sole exercise of the parental responsibilities and also on some substantive aspects of parental responsibilities, particularly educational choices and the housing of the child.

24 Legal relevance of agreements. ‘Family Constitutions’, ‘Domestic Contracts’, ‘Family Pacts’ or instruments alike regarding the content of parental responsibilities usually are not considered enforceable civil contracts.

For example article 4 of the German Act on the Religious Upbringing of Children provides that “agreements on the religious upbringing of a child have no civil effect”. Article 341 § 2 Turkish Civil Code even provides that such agreements are deemed void.

174 See France: Q8.
175 See for example ECtHR (Chamber), Hokkanen v Finland (1994), § 64.
176 France: Q11; Spain: Q11.
177 France: Q9.
178 France: Q9; Spain: Q10.
180 Canada: II § 2.
181 France: Q9.
182 Croatia: Q9; Finland: Q9; Germany: Q10; Greece: Q10; Ireland: Q9; Netherlands: Q9; Poland: Q10; Portugal: Q10; Scotland: Q9 & Q10; Turkey: Q9; USA: [Parents Without Contracts] and [Child Custody Settlement Contracts].
183 Germany: Q9 and also see Netherlands: Q9, with reference to Hoge Raad 20 May 1938, NJ 1939, 94 and Poland: Q9.
The Scottish Government therefore explicitly indicates in the Parenting Agreement for Scotland pack that

“it is important to remember that the Parenting Agreement itself is not a legal contract and is not intended to be enforced by the courts. By completing and signing the Parenting Agreement you are not making a legally binding commitment, this is not its purpose.” The signature box specifies that “by signing above, you are simply confirming what you have jointly agreed and there is no legal commitment in doing so.”

The reasons therefore are the following. First, agreements cannot oust the jurisdiction of the courts to determine the best interest of the child. In most legal systems, the agreement between the parents will only become enforceable if so ordered or homologated by court (see infra para 60). In the light of the respect for family privacy, however

“a court order should not be made unless it would be better in all the circumstances of a case to make one” in Scots law. The English reporters elaborate that sometimes issuing a court order, which endorses a parental agreement may sometimes be the better option. The courts may also refrain from making agreements between the parents enforceable and issue a consent order, so as to allow them to petition the courts later without having to prove changed circumstances.

Second, the parents can always petition the court to review their arrangements in the light of changed circumstances or, even without changed circumstances, in the best interest of the child (see infra para 75).

Fourth, several national reporters point at the fact that parental agreements are not binding upon the child who is capable of forming his own views. This is particularly so with regard to religious and philosophical choices.

D. Maintenance

25 Default rules. Maintenance obligations – in kind or through maintenance payments – exist towards children in all legal systems and are closely linked with public family law. In some systems, but not in other, the obligation applies beyond the age of majority in favour of children who are still studying.

Legal parents have maintenance obligations whether or not they exercise parental responsibility. Non-parents with parental responsibility sometimes also have maintenance obligations. Furthermore, such obligations sometimes also rest on non-parents with no parental responsibility, e.g. the genitors of the child or the stepparent.

---

184 Turkey: Q9.
186 Canada: II § 2; England & Wales: Q5 & Q9 & Q10, with reference to Al v MT [2013] EWHC 100 (Fam); France: Q9; Germany: Q10, with reference to Bundesgerichtshof 11 May 2005, FamRZ 2005, 1741; Greece: Q10; Ireland: Q9; Spain: Q10. See also Doe v Alberta, 2007 ABCA 50 [http://canlii.ca/t/1qhjr], § 26 (with regard to maintenance).
188 England & Wales: Q10.
189 England & Wales: Q9; France: Q9.
190 Denmark: Q9; Ireland: see s. 17(2) Guardianship of Infants Act 1964; Romania: Q9 & Q10; Scotland: Q9; Turkey: Q9.
191 E.g. Scotland: Q6
192 Belgium: Q6; Canada: II § 2 (Ontario); Puerto Rico [IV. Vertical Family Law]; Turkey: Q6.
193 Cameroon: Ch. 2, par. 1; France: Q6.
195 Canada: II § 2; England & Wales: Q6; Ireland: Q6; Netherlands: Q6; Poland: Q6.
26 Contractual arrangements. Because of the links with public family law, contractual arrangements can only concern modalities of the maintenance obligation, but not the obligation itself.\textsuperscript{196} Parents in other words cannot shift their responsibility onto collective resources.\textsuperscript{197} They also are stimulated to agree on child support rather than collecting it through government agencies.\textsuperscript{198}

It is generally accepted that third parties may assume maintenance obligations by contract.

§ 3. Partners

A. Introduction

27 Plan. The denominator “Husband and Wife” only in a minority of legal systems still covers the law on private law relationships between adult socio-affective, romantic or sexual partners.\textsuperscript{199} We have therefore chosen the neutral title “Partners”. Hereinafter, we will first provide a short general overview of the three generally accepted types of relationships, before discussing the contractualisation of respectively formation, content and dissolution of (formal) relationships. We will not elaborate LAT-relationships.

B. General overview

28 Marriage. Marriage exists, under that name, in all legal systems and still is the foremost status, ‘both qualitatively and quantitatively’\textsuperscript{200}. It brings along imperative statutory intervention with regard to its formation, content and dissolution.

Some reporters point at a de-institutionalisation of marriage,\textsuperscript{201} leaving more leeway for the parties’ will than for the public will.\textsuperscript{202} For example, divorce-on-demand is now available in some legal systems (see \textit{infra} para 42). This evolution fits in with the on-going movement of marriage law between the two poles status and contract,\textsuperscript{203} and towards the latter during the last decades.

Besides, the general law on obligations and contracts is also increasingly applied to spouses in case marriage law would not sufficiently protect their interests, for example in order to compensate the contribution by one spouse in the other spouse’s business or property\textsuperscript{204} (see \textit{infra} para 40).

A growing number of Western legal systems, and also Brazil following a Constitutional Court decision, have opened marriage to partners of the same sex in recent years.\textsuperscript{205} This is not (yet) the case particularly in the Eastern European, Far-Eastern and African systems reported on.

\textsuperscript{196} Germany: Q11; Malaysia: Q8; USA [Child Support Settlement Contracts].
\textsuperscript{197} Romania: Q6.
\textsuperscript{198} England & Wales: Q10 and see more generally C. SKINNER en J. DAVIDSON, “Recent trends in child maintenance schemes in 14 countries”, \textit{Intl. J. Law, Policy, Fam.} 23 (2009), 25-52
\textsuperscript{199} For example in Cameroon: Ch. 2, par. 2; Malaysia: Q12; Poland: Q12; Romania: Q12; Taiwan: Q12.
\textsuperscript{200} Belgium: Q12.
\textsuperscript{201} France: Q12.
\textsuperscript{202} USA [Marriage as Contract?].
\textsuperscript{203} Romania: Q13; USA [Marriage as Contract?].
\textsuperscript{204} Belgium: Q15; France: Q15.
\textsuperscript{205} Belgium; Brazil; Canada; England & Wales; France; Scotland; The Netherlands; USA (\textit{partim}).
Marriage is still reserved to two partners in all systems except in Cameroon\textsuperscript{206} and some of the Malaysian states, under their respective Muslim Family Law Acts.

29 Registered Partnership. Registered partnership schemes are only not available in a minority of legal systems. Where they are available, a patchwork of regimes exists on which generally two different mindsets seem to apply.

On the one hand, legislatures have created a registered partnership as “functional equivalent to [exclusively opposite-sex] marriage”\textsuperscript{207}, which laws on formation, content and dissolution are (gradually) mirrored into the registered partnership.\textsuperscript{208} Some of those regimes, but not all, were exclusively reserved to same-sex couples. Small, but symbolically important, differences with marriage seem to subsist, not only in the ‘vertical’ (parent-child) effect of registered partnership, but also in its ‘horizontal’ content.\textsuperscript{209} Examples are the impossibility to opt for a common family name, the absence of a duty of fidelity and easier dissolution.

In some of those legal systems, marriage has meanwhile been opened to same-sex couples. The exclusively same-sex registered partnership thus became ‘redundant’ and has been abolished for future registration in Denmark,\textsuperscript{210} and will probably be abolished in several states in the USA.\textsuperscript{211} This is not (yet) the case in England \& Wales, where the paradoxical result now is that opposite-sex couples can only marry, but same-sex couples have a choice between marriage and civil unions.\textsuperscript{212} Different opposite-sex couples have contended before the ECHR\textsuperscript{213} that this is discriminatory. Interestingly, the Dutch registered partnership – for both opposite-sex and same-sex partners, was deliberately upheld after the opening of marriage. Socio-legal research had shown that there was a societal demand for a non-symbolic alternative to marriage.\textsuperscript{214}

On the other hand, other legislatures have conceived their registered partnerships schemes as ‘mini-maries’, accessible for both opposite- and same-sex partners.\textsuperscript{215} These schemes are rather contractual in nature.\textsuperscript{216} They have fewer legal consequences in both private and public family law and hence formation and dissolution are also more leniently organised in law. Some reporters however point at a trend towards “matrimonialisation” of these schemes,\textsuperscript{217} which is now considered to be a civil status.

30 Cohabitation. In a minority of legal systems, cohabitation is still considered contrary to the numerus clausus of family relations\textsuperscript{218} and for example a surviving partner cannot claim

\textsuperscript{206} Cameroon: Ch. 2, par. 2.
\textsuperscript{207} England \& Wales: Q12.
\textsuperscript{208} Finland: Q12; Germany: Q12; Ireland: Q12; The Netherlands: Q12; Scotland: Q12; USA [No Marriage and No Contract]. A same reform is underway in Croatia: Q12. This is not (yet) the case in England \& Wales, where the paradoxical result now is that opposite-sex couples can only marry, but same-sex couples have a choice between marriage and civil unions.\textsuperscript{212} Different opposite-sex couples have contended before the ECHR\textsuperscript{213} that this is discriminatory. Interestingly, the Dutch registered partnership – for both opposite-sex and same-sex partners, was deliberately upheld after the opening of marriage. Socio-legal research had shown that there was a societal demand for a non-symbolic alternative to marriage.\textsuperscript{214}

On the other hand, other legislatures have conceived their registered partnerships schemes as ‘mini-maries’, accessible for both opposite- and same-sex partners.\textsuperscript{215} These schemes are rather contractual in nature.\textsuperscript{216} They have fewer legal consequences in both private and public family law and hence formation and dissolution are also more leniently organised in law. Some reporters however point at a trend towards “matrimonialisation” of these schemes,\textsuperscript{217} which is now considered to be a civil status.

30 Cohabitation. In a minority of legal systems, cohabitation is still considered contrary to the numerus clausus of family relations\textsuperscript{218} and for example a surviving partner cannot claim
damages in tort law against the person responsible for the death of the other partner. In some other legal systems, cohabitation is still ignored.\textsuperscript{219}

A growing number of legal systems attach legal consequences to cohabitation in \textit{public family law}, for example for tax purposes, in social security schemes or in provisions on protection against domestic violence.\textsuperscript{220}

In \textit{general private law}, cohabitation is taken into consideration for example in the context of employee benefits.\textsuperscript{221}

A variety of approaches finally exist with regard to the \textit{private family law} perspective on cohabitation.

