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Current developments

European marital property law Survey 1988-1994

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Abbreviations

ABGB:	Allgemeines Bürgerliches Gesetzbuch (Austria)
AC:	Law Reports Appeal Cases (United Kingdom)
All ER:	All England Law Reports (England and Wales)
BGB:	Bürgerliches Gesetzbuch (Germany)
BGE:	Entscheidungen des Schweizerischen Bundesgerichtes. Amtliche Sammlung (Switzerland)
BGH:	Bundesgerichtshof (Germany)
BGHZ:	Amtliche Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen (Germany)
BJM:	Basler Juristische Mitteilungen (Switzerland)
CC:	Civil Code (Belgium, France, Greece, The Netherlands)

EheG:	Ehegesetz (Gesetz zur Vereinheitlichung des Rechts der Eheschliessung und der Ehescheidung) (Austria)
EvBl:	Evidenzblatt der Rechtsmittelentscheidungen (Austria)
FamRZ:	Zeitschrift für das gesamte Familienrecht
FinRMA:	Finnish Revised Marriage Act; Act on the Revision of the 1929 Marriage Act (13.6.1929/234) of 14.4.1987/411[1]
FLR:	Family Law Reports (United Kingdom)
FuR:	Familie und Recht (Germany)
HR:	Hoge Raad (The Netherlands)
JBl:	Juristische Blätter (Austria)
MCA:	Matrimonial Causes Act 1973 (England)
NJ:	Nederlandse Jurisprudentie (The Netherlands)
OGH:	Oberster Gerichtshof (Austria)
OLG:	Oberlandesgericht (Austria & Germany)
SJZ:	Schweizerische Juristenzeitung (Switzerland)
SwedMA:	Swedish Marriage Act 1987 (*Äktenskapsbalken*)
SZ:	Entscheidungen des Obersten Gerichtshofes in Zivilsachen (Austria)
ZGB:	Zivilgesetzbuch (Switzerland)

Scheme

[1] It should be noted that several original provisions of the 1929 Act remain in force.

Chapter I. Contractual autonomy in marital property law

§ 1. Legal and contractual marital property regimes

1. Marriage evidently influences the patrimonial position of the spouses. One could define the combination of rules determining this situation as the marital property regime.

2. The notion of marital property regime is well-known in countries of the civil law or continental tradition where the legislator always has shown great interest in the regulation of the patrimonial aspect of marriage.

There may be a legal or non-contractual marital property regime, of a default nature, designated by law to enter into force, at the time of conclusion of the marriage, in case the spouses did not draft a marital contract. Thus, the legal or non-contractual regime is a default regime, only applied in the absence of a marital contract (establishing a contractual marital property regime). In principle, spouses can organise their patrimonial situation and relation as they think fit and create their own contractual marital property regime. Quite often, the legislature elaborates some types of marital contracts (see no 57).

3. The common law tradition, on the other hand, is not so familiar with concepts as marital property regime or marital contract.

There is no explicit legal regime, since there is no specific set of rules regulating the patrimonial consequences of the marriage during the course of the marriage. The

patrimonial position of the spouses is, in principle, the same as if they were not married at all. One could qualify this as a legal regime of separation of property. The patrimony of the spouses remains separated, as if there were no marital bond. Each spouse has his own separate property.

Moreover, there is no special regulation concerning marital contracts. Ante- or post-nuptial agreements, separation or maintenance agreements all are subject to the general law of contracts (see no 6). Neither does statute law elaborate any type of marital contract.

§ 2. Limited freedom of contract in marital property law

4. Theoretically, freedom and autonomy of contract, as a basic concept in Western law, is considered to govern marital property law. However, contractual freedom is not absolute and may be severely limited. Besides general material restrictions concerning the validity of each contract based on public policy and good faith, there may be both formal requirements and specific material restrictions resulting from the existence of imperative marital property rules.

A. *Formal requirements*

5. As to the validity of the contract between the spouses, it is often considered to be a solemn contract, requiring a notarial deed.[2] In Austria, courts accept the validity of a contract even when the formal requirements were not fulfilled initially, if the spouses are complying with their contractual obligations. In Finland and Sweden, it is required that the marital contract be in writing, signed and witnessed by two persons.

Moreover, to oppose the contract towards third parties, some form of publicity is imposed. This may be a marginal mention in the marriage act,[3] registration in the register of commerce, registration in a special public (marital property) register.[4] In Finland and Sweden, the contract must be registered with the court, although it is not subject to an approval, neither administrative nor judicial. Public ratification is needed in Switzerland.[5]

6. In English law, there are no specific formal requirements for making a marital contract. The general law of contracts is to be applied. If a contract is to be made out, it must be shown that (i) there was a genuine meeting of minds between the parties, (ii) the parties intended to create a legally enforceable relationship, (iii) the terms of agreement are sufficiently precise, (iv) there is consideration, unless the agreement is contained in a deed or document under seal, (v) the terms which it is sought to enforce are not illegal or contrary to public policy. If a marital contract is established, imperative rules on property distribution may affect its enforceability (see no 9, 55, 82).

[2] Eg Austria, Belgium, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Spain, Switzerland.

[3] Eg Belgium, France, Italy, Luxemburg, Portugal, Spain.

[4] Eg Germany, Greece, the Netherlands.

[5] Art 184 ZGB.

However, the Law of Property (Miscellaneous Provisions) Act 1989 imposes a general requirement that a contract for the disposition of land or any interest in land should be in writing and signed by the parties. It would seem that this Act will do much to restrict reliance on informal contracts as a source of entitlement to property, although it does not affect the operation of implied resulting and constructive trusts (see no 17).

7. Changing the marital property regime during the marriage, by making a new marital contract or changing an existing contract, entails some additional formal restrictions. The marital property regime, being a normative set of rules, in some countries, it may only be changed by mutual consent of both spouses and on the condition of judicial approval (homologation).[6] No such approval is required in several other countries.[7]

B. *Specific material restrictions: imperative marital property law*

8. A substantial restriction of contractual freedom follows from imperative rules of marital property law. Contractual freedom is virtually non existent in most of the East-European countries where a limited community property system is imposed as an imperative legal regime.

9. Generally, the legal regime is not imperative and only offers an alternative in the absence of a marital contract (see no 2). In some countries, however, various rules of the legal regime are imperative, to be applied to all marriages, regardless of the existence of a marital contract. This imperative character may be quite dominant, affecting management of property and creditors' rights during the marriage as well as property distribution upon dissolution of the marriage. Contractual freedom may be so limited that one could even qualify such a legal regime as imperative in principle, with only some aspects left to the spouses' contractual autonomy.

(1) At common law, for instance, during the marriage, the concept of separation of property is imperative regarding management of property and creditors' rights. Marital contracts (usually marriage settlements) normally only deal with the question of property distribution. However, here too, contractual freedom is very relative since the matter is governed imperatively by the concept of equitable distribution (see no 55, 82).

The marital contract cannot preclude the court from exercising its jurisdiction to make financial provision and property adjustment orders. The possible relevance of these rules must be considered in any case concerning the enforceability of marital contracts, although in practice the rules are more relevant to cases in which rights are purportedly taken away rather than to cases in which rights are conferred by contract.

(2) Also in Sweden and Finland, one could consider the legal regime to be almost imperative. During the marriage, the concept of separation is imposed through imperative rules regarding the management of property (see no 26, 28) and creditors' rights (see no 34). Therefore, it is not possible to adopt a genuine, ie applicable from the outset of marriage, community property system, by marital contract.

[6] Eg Belgium, France, Italy, the Netherlands.
[7] Eg England, Finland, Greece, Luxemburg, Spain, Sweden.

In fact, the marital contract may only deal with the distribution of property upon dissolution of the marriage, eg excluding certain assets from distribution. But also at this point, contractual autonomy is limited through the imperative rules of equitable distribution, applied as a correction both to the equal division of marital property in the legal regime and to the title principle in a contract of separation of property, enabling the judge to ignore the marital contract to a certain extent (see no 51, 84).

10. In most countries, the legal regime is of a default nature. However, this does not imply that the legislature does not impose any imperative rules, applicable to all marriages, regardless of the non-contractual (legal) or contractual marital property regime.

(1) There will often be a separate set of imperative rules, called the primary regime,[8] formulating the mutual rights and obligations of spouses. This primary regime does not only impose several personal obligations on the spouses, but also some important patrimonial obligations such as the obligation of each spouse to contribute to the marital expenses or the joint liability for reasonable household debts (see no 32, 35).

Very important in this regard are protective measures concerning the management of property, even be it separate property. First of all, the family home and its furnishings are protected, in most cases requiring consent of both spouses to deal with these assets (see no 20, 25-27). Sometimes general management restrictions are imposed for important transactions (see no 20, 28).

As opposed to the primary regime, legal regime or marital contract are functioning as a secondary property regime, affecting only the area left to contractual autonomy.

(2) Moreover, in several countries of separation of property, at the end of the marriage, patrimonial solidarity and sharing is imposed to a varying degree. In Austrian law, parties cannot draft a contract of separation of property, before dissolution of the marriage, departing from the principle of equitable distribution of *Gebrauchsvermögen* (see no 49). In England, the concept of equitable distribution is imperative, and any marital contract can be overridden by a court in divorce proceedings or (subject to certain restrictions) on the death of either spouse (see no 9, 55, 82). The same is true in Sweden and Finland, the more limited mechanism of judicial correction upon property distribution, based on equity, being imperative (see no 9, 51, 84).

11. Finally, it is possible that some principles are imposed mandatory within one (secondary) marital property system. For instance, the Belgian management rules of the legal regime, must be respected in any type of community regime, be it contractual or not (see no 21, 67). Also in Switzerland and Greece, the management rules laid down for a contract of community property are imperative.

In Greece, the solidarity mechanism of the legal regime of separation is imperatively applicable to all systems of separation of property, contractual or not (see no 54, 82).

[8] See eg Art 214-226 French CC; Art 212-224 Belgian CC; Art 81-92 Book I Dutch CC.

Chapter II. Legal or non-contractual marital property systems

§ 1. Community vs. separation

A. *Community property systems*

12. In the continental community property tradition, marital property law is recognised as a specific part of the law regulating the patrimonial situation of married persons. The marital property regime is a normative set of rules determining all patrimonial aspects of the marriage. Thus, the legislature has worked out a detailed property regime that applies if the spouses did not make a marital contract. Such regime regulates the spouses' property situation from the start until the end of the marriage.[9]

13. In community property countries, the marriage automatically entails a mass of common property. This community may be limited to the gains, excluding premarital goods and goods acquired by way of gift, will or inheritance, as in France[10] and Belgium,[11] or may be total, encompassing all but the strictly personal goods of the spouses, as in the Netherlands.[12] Due to the presumption of community property, the difference between the limited and total community property will often be much less pronounced than one would expect.

Moreover, even in the system of total community of property, some assets may be an impediment to become part of the community, because they are too closely attached to the entitled person. According to current case law and prevailing doctrine, in Dutch law, personal goods in this respect only comprise the right to alimony.[13]

14. Contractual modifications as to the composition of the community property as designated by the legal regime are possible, both by expanding or reducing the community (see no 58).

15. Some Scandinavian countries, such as Norway, Denmark and Iceland, have adopted a community property system whereby, after the conclusion of the marriage, the property of each spouse is divided into two categories, common property (as broadly defined as in the Netherlands) and separate property. Although this terminology suggests that there would exist, in theory, a genuine community of property upon conclusion of the marriage, this seems, in practice, not the case. These regimes are to be approached in the context of the Scandinavian tradition of deferred community property (see no 40, 51).

[9] Or, of course, until the end of the marital property system, if spouses would change it by marital contract (see no 7).

[10] Art 1405, al 1 French CC.

[11] Art 1399, al 1 and 1400-1408 Belgian CC.

[12] Art 94 Book I Dutch CC.

[13] Since the decision of the Supreme Court of 27 November 1981, NJ, 1982, no 503, although a pension right itself should apportion to the spouse who is formally entitled to it, the value of pension rights and claims are part of the community and must therefore be divided between the parties. Also under the new law of 1994, the pension claim itself is not part of the community, but its value should be distributed between the spouses. About this system of pension distribution: see no 38.

B. *Separation of property systems*

16. In several countries, the property regime entering into force, in the absence of a marital contract, upon conclusion of the marriage, is much less organised. In principle, marriage does not even change the spouses' patrimonial situation.[14] The legal regime may be said to be a separation of property. It is, of course, possible for the spouses to own an asset jointly, to which the regular rules of contract and property law apply.

17. So, in English law, since the Married Women's Property Act 1882, it is a basic principle that marriage as such has no effect on property entitlement. However, there are some exceptions to this rule. Under some circumstances, one spouse may, during the marriage, claim property rights in assets of the other spouse.[15]

(1) First of all, there are a number of statutory provisions conferring rights on a spouse, by way of exception to the general rule.

The Married Women's Property Act 1964 gives a right to husband and wife to share equally any savings from a housekeeping allowance made by a husband to his wife. It seems that the provisions of this Act are rarely invoked. The Law Commission has recommended repeal of the Act, and that it be replaced by a statutory presumption that property bought for the joint use or benefit of spouses should be jointly owned by them.[16]

According to the Matrimonial Proceedings and Property Act 1970 (section 37) the spouse who substantially contributes in money or monies worth to the improvement of property is, in the absence of contrary agreement, to be treated as acquiring a share or an enlarged share in the property. In the absence of agreement, it is for the court to quantify the shares according to what it considers to be just.

The Matrimonial Homes Act 1983[17] gives one spouse certain rights to occupy the matrimonial home unless and until a court order determines otherwise (see no 25).

(2) Secondly, based on the law of trusts, one spouse may claim a beneficial interest in the other's property. The law of implied and resulting trusts has been developed to enable both parties to a marriage to claim an interest in property.

The fact that a person expends money or labour on another's property does not of itself entitle him to that property or to an interest in it, but a trust may be imposed if two conditions are satisfied. First there must be evidence that the parties intended that they should both be beneficial owners of an interest in that property. Secondly, the applicant, ie the person who would not be entitled if only the documents relating to the legal estate were referred to, must show reliance on this intention to the applicant's detriment.[17a]

18. In Austria, the *Gütertrennung* implies that both spouses are separate owners of all goods and debts. Also the Greek legal regime is based on the principle of separation

[14] Of course, apart from marital property law, a spouse may have rights of succession on the death of the other. A spouse may also have rights under official or private pension schemes.

[15] Moreover, in case of divorce, the principles of equitable distribution will be applied (see no 55).

[16] Subject to certain exceptions.

[17] Shortly to be replaced by the Family Homes and Domestic Violence Act 1995.

[17a] The application of the law has been authoritatively established by the House of Lords in *Lloyds Bank v Rossett* [1991] 1 AC 107.

of assets. Any personal property of the spouses, either existing before marriage, or acquired during it, remains personal and belongs to the acquiring spouse. The same concept of separation of property during the marriage is applied in the Scandinavian system of deferred community property[18] and in the German and Swiss legal regimes of *Zugewinngemeinschaft* and *Errungenschaftsbeteiligung*.

Recognising the influence of the spouses' cohabitation on commingling of assets, it is a common rule that movable property unproven to be owned by one of the spouses will be qualified as joint property.[19] Thus, the Swiss Civil Code formulates a legal presumption of joint ownership regarding property unproven by the creditor to be property of the debtor spouse.[20]

Often presumptions of ownership may be based on the use or possession by one or both of the spouses. In Germany, household goods acquired during marriage are presumed to be undivided property of both spouses.[21]

Greek law establishes some rebuttable presumptions concerning the ownership of movables. Movables in possession of either or of both spouses are presumed for the creditor's benefit to belong to the debtor-spouse, while, in the internal relationship between spouses, movables possessed by both, are presumed to belong to both equally. In the relationship towards creditors, movables intended for the personal use of each spouse are presumed to belong to the spouse using them.

19. In all of these systems, during the marriage, there is no common property, designated as such by law. This does not imply that there would be no idea of sharing in these systems. However, as for instance the notion of deferred community property indicates, the sharing is deferred, for it only occurs at the termination of the marriage. There are various techniques used to realise this principle of sharing (see no 41-56).

§ 2. Management of property

A. *Community property systems*

20. In community property systems, a distinction must be made between management of one's own separate property and management of the community. As to the separate property, since only one spouse is the owner, the management of it is based on the principle of autonomy. It is managed solely and exclusively by the owning spouse. However, this principle is mitigated through several imperative rules requiring consent of the other spouse for certain important acts, formulated in the primary regime.

Thus, in application of the primary regime, the family home is protected against disposition or encumbrance by one spouse without the other's consent.

Moreover, in the Netherlands, the primary regime also contains more general management restrictions: gifts inter vivos and securities in favour of third parties, as well as buying on credit, may not be done without the other spouse's consent.[22] The

[18] This term should be nuanced: see no 51.

[19] Compare art 1468 Belgian CC.

[20] Art 200, al 2 ZGB. In case of doubt, shares in the undivided property are presumed equal (art 646, al 2 ZGB).

[21] Compare in England: see no 17.

[22] Art 88 Book I Dutch CC.

same applies to all contracts in favour of third parties, unless no value has been withdrawn inter vivos from the acting spouse's estate. So the appointment of a beneficiary of an annuity usually demands the consent of the other spouse.[23] On the other hand, when a spouse, manager-shareholder of a company with limited liability, acts on behalf of the company, the Civil Code provides that the obligation to obtain the consent of one's partner is not compulsory when that acting spouse, alone or together with the other managers, owns the majority of the shares.[24]

In Belgium, gifts inter vivos and (personal) guarantees may be nullified if they endanger the interest of the family.[25]

21. As to the management of community property, in France and Belgium, the principle of equal ownership rights in that property is expressed by giving each spouse an equal management right towards the community property (concurrential management),[26] although the consent of both spouses is required for some major acts, such as alienation or encumbrance of real property, gifts inter vivos, contracting loans.[27] In Belgium, these rules are imperative for each, also contractual, system of community property (see no 11, 67).[28]

In the Netherlands, the principle of exclusive management is not limited to the separate property, but does equally apply to the community, subject to the management restrictions of the primary regime (see no 20). Each community asset is managed exclusively by that spouse by whom it has been acquired.[29] However, all property acquired by one spouse, but used with his consent by the other in the execution of the latter's profession or enterprise, shall be managed by that professional or entrepreneur.