First, the application of the general law on obligations and contracts to cohabitants is accepted. This means, \textit{on the one hand}, that cohabitants may contractually organise their rights and obligations towards each other without risk of qualification of those arrangements as \textit{pretium stupri} (reward for sexual relations) and thus void for public policy reasons \textit{per se}:

\begin{quote}
"The fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services."
\end{quote}

In some legal systems, such cohabitation agreements are explicitly provided for.\textsuperscript{222} \textit{On the other hand}, in absence of an agreement, cohabitants can rely on general legal concepts such as unjust enrichment, without being barred therefrom on the basis of their relationship.\textsuperscript{223} As the \textbf{Canadian} reporter puts it:

\begin{quote}
""Love" does not justify a transfer that would otherwise be reversible as unjust and the services rendered will usually be valued in a market oriented way."
\end{quote}

Even more, the application of the general legal concepts is sometimes \textit{"matrimonialised"} in order to better take into consideration the particular context of the relationship.\textsuperscript{224} For example, a fiduciary or confidential relationship between the partners may be accepted more easily, or unjust enrichment may lead to a 50\%\slash 50\% division of acquired property by the family joint venture as if there was a marriage.\textsuperscript{225}

\begin{quote}
"Restricting the money remedy to a fee-for-service calculation is inappropriate [...]. It fails to reflect the reality of the lives of many domestic partners. [...] While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to
\end{quote}

\begin{thebibliography}{9}
\bibitem{219} For example in Romania: Q12.
\bibitem{220} Belgium: Q12; England & Wales: Q12; Finland: Q12; France: Q12; Portugal: Q12; Scotland: Q12; USA [No Marriage and No Contract].
\bibitem{221} USA [No Marriage and No Contract].
\bibitem{222} \textit{Marvin v Marvin} (1976) 18 Cal.3d 660, retrieved at http://online.ceb.com/calcases/C3/18C3d660.htm on 24 April 2014, partly cited in USA [No Marriage and No Contract]. Also see Cameroon: Ch. 2, par. 2; Denmark: Q12; England & Wales: Q12; France: Q15; Québec: Ch. II, § 3.
\bibitem{223} For example Greece: Q12.
\bibitem{224} Belgium: Q12; France: Q12; The Netherlands: Q12; Portugal: Q15; Puerto Rico [Horizontal Family Law]; USA [No Marriage and No Contract].
\bibitem{225} Canada: Ch. II, § 3.
\bibitem{226} Germany: Q12 with reference to BGH 9 July 2008, XII ZR 179/05, BGHZ 177, 193.
\end{thebibliography}
share in the other’s property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives.”228

Second, some legal systems have introduced a default family law protection for cohabitants that is either imperative,229 or organised on either an opt-in or (controlled) opt-out230 basis. The protection may be higher for cohabitants who reach thresholds that qualify them for (enhanced) protection, such as a minimum period of cohabitation or a common child.231 These cohabitation schemes are always based on “approximations of marriage”232, even where not based on theories of common law marriage233 or their continental counterparts. The USA reporters rightly question such paradigm. The legal protection so granted primarily concerns the property of the partners or one of them, and particularly the household home and assets. They may also concern compensatory payments.234 Support obligations are more rarely applied,235 as they still seem to be considered the exclusive core of the civil status acquired through marriage or registered partnership.236

C. Formation

31 No exemption from mandatory conditions. Mandatory rules apply to both the substantive and formal conditions to marry and, to a lesser extent, to enter into a registered partnership. All reporters stress that neither (future) spouses nor third parties may exempt the spouses from respecting these conditions.237 Not only the spouses but also government agents and all third parties concerned may usually petition the court to declare null and void a marriage concluded contrary to those conditions.238

Some substantive conditions apply in all legal systems, such as the conditions of competence and being of age – with a possibility of dispensation239 – and impediments on the basis of kinship and affinity.

As a solemn contract, formal relationships must always be concluded before a public authority. This generally is the civil registrar, and in many systems240 also or an agent of minister of recognised religious or philosophical organisations, at least for opposite-sex relationships.241

32 Adding conditions? Notwithstanding the above-mentioned public interest in the formation of marriage and registered partnership, the fundamental freedom to marry or not to marry is stressed by most reporters and is linked to the contractual nature of entering into a marriage or a registered partnership.242 In some legal systems, the freedom to marry is consti-

---

229 Brazil: Q12; Finland: Q12; Portugal: Q12; Scotland: Q12; USA [No Marriage and No Contract].
230 Ireland: Q12.
231 Finland: Q12; Ireland: Q12.
232 USA [No Marriage and No Contract].
233 See on the difference Puerto Rico [Horizontal Family Law].
234 For example in Finland: Q12.
235 For example in Croatia: Q12.
236 For example Denmark: Q12.
237 See for example Canada: Ch. II, § 3 & Q13; Croatia: Q13; Québec: Ch. II, § 3; Ireland: Q13; Malaysia: Q13; Poland: Q13; Romania: Q13; Taiwan: Q12; Turkey: Q13; USA [Getting Married].
238 For example Croatia: Q12; Québec: Ch. II, § 3.
240 For example Brazil: Q12; Canada: Ch. II, § 3; Croatia: Q12; Denmark: Q12; Greece: Q12; Portugal: Q12; Scotland: Q12; Spain: Q13.
241 Denmark: Q12; Scotland: Q12.
242 Germany: Q12; Portugal: Q12.
All legal systems also particularly contain rules on the full and free consent of both spouses: ‘Consensus non concubitus facit nuptias’. Some legal systems strictly regulate marriage or dating agencies.

However, contractual freedom is not accepted when it comes to limiting the freedom to marry or to enter into a registered partnership, or to adding substantive or formal conditions thereto. This applies both to the (future) partners themselves (infra para 33) and to third parties (infra para 34). One of the reasons therefore is that the parties, by consenting, enter into a relationship which content is imperatively regulated and that they cannot freely dissolve.

33 (Cont’d). (Future) partners. Betrothal is explicitly regulated in some legal systems, always with the caveat that betrothal does not civilly oblige either party to subsequently enter into marriage (or a registered partnership). Article 267 Romanian Civil Code explicitly forbids penalty clauses in this regard.

Depending on the circumstances of the case, refusal of marriage can give rise to a claim in damages. The same applies in legal systems where betrothal is not explicitly regulated.

In almost all legal systems, the parties can also not limit their or each other’s freedom (not) to marry or to enter into a registered partnership by adding suspensive or resolutive conditions to their consent. Such limitations are considered contrary to the right to self-determination. Some legal systems explicitly prohibit this.

Article 45, 2nd sentence Spanish Civil Code thus provides that the condition, term, or mode of consent shall be void. Under § 1311, 2nd sentence German Civil Code, the consent cannot be given under a condition or time limit.

In other legal systems, such conditions would be considered null and void for public policy reasons, for example if they concern the payment of a dowry. In Cameroon, conditions to a spouse’s consent are however accepted, such as the condition of graduating or of giving birth to a living child.

34 (Cont’d). Third parties. Third parties may want to directly or indirectly encourage or discourage a party to enter into a formal relationship, for example through conditions to a gift or bequest or as a resolutive clause in an employment contract. Conditions or clauses may also add substantive or formal conditions to entering into a formal relationship, for example the condition (not) to marry before reaching a certain age.

A marriage or registered partnership concluded contrary to the abovementioned conditions or clauses is perfectly valid if the imperative statutory conditions have been respected.

243 For example France: Q13; Portugal: Q13.
244 For example Belgium: Q12; Brazil: Q12; Cameroon: Ch. 2, par. 2; Germany: Q13; Spain: Q13.
245 Scotland: Q13.
247 Belgium: Q13; Canada: Ch. II, § 3; USA [Getting Married].
248 USA [Marriage as Contract?].
249 Cameroon: Ch. 2, par. 2; Romania: Q12 & Q13 and articles 267 and 268 Civil Code; Scotland: Q13 and s. 1 (1) Law Reform (Husband and Wife) (Scotland) Act 1984; Spain: Q13 and articles 42-43 Civil Code; Turkey: Q12.
250 Belgium: Q13; Brazil: Q13; Greece: Q13; Poland: Q13; Portugal: Q13; The Netherlands: Q13; Turkey: Q13.
252 Cameroon: Ch. 2, par. 2.
253 England & Wales: Q13; Finland: Q13; Germany: Q13; Greece: Q13; Romania: Q13.
However, in the “external dimension”\textsuperscript{254} vis-à-vis the third party, the consequences of not respecting the conditions or clauses will differ. In some legal systems, the – mostly financial – sanctions may apply.\textsuperscript{255} Article 268 (1) Romanian Civil Code for example explicitly provides for the restitution of gifts made in consideration of a betrothal or subsequent marriage, in case the engagement is broken. In most cases however, the abovementioned conditions or clauses would be considered to infringe on the freedom (not) to marry or to be otherwise contrary to public policy and will be null and void,\textsuperscript{256} or at the least not enforceable. Some legal systems even explicitly prohibit adding conditions and clauses with regard to marriage, for example in testaments.\textsuperscript{257}

\section*{D. Content}

\subsection*{35 In all legal systems, marriage and registered partnership bring about legal consequences that are at least in part imperative. These imperative consequences are more comprehensively regulated in continental legal systems, and systems based thereon, than in other systems. In either system, the mandatory regulation of the content of formal relationships seems to be on its return. Now that divorce or partnership dissolution seems socially more accepted, partners rather opt for dissolution than to litigate on their rights and obligations standing their formal relationship. Formal relationships therefore basically have become schemes that make accessible a minimal protection upon divorce or dissolution, which is now more extensively regulated than formal relationships ‘going concern’.\textsuperscript{258} }

We will hereinafter look into contractualisation of respectively the personal and patrimonial mandatory content of formal relationships. We will not elaborate on property relations between spouses as such.

\subsection*{1. Personal content}

\subsection*{36 Overview.} In some legal systems, personal rights and obligations in formal relationships are not explicitly provided for.\textsuperscript{259} The matter belongs to the private sphere of the partners, who may agree on its content. Other legal systems only generally refer to a duty to establish a life community (\textit{consortium omnis vitae}).\textsuperscript{260} In a number of legal systems, this \textit{consortium} is regulated more in detail, for example by obliging to spouses to cohabit, to fidelity and to assist each other. These regulations sometimes also contain some rights the partners may agree on, such as the location of their matrimonial home, a joint family name or the decision to have children or not.\textsuperscript{261} The applicability of this imperative content may also be dependent upon the choice for a covenant marriage.\textsuperscript{262} Is does not always equally apply to registered partners.\textsuperscript{263}

\begin{thebibliography}{9}
\bibitem{254} Terminology in Romania: Q13.
\bibitem{255} Belgium: Q13; Greece: : Q13; Finland: Q13.
\bibitem{257} Article 223\textsuperscript{3°} Portuguese Civil Code.
\bibitem{258} On the above: Canada: Ch. II, § 3; Germany: Q12 & Q15; Scotland: Q14; USA [Rights and Responsibilities During Marriage].
\bibitem{259} Canada: Ch. II, § 3.
\bibitem{260} Germany: Q12 & Q14 & Q15; Ireland: Q12.
\bibitem{261} Belgium: Q12 & Q14; Cameroon: Ch. 2, par. 2; Croatia: Q12 & Q14; Poland: Q14; Québec: Ch. II, § 3; Romania: Q14; Spain: Q14; The Netherlands: Q14.
\bibitem{263} Belgium: Q12; France: Q12 & Q14.
\end{thebibliography}
37  **No opting out or in.** On the one hand, formal partners generally are not allowed to, wholly or partly, opt out their personal rights and duties. They could risk their marriage being considered null and void, for example as sham marriage not aimed at establishing a life community.