22. Consent requirements are accompanied by two types of corrections (see also no 26). The first is a sanction which may be invoked if one spouse acts without the consent prescribed by law. The other spouse may then ask the court to nullify the forbidden act.[30]

A second type of correction is needed for situations where a spouse cannot or does not want to give the required consent. In case of incapacity or illness of one spouse, or if one spouse refuses to cooperate without a sound reason or engages in bad management or fraudulent behaviour, the other spouse may ask the court to act alone (for a particular transaction), or even, more generally, to be substituted in the first spouse's management rights.[31] In the worst scenario, a judicial separation of property might be requested (see also no 68).[32]

[23] Even when it is revocable, according to the Ministry of Justice. This has been highly criticised by the doctrine.

[24] Art 88 Book I Dutch CC.

[25] Art 224 Belgian CC.

[26] Art 1421 French CC; Art 1416 Belgian CC.

[27] Art 1422, 1424-1425 French CC; Art 1418-1419 Belgian CC.

[28] Art 1451 Belgian CC.

[29] Art 90 Book I Dutch CC.

[30] Eg art 215, 224, 1422-1423 Belgian CC.

[31] Art 217, 219, 1426 French CC; Art 220, 221, 1420-1421, 1426 Belgian CC; Art 90-91 Book I Dutch CC.

[32] Art 1470-1474 Belgian CC; art 1443-1449 French CC; art 109-113 Book I Dutch CC.

B. *Separation of property systems*

23. In a regime of separation of property, all property is, in principle, separate property of one or another spouse. Each spouse manages its own property alone. Essentially, the legal owner of property can deal with it as he wishes. This principle of exclusive management concretises the autonomy of the spouses, the cornerstone of a system of separation of property. The general principles of contract and property law do apply. Thus, spouses may jointly own property. One spouse can also mandate the other spouse to manage his property.

24. However, even within this concept of separation, the fact of being married may imply some, although limited, patrimonial solidarity, by restricting the management rights of a spouse. In some circumstances, there are steps which can be taken by a spouse to prevent his or her partner acting prejudicially.

The reason for these restrictions may be double. First, there is the desire of the legislator to protect the living circumstances and environment of the family (see 1). Secondly, in the light of the idea of sharing at the end of the marriage, there might be some more general protective management restrictions (see 2).

1. Protection of family home

25. In English law, based on the Matrimonial Homes Act 1983 (see no 17), a spouse can register a claim to a right to occupy the matrimonial home which will bind a third party, and therefore in practice make it impossible to deal with the property, unless and until a court orders otherwise.

In Austria, the interests of the non-owning spouse in the family home are protected through § 97 ABGB, restricting the rights of the spouse who owns or leases the family dwelling.

26. Also in Sweden and Finland, the family dwelling is protected, even if it has been contractually excluded from the marital property and has been designated as separate property. This protection is imperative, regardless of the marital contract.

In Finland, a spouse may not, without the written consent of the other spouse, transfer ownership, lease or any other title to the occupation of an immovable property which is exclusively or mainly intended to be used as the family home.[33] This consent must be give in concreto, for one specific disposition. The same principle, except that the consent may be oral in this case, is formulated for movable property such as furniture and other household contents, tools of trade of the other spouse or property for the personal use of the other spouse or of the children.[34]

Since these restrictions on the management of property are mandatory, enforcement mechanisms such as nullification and subsitution are needed (compare no 22). Any disposition made in breach of management rules will be declared void upon an action to be brought by the other spouse within six months (immovables) or three months (movables) from the time of knowledge of the disposition. In the case of movables,

[33] Section 38 FinRMA.
[34] Section 39 FinRMA.

third parties in good faith are protected.[35] Refusal or unableness to give consent may be solved by authorisation of the court for the disposition to be made by one spouse only.[36]

27. A similar protection of the family dwelling exists under Swiss law. It is forbidden for a spouse to dispose of the family home or to restrict its use by the family in another way, without the other spouse's consent.[37] Also, one spouse may not terminate the lease without the other's consent.

2. General management restrictions

28. Especially in systems with a guaranteed right of sharing at the end of the marriage (see no 50-54), the solidarity principle may, already during the marriage, put some burdens on the autonomy and exclusive management rights of spouses. The underlying objective is to prevent each spouse from managing its property in a way that, upon dissolution of the marriage, there would be nothing left to divide.

(1) Thus, in Sweden and Finland, exclusive management rights of property that will become marital property upon dissolution of the marriage, are limited through imperative rules. In Sweden eg, disposition of such property requires the other spouse's consent.

(2) Similar restrictions on the principle of exclusive management exist[38] in German law. In two situations, a spouse may not act without the other's consent, although this protection is not imperative, for it may be contractually excluded. The first limitation[39] concerns the disposition of property that comes down to a disposition over the entire or almost entire patrimony (*Vermögen im Ganzen*),[40] if the third party knows or should know, given the circumstances, that this is such a transaction.[41] A second limitation[42] concerns household goods, excluding the family home. Acts performed without the required consent are null and void.[43] Refusal or unableness to consent may be substituted by the approval of the *Vormundschaftsgericht*.

In Switzerland, a spouse may not dispose of his share in undivided property (*Miteigentum*) without the other's consent.[44] Moreover, the court (*Eheschutzrichter*) may, because of the economic well-being of the family, forbid a spouse to dispose of an asset.

(3) In addition, the management rights of a spouse may also be limited indirectly. Often, certain gifts or wasteful acts are ignored and added to the distributable mass. Swiss law, for instance, states that should be added to the *Errungenschaftsbestand,* gifts made by a spouse without the other's consent in a period of five years before the

[35] Section 39, al 2 FinRMA.
[36] Section 40 FinRMA.
[37] Art 169, al 1 ZGB.
[38] § 1364 BGB.
[39] § 1365 BGB.
[40] 85 or 90% according to the extent of the patrimony (BGHZ 77, 299; BGH, FamRZ 1991, 669).
[41] BGH, FamRZ 1993, 1302.
[42] § 1369 BGB.
[43] § 1366-1368 BGB.
[44] Art 201, al 2 ZGB. Compare no 71.

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[44] Art 201, al 2 ZGB. Compare no 71.

dissolution of the marriage and transactions carried out by one spouse to the detriment of the other's compensation rights.[45]

29. General management restrictions cannot be found in English law, where there is no guaranteed right but merely a possibility to particicipate in case of divorce (see no 55). The idea of sharing at the end of the marriage, being subject to the judge's discretion through the concept of equitable distribution, is less compelling than in the aforementioned regimes, and not strong enough to impose restrictions of a more general type on the autonomy of the spouses to manage their assets during the marriage.

However, if divorce or certain other proceedings are pending, it may be possible to obtain an injunction from the court, prohibiting dealings with the property. Moreover, in recent years the courts have increasingly set aside, relying on the doctrines of undue influence and misrepresentation, loans effected by one spouse to which the other has ostensibly agreed.[45a]

§ 3. Creditors' rights

A. *Community property systems*

30. As a general principle of the law of obligations and contracts, creditors may recover from the entire patrimony of their debtor. Translated towards a community property system, a creditor can always seize his debtor's separate property and his income, regardless of the latter's qualification as community property.

31. The question arises to what extent the community property as a whole may be seized by a creditor.

In France and Belgium, creditors of a separate debt may, in principle, not recover from the community property.[46] In Dutch law, however, these creditors may seize the community property, except if the other spouse points out separate property of the debtor-spouse, sufficient for recovery.[47]

Creditors of a common debt may seize both the contracting spouse's separate property and the community property.[48] In Belgium, common debts may, in principle, in addition to separate property of the contracting spouse and community property, even be recovered from separate property of the non-contracting spouse.[49]

32. Usual household debts are considered to be essential in the marital context and do, therefore, automatically engage each of the spouses and hold them jointly liable. This principle is laid down in the primary regime and applies to all marriages.[50] It may be

[45] Art 208 ZGB. See also § 1375 BGB.

[45a] *Barclays Bank v O'Brien* [1994] 1 AC 180; *CIBC Mortgages v Pitt* [1994] 1 AC 200.

[46] Recovery is limited to separate property and income of contracting spouse (see no 30). See art 1411, al 1 French CC, with exception in al 2; art 1409 Belgian CC with exceptions in art 1410-1412.

[47] Art 96, al 1 Book I Dutch CC.

[48] Art 1413 French CC; art 95, al 1 Dutch CC.

[49] Art 1414, al 1 Belgian CC with exceptions in al 2.

[50] Art 220 French CC; Art 222 Belgian CC; Art 85, al 1 and 86 Book I Dutch CC.

considered to be a general rule, applicable also in systems of separation of property (see no 10, 35).

B. *Separation of property systems*

33. The principle of separation inherently implies an immunity of one spouse's property from liability for the other's debts. Each spouse is responsible for his own debts, as if he were unmarried. Creditors may seize all property owned[51] by their debtor. This includes his share in undivided property. Creditors cannot recover from the other spouse's property.

34. In Finland and Sweden, these principles are mandatory and cannot be altered in a marital contract, not even a community contract. This implies that the concept of separation of patrimonies, as prescribed by the legal regime, is mandatory for all marriages.

Also in English law, the concept of separation of debts and recovery is imperative (see no 9). However, the English Insolvency Act 1986 contains provisions whereby certain voluntary dispositions in favour of spouses (and others) may be set aside by a court on the application of a creditor. The court also has the power, in certain circumstances, to order a sale of property in which the debtor has a (legal or beneficial) interest, thus, for example converting a wife's interest in the family home into an interest in the proceeds of sale.

35. Joint liability for household debts is a generally accepted principle (see no 10, 32). In Germany, usual and reasonable household debts contracted by one spouse automatically engage the other spouse (*Gesamtschuld)* and result in a joint liability (*Gesamtgläubigerschaft*).[52] In Switzerland, each spouse may engage the other spouse for current daily needs.[53] This principle may, in Swiss law, be set aside for serious reasons (eg incapacity), on the condition that third parties be warned individually.

According to the Austrian *Schlusselgewalt*,[54] usual household debts contracted by the homemaker (without income) will also bind the other spouse (with income). This rule does not apply if the non-contracting spouse warns the third party that he does not intend to be bound by the contract.

§ 4. Distribution of property upon dissolution of the marital property regime[55]

A. *Community property systems*

36. The principle of equal distribution is an essential feature of community property

[51] In England, certain exceptions (eg basic household equipment and furniture) to this principle have been created by statute (Courts and Legal Services Act 1990, section 15).

[52] § 1357 BGB.

[53] Art 166, al 1 ZGB. For some applications: see BGE 49 II 450; BGE 50 I 47.

[54] § 96 ABGB.

[55] Dissolution of the marital property regime may be caused by dissolution of the marriage itself (divorce, separation, death), by nullification of the marriage, by change of marital property regime, in case of absence. In some countries, eg Austria, Greece, Switzerland, bankruptcy of one spouse may lead to dissolution of the (contractual) community property system.

systems. It is the emanation of the solidarity principle, the idea of sharing, fundamental to this view on marital property. However, this general rule is not imperative and will often be modified by marital contract (see no 85).[56]

Normally, each spouse has an abstract and equal right in the entire community property. There may, however, be circumstances in which one spouse may claim a preferential right to a certain community asset. In Belgium, for instance, the surviving spouse is entitled to receive the family home.[57] In case of divorce, each spouse may request this. It often will be awarded to the spouse with custody over the children.[58] In the Netherlands, more generally, preferential attribution applies, based on reasonableness, to assets in which the spouse has a personal interest, eg property with emotional value derived from his family.

All of these preferential rights are credited to the receiving spouse's share in the community property, so they do not constitute an exception to the equal division rule.[59]

37. In France and Belgium, the judge has no discretionary power as to what property may be distributed nor can he change the distribution rule. In the Netherlands however, the Supreme Court has given itself a discretionary power, if necessary for reasons of equity and fairness, to determine that certain assets will be awarded to one spouse or to deviate from the equal division rule. The Court is using this power reluctantly.[60]

38. In the Netherlands, since the Supreme Court decision of 27 November 1981, the value of pension rights and claims[61] must be divided between the spouses (see no 13). In 1994, a statutory system of pension distribution has been enacted.[62] At the moment of dissolution of the marriage by divorce,[63] the ex-spouses have a right to half of the value of the old age pensions[64] built up during the marriage. It should be stressed that the spouses have that right irrespective of their current matrimonial regime, community, separation of property or whatsoever. However, this is not the case if the spouses explicitly agreed in the marital contract not to distribute the pension claims, since this statutory system of pension distribution is not imperative.

The spouse-creditor has an independent claim against the pension fund when that fund has been informed about the divorce within two years after it has taken place.

It is important that the Act may have retroactivity for those marriages which have

[56] An exception seems to be Italian law where the principle of equal distribution is imperative.

[57] Art 1446 Belgian CC. Compare in Switzerland (see no 53, 88).

[58] Art 1447 Belgian CC. See also in France and Italy and the *Hausratsverordnung* in Germany (see no 52).

[59] As opposed to the clause of preciput: see no 85.

[60] See HR, 7 December 1990, NJ, 1991, no 593, with annotation of E.A.A. Luijten, where the husband murdered his much older and wealthy wife shortly after the marriage. The case is however in line with art 6 Book II Dutch CC and with the Kriek-Smit case (HR, 12 June 1987, NJ, 1988, no 150). Compare with the exceptional possibility to ignore the terms of a contract of separation based on considerations of equity (see no 90).

[61] A pension consists of two elements: the pension for the contracting party, ie the employee (old age pension) and a pension claim for his or her future widow or widower (extraordinary widow or widower pension).

[62] Entering into force 1 May 1995. Compare with the German *Versorgungsausgleich* (see no 52).

[63] Or when a judgment pronounces separation of bed and board.

[64] The new law only takes into account the old age pension. For the distribution of the pension claim, the widow or widower pension is not to be taken into account.

come to an end by divorce before the Supreme Court's decision of 1981. This is the case if that marriage has lasted at least eighteen years, children have been born, and the pension fund has been informed within two years after the coming into force of the new statute. Then, the other ex-consort will receive a claim of one fourth of the old age pension.

B. *Separation of property systems*

39. Strictly speaking, there can be no distribution of property in a system of separation of assets. The title principle determines what property belongs to each spouse. There might only be a distribution of undivided or joint property, according to the general principles of contract and property law. It is clear that the title concept may work a great hardship upon a spouse-homemaker, taking care of the household and of the children and not, or only partially, active on the job market.

40. At the beginning of this century, Scandinavian countries introduced the idea of sharing, well-known to the community property tradition, by adopting an intermediate solution. During the course of the marriage, the autonomy of separation of property is saved, but at the end of the marriage, the harsh results of the title principle are mitigated by the origin of a community of goods. Thus, in lieu of creating a community at the outset of the marriage, this is deferred until the end of the marriage. At that moment, each spouse obtains an equal property right in kind (in natura) in a mass of common goods. A comparable idea is applied in systems with a compensation mechanism entitling each spouse to an equal share in value of the other's gains.[65]

In the seventies, also the common law world acknowledged the unfairness of separation of property upon dissolution of the marriage. Here, sharing principles are realised by making it possible to ignore the title concept through reallocation of property. The judge can award all or certain categories of property, to each one of the spouses, considering several factors, as he thinks fit, regardless of the title to that asset. This is called equitable distribution (see no 55).

41. Thus, while it is clear that the need for a patrimonial correction at the end of the marriage has been recognised in virtually all countries with separation of assets as legal marital property regime, the concrete way to realise these sharing principles varies substantially.

(1) First, the mass of goods that may be distributed is quite different from one system to another. All property of the spouses could qualify as divisible, or only part of it, as defined by law (see 1).

(2) Secondly, there are several options as to the method of distributing this divisible mass.

One should distinguish betweems systems with a *guaranteed right to participate* in some mass of marital property and systems only providing for a *possibility for such a participation* or sharing. This clearly is closely connected with the method of distribution. If an equal, or any other mathematically fixed distribution standard, is used, the judge has no discretionary choice and the fact of sharing is guaranteed. In

[65] Regarding the difference between participation in nature and in value and possible nuances: see no 51.

the equitable distribution, whether or not there will be a division of property, is in the hands of the judge. Thus, it is not certain that some sharing will be realised.

Traditionally, a distinction is also made between sharing in nature (*participation en nature)* and sharing in value (*participation en valeur)*. In the first type, each spouse is awarded ownership rights in specific assets. In the second type, one spouse has a right in value, a compensation claim in money towards the other spouse. It seems appropriate to nuance this distinction (see no 51).

(3) These sharing principles are always applicable in case of dissolution of the marriage upon divorce. Sometimes, they are limited to the event of divorce or nullity of the marriage.[66] Sometimes, they apply equally in case of the death of one of the spouses.[67]

1. Divisible mass

42. An important distinctive feature in all of these corrective systems is the mass of property that may be divided between the spouses. This question should be considered independently from the method of distribution (see 2).

43. a) *Broad divisible mass* The Scandinavian deferred community is a broad mass of divisible property. As in the Dutch system of total community property (see no 13), the content of the community property is not limited to the marital gains. It encompasses all property, also premarital property and property acquired by gift, will or inheritance, except strictly personal things. In Sweden, the proceeds of some insurances such as retirement pensions, disablement compensation and survivor's allowances is separate property.[68] The divisible property is called marital property,[69] as opposed to separate property.[70]

This broad definition of the community may be contractually limited. Also, the donor or testator may condition his gift by designating it as separate property. Spouses cannot alter such stipulation through their marital contract.

44. In England, the mass of property that may be divided is virtually unlimited. It is left to the judge's discretion, considering several factors and circumstances, what property will be awarded to which spouse, regardless of the title of ownership (see no 55).

45. b) *Limited divisible mass* In several other countries, the category of property that may be distributed between spouses is limited, mostly to the gains acquired during the marriage. Here the size and content of the divisible mass may be compared with the systems of limited community property (see no 13).