The parties’ contractual freedom is limited to exercising the options provided for in the law. The agreement between the partners however would not be considered binding for the future, for example with regard to the decision to have children or not. To consider such agreements binding would be an infringement on each partner’s personality rights. Only the English reporters more convincingly refer to the parties’ freedom to determine the content of their marriage; in England & Wales the law contains no explicit personal rights and obligations. An arrangement by which the spouses decide not to consume their marriage would therefore be valid if based on an objectively reasonable argument. Only in absence of such reason could the arrangement be found invalid for public policy reasons.

One exception that seems to be generally admitted is the separation agreement, in which the partners agree that they will not cohabit and regulate the financial consequences of that situation. The Cameroonian reporter also refers to agreements between the husband and his different spouses on their alternating cohabitation.

On the other hand, cohabitants are not allowed either to opt in all or some of the personal rights and obligations of formal partners in case this could be considered an infringement on their personal liberty. This position of course can make one think on the compatibility of the rights and obligations of matrimonium with the formal partners’ freedom.

Formal partners in any case could not add personal rights and obligations to the legal ones.

38  **“Obligations that do not oblige”.** Almost all reporters point at the fact that the personal rights and duties generally are not enforceable or at least not enforceable in kind in case they are not executed. They “do not have a civil law character, but only family law features”.

Parties may also not contractually provide for enforceability. Agreements on personal rights and obligations moreover are considered superfluous for the law itself already obliges the partners.

A partner besides can easily decide to withdraw from his obligations by petitioning for divorce.

---

264 For example Belgium: Q12 & Q14; Croatia: Q14; France: Q12 & Q13; Germany: Q14; Portugal: Q14; Québec: Ch. II, § 3; Spain: Q14; Turkey: Q14.
265 For example Romania: Q14 and article 308 Civil Code.
268 Germany: Q14; Ireland: Q12; Romania: Q14 and article 309 Civil Code; Spain: Q14; USA [Postnuptial and Separation Contracts].
269 Cameroon: Ch. 2, par. 2.
270 Belgium: Q14.
271 Portugal: Q14.
272 Spain: Q14.
273 Belgium: Q14; Canada: Ch. II, § 3; Croatia: Q12 & Q14; Finland: Q14; Greece: Q14; Ireland: Q12 & Q14; Portugal: Q14; Scotland: Q14; Spain: Q14; The Netherlands: Q14; Turkey: Q14; USA [Rights and Responsibilities During Marriage].
274 Poland: Q14.
275 USA [Premarital Contracts].
The parties may however *indirectly* make their arrangements binding upon each other by two means. On the one hand, the non-respect of the personal rights and duties is indirectly taken into consideration when deciding on the irretrievable breakdown of the marriage or registered partnership, and sometimes also when deciding on the consequences of divorce or dissolution of the partnership (see *infra* para 41 et seq). An ex-spouse for example can be excluded from post-divorce support on the basis of faulty behaviour. For the assessment of that behaviour, the courts may take into consideration documents in which the partners have explicitly formulated which expectations they have from their relationship, and in which they may have defined which behaviour would cause a breakdown of the marriage or registered partnership. This may be considered a soft, indirect, form of contractualisation.

On the other hand, the spouses may include “*Good Boy Bad Boy*-clauses” that may serve as carrot or stick and

- give access to or exclude from financial benefits,
- be used as liquidated damages clause, or even, where allowed,
- serve as a penalty clause.

The matter is of course controversial, for divorce and post-divorce support have long been considered the only applicable sanctions in case of non-respect of marital duties. With the introduction of no-fault divorce and support, “*Good Boy Bad Boy*-clauses may however have a new future. Also, liquidated damages seem accepted in case of cohabitants, in their arrangements on the legal consequences of the exercise of their freedom to end cohabitation.

2. *Patrimonial content*

*Overview.* The right to consortium between the spouses and, to a lesser extent, registered partners, also implies the establishment of the household as economic entity. The law in almost all legal systems therefore regulates the core of such entity, usually comprising the protection of the household home and furniture, a mutual financial support duty, a duty to contribute to the household expenses and several liability for those expenses. These rights and obligations are enforceable and the parties may not contractually deviate from their fundamentals at the least not to *limit* rights and duties, “*Good Boy Bad Boy*-clauses (see *supra* para 38) are possible. Contractual freedom is also more easily accepted in case of postnuptial or separation agreements in which the partners organise their separation and these agreements remain binding *rebus sic stantibus* (also see *infra* para 70).

---

276 Croatia: Q14; Greece: Q14; Romania: Q14; Spain: Q14; Turkey: Q14.
277 Canada: Ch. II, § 3; USA [Rights and Responsibilities During Marriage].
278 Greece: Q16; Romania: Q16; USA [Premarital Contracts].
279 The term refers to “*Good Boy Bad Boy*”, a 1985 video work by the American artist Bruce Nauman. The term “bad boy clauses” is used by the Armerican reporters in USA [Premarital Contracts].
282 France: Q12 & Q13; Québec: Ch. II, § 3.
283 See in general Belgium: Q12; Canada: Ch. II, § 3; Denmark: Q14; Finland: Q12 & Q14 & Q15; France: Q13; Germany: Q12; Ireland: Q12; Poland: Q14; Québec: Ch. II, § 3; Scotland: Q14; The Netherlands: Q15, but also see article 1:84 (3) Civil Code; USA [Rights and Responsibilities During Marriage].
284 Croatia: Q14 & Q15.
285 Ireland: Q12; USA [Postnuptial and Separation Contracts].
Cohabitants are allowed to opt in the patrimonial protection and, as mentioned supra para 30, the core protection sometimes also applies automatically in part.

40 Non-financial contribution to household expenses. Many national reporters have focused on the duty of both partners to contribute to the household expenses according to their possibilities. It is still mostly women who take up the task of homemaker and thus contribute to the household expenses in kind, whereas men mostly contribute in cash. The default legal rules then provide for an indirect compensation for the economic weaker party upon the dissolution of the marriage or registered partnership, through the division of the matrimonial property, support and, in some cases, compensatory payment (see infra para 45).

The question however has arisen whether formal partners can avoid that one of them becomes economically dependent on the other, by explicitly providing for a compensation of non-financial contributions in the household expenses standing the marriage or partnership, and not only at its dissolution, for example in a prenuptial agreement.

In some legal systems, such agreements are not accepted for the marriage or registered partnership itself obliges the partners to contribute in kind and this obligation may not be monetised; it is the classical argument of status versus contract. There is of course a remarkable difference with cohabitants, who are not matrimonially obliged to contributions in kind and who may arrange for a market-oriented compensation of their contributions, as long as the compensation cannot be considered pretium stupri (see supra para 30). This issue really touches the core of what family law is.

In other legal systems, formal partners also are not allowed to conclude agreements on compensation, but only standing the marriage. Some of these systems generally provide for a compensatory payment upon the dissolution of the marriage, and the parties at that time are allowed to settle. The same applies in other legal systems that specifically provide for compensatory payments for the partner who contributed to the business of the other partner. In some other of these systems, the general law on obligations, contracts and companies applies and the existence of a business partnership sui generis is accepted.

Only a minority of legal systems allow registered partners to conclude agreements on the compensation of their contributions in kind in the household, standing the relationship.

For example, article 1003-I of the Taiwanese Civil Code provides that “[t]he payments for living expenses of the household will be shared by the husband and the wife according to each party’s economic ability, household labor or other conditions unless otherwise provided for by law or mutual agreement.” Article 1:84 para 3 of the Dutch Civil Code also explicitly provides that the spouses may derogate from the default rules on household expenses in a written agreement.

The Taiwanese reporter however points at the risk of bargaining inequalities, a.o. based on gender.

In some of these systems, the partners can rely on agreements on the organisation of the household, whereby they agreed that one of them is the homemaker and cannot be expected to

---

286 For example USA [Cohabitation Contracts].
287 See extensively Taiwan: Q12.
288 For example Greece: Q15; The Netherlands: Q15.
289 Finland: Q15; France: Q12; Germany: Q17; Greece: Q15; Ireland: Q15; Québec: Ch. II, § 3; Romania: Q15 & Q16 and article 390 Civil Code; Spain: Q17; Taiwan: Q12.
290 For example Finland § 64 Marriage Act; Romania: article 328 Civil Code.
291 Belgium: Q15; France: Q15; Germany BGH 9 July 2008, XII ZR 179/05, BGHZ 177, 193, § 27; Portugal: Q15.
292 Also see Cameroon: Ch. 2, par. 2; Finland: Q15; Malaysia: Q14; Portugal: Q15; Turkey: Q15.
293 Taiwan: Q12.
gain a professional income. These agreements are considered binding until a change of circumstances occurs.

E. Dissolution and its consequences

1. Dissolution

41 Overview: the right to divorce. Divorce law has been liberalised throughout the world during the last decades; it has become easier for spouses to divorce.

First, no-fault divorce has by and large replaced fault divorce as foremost ground for divorce. No-fault divorce is generally available under the generic denominator “irretrievable breakdown of the marriage”, which can be proven or which is presumed after a period of separation or in case of a common request or a request by one spouse that is accepted by the other. In some legal systems, fault divorce subsists either beside no-fault divorce or under the umbrella of the irretrievable breakdown of the marriage, as proof thereof.

Second, ‘divorce-on-demand’ has been introduced, that is: the conditions under which divorce is available upon simple request have been relaxed. Divorce-on-demand by one spouse is more generally available after a period of separation or of reflection. These periods are shorter or not applicable in case the spouses jointly petition divorce or in case one spouse accepts the request of the other. Divorce by mutual consent is only available as separate ground for divorce in some legal systems and where it is possible, spouses are not always expected to reach an agreement on all the consequences of their divorce. Only some legal systems allow one spouse to apply for divorce without further conditions once the spouses have been married for a minimum period.

Third, the formal conditions for divorce have been eased. In a growing number of legal systems, ‘out-court divorce’ is now available either before the civil registrar or before the notary public. The conditions may differ according to whether or not the spouses have minor children and to whether or not they have reached an agreement on the consequences of the divorce.