46. Thus, the German Zuge*winn* is calculated by comparing the property of one spouse at the beginning of the marriage (*Anfangsvermögen*) with his property at the end

[66] Eg Austria, England, Germany.
[67] Eg Sweden, Finland, Greece.
[68] Compare in the Netherlands: see no 13.
[69] "Giftorättsgods" in Sweden, "Faelleseje" in Norway, Denmark and Iceland, "Avio-oikeus" in Finland.
[70] "Enskild egendom" in Sweden and Finland, "Saereje" in Norway, Denmark and Iceland.

(*Endvermögen*). The difference between these patrimonies constitutes one spouse's gains and may be divided (see 2). Existing debts are deducted from the *Anfangsvermögen*, that may not be less than zero. Property acquired during the marriage by way of gift, will or inheritance are treated as if they belong to the *Anfangsvermögen*. However, gifts between spouses must, in principle, be added to the endowed spouse's *Zugewinn*, except if § 1380 BGB applies (see no 52).

Also excluded from the *Endvermögen* are pension and insurance rights, not because they are separate property, but because they are subject to a specific distribution system, the socalled *Versorgungsausgleich* (see no 52).

Parties may contractually exclude the *Zugewinngemeinschaft* by marital contract.[71] If the formal requirements of the contract are not met (see no 5), it is void, and the separation of property applies as subsidiary legal regime.[72]

47. In Switzerland, all property acquired during the marriage belongs to the *Errungenschaft* (marital property) and may be divided between spouses at the end of the marriage.[73] Separate property or *Eigengut* is restrictively defined in the Civil Code.[74] It includes goods for personal use, premarital goods and property acquired during the marriage by way of gift, will or inheritance, *Genugtuungsanspruche*, goods with an equal or similar purpose[75] in substitution of separate property. Certain assets may be excluded contractually from the *Errungenschaft*, for instance professional goods.[76]

48. Upon dissolution of the marriage by divorce, annulment or death, Greek law imposes a mandatory compensation mechanism between spouses (see no 54).[77] If during the marriage the property of one spouse has increased and the other has contributed by any means to this increase, the latter has a right to claim part of the increase due to his contribution. The divisible mass is limited to the marital increase of one's property.

49. In Austria, the divisible property is limited to the socalled *eheliche Gebrauchsvermögen* and *eheliche Ersparnisse*. Each spouse may ask (within a period of one year) for the division of these assets.[78] The *Gebrauchsvermögen* includes all property used during the marriage by both spouses. Family home and furnishings invariably qualifiy as *Gebrauchsvermögen*. According to the circumstances, case law has also accepted a horse,[79] a weekend home[80] and a castle[81]. The *Ersparnisse* are savings realised during the marriage, usually meant to be used or consumed, such as

[71] § 1408 BGB.
[72] Compare regarding the *Versorgungsausgleich*: no 52.
[73] Art 197, al 1 ZGB.
[74] Art 198 ZGB.
[75] See BGE 100 II 82.
[76] Art 199, al 1 ZGB.
[77] Art 1400-1402 Greek CC.
[78] § 81, 95 EheG.
[79] OGH in EvBl 1983/40.
[80] OGH in JBl 1983, 488.
[81] OGH in JBl 1986, 114.

money, bonds, jewelry, works of art, coin and stamp collections, and even real property. Whether certain goods are meant to be used or not, is determined objectively according to common understanding.

Excluded from the distributable mass of *Gebrauchsvermögen* and *Ersparnisse* is property acquired before the marriage or during the marriage by way of gift will, or inheritance. However, if such an asset is the family home, it may be divided if the use of it is essential for the needs of one spouse.[82] Also not included are assets for the personal or professional use of one spouse, assets belonging to a corporation[83] and shares in a corporation.[84]

2. Distribution method

50. a) *Right to participate: equal distribution* In several legal regimes of separation of property, sharing is realised upon dissolution of the marital property system, through a guaranteed right towards, in principle, half of the divisible mass. There are, to a varying degree, some exceptions based on equity.

51. In Sweden and Finland, the traditional community rule of equal distribution does apply. However, this mathematical principle may be mitigated through a concept of equitable sharing.

(1) At the termination of the marriage, either at divorce or at death, all net property which has not been excluded from the divisible mass by marital contract or otherwise, will be divided equally between the parties. The sharing may be made either by an agreement between the parties[85] or by an administrator, usually an advocate, appointed by the court of first instance upon the application by any party.

In Sweden and Norway, the divisible mass that arises upon dissolution is a genuine (deferred) community in which both spouses have real property rights, so that, in principle, the division is in kind (in natura). In the Finnish system, sharing is realised through a compensation claim towards the marital property of the other spouse.

(2) At first glance, one may discern here a basic difference between a deferred community property system and a system with merely a compensation mechanism. In fact, however, the differences are of a technical nature and, quite often, there might be almost no difference at all.

Indeed, on the one hand, in the so-called deferred community property system in Sweden and Norway, each spouse enjoys a preferential right to take assets coming from him into the divisible mass. The spouse whose assets exceed one half of the total divisible mass, may pay a compensation in lieu of transferring part of the property towards the other spouse. On the other hand, also under Finnish law, the debtor-spouse has an option. He or she may choose either that the division is carried out in natura, ie a necessary share of his or her property is transferred to the less owning spouse, or

[82] § 82, al 2 EheG.

[83] For economic reasons (see OGH in JBl 1986, 119).

[84] As long as they are not purely an investment (OGH in JBl 1983, 316; OGH in EvBl 1988/11).

[85] In this case, the parties are free to agree, within the limits imposed by unfair contracts terms provisions, whatever they want to.

that the difference between the property values is paid in money.[86] If the second option is chosen, he may finance the payment through a bank loan, but the payment must be made in cash at the end of the sharing procedures, which then is terminated by the signing of the property sharing document by the administrator. If the wealthier spouse is unable to make a prompt cash payment in money, the administrator shall carry out the sharing in natura.

Thus, the distinction between participation in nature and in value, if used to characterise a marital property system as a whole, may seem somewhat artificial. Often, there is simply no such clear-cut distinction to be made. Therefore, one could argue to nuance the concept of deferred community property, by using the term in a broader sense, encompassing all mechanisms of equal participation, no matter whether this occurs in nature or in value. Thus, the systems of *participation en nature* (the socalled deferred community property) and of *participation en valeur* are emanations of one general type of participation-systems. Or one could suggest that the term deferred community property should be abandoned altogether, an idea recently expressed by Professor Anders Agell.[87] A more neutral and general concept would then be used, eg 'separation of property with equal participation right', or to put it more simply: participation systems.

This is not to say, however, that within such a participation system, there will be no difference between the techniques that may be used. One can distinguish between the technique of participation realised in nature, through a transfer of property rights in certain assets, or merely in value, through a compensation claim in money. These techniques may appear as equal options within a participation system, as is the case in the aforementioned Scandinavian regimes. The combination may also be less egalitarian, for instance opting for the participation in value as a general principle, with the participation in nature only as a correction in exceptional circumstances.

Thus, in the German legal regime (see no 52) payment normally will have to be made in money. The *Zugewinnausgleich* is a *Wertausgleich* without any influence on the parties' property rights of the assets. The same principle governs the French contractual regime of *participation aux acquêts* (see no 65), as it has been elaborated in the French Civil Code. In both cases, an exception is possible, so that in case of gross inequity for the debtor-spouse, payment can be made in nature through a transfer of property rights in certain goods.[88]

(3) The principle of equal distribution can be mitigated. In Finland and Sweden, the law reforms of 1987 have introduced the concept of equitable sharing, making it possible in individual cases to deviate from the principle of equal sharing if so required on the grounds of equity and justice.[89] Equal distribution will not be followed if it would lead to an unfair result or to the result that one party would obtain unjustified benefits. Factors to be taken into account are the economic and social situation of the spouses,

[86] Compare in Greece where the judge can make a choice (see no 54) and in Germany where payment should be made in money (see no 52).

[87] See bibliography: Agell, 1995, p9.

[88] See § 1383 BGB and art 1576, al 2 French CC.

[89] Section 103.b FinRMA; Chapter 12, section 1 SwedMA.

the length of the marriage, the contributions of each spouse to the common household and other aspects relating to the family economy.

As opposed to the common law system of equitable distribution (see no 55), the judge cannot reallocate all property as he thinks fit, and award all or most of the property to one spouse. There are some limits to be respected.

Thus, in Finland, the division of property may be modified so that the compensation claim will not or not entirely be awarded. The less-owning spouse will obtain from the other spouse less property than to which he would otherwise be entitled to under the equal distribution rule. Another possible technique for departing from the equal distribution principle is to limit equal sharing to property acquired during marriage and excluding other assets. Thirdly, one could include assets in the distribution, that were contractually excluded.

In Sweden, the deviation from equal distribution is limited to the amount of marital property of the spouse receiving more than half of the divisible mass. By excluding or restricting one spouse from sharing in the other's marital property, the latter may receive up to his entire marital property (even if exceeding one half of the totality of both spouses' marital property), but not more than this. Moreover, except in short marriages of less than five years, the distribution of the family home and household goods, must be equal.

52. In Germany, the principle of equal distribution governs both the general regime of the *Zugewinnausgleich* as well as the specific *Versorgungsausgleich.* Only very limited exceptions can be made.

(1) In the *Zugewinngemeinschaft,* the spouses do not have a right in natura in a community, but they do have a claim in value to share equally in one another's gains (*Zugewinn*).[90] The gains of each spouse are calculated by comparing *Endvermögen* and *Anfangsvermögen* (see no 46). There is a *Zugewinn* if the value of the former is higher than the latter. If at least one spouse has a *Zugewinn,* a compensation or *Ausgleich* will be made. The one spouse with the *Zugewinn* must pay half of it to the other. If both spouses have a *Zugewinn,* the difference between these two results is divided by two and that amount must be paid by the 'richer' to the 'poorer' of the spouses. It should be noted that, according to § 1380 BGB, gifts between spouses are considered to be an anticipation of the *Zugewinnausgleich* and must be credited to the compensation claim of one spouse, if it has been explicitly stipulated so and it is presumed so if the gift exceeds the value of an occasional gift, taking into account the family's living standard.

Besides the general *Zugewinnausgleich,* German law knows the *Versorgungsausgleich.* This is a system of equal distribution of certain pension and insurance rights.[91] This compensation mechanism may be excluded in a marital contract,[92] drafted at the least one year before the end of the marriage. Such exclusion is presumed to be a choice for the system of separation of property (compare no 46).

(2) A deviation from the principle of equal sharing in the *Zugewinnausgleich* may

[90] § 1378, al 1 BGB.
[91] Compare in the Netherlands: see no 38.
[92] § 1408, al 2 BGB.

be found in the, very limited, possibility for the judge to rule that the compensation claim may not be executed (or not entirely executed) in case of gross unfairness.[93] The court enjoys a somewhat broader discretionary power for reducing or even excluding the right of a spouse to the *Versorgungsausgleich*.[94]

(3) The *Hausratsverordnung* imposes an equitable distribution of the family home and household goods,[95] as far as the spouses did not divide these goods by mutual consent. The term equitable distribution is misleading in this context, since it does not deviate from the principle of equal distribution, but merely allows preferential attribution of use or ownership of certain assets against compensation, thus respecting the mathematical rule of equal division (compare no 36).

The court will take into account several factors such as the needs of the spouses and the interests of the children.[96] Although the cause of divorce is not considered, factual circumstances after divorce, eg remarrying, will be taken into account. Concerning the family home, the judge cannot alter ownership rights, but he may award the non-owner a right of use or occupation. A reasonable compensation must be paid. The court may also convert leasehold interests in the family home from one spouse to another. Household goods may be distributed equitably (*gerecht und zweckmässig*).[97] A fair compensation is due by the spouse receiving more than fifty percent. Assets belonging to one spouse may exceptionally be awarded to the other spouse, also on the condition of payment of a reasonable compensation determined by the judge.

53. The concept of the Swiss *Errungenschaftsbeteiligung* is comparable to the German legal regime. The property owned by each one of the spouses is divided into separate property and marital property. The net result of one spouse's marital property or *Errungenschaft* is his *Vorschlag*. Each spouse has a claim towards half of the other's *Vorschlag*.[98] This principle for division may be contractually modified. In case of dissolution of the marriage upon divorce, such a contractual clause will only apply if it has been explicitly so stipulated.

In case of dissolution by death, the surviving spouse enjoys a preferential right to the family home and household goods, as far as this is needed to continue the former living standard (compare no 36, 88). Undivided property may be awarded, against compensation, to the spouse who proves a determining interest in that property.[99]

54. In Greek law, in theory, there is no guaranteed right of participation, since one spouse will share only in the others gains if and to the extent of his contribution towards the other's patrimonial increase (see no 48). However, for it is difficult to evaluate one spouse's contribution to the increase of the other's property, the law fixes this contribution, as a rebuttable presumption, at one third of the increase. Based on this

[93] § 1381 BGB.
[94] § 1587 c and h BGB.
[95] All movables needed in daily family life. Excluded are clothes, money and professional goods (OLG Hamm in FamRZ 1990, 54).
[96] Hausratsverordnung.
[97] § 8, al 1 Hausratsverordnung.
[98] Art 215, al 1 ZGB.
[99] Art 205, al 2 ZGB.

legal presumption, the compensation mechanism does in fact lead to a mathematically fixed, although not equal, distribution.

It is impossible to waive this compensation right by marital contract (see no 11, 82). However, after dissolution, disposing of the claim is allowed. The judge has some discretionary power, for he can decide how the debtor-spouse shall fulfill his obligation: in money (in value) or in kind (in natura).

55. b) *Possibility to participate: equitable distribution* In the English system of equitable distribution, the divorce court has virtually unlimited powers in divorce, nullity of marriage and judicial separation[100] proceedings to achieve whatever result is regarded as fair, just and reasonable.

(1) Statute law[101] distinguishes between financial provision orders and property adjustment orders, and, ancillary to the making of the previous orders, the court also has power to order a sale of property. These powers are frequently and extensively exercised.

Financial provision orders are periodical payments for maintenance pending suit, secured or unsecured periodical payments after dissolution of the marriage, sometimes for a specified term, and lump sum orders, that may involve very large sums.[102] It should be noted that in English law, the matters of maintenance or alimony, both for spouses and children, and the problem of property distribution are treated all together.

Property adjustment orders include the power for the court to order that specified property, eg the matrimonial home or investments, be transferred to the other spouse (or to or for the benefit of a child of the family). The court may also direct that property to which a party to the marriage is entitled be settled for the benefit of the other spouse and/or the children of the family. This power is often used to make arrangements in connection with the former matrimonial home, in an attempt to ensure that it is available for occupation as a home for the children, whilst preserving both spouses' financial interest in it.

The court may also make an order varying for the benefit of the parties or the children, any ante-nuptial or post-nuptial settlement. This power can be used to make appropriate variations in a traditional marital settlement, the term settlement being widely interpreted;[103] and in some circumstances it may be used to vary occupational pension rights.[103a]

(2) In exercising its power to make these orders, the court must follow detailed guidelines that have been formulated by the legislature.[104] The minimal loss principle, directing the court to seek to place the parties in the financial position in which they

[100] Such decree in theory has the effect of removing the duty of one spouse to live with the other (MCA, section 18 (1)). In civil law countries, it is known as separation of bed and board. This term should not be confused with the judicial separation *of property*, existing in several countries, being a type of sanction and protective measure, by court order imposing a strict separation of property in lieu of a community regime or a participation system. See no 22, 68.

[101] MCA, section 21.

[102] See eg *Gojkovic v Gojkovic* [1990] 1 FLR 140: 1.3 million pounds.

[103] See *E v E* [1990] 2 FLR 233.

[103a] See *Brooks v Brooks* [1995] 3 All ER 257.

[104] Except for maintenance orders pending suit, where the legislation contains no guidelines at all and simply directs the court to make such order as it thinks reasonable.

would have been had the marriage not broken down, that governed the MCA 1973, was removed by the Matrimonial and Family Proceedings Act 1984. Although the 1984 Act does not substitute any comparable directive, it contains several provisions intended to structure the exercise of the court's discretion.

First of all, it is the duty of the court in deciding whether to exercise its powers and, if so, in what manner, to have regard to all the circumstances of the case, first (but not paramount) consideration being given to the welfare, while a minor, of any child of the family who has not attained the age of 18.[105]

Secondly in making any of the beforementioned orders in relation to a spouse, it is provided that the court shall 'in particular' have regard to certain specified matters.[106] Thus, the law enumerates a list of factors to be considered. These include (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, (b) the financial needs, obligations and responsabilities which each of the parties has or is likely to have in the foreseeable future, (c) the standard of living of the family before the marriage breakdown, (d) the age of each spouse and the duration of the marriage, (e) physical of mental disability of either of the spouses, (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family, (g) the conduct of the spouses, if that conduct is such that it would in the opinion of the court be inequitable to disregard it and (h) the value of any benefit, such as a pension, which by reason of divorce or annulment of the marriage, that party will lose the chance of acquiring.

Finally, the Act contains a number of provisions designed to direct the court's attention to the principle of self-sufficiency, and to facilitate in appropriate cases the making of a 'clean break' between the spouses.[107]

56. The distribution of the Austrian *Gebrauchsvermögen* and *Ersparnisse* is made according to equity,[108] The court has to take into account the contribution of each spouse (including services as a homemaker, caring for the children and cooperation in the other spouse's professional activity) towards the acquisition of property, but also the well-being of the children. If the spouse requesting the division, limits his claim to certain assets, only these assets may be divided, although the judge, in making this distribution, will have to take into account the elements of *Gebrauchsvermögen* and *Ersparnisse* not included in the request.[109]

The distribution may be realised through a reallocation of property, awarding ownership of specific assets to one or another spouse. Other possibilities are money claims[110] or a right of use and occupation of the other spouse's house.[111] Similar to the German Law, it is also possible to convert leasehold interests in the family home from one spouse to the other (see no 52).

[105] MCA, section 25 (1).
[106] MCA, section 25 (2).
[107] MCA, section 25 A.
[108] § 83 EheG.
[109] OGH in EvBl 1980/215 = SZ 53/81; OGH in JBl 1983, 316 = SZ 55/163.
[110] § 94, al 1 EheG.
[111] § 89 EheG.