Only the Croatian and Polish reporters refer to so-called negative conditions for divorce. In some cases the courts may refuse or postpone the divorce in the interest of the children, the other spouse or for public policy reasons. Such clauses also exist in some other legal systems.

294 For example Belgium art. 301, § 3, para 2 and § 5 Civil Code; Germany: Q15.
295 Belgium: Q12; Canada: Ch. II, § 3; Croatia: Q12; England & Wales: Q12; Finland: Q12; Germany: Q12; Greece: Q16; Ireland: Q12; Malaysia: Q16; Portugal: Q16; The Netherlands: Q12; Scotland: Q12; USA [Getting Divorced].
296 For example Puerto Rico [Horizontal Family Law]; Taiwan: Q12.
297 For example Belgium: Q12; Canada: Ch. II, § 3; Québec: Ch. II, § 3; Scotland: Q12; USA [Premarital Contracts].
298 Belgium: Q12; Croatia: Q12; Denmark: Q12; Finland: Q12; Spain: Q13 & Q16; The Netherlands: Q12.
299 It is for example in Belgium: Q12; Croatia: Q12; Greece: Q16; Malaysia: Q16; Puerto Rico [Horizontal Family Law]; Romania: Q16; Taiwan: Q12.
300 Brazil: Q16; Denmark: Q17; Romania: Q16; Taiwan: Q12. Administrative divorce will probably also be possible in The Netherlands soon: The Netherlands: Q12.
301 Denmark: Q17; Romania: Q16. Comp. Québec: Ch. II, § 3 and The Netherlands: Q12 with regard to the registered partnership.
302 Croatia: Q16; Poland: Q16.
The conditions for the dissolution of a registered partnership generally have been more liberal than for divorce, and may have caused the liberalisation of divorce too.

In some legal systems, separation from bed and board is still available. We will not elaborate this little used regime.

42 Contractualisation. The abovementioned increasing role of self-determination notwithstanding, contractual freedom with regard to the substantive and procedural conditions of dissolution of a formal relationship is rejected in unison: “divorce is regulated by law, not by the spouses”. This applies both to the partners and to third parties.

43 (Cont’d). Partners. The parties themselves are not allowed to either give up or condition their freedom to divorce under the legal conditions. In many legal systems they may however waive their right to apply for divorce on a certain ground ex post, for example by pardoning the other partner for his misconduct.

Beside, three states in the USA still have forms of covenant marriage, which precludes the spouses from applying for divorce on certain grounds. The USA reporters however do not consider covenant marriage as a form of contractualisation. The parties’ freedom is limited to opting in a legal regime, which they cannot modify.

Also, one could defend the possibility for formal partners to agree on liquidated damages or even penalty clauses (where allowed) in case they use their right to divorce under conditions or within a period further defined. It is accepted that cohabitants agree on such clauses, as long as they do not limit their freedom to end cohabitation. Since divorce in many systems no longer can be considered a sanction, formal partners may thus also want to privately arrange the exercise of their right to dissolve the relationship.

Of course parties cannot exempt each other from the legal conditions for divorce. As mentioned supra para 38, the explicit formulation of partners of their expectations from their relationship may be taken into account by the courts when assessing the irretrievable breakdown of the marriage. This is a soft form of private ordering.

44 (Cont’d). Third parties. With regard to the legal relationship with third parties, the abovementioned findings with regard to the formation of formal relationships (see supra para 34) apply mutatis mutandis.

---

303 Belgium: Q12 & Q16; Québec: Ch. II, § 3; The Netherlands: Q12.
305 Brazil: Q16; Canada: Ch. II, § 3; Cameroon: Ch. 2, par. 2; Denmark: Q16; England & Wales: Q16; Finland: Q16; France: Q15; Germany: Q16, (with reference to Supreme Court 9 June 1986, BGHZ 97, 304; Greece: Q16; Ireland: Q12; Poland: Q16; Portugal: Q16; Romania: Q16; Scotland: Q16; Spain: Q16; Taiwan: Q12; The Netherlands: Q16; USA [Getting Divorced].
306 Romania: Q16.
307 Finland: Q16; Germany: Q16; Greece: Q16; Romania: Q16.
308 USA [Premarital Contracts].
309 This is not the case for example in Finland: Q16; Germany: Q16 with reference to Supreme Court 19 December 1989, NJW 1990, 703.
310 Portugal: Q16.
311 Belgium: Q13.
312 France: Q16.
2. Consequences of dissolution

Overview. In most legal systems, a “multi-pillar system”\(^\text{313}\) is applied to the legal consequences of divorce or dissolution of the registered partnership.\(^\text{314}\) Different schemes regulate

- property division
- financial support,
- in some systems also compensatory payment,\(^\text{315}\)
- pension splitting\(^\text{316}\) and
- the rights on the household home and assets\(^\text{317}\)
- in only a few systems damages.\(^\text{318}\)

Those schemes are applied independently from each other, although the outcome of one scheme may of course influence the outcome elsewhere.\(^\text{319}\)

In only some legal systems, the aforementioned issues are dealt with as a whole in one scheme, for example of ancillary relief. The form of ancillary relief may be adapted to the specific case.\(^\text{320}\)

Registered partners in a ‘mini-marriage’ and cohabitants in principle contractually arrange the consequences to their break-up.\(^\text{321}\) As mentioned supra para 30, their situation tends to institutionalise however.

Contractual freedom – Object. Formal partners mostly are fairly free to organise their shares in matrimonial property; the matter belongs to patrimonium.\(^\text{322}\)

The same contractual freedom does not apply to a “core”\(^\text{323}\) of rights and obligations that aim at compensating solidarity from the past and at safeguarding solidarity for the future. Particularly financial support and compensatory payments thus belong to a matrimonium on which no or little contractual freedom exists. In English case law, “opting out of the fairness-strands of needs and compensation”\(^\text{324}\) therefore is not easily accepted, even though contractualisation is more easily accepted as long as those thresholds are not met.

As mentioned supra para 40, the general law of obligations and contracts is applied where matrimonium does not fairly compensate transfers in property or the contribution in kind by one partner to the wealth increase of the other. This may be particularly so in case the partners have opted for a separate property regime.

(Cont’d) – Time. Differences exist between legal systems regarding the moment on which partners may enter into an agreement. Within legal systems, differences also apply according to the object of the agreement. For example, agreements on property may be concluded already in prenuptial agreements, whereas agreements on support and compensatory pay-

\(^{313}\) Germany: Q12.

\(^{314}\) Belgium: Q12; Croatia: Q12; Finland: Q17; France: Q17; Poland: Q17; Romania: Q16; USA [Division of Assets Upon Divorce] and [Spousal Support Upon Divorce]. Also see the references hereinafter.

\(^{315}\) Finland: Q15; France: Q12; Germany: Q17; Greece: Q15; Ireland: Q15; Québec: Ch. II, § 3; Romania: Q15 & Q16 and article 390 Civil Code; Spain: Q17; Taiwan: Q12.

\(^{316}\) Germany: Q17; The Netherlands: art. 1:155 Civil Code.

\(^{317}\) Germany: Q17.

\(^{318}\) France: article 266 Civil Code; Taiwan: article 1056 Civil Code.

\(^{319}\) Finland: Q17; France: Q17; Poland: Q17; Portugal: Q17. More reluctantly: Denmark: Q17.

\(^{320}\) England & Wales: Q17; Ireland: Q17; Scotland: Q17.

\(^{321}\) Belgium: Q12 & Q17.

\(^{322}\) Scotland: Q15; USA [Division of Assets Upon Divorce].

\(^{323}\) Cf. Germany: Q17: “Kernbereich”.

\(^{324}\) England & Wales: Q17.
ments are only possible in the framework of the divorce settlement. Another example is the applicability of formal requirements to ‘early agreements’. Such limits are a way of preventing the weaker party from waiving his rights untimely. Besides, once married or partnered, the partners are in fiduciary or confidential relationship and their transaction will not be considered as at arm’s length. Some legal systems seem to evolve towards a larger contractual freedom with regard to pre- and postnuptial agreements, to which court scrutiny will however apply at the time of the divorce (thereto infra para 60).

Most legal systems, but not all, allow formal parties to conclude prenuptial (or pre-registered partnership) agreements in which they may agree on both patrimonium and matrimoniwm rights and duties, even if they cannot wholly oust the court’s jurisdiction, at least with regard to matrimoniwm rights and duties.

More contractual freedom is allowed once the parties have entered into a formal relationship. They may then conclude postnuptial agreements, which mostly aim at organising a separation and then also are called separation agreements.

Only in some legal systems parties are only allowed to conclude a divorce or dissolution settlement contract upon the dissolution of their relation.

48 (Cont’d) – Scrutiny. Another way of protecting the weaker party is ex ante and ex post court scrutiny and jurisdiction, which we will elaborate infra para 59 et seq.

---

325 For example Malaysia: Q14 and s. 80 Law Reform (Marriage and Divorce) Act 1976; Québec: Ch. II, § 3; Romania: Q16; The Netherlands: Q17.
326 Germany: Q17; Spain: Q17.
327 USA [Premarital Contracts].
328 See for example Germany: Q17; England & Wales: Q17; Spain: Q17.
329 For example: England & Wales: Q17; Germany: Q17; USA [Premarital Contracts].
330 Canada: Ch. II, § 3; Malaysia: Q16 & Q17; Scotland: Q17; Spain: Q17 and article 90 Civil Code; USA [Postnuptial and Separation Contracts].
331 For example Belgium: Q17; Canada: Ch. II, § 3; France: Q17; Québec, see art. 423 Civil code of Québec.
332 In general: USA [Divorce Settlement Contracts].
Chapter III. Court Jurisdiction

Introduction

49 Plan. In Chapter II, we have determined the leeway for private ordering in substantive family law. This Chapter concerns the courts’ jurisdiction and we will distinguish between ‘process’ (§ 1) and ‘product’ (§ 2). The former concerns the courts’ versus private jurisdiction in the process of resolving family disputes. The latter refers to court scrutiny of the outcome of the process, both at the time of its execution in an agreement and at the time of its performance.

§ 1. Process

A. General remarks

50 ADR and family disputes. Alternative dispute resolution (hereinafter: ADR) is a form of contractualisation of the administration of justice – conceived as privatisation, this is contractualisation between citizens and not between a citizen and state courts.

In many legal systems ADR techniques are regulated particularly in family matters, with a view of safeguarding the intrinsic continuity of family relationships, even after the break-up of a couple.333 This concern for continuity makes the receptiveness for ADR techniques less paradoxical than it seems to be in light of the general family law exceptionalism.334

Beside ADR by a professional, the Cameroonian335 and Malaysian336 reporters also refer to ADR by the family council or the penghulu (head of village) respectively.

Notwithstanding the legislatures’ preference for ADR, many reporters stress that ADR-techniques are not available in status matters337 – with the exception of divorce (by mutual consent) in most legal systems and parenthood (particularly through surrogacy agreements) in some legal systems.

But disputes on the content of the relationship between parents and children and between partners are preferably resolved through ADR techniques. Again, regulation of ADR techniques exists rather in the context of the dissolution of family relationships than in the assumption of ‘going concern’.

We will hereinafter first draw the general framework of ADR techniques (B.) and subsequently consider their promotion (C.).

B. Legal framework of ADR

51 Legal framework. Some legal systems do not explicitly regulate ADR techniques (in the context of family disputes).338

333 Cameroon: Ch. 3.
334 Comp. USA [Contracting Method – Alternative Dispute Resolution].
335 Cameroon: Ch. 3, par. 1.
336 Malaysia: Ch. 3.
337 See more generally Greece: Q19; Turkey: Q19.
338 For example England & Wales: Q18 and Q20; remarkably also not in The Netherlands, which nevertheless “considers itself as a leading country with regard to mediation”: Q18.
Other legal systems provide a legislative framework so as to promote the use of ADR techniques\textsuperscript{339} or at the least charge the (family) courts to take into account agreements that parties may have reached.\textsuperscript{340} The different ADR techniques there represent a continuum, with blurred lines between
- the resolution of the dispute by the parties themselves or with the help from, or even by, a third party – for example Med-Arb\textsuperscript{341} – and
- between out-court and in-court techniques.

52 Resolution by (expert-assisted) parties. The least intrusive form of ADR is attorney assistance during parties’ negotiations. This technique is not regulated in most legal systems.\textsuperscript{342} In some legal systems, the assistance by an attorney will be taken into account by the courts when scrutinising the agreements (see infra para 66).\textsuperscript{343}

One step further, a framework for collaborative law (convention de procedure participative) is available in the French civil code, particularly for spouses with a view of divorcing or separating (art. 2067 Civil Code). This technique is also informally applied in other legal systems.\textsuperscript{344}

53 Resolution with the assistance of a neutral third party. With regard to ADR with the assistance of a neutral third party, a distinction is usually made between
- mediation and conciliation, and
- out-court and in-court ADR.

The denominator mediation usually reflects the merely facilitating role of the third party, who will not provide the parties with advice and will not propose solutions himself. On the contrary, a conciliator may assume the latter roles.

Out-court ADR refers to ADR which is applied outside the context of a pending action by a third party who is not a member of the court or its supporting services. As mentioned, the lines between these different forms are sometimes blurred.

54 (Cont’d). Mediation. In some legal systems, “pre-trial mediation”\textsuperscript{345} is not only available ‘on the market’, but is also facilitated through specialised social welfare\textsuperscript{346} or court services, sometimes at a reduced rate\textsuperscript{347} or even free of charge.\textsuperscript{348}

Pending court action, some legal systems
- regulate the referral of the parties to mediation by the court,\textsuperscript{349}
- provide in-court mediation services,\textsuperscript{350}
- organise specific case management or settlement hearings\textsuperscript{351} or even

\textsuperscript{339} For example Belgium: Q18 and Q19; France: Q18; Portugal: Q18; Romania: Q18.
\textsuperscript{340} Also see for France: art. 373-2-11° Civil Code.
\textsuperscript{341} Canada: Ch. III, § 1.
\textsuperscript{342} Belgium: Q18; Finland: Q18.
\textsuperscript{343} Canada: Ch. III, § 1.
\textsuperscript{344} Belgium: Q18 & Q20, Germany: Q18; Québec: Ch. III, § 2; The Netherlands: Q19 and USA [Contracting Method – Alternative Dispute Resolution – Collaborative Law].
\textsuperscript{345} Portugal: Q18.
\textsuperscript{346} Brazil: Q19; Croatia: Q18; Denmark: Q19; Ireland: Q19.
\textsuperscript{347} Canada: Ch. III, § 1; USA [Contracting Method – Alternative Dispute Resolution - Mediation].
\textsuperscript{348} For example Denmark: Q18 & Q19; Puerto Rico [VI. Procedural Contractualisation. 1 Jurisdiction]; Québec: Ch. III, § 2 (in case there are minor children involved). Comp. Finland: Q19.
\textsuperscript{349} For example Belgium: Q18; England & Wales: Q18 and Q20; France: Q18; Germany: Q19; Poland: Q18; The Netherlands: Q18.
\textsuperscript{350} For example Brazil: Q18; Canada: Ch. III, § 1; Denmark: Q18; The Netherlands: Q18.
\textsuperscript{351} Canada: Ch. III, § 1; Ireland: Q19.
provide in-court mediation by specialised chambers or judges,\textsuperscript{352} assisted by experts.\textsuperscript{353} The specialised judge or chamber will not judge the case when no settlement is reached. The action will be stayed awaiting the outcome of the mediation.\textsuperscript{354}

\textbf{Finland} and \textbf{Germany} also regulate \textit{post-trial “enforcement mediation”}\textsuperscript{355} with a view of avoiding new court actions. For example, parties may appeal to specialised (in-court) mediation services, linked to social welfare or court services, in case of non-compliance with a visitation order concerning minor children in \textbf{Germany}.\textsuperscript{356}

55 (Cont’d). Conciliation. Conciliation by (family) courts seems fairly widespread.

In first instance, a conciliation hearing or referral to a conciliator may be aimed at \textit{reconciliation} and at getting the family ‘back on track’.\textsuperscript{357}

In family proceedings, a conciliation hearing usually is the (mandatory) first step towards resolving the dispute.\textsuperscript{358} Other available forms of conciliation are comparable to in-court mediation be it\textsuperscript{359} or not\textsuperscript{360} by a specialised chamber or judge.

56 Third party dispute resolution. Resolution of family disputes by a third party may be achieved through arbitration,\textsuperscript{361} or through a binding advice (\textit{bindend advies}). The latter is not enforceable as an arbitral award and must be included in a settlement agreement (\textit{vaststellingsovereenkomst} \textsuperscript{362}) by the parties. Only the \textbf{Dutch} reporters refer to binding advice as ADR-technique and to the explicit regulation of settlement agreements in the civil code.

In view of the \textit{status}-contract divide, some legal systems explicitly exclude family disputes from arbitration.\textsuperscript{363}

In other legal systems, arbitration is explicitly made available, albeit with the necessary safeguards for the parties, for example in \textbf{Canada} in order to avoid ‘\textit{Shari’ah awards}’ that are incompatible with state law.\textsuperscript{364}

In most legal systems, no explicit provisions on arbitration in family matters exist. Some reporters in that regard state that arbitration is not available since parties may not freely dispose of their \textit{status}.\textsuperscript{365} These reporters do not seem to consider the potential of arbitration in

\textsuperscript{352} For example Belgium: Q18; Canada: Ch. III, § 1; Denmark: Q18; Québec: Ch. III, § 2.
\textsuperscript{353} Finland: Q19.
\textsuperscript{354} For example Denmark: Q18; Ireland: Q18; Portugal: Q18.
\textsuperscript{355} Finland: Q19.
\textsuperscript{356} Germany: Q19.
\textsuperscript{357} Greece: Q20; Malaysia: Q19; Poland: Q18 & Q19.
\textsuperscript{358} For example Cameroon: Ch. 3; Canada: Ch. III, § 1; Belgium: Q19 & Q20; Finland: Q18; Germany: Q18; Québec: Ch. III, § 2.
\textsuperscript{359} Belgium: Act of 30 July 2013 concerning the introduction of the Family and Juvenile Court, retrieved at http://www.ejustice.just.fgov.be/wet/wet.htm on 9 June 2014 and Q18 & Q19 & Q21; Finland: Q18; Germany: Q18 & Q19; Taiwan: Q18.
\textsuperscript{360} France: art. 252 and 373-2-10 Civil Code; Poland: Q19.
\textsuperscript{361} USA [Contracting Method – Alternative Dispute Resolution - Arbitration].
\textsuperscript{362} The Netherlands: art. 7:900-906 Civil Code and Q18.
\textsuperscript{363} Brazil: art. 852 Civil Code; Greece: Q21; Romania: art. 542 Code of Civil Procedure and Q18; Québec: art. 2639 Civil Code.
\textsuperscript{364} Canada: Ch. III, § 1.
\textsuperscript{365} Croatia: Q18; Finland: Q21; France: Q20; Portugal: Q21; Taiwan: Q18.
disputes concerning not status as such, but rather the content of family relations, such as maintenance.\textsuperscript{366} Arbitration seems possible in that respect and all in all it is emerging in family disputes, even in absence of explicit regulation.\textsuperscript{367} In South Germany, a specific Family Arbitration Court was created in 2006.\textsuperscript{368} Arbitration still is more easily accepted in family property regimes than it is with regard to personal rights and duties, such as contact and visitation rights.\textsuperscript{369}

\textbf{C. Promotion of ADR}

\textbf{57 Information on ADR.} ADR in family matters is promoted in different phases of family disputes. In some legal systems, social welfare services will already provide information to their clients.\textsuperscript{370} In some legal systems, also legal professionals – particularly attorneys – are obliged to provide information on ADR techniques.\textsuperscript{371} Once a petition to court is made, some legal systems regulate information on ADR by the Civil\textsuperscript{372} or Court Registrar.\textsuperscript{373} Finally, many legal systems impose on the courts themselves to inform and to propose ADR to the parties at the first hearing.\textsuperscript{374}

\textbf{58 Mandatory ADR.} Some legal systems have adopted norms on mandatory ADR.

First, an ADR-clause may have been agreed between the parties, be it or not \textit{ad hoc}. Some legal systems require the parties to at least attempt ADR in that case and will stay proceedings to that end.\textsuperscript{375}

In other legal systems, ADR-clauses are only indirectly imposed on the parties, for example by applying liquidated damages\textsuperscript{376} or penalty clauses or by imposing the costs of court proceedings on the non-compliant party.\textsuperscript{377}

Other legal systems provide no direct or indirect enforcement of ADR-clauses\textsuperscript{378} for mandatory ADR is not considered desirable and ousting court jurisdiction is not accepted in family matters. The ADR-clause is merely a gentlemen’s agreement in those systems.\textsuperscript{379}

Second, mandatory ADR in some legal systems applies even if the parties did not agree on an ADR-clause.

In Germany, applicants to the court must explain whether or not they tried ADR and whether or not ADR is contraindicated in the case at hand.\textsuperscript{380}

\begin{footnote}
\textsuperscript{366} See also: Greece: Q21.
\textsuperscript{367} England & Wales: Q21; Finland: Q21; Germany: Q21; Scotland: Q21; The Netherlands: Q19 and Q21.
\textsuperscript{368} Germany: Q21.
\textsuperscript{369} Turkey: Q21.
\textsuperscript{370} Denmark: Q19; Finland: Q19.
\textsuperscript{371} Canada: Ch. III, § 1; England & Wales: Q18 and Q20; Québec: Ch. III, § 2.
\textsuperscript{372} Portugal: art. 1774 Civil Code.
\textsuperscript{373} Belgium: Q19 & Q21.
\textsuperscript{375} Canada: Ch. III, § 1; Belgium: Q19 & Q21; Germany: Q19 & Q21.
\textsuperscript{376} For example in Germany: Q19.
\textsuperscript{377} Comp. Germany: Q19.
\textsuperscript{379} France: Q19.
\textsuperscript{380} Germany: Q19.
\end{footnote}
Some legal systems impose that parties must have been informed on ADR by a professional, or have attended an information session or even had a first meeting with a mediator either as a prerequisite for petitioning the court, or upon court order.