It is not possible to exclude these rights in *Gebrauchsvermögen* and *Ersparnisse* by marital contract. However, for *Ersparnisse*, a contractually modified division may be stipulated in a notarial deed. After dissolution of the marriage, a modified division is possible by mutual consent.

Chapter III. Contractual marital property systems

§ 1. Community vs. separation

57. In several countries, the legislature itself elaborates contractual marital property regimes. Two types of marital contract mentioned in the French and Belgian Civil Code are total community of property[112] and separation of property.[113]

In the Netherlands, the law mentions three marital contracts, although none of them is commonly used. There are two forms of limited community (fruits and revenues; gains and losses)[114] and the *wettelijk deelgenootschap*, a contract of separation with a final compensation mechanism.[115] Comparable to the latter is the French *participation aux acquêts* (see no 65).[116]

In Austria, the law offers different types of marital contracts. The most important are: community property inter vivos, community property by death and *Heiratsgut*.[117] The most common marital contracts in Germany and Switzerland are the separation of property and the community property.

In Greece, in 1983, a contract of community property was introduced in the Civil Code. However, in practice it is not used[117a], being an institution unknown to and unconnected with the Greek mentality and reality.

A. *Contracts of community property*

58. In countries like France and Belgium, where a limited community is functioning as legal regime, spouses may create by marital contract a total community or may change some aspects of the legal regime as to the content or division of the community. In the Netherlands, with a total community as legal regime, the opposite may be done.

59. The Austrian contract of community inter vivos may be total or limited. Excluded are only non transferable goods (*Sondergut*).[118] The most common limited community systems are limited to assets acquired during the marriage. The latter is called an *Errungenschaftsgemeinschaft*.[119] Unlike the Swiss legal regime (*Errungenschaftsbeteiligung*) (see no 53), this is a genuine community property system. The community or *Gesamtgut* is qualified as a regular undivided mass (*Miteigentum*), although some

[112] Art 1526 French CC; Art 1453 Belgian CC.
[113] Art 1536-1543 French CC; Art 1466-1469 Belgian CC.
[114] Art 123-127 and 128 Book I Dutch CC.
[115] Art 129-145 Book I Dutch CC.
[116] Art 1569-1581 French CC.
[117] § 1218-1229, 1233-1236 ABGB.
[117a] As yet, only three such marital contracts have been recorded in the public register all over Greece.
[118] Compare with the Dutch legal regime. See supra no 13.
[119] § 1235 ABGB.

authors seem to consider it as *Gesamthandeigentum.*[120]

60. In Germany, the contract of community property may either create a total community, except non-transferable property (*Sondergut*), or a limited community, excluding several goods (*Vorbehaltsgut*). The community property is called the *Gesamtgut.*

61. In Swiss law, the total community includes all property except goods designated by the legislature as separate property (*Eigengut*; see no 88). Limited community property systems are the *Errungenschaftsgemeinschaft*, where the community is made up by the *Errungenschaft* (see no 53) and the *Ausschlussgemeinschaft*, where the community property includes all goods that are not contractually excluded, except for the *Eigengut*, that may never be common. There is a presumption of community (compare no 13), making assets common if they cannot be proven to be separate property.

B. *Contracts of separation of property*

62. One should distinguish between marital contracts establishing a pure and simple separation of property and those adopting a corrected or mitigated separation.

1. Pure and simple separation

63. A marital contract of pure and simple separation is an attempt to realise to the utmost extent the principle of separation of property, both during the marriage as well as upon dissolution of the marriage. Possible inequities of the strict separation are most flagrant and clear upon divorce, where one (professionally active) spouse gets virtually everything and the less professionally active spouse who spent a considerable amount of time and energy at home with the children receives almost nothing (see no 39). In the Netherlands, a contract of pure and simple separation, allowing such result at the end of the marital bond, has been called a 'cold exclusion'.

In several countries, such as France, Belgium, the Netherlands, although some imperative rules apply during the marriage through the primary regime (see no 10), upon dissolution, the title principle is applied without any correction and each spouse will take his own property, and his share in undivided property.

Also in Germany and Switzerland, a contract of pure and simple separation of property is possible, since the participation mechanism of the legal regime is not imperative (compare no 64).

2. Mitigated separation

64. In some other countries, however, the consequences of separation of property upon dissolution of the marriage are corrected by a compulsory participation mechanism. Such imperative rules make the contractual establishment of a pure and simple separation system or cold exclusion impossible.

Thus, at common law, the equitable distribution principles are of an imperative nature. No marital contract may set them aside (see no 9, 82). In Greece, the

[120] For the consequences of this distinction, see no 68.

compensation mechanism of the legal regime is applicable to any system of separation of property (see no 11, 54). The same is true for the equitable distribution of *Gebrachsvermögen* in Austria (see no 10, 56).

In Sweden and Finland, the concept of equitable sharing is not only functioning as a correction towards the principle of equal distribution in the legal regime but may be used to correct any marital contract, also if the spouses explicitly opted for a complete and strict separation of property, a 'symmetrical' marital contract excluding the legal regime of participation as a whole, stipulating that all present and future property is separate property. Moreover, in these countries, various imperative rules do apply during the marriage, imposing severe management restrictions on the autonomy of the spouses (see no 9, 26, 28, 34).

65. In the abovementioned jurisdictions any (contractual or non-contractual) system of separation of property is a (legally) mitigated separation. In countries where no such imperative statutory correction is imposed, the spouses often try to provide for some corrective devices through contractual modifications of the system of separation of property.

Thus, in France and Belgium, spouses often add a limited community of certain assets or even of one single piece of (real) property to the contract of separation. Here, some property is designated, already during the marriage, to belong to a community. In the Austrian contract of community by death, on the other hand, the existence of a community is deferred until the termination of the marriage by death.

Another possibility is to award each spouse a contractual claim towards the other's marital gains. Such compensation clauses may be final, imposing a compensation once, at the termination of the marriage, as in the Dutch *wettelijk deelgenootschap* and the French *participation aux acquêts*. A contract of this type is comparable to the German legal regime of the *Zugewinngemeinschaft*.

Far more preferred, in the Netherlands, is a contract with a periodical compensation, such as 'the new Amsterdam compensation clause', where the compensation must be calculated and executed, at least in theory, each year. Sometimes, a final compensation clause is added to it. This may rescue the spouse-creditor in the, quite common, situation that parties did not establish nor execute the periodical compensation rights.

66. Considered to be 'dead law' is the Austrian contract of the *Heiratsgut*, creating a special mass of property (dowry), added to the basic system of separation of property. This dowry encompasses goods given to the groom by the bride or a third party, such as the parents of the bride, in order to relieve the costs of marital life.[121] If ownership rights are not regulated in the contract, the husband will only receive a right of use and enjoyment, except for money and other fungibles. This type of contract, based on the ancient Roman dotal system, used to exist in several countries. Generally, it has been abolished because of the sexual inequality inherently connected with it.

In Greece, the new family law of 1983 on the one hand has put an end to the old institution of dowry, but on the other hand it provides for the possibility of the parent to transfer to the child property of any kind, in view of the creation of family or professional independence. This conveyance is subject to special low taxation.

[121] § 1218 *et seq* ABGB.

§ 2. Management of property

A. *Contracts of community property*

67. In Belgium, management rules of the legal regime do apply imperatively to each marital contract establishing a regime of community property (see no 11, 21).[122] Also in the Netherlands, management rules of the legal regime apply to all kinds of marital community systems. However, here, these rules are not compulsory.[123] One may deviate from them by marital contract, although the management rules of the legal regime usually apply.

Concerning the contract of community of property, Greek law states a principle that is typical for the concept of management in all community property systems.[124] Certain acts regarding community assets must be performed by both spouses or by one of them with the other's consent. This is a mandatory rule. If one spouse is physically or legally incapable or refuses to cooperate, the court may, if it is in the interest of the family, authorise the other spouse to accomplish the transaction alone (compare no 22, 26).

68. In Austria, as far as community property is considered to be a regular undivided mass of goods or *Miteigentum* (see no 59), the spouses may freely dispose of their part in it. However, case law and doctrine accept that, at least in the internal relationship between spouses, the consent of the other spouse is required. Moreover, some authors qualify the community not as *Miteigentum,* but as *Gesamthandeigentum,* hereby inherently requiring the other spouse's consent to dispose of one's share in the common property. The latter is the case in the German[125] and Swiss[126] contract of community property.

In Germany, property belonging to the *Gesamtgut* is managed by both spouses together.[127] Cooperation of one spouse may be substituted by authorisation of the court (*Vormundschaftsgericht*) in case of unmotivated refusal.[128] The management rights may also be delegated contractually to one spouse. This must be registered in order to make it effective in relation to third parties. Incapacity, abuse of right[129]and gross neglect of management duties may bring about a judicial separation of property (compare no 22)[130].

In Swiss law, each spouse can manage the community alone, engage the community and dispose of community property,[131] except for some important acts exceeding the normal administration, requiring both spouses' consent.[132] Unlike most other systems, it is not possible to substitute one spouse's consent with the court's authorisation, nor

[122] Art 1451 Belgian CC.
[123] Art 97 Book I Dutch CC.
[124] Art 1407 Greek CC.
[125] § 1419 BGB.
[126] Art 222, al 3 ZGB.
[127] § 1421 BGB.
[128] Compare §§ 1451, 1452 BGB.
[129] BGH in BGHZ 48, 370.
[130] Compare art 1470-1474 Belgian CC.
[131] Art 227, al 2 ZGB. See also art 229 ZGB for professional acts.
[132] Art 228, al 1 ZGB.

to withdraw his power of management. However, in these circumstances, the judge might order a judicial separation of property.

69. In Finland and Sweden, management principles of the legal regime, based on the spouses' autonomy, are imperative and cannot be altered in a marital contract. Based on the separation of property during the marriage, in principle, each spouse manages the property of which he is the owner. Some imperative management restrictions apply to property that will be divisible at the end of the marriage (see no 26, 28).

B. *Contracts of separation of property*

70. The basic rule of the contract of separation of property, ie separation of assets, liablilities and management, governs each contract of separation. However, it is slightly mitigated in countries like France, Belgium and the Netherlands, through the primary regime (see no 10). Thus, eg in Belgium, the spouse owning a house which qualified as a family dwelling could not sell or encumber it without his spouse's consent. Also, a gift or personal security offered by him could be nullified if it endangered the interest of the family (see no 20).

In Sweden and Finland, even more farreaching restrictions are caused by the imperative character of the management rules of the legal regime (see no 26, 28). This is not so for the management restrictions of the German *Zugewinngemeinschaft* (see no 28).

71. In the Swiss contractual regime of separation, parties may contractually lay down the character of an asset as *Miteigentum* or *Gesamteigentum* (compare no 68). The requirement of the other's consent to dispose of one's share in undivided property, as existing in the *Errungenschaftsbeteiligung* (see no 28), does not apply.[133] As in all systems of separation of property, delegation of power of management over one's patrimony is possible, in Switzerland even implicitly.

72. The dowry, in the Austrian dotal system, is managed by the owner, the bride or the groom.

73. In contractual regimes creating a final or periodical compensation mechanism, the marital contract should provide for some restrictions regarding the management of the property during the marriage, based on the protection of the idea of sharing at the end of the marriage (compare no 28).

§ 3. Creditors' rights

74. According to the fundamental principle of 'privity of contract', the marital contract may not alter legal rules regarding creditors' rights.

If the legal regime is a community property system, the principles on creditors' rights of this legal regime will imperatively govern any community property system,

[133] Art 646, al 3 ZGB.

be it contractual or not (see no 75). Creditors' rights in case of contracts of separation will follow the general principles of law, subject to some imperative marital property rules (see no 80).

If the legal regime is a system of separation of property, the principles on creditors' rights of this legal regime, merely an application of the general rules on creditors' rights, will imperatively govern any regime of separation (see no 80). Sometimes, other principles are enumerated in case of a contract of community property (see no 76-78). In some cases, however, the principles of the legal regime on creditors' rights are so imperative that they dominate any marital property system, be it a community property system (see no 79).

A. *Contracts of community property*

75. In community countries like Belgium, France, and the Netherlands, the principles on creditors' rights adopted by the legal regime are to be applied in any contract of community property.

76. The German contract of community property allows, in principle, creditors of one spouse to seize both the separate property of the debtor (*Sondergut* and *Vorbehaltsgut*) and the community property. The latter is immune from seizure if the debtor contracted without the required consent of the other spouse, or in case of debts exclusively connected with separate property.[134]

In the Swiss contract of community property, creditors of one spouse, in principle, may only recover from the debtor's separate property and from his share in the community. Exceptionally, one can seize the entire community. This is the case for a *Vollschuld,* restrictively enumerated in art 233 ZGB, basically being debts for the benefit of the community or the family.

77. In Greece, the creditor of one spouse must seize primarily the separate property of that spouse. If there is no such property, or if this does not satisfy his claim, he may recover from the community property.

78. In the Austrian contract of total community, each creditor may seize both the separate property of the debtor-spouse and the entire community property. If the community is limited, the creditor may only seize the debtor's share in the community, except if the debt is contracted for the benefit of the community.[135]

79. Imperative application of the principles of the legal regime of separation of property, irrespective of the chosen marital contract, may be found in common law jurisdictions (see no 9, 34). Also in Finland and Sweden, the principles regarding creditor's rights of the legal regime are imperative and cannot be altered in a marital contract (see no 9, 34). Each spouse is responsible for his own debts with his own property, regardless of the qualification of that property as community property.

[134] § 1438 BGB.
[135] § 1235 ABGB.

B. *Contracts of separation of property*

80. Applying the general principle of law regarding creditors' rights, any debtor contracting alone is responsible for his own debts with his entire patrimony. Creditors, in principle, may not seize property of someone else, even the debtor's spouse.

However, imperative marital property rules may establish an exception. For instance, the non-contracting spouse is jointly liable for common household debts contracted by the other spouse (see no 10, 32, 35).

81. In the Austrian dotal system, creditors of the husband may seize his property and claim a lien on the dowry assets charged with a right of use and enjoyment of the husband. The wife's creditors may recover from her own property and from dowry goods, the wife being the legal owner of the dowry.

§ 4. Distribution of property upon dissolution of the contractual marital property regime

A. *Imperative distribution rules applicable to all marital contracts*

82. In several countries, the legal regime imposes mandatory distribution rules. This implies that marital contracts may be altered or ignored in order to comply with these principles.

Thus, in English law, the principle of equitable distribution may never be set aside by a marital contract. Such a contract will be ineffective in so far as it purports to oust the jurisdiction of the court to make orders in divorce and other proceedings relating to maintenance and property entitlement. The only way in which a marital contract can be made effective is that it should be incorporated in a court order. Therefore, a marital contract does not bind a court and may be altered by the court, performing its task of equitable distribution (see no 9, 55).

Neither is it possible in Greece, in a regime of separation of assets, to exclude the compensation mechanism of the legal regime by marital contract (see no 54).

83. In Austria, the principle of the legal regime, regarding equitable distribution of the *Gebrauchsvermögen* (see no 56), is imperative and applicable to all marriages, irrespective of the terms of the contractual agreement. Thus, it also applies to contracts of community property.

84. In Scandinavian countries like Finland and Sweden, the possibility of equitable sharing (see no 51) is also imperative, so that the court may set aside partly or fully the terms of the marital contract. Even if the contract establishes a complete separation of property, the court might order sharing of property in such a way that, in spite of the contract, all property of one spouse would be treated as marital property subject to equal sharing, while the other spouse's property remains his separate property, excluded from sharing.

B. *Contracts of community property*

85. In most community countries, parties may choose in a contract of community any method of distribution, they think fit.[136] In the absence of an explicit clause in the contract, the distribution will be equal, as laid down in the legal regime (see no 36). The same is true in Greece.[137]

It is, for instance, quite common to stipulate in the contract that the surviving spouse, in case of dissolution of the marriage by death, will receive the entire community property. Another possibility is a clause of 'preciput', attributing one specific asset or a category of property to the surviving spouse, then equally dividing the remaining property.[138]

86. In Austria, the distribution of community property will vary according to the ground for dissolution of the marriage. In case of divorce by mutual consent[139] or by judgment establishing mutual guilt of the spouses, marital contracts, including contracts regarding succession rights, are dissolved.[140] Each spouse will take back what he brought into the community, gains and losses realised during the marriage will be shared equally.[141] Parties may depart by contract from this principle.

The position of the spouse divorced as the innocent party is the same as the position of the surviving spouse in case of dissolution of the marriage by death.[142] Each spouse will receive an equal share of the community,[143] unless the contract provides otherwise. However, upon divorce, the innocent spouse may prefer the dissolution of the marital contract, without losing the benefit of a succession contract.

87. In Germany, if parties do not agree upon distribution of the community property, each one of them may request approval for a distribution plan, enabling full payment of creditors. The mass of property, remaining after deduction of debts, will be distributed equally among the spouses,[144] taking into account eventual internal compensation claims. The spouse who brought a certain asset into the community or the spouse using a certain community asset personally, may be awarded this asset preferentially (compare no 36), in exchange for compensation of the value at the time of distribution.[145]

Moreover, for reasons of equity and fairness, each spouse may request a distribution based on enrichment. This means that each spouse can take back property brought into

[136] See eg in Belgium, France, Luxemburg, Portugal, Spain, the Netherlands. An exception is Italy (see no 36).

[137] Art 1415 Greek CC.

[138] This evidently constitutes an exception to the equal division rule, as opposed to a preferential right (see no 36).

[139] § 55a EheG.

[140] § 1266 ABGB. A nullification of the marriage also implies the dissolution of marital and succession contracts (§ 1265 ABGB).

[141] Recent doctrine teaches that gains and losses regarding assets brought into the community will be shared proportionally according to the value of the assets brought into the community.

[142] § 1266 ABGB.

[143] § 1234 ABGB.

[144] § 1474-1477 BGB.

[145] Also for real property: see OLG Munich in FamRZ 1988, 1275. Compare art 1455 Belgian CC.

the community by him, the deficit being shared between them proportionally, according to the size of property brought into the community. The time of valuation of that property is the moment of bringing it into the community, indexed at the time of distribution.

88. Under Swiss law, upon judicial