A minority of legal systems furthermore obliges an attempt to effectively resolve their dispute through ADR in some cases. Mandatory ADR never applies when it is manifestly contraindicated, for example in case of urgency proceedings or for other legitimate reasons that corrupt equal bargaining positions such as domestic violence and child protection cases.

Other legal systems reject mandatory ADR altogether for it is considered undesirable. Mandatory ADR seems a negation of contractualisation anyhow.

§ 2. Product

A. A priori scrutiny

59 Enforceability without court scrutiny. The product of the ADR process is as enforceable as a judgment or court order in some legal systems. This is mostly the case for arbitral awards and for settlement agreements in the form of a notarial deed. The intervention of an arbitrator or a notary public may indeed be considered as ‘hallmark’ that guarantees that both process and product have been monitored. In the other systems, the enforceability also applies to other agreements (that are recorded).

60 Enforceability subject to court scrutiny. In most legal systems however, all family agreements, including arbitral awards, need to be approved (or homologated or ratified or included in a consent order or granted leave for enforcement) by an administrative or judicial body in order to be enforceable. This is particularly (but sometimes only) so for agreements concerning (custody of) minor children.

---

381 Croatia: Q18; Ireland: Q19; Québec: Ch. III, § 2.
382 Canada: Ch. III, § 1; England & Wales: Q19; Germany: Q19; Poland: Q19; Romania: Q18; Québec: Ch. III, § 2.
383 Croatia: Q18; France: art. 255, 2° (with regard to divorce) and 370-2-10 (with regard to parental responsibilities) Civil Code; Puerto Rico [VI. Procedural Contractualisation. 1 Jurisdiction]; Taiwan: Q18.
384 Cameroon: Ch. 3; Canada: Ch. III, § 1; France: on an experimental basis Act n° 2011-1862, retrieved at http://www.legifrance.gouv.fr on 9 June 2014; Malaysia: Q19; Taiwan: Q18; USA [Contracting Method – Alternative Dispute Resolution - Mediation].
385 Canada: Ch. III, § 1; Taiwan: Q18; Turkey: Q19; USA [Contracting Method – Alternative Dispute Resolution - Mediation].
386 Canada: Ch. III, § 2; Germany: Q22; Greece: Q22; Ireland: Q22; Portugal: Q22.
387 Belgium: Q22; Croatia: Q22.
388 Canada: Ch. III, § 2; Denmark: Q22; Finland: Q10; England & Wales: Q22; Germany: Q19; Ireland: Q19; Portugal: Q18; Romania: Q22; Scotland: Q23; Taiwan: Q18.
389 For example England & Wales: Q21 & Q23, insofar children are concerned.
390 Denmark: Q19; Finland: Q19 & Q22.
391 For example Cameroon: Ch. 3; Belgium: Q20 & Q21 & Q23; Brazil: Q22; England & Wales: Q23; France: Q9 & Q10 & Q18 & Q22 & Q23; Greece: Q22; Ireland: Q10 & Q18 & Q23; Poland: Q22; Portugal: Q22; Puerto Rico [VI. Procedural Contractualisation. 2. Recognition]; Québec: see Canada: Q22; The Netherlands: Q22; Turkey: Q18 & Q19. In Malaysia: Q22, this is dependent on what the court may have determined.
392 For example Germany: Q22 & Q23 and § 156(2) Act on Family Proceedings (FamFG), retrieved at http://www.gesetze-im-internet.de/ on 11 June 2014.
393 Belgium: Q8; Brazil: Q10 & Q18; Canada: II § 2; Croatia: Q10 & Q22; Finland: Q8 & Q22; Portugal: Q8; Romania: Q10; Turkey: Q10; USA: [Parents Without Contracts]. This is not necessarily so in Poland, see Q10.
As the Irish reporters put it: "lawsmakers have long asserted the importance of the state’s capacity to retain ultimate control over the resolution of family disputes. Although this conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract, such state involvement is permitted and even encouraged in family law given the underlying and inescapable issues of public policy that arise. [...] In particular the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit."

We will now elaborate the different levels of court scrutiny that apply, depending on the process applied and on the subject matters of the agreement.

61 (Cont’d). Process applied. In order to promote ADR, some legal systems provide for ‘light’ proceedings or a lower level of scrutiny for the approval of family agreements achieved through ADR vis-à-vis other agreements. This is particularly and naturally the case for agreements reached through in-court ADR.

In Romania, a whistle-blower’s function applies to the out-court mediator: he must petition the court in certain circumstances in which the parties do not have equal bargaining positions or in which the child’s interest is in danger.

Different standards of scrutiny may also apply according to the moment on which the agreement was reached: closer scrutiny for example may apply to a prenuptial agreement than to a separation agreement. Such different standards do not apply in other legal systems.

62 (Cont’d). Subject matters. The administrative or judicial body will always screen the agreements for infringements of the public policy (‘ordre public’) or bona mores. In some legal systems, this is the only scrutiny applying in order to receive leave for enforcement of an arbitral award.

The agreements are not always scrutinised insofar they concern the adults involved. In some systems, no scrutiny at all applies (to certain agreements).

In other systems, at least marginal scrutiny applies. For example in France, the court will assess whether the interests of both spouses are preserved (art. 268 Civil Code); that is: whether the agreement is equitable. Sometimes, scrutiny will be stricter insofar the agreements concern personal rights – particularly status – and support, compared to agreements on property rights. In some legal systems, not only the outcome but also the process will be

---

394 Ireland: Q23.
395 For example in the context of a marital breakdown dispute in *The State (Bouzagou) v Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 426 Barrington J noted that in the absence of an agreement between the husband and wife, the task of reconciling the rights of the individual members of the family was a matter for the courts to determine.
396 Cameroon: Ch. 3; Belgium: Q22; Denmark: Q18; France: Decree n° 2010-1395 of 12 November 2010, retrieved at http://www.legifrance.gouv.fr/ on 9 June 2014; Romania: Q22; Turkey: Q22.
397 For example Belgium: Q21 & Q22; Germany: Q19.
399 Québec: Q22.
400 Scotland: Q22.
401 Brazil: Q22; Canada: Ch. III, § 1; England & Wales: Q23.
402 Belgium: Q22; The Netherlands: Q22.
403 Belgium: Q22; The Netherlands: Q22 & Q23.
404 Finland: Q23; Puerto Rico [Horizontal Family Law]; Scotland: Q22; Spain: Q17; Turkey: Q17; USA [Divorce Settlement Contracts].
405 France: Q22.
406 Finland: Q23.
assessed, particularly the equal bargaining position of the parties and their free consent.\footnote{France: art. 232 Civil Code; Portugal: Q24. On gender inequalities see Taiwan: Q12.} One of the assessment criteria may then be whether or not the parties have received independent legal advice.\footnote{Canada: Ch. III, § 1.}

The highest level of scrutiny applies to agreements concerning minor children, and particularly with regard to personal aspects such as custody and visitation.\footnote{For example England & Wales: Q23; Finland: Q23; Scotland: Q22.} Some legal systems only allow a marginal scrutiny.

A continuum seems to apply with regard to the applicable scrutiny. At the one end, a \textit{positive standard} applies, under which the courts just \textit{may},\footnote{For example Finland: Q9; France: Q7; Greece: Q10; Portugal: Q9.} but sometimes \textit{must},\footnote{France: Q9; Poland: Q10.} take into consideration private arrangements that according to the court (evidently) serve the best interest of the child.\footnote{Croatia: Q22; France: art. 232 and 373-2-7 Civil Code and Q9; Germany: Q22; Ireland: Q10; Portugal: Q10; Romania: Q10; The Netherlands: Q8 (only marginal scrutiny) and Q22; Taiwan: Q9.} At the other end of the continuum, a \textit{negative standard} applies, under which the courts may only set aside such arrangements in case they (evidently) do not sufficiently preserve the best interest of the child or are (evidently) contrary to the best interests of the child.\footnote{Belgium: Q22; England & Wales: Q23; France: art. 232 and 373-2-7 Civil Code and Q9; Germany: Q22; Ireland: Q10; Portugal: Q10; Romania: Q10; The Netherlands: Q8 (only marginal scrutiny) and Q22; Taiwan: Q9.} In some legal systems, both standards are used for different agreements. However different the starting point, the outcome of both approaches seems comparable nevertheless.

In some legal systems, the court will also scrutinise the process, for example the parents’ free consent.\footnote{France: Q18.}

\section{Consequences.} Usually, the administrative or judicial body will refuse to approve the agreement in case it infringes the applicable standard, and remit it to the parties\footnote{Turkey: Q23.} or the arbitrator.\footnote{Canada: Ch. III, § 1.} Only rarely would a state body also have jurisdiction to modify the agreement at the applicant’s request\footnote{Canada: Ch. III, § 1.} or even \textit{ex officio}.\footnote{Croatia: Q22; Malaysia: Q23 and s. 80 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014: approval \textit{subject tot conditions} is possible.}

Controversy exists with regard to the binding effect of agreements that were not approved notwithstanding a requirement thereto.\footnote{For example Poland: Q21.}

\section{A posteriori scrutiny}

\section{Context.} Courts – and rarely administrative bodies – may be required to scrutinise a family agreement in the phase of its performance. The courts’ jurisdiction in this regard is very differently conceived throughout the world. Moreover, the courts’ jurisdiction in family matters does not necessarily reflect a legal system’s stance with regard to the binding effect of contracts in general private law.
In some legal systems, the courts’ jurisdiction to nullify or modify a family agreement is quite large (compared to general contract law).\textsuperscript{420} The traditional status-contract divide justifies such large competence.

Yet in other legal systems, the courts’ competence is quite limited (vis-à-vis contract law in general).\textsuperscript{421} One of the reasons is that the tenets of general contract law are more difficult to apply to family agreements. Unconscionability in divorce settlements is one example thereof. Consideration can only be assessed taking into account the specific context of the case; the court \textit{inter alia} may take into account that the unequal division of property is the price one spouse pays for a swift divorce or in order to avoid support payments.\textsuperscript{422}

\textbf{65 Levels of scrutiny.} Different levels of court scrutiny apply according to whether the petition targets the circumstances of the \textit{execution} of the contract, the circumstances of the \textit{performance}, or the content of the agreement with regard of the \textit{children}.

A two-step standard applies in different legal systems with regard to the judicial review of an agreement on the basis of unfairness (in the broad sense) at the time the execution (’\textit{sittenwidrigkeit}’) or of the performance (’\textit{treuwidrigkeit}’) of the agreement.\textsuperscript{423}

In \textbf{Canada}, this is the \textit{Miglin v Miglin}-enquiry,\textsuperscript{424} even though the Canadian Supreme Court may have determined a lower threshold for judicial review meanwhile.\textsuperscript{425}

In \textbf{England & Wales}, \textit{Radmacher v Granatino} currently is the lead case, in which \textit{needs} and \textit{compensation} were determined as most important strands under the fairness test.\textsuperscript{426}

In \textbf{Germany}, the \textit{Bundesverfassungsgericht} and the \textit{Bundesgerichtshof} developed the two-step approach in subsequent cases on the basis of the Constitutional right to self-determination. They have determined two thresholds for judicial review: one procedural, which “triggers” judicial review, and one substantive, serving to determine the minimum required solidarity between ex-spouses.\textsuperscript{427} Hereto, an order of rank has been drawn of rights and obligations that concern the fundamentals of post-divorce solidarity (’\textit{Kernbereich}’). The more the agreement deviates from that \textit{Kernbereich}, the higher the level of scrutiny will be.

\textbf{1. Scrutiny of the execution of the agreement}

\textbf{66 Public policy and good morals.} First, an assessment of the possible infringement of the public policy (’\textit{ordre public}’) or \textit{bona mores} applies, for example with a view of nullifying a ‘\textit{Shari’ah}-agreement’ that is incompatible with state norms.\textsuperscript{428}

\begin{itemize}
  \item \textsuperscript{420}Canada: Ch. III, § 2 with reference to \textit{Rick v Brandsema} 2009 SCC 10, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.
  \item \textsuperscript{421}Belgium: Q24; France: Q24; Germany: Q24; Scotland: Q24; The Netherlands: Q24 & Q25.
  \item \textsuperscript{422}Belgium: Cass. 9 November 2012 (2 judgments), Justel N-20121109-7 and N-20121109-9, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014.
  \item \textsuperscript{423}England & Wales: Q17; Germany: Q17; The Netherlands: Q17 and article 1:158 Civil Code; USA [Premarital Contracts]. Also see Taiwan: Q12 and article 1030-1 Civil Code.
  \item \textsuperscript{424}Canada: Ch. III, § 2 and Québec: Ch. III, § 2, both with reference to \textit{Miglin v Miglin} 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.
  \item \textsuperscript{425}Canada: Ch. III, § 2 with reference to \textit{LMP v LS} 2011 SCC 64, retrieved at http://scc-csc.lexum.com/ on 19 June 2014.
  \item \textsuperscript{426}England & Wales: Q17 and \textit{Radmacher v Granatino}, UKSC 2009/0031, retrieved at http://www.supremecourt.uk/decided-cases/ on 19 June 2014.
  \item \textsuperscript{427}Germany: Q17 and Q24.
  \item \textsuperscript{428}Canada: Ch. III, §§ 1-2.
\end{itemize}
67 No consensus ad idem. A family agreement may be (partly) declared null and void on the basis that there was no consensus ad idem at the time of its execution. As mentioned supra para 64, there is not necessarily a one-to-one application of general contract law. Controversy for example has arisen over the effect of the nullification of a divorce settlement on the divorce itself.\textsuperscript{429} The importance of stability of family relations has also been stressed in this regard.

One widespread ground for (partly) nullification is abuse of circumstances and excessive benefit.\textsuperscript{430} Both conditions need to be fulfilled: the inequality must exist both in the process and in the outcome.\textsuperscript{431} On the one hand, abuse of circumstances refers to the unequal bargaining positions during the process. Such inequality will however only be taken into account in case it has led to excessive benefit for one party or an excessive burden for the other party. On the other hand, also the unequal outcome as such is not sufficient; it must have been caused by abuse of circumstances. It seems that some courts would accept a presumption to that effect. Unequal bargaining positions indeed may be difficult to assess ex post otherwise than on the basis of the unequal outcome.\textsuperscript{432} The inequality of the outcome moreover must be assessed at the time of the execution, without hindsight,\textsuperscript{433} and not at the time of the performance of the agreement.

Other grounds on the basis of which consensus ad idem may be challenged are the fiduciary duty of disclosure\textsuperscript{434} and the lack of qualitative assistance by an expert.\textsuperscript{435}

68 Disrespect of ADR-principles. The validity of the agreement may also be disputed on the ground of non-respect of the principles of ADR, for example in case the mediator has not been impartial or did not safeguard equal bargaining positions between the parties.\textsuperscript{436}

2. Scrutiny of the performance of the agreement.

69 Context. In cases where scrutiny of the execution of an agreement does not offer a solution for a party, he or she may also apply for judicial review on the basis of scrutiny of the performance of the agreement, which we will now elaborate.


\textsuperscript{431} Finland: Q24; Germany: Q24; Scotland: Q24 and Gillon v Gillon (No 3) 1995 SLT 678 at 681 C-E.

\textsuperscript{432} Germany: Q24.

\textsuperscript{433} Scotland: Q24.


\textsuperscript{436} Romania: Q22.
Finality of agreements is one of the fundamentals of contract law. Exceptions to the principle of finality are however accepted in all legal systems, albeit to a very different extent.\textsuperscript{437}

**70 Public Policy and good morals.** Public policy reasons may always justify the review of a family agreement, for example in case one of the parties would remain or become dependent on social security or social assistance regimes.\textsuperscript{438}

**71 Hardship.** In other legal systems, judicial review of an agreement is possible only in case of hardship, for example because performance would be unreasonable and unfair or contrary to good faith or that the agreement has become significantly unfair.\textsuperscript{439} Sometimes the courts will also take into account the circumstances of the case at the time of the execution of the agreement in order to assess its unfairness at the time of the application.

**72 Rebus sic stantibus.** In most legal systems, hardship is not (always) required. The doctrine of fundamental change of circumstances (\textit{clausula rebus sic stantibus}) is leniently applied throughout the world to some family agreements (between adults,) particularly concerning personal rights, support and compensatory payments.\textsuperscript{440}

Variability in function of changed circumstances is generally considered fundamental particularly for maintenance obligations.\textsuperscript{441} Hence in some legal systems, the courts in every case maintain jurisdiction to award or vary support, whichever settlement the parties may have reached.\textsuperscript{442}

Conditions generally applicable are that the change of circumstances must be unexpected or unforeseeable and must occur independent from the will of the parties. In some legal systems, a strict view is taken on change of circumstances.\textsuperscript{443}

For example in \textit{Miglin v Miglin}, the Canadian Supreme Court determined “that a certain degree of change is foreseeable most of the time. [The parties] must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities […] might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person’s health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. […] That said, we repeat that a judge is not bound to do what is not foreseeable to the parties. We must not make the mistake of treating the parties like children, as if they can never contemplate the future. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable.”

\textsuperscript{437} See in general USA [Private Ordering Permanence – Modifications of Final Judgments in Family Law].


\textsuperscript{440} Cameron: Ch. 3; Germany: Q25 and § 313 BGB; Ireland: Q25; Romania: Q22; Spain: Q17; Taiwan: Q22; USA [Private Ordering Permanence – Modifications of Final Judgments in Family Law].


\textsuperscript{442} Canada: Ch. II, § 3; Croatia: Q17; Ireland: Q17; Malaysia: Q17; Portugal: Q17; Puerto Rico [Horizontal Family Law]; USA [Premarital Contracts] and [Spousal Support Upon Divorce].

\textsuperscript{443} For example in England & Wales: Q23 with reference to the “Barder criteria” as developed on the basis of \textit{Barder v Barder} (\textit{Caluori intervening}) [1988] AC 20; Finland: Q25.
In some cases, the court may not change certain clauses, for example the agreed duration of post-divorce support; it then only has competence to modify the amount of support payable.445

73 Initial unfairness. Exceptionally no change of circumstances or current unfairness is required. For example the Canadian, Danish, Dutch and Finnish courts may set aside or modify an agreement on maintenance in case of gross misjudgement of the statutory standards at the time of executing the agreement.446

74 Contractualisation. Parties to a family agreement in some legal systems have some leeway to exclude or rather extend courts’ jurisdiction on the ground of fundamental change of circumstances.447 Other systems do not allow waivers with regard to some aspects, for example post-divorce support.448

3. Scrutiny in the best interest of the child

75 Different approaches. In some legal systems, parents may not be allowed to modify their agreement on the children by mutual consent without new judicial approval.449 The courts may anyhow review all agreements in the best interests of the child in all legal systems. No common ground however exists with regard to the conditions and the level of scrutiny applying.

In some legal systems, the “yardstick”450 of the welfare of the child allows courts (or administrative bodies) to “generously”451 review family agreements even in absence of a (fundamental) change of circumstances.452

In other systems, the best interest of the child is only the underlying standard in case of review of an agreement based on a (fundamental) change of circumstances, which will be broadly interpreted.453

Other legal systems take a third stance, in-between. They allow judicial review in the best interest of the child, as long as that would not undermine the stability and continuity of

445 USA [Private Ordering Permanence – Modifications of Final Judgments in Family Law]
449 USA [Child Custody Settlement Contracts].
450 England & Wales: Q23.
451 Canada: Ch. III, § 2.
453 Finland: Q25; Québec: Q22; Romania: Q22; The Netherlands: Q25; USA [Private Ordering Permanence – Modifications of Final Judgments in Family Law].
the circumstances in which a child is raised. A time moratorium may be applied to untimely requests for review.

In either case, the many existing standards of scrutiny often are quite vague and may be conceived positively or negatively. In some systems, a higher level of scrutiny seems to apply than is the case for the initial approval of agreements. For example, full scrutiny instead of marginal scrutiny applies when reviewing an agreement.

76 Contractualisation? As mentioned supra para 24 family agreements regarding children “are not intended to have contractual effect”. However, the free revocability of agreements between the parents seems the exception.

§ 1 of the German Act on the Religious Upbringing of Children for example explicitly provides that “the agreement between the parents is revocable at any time”.

Such agreements indeed are generally considered to be binding for the parties. The Netherlands even reinforces the binding effect of agreements by imposing ‘parenting plans’. Revocability by a parent thus depends on the existence of a weighty reason.

Article 376-1 French Civil Code so provides that the Family Court may […] take into consideration the pacts […] unless one of [the parents] substantiates weighty reasons that would justify him to revoke his consent”.

The courts may however always vary agreements in the light of the abovementioned criteria: agreements are not binding upon them.

454 Finland: Q25; France: Q9; Ireland: Q9; Portugal: Q9 & Q10.
455 USA [Private Ordering Permanence – Modifications of Final Judgments in Family Law]
456 Finland: Q27.
457 For example in Belgium: art. 387bis Civil Code; Germany: Q27.
458 Scotland: Q24 & Q27.
459 Finland: Q9; Germany: Q9; Greece: Q10; Ireland: Q10; Malaysia: Q11; Poland: Q10; Portugal: Q9; Scotland: Q9.
460 Belgium: Q25.
461 For example Croatia: Q9; Netherlands: Q10.
462 For example Scotland: Q27.
Chapter IV. Conclusions

77 Pendular movement. The on-going pendular movement of family law between status and contract (see supra para 28) has without doubt convergently gone in the direction of contract during the last decades. Examples are the possibilities to contract into or out of parenthood (surrogacy, medically assisted procreation, see supra para 13) in the parent-child relationship and the greater leeway for pre- or postnuptial agreements as witnessed particularly in England & Wales (see supra para 46).

The trend towards contractualisation however rather concerns the content of parenthood or partnerships than their formation and dissolution. Moreover, procedural contractualisation seems further reaching than substantive contractualisation. Given the exceptionalist position of substantive family law, the acceptance of ADR in family disputes seems somewhat inconsistent.

There are remarkable convergent trends ‘from contract to status’ as well. This is particularly the case for the legal position of biological and social parents (supra paras 14 and 20), beside legal parents, and for cohabitants, beside spouses and registered partners (supra para 30). This trend does not only concern the content and dissolution of family relations but also their content. We found remarkable convergence with regard to judicial review of nuptial agreements and divorce settlements on the ground of unfairness (see supra paras 64-74).

Both evolutions can be explained as forms of constitutionalisation of family law. On the one hand, individualisation offers greater freedom for each family member both within and outside the numerus clausus of family relations. Yet on the other hand, the ‘freed individuals’ are placed directly under ‘state control’ under the described interventionist, parens patriae, trend (see supra para. 5).

78 What’s in a word? Some reporters stress that the word ‘contractualisation’ should not be used in its legal-technical meaning as enforceable rights and obligations with civil effect, with a view of describing trends in family law.

First, the limits of contractual free movement are considered more important than the movement itself, and mostly free movement would be limited to exercising available legal options, for example with regard to surrogacy (supra para 13) or covenant marriages (supra para 43). ‘Intention’ or ‘autonomy’ would therefore be better denominators than contractualisation.

Second, a basic principle of contract law is the binding effect and finality of contracts, vis-à-vis both parties and third parties, including courts. Hence, many exceptions to this basic principle apply (supra paras 64-76).

‘Private ordering’ for these reasons seem to be preferred over ‘contractualisation’ to describe current evolutions in family law. In application thereof, the word ‘agreement’ or ‘pact’ is preferred over ‘contract’, or at least would the word contract receive the epithet ‘domestic’ (supra par. 24). In sum, these instruments are characterised by a ‘family law’ rather than ‘contractual’ nature.

464 USA [Contracting Method: Alternative Dispute Resolution].
465 For example: Germany: Q28; Spain: Q28.
466 Also see Spain: Q28.
The question however arises what makes a contract ‘domestic’ of nature and what distinguishes it from a contract regulated by general contract law. Also, many blurred lines between private ordering and contractualisation persist that justify questioning the rejection of contractualisation. We will now point at the most debated issues.

79 **Marvin v Marvin versus Borelli v Brusseau.** The question first arises why parties in a family relation are somewhat excluded from contractual freedom. The question is strikingly illustrated by the *Marvin* and *Borelli* cases, concerning cohabitants and spouses respectively.

In *Marvin v Marvin*, Michelle Marvin had been in a cohabitation relationship with Lee Marvin during six years, after which he compelled her to leave his household. While Michelle Marvin had given up her lucrative career, substantial real and personal property was acquired only in the name of Lee Marvin. Michelle Marvin claimed that

"she and defendant "entered into an oral agreement" that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." Furthermore, they agreed to "hold themselves out to the general public as husband and wife" and that "plaintiff would further render her services as a companion, homemaker, housekeeper and cook to ... defendant."

As mentioned supra para 30, the Californian Supreme Court accepted the validity of such agreement for

"adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. (...) So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements."

We also have pointed at a trend towards ‘matrimonialisation’ of such contracts between cohabitants.

Surprisingly, spouses (and registered partners) are not “as competent as any other persons to contract respecting their earnings and property rights”. Whereas there is growing acceptance of postnuptial agreements and divorce settlements, contracts on efforts and earnings when ‘going concern’ are only rarely accepted, as we described supra para 40.

The matter was discussed in the (in-)famous *Borelli v Brusseau* case. Hildegard Borelli was married to Michael Borelli in 1980 with an antenuptial contract excluding her from most of Micael Borelli’s property. Michael Borelli then suffered severe health problems and became concerned and frightened over his health.

"In August 1988, decedent suffered a stroke while in the hospital. "Throughout the decedent's August, 1988 hospital stay and subsequent treatment at a rehabilitation center, he repeatedly told [appellant] that he was uncomfortable in the hospital and that he disliked being away from home. The decedent repeatedly told [appellant] that he did not want to be admitted to a nursing home, even though it meant he would need round-the-clock care, and rehabilitative modifications to the house, in order for him to live at home."

651 "In or about October, 1988, [appellant] and the decedent entered an oral agreement whereby the decedent promised to leave to [appellant] the property listed [above], including a one hundred percent interest in the Sacramento property.... In exchange for the decedent's promise to leave her the

---


ty ... [appellant] agreed to care for the decedent in his home, for the duration of his illness, thereby avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended. The agreement was based on the confidential relationship that existed between [appellant] and the decedent."

Appellant performed her promise but the decedent did not perform his. Instead his will bequeathed her the sum of $100,000 and his interest in the residence they owned as joint tenants. The bulk of decedent's estate passed to respondent, who is decedent's daughter.”

Unfortunately for Mrs Borelli, the Californian Supreme Court did not accept the oral agreement as a binding contract, for

"It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. [...]"

"Indeed, husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income."[...]

When necessary, spouses must "provide uncompensated protective supervision services for" each other. Estate of Sonnicksen (1937) 23 Cal. App.2d 475, 479 [73 P.2d 643] and Brooks v. Brooks (1941) 48 Cal. App.2d 347, 349-350 [119 P.2d 970], each hold that under the above statutes and in accordance with the above policy a wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy; and there is no consideration for the husband's promise.[...]

[T]he duty of support can no more be "delegated" to a third party than the statutory duties of fidelity and mutual respect (Civ. Code, § 5100). Marital duties are owed by the spouses personally. [...]

We therefore adhere to the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case. [...]

The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.”

We have however described that different legal and contractual mechanisms allow spouses to claim compensation – even in absence of need – of their ‘performance’ during marriage, at the time of its dissolution. We claim that contracts on compensation should be allowed when ‘going concern’, in order to prevent litigation.

In sum, the ‘matrimonialisation’ of the contractual relationship between cohabitants should be complemented with a ‘contractualisation’ of the marital relationship between spouses or registered partners. A marketization or monetising of family relations of course would have a much greater impact than the issues discussed in this general report, and would also concern intergenerational solidarity and the relation to social security.

80 Balfour v Balfour versus Meritt v Meritt. In the course of this general report, we repeatedly pointed at the greater contractual freedom at the moment of dissolution of the family relation compared to the relation ‘going concern’ (supra paras 8, 21, 22, 23, 35, 50 and 79). This is both the case for the relation between parents and children and between partners; and both with regard to substantive and procedural contractualisation. In our opinion, the justification cannot be that the family relation is winded up at the time of its dissolution; those relations are intrinsically continuous, both between parents and children and between partners, for example with regard to post-divorce support.

A striking example of this issue is offered in the Balfour and Meritt cases.
In *Balfour v Balfour*, the husband had promised his wife to send monthly payments of £30,000 from Ceylon, where he resided for work, while his wife would stay in England for health reasons. After their divorce, the question arose whether the ‘contract’ was enforceable. The court of appeal found that it was not, for no intention to create legal relations existed. The lack of consideration was also considered important. The contract therefore was of a purely domestic nature.

In *Meritt v Meritt*, the husband had left the house to live with another woman. Afterwards, the spouses discussed the arrangements to be made in the husband’s car, whereby the husband

“What wrote these words on a piece of paper: "In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property into your sole ownership. Signed, John Merritt. 25th May, 1966."

Denning LJ clearly distinguished the case from the domestic arrangements in Balfour:

“It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.”

He therefore referred to his previous opinion that

“When husband and wife, at arms’ length, decide to separate, and the husband promises to pay a sum as maintenance to the wife during the separation, the Court does, as a rule, impute to them an intention to create legal relations.”

In sum, we claim that parties in family relation going concern may conclude enforceable contracts in case their intention thereto is clear and in case consideration remains within the contractual leeway allowed under their status.

81 **Court jurisdiction.** Parties in a family relation generally are not allowed to waive a ‘core’ ([supra para 46](#)) of rights and obligations arising out of their *status* as parents or partners. The lack of (valid) consideration therefore makes the arrangement domestic rather than contractual of nature.

We have however repeatedly pointed at the impossibility to oust the courts’ jurisdiction and have pointed at court scrutiny and at the possibilities for judicial review of (family) contracts ([supra paras 59-76](#)).

On the one hand, scrutiny is possible on the ground of unfairness (in its broadest sense) at the time of the execution or the performance of the agreement. Scrutiny is even stricter when it concerns children. Different reporters have pointed at the interventionist approach of government in other fields of law as well.

On the other hand, the *clausula rebus sic stantibus* is broadly applied to family law agreements. Family law seems somewhat exceptional in this regard.

We therefore assert that given the courts’ jurisdiction to review family arrangements, greater contractual leeway may be accepted for the parties to a family relation, standing that

---

469 *Balfour v Balfour* [1919] 2 KB 571


471 For example Germany: Q4 and Q17.
relation. For example, arrangements on parental responsibilities should be considered binding for the parents themselves.

The question also arises whether or not scrutiny is stricter and whether or not judicial review is easier in family settings than in contract law in general, given the overall constitutionalisation of private law. Government interventionism in contract law in general makes family law less exceptional indeed. It would therefore be interesting to further research the differences in the levels of judicial review so as to determine what is the specific nature of ‘domestic contracts’.

82 “Good Boy Bad Boy”. One reason to exclude a contractual approach towards ‘breach of contract’ in family relations is that family law was considered to offer its own particular remedies, for example fault divorce. Increasing repeal thereof causes family law agreements to be the only contracts where no fault-based remedies exist.

So-called “Good Boy Bad Boy”-clauses (supra paras 38, 39, 43 and 45) may be proposed as ways to substitute the above-mentioned evolution.

83 ADR. ADR-techniques are increasingly promoted, and sometimes imposed on parties, as ways of dissolving family disputes. ADR in family disputes usually implies the intervention of a neutral third party – mediator of conciliator – with a view of enabling the parties to reach a settlement.

More governmental attention may be had for two other types of ADR.

On the one hand, not all parties need a neutral third party, and forms of collaborative law could be promoted given the positive first experiences with these techniques (supra para 52).

On the other hand, parties should not always be forced to litigate in case they do not reach a settlement even with the help of a neutral third party. Arbitration seemingly is an underestimated technique, which can be broadly applied to (the content of) family relations (supra para 56).

84 Parens patriae. These conclusions have mainly drawn on family relations between adults. Contractualisation of parenthood – for example with surrogacy agreements – remains the exception throughout the world. Also, agreements on parental responsibilities and on maintenance are under strict scrutiny. This close monitoring can be justified under the parens patriae doctrine.

One of the points of interest however has been whether, and to what extent, parens patriae also applies to the weaker party in family relations between adults. The answer seems to be that parens patriae decreasingly applies, at the least vis-à-vis contract law in general.

In sum, family law exceptionalism seems to be on its return (again). It seems however substituted by increased state regulation in general.472

472 Germany: Q28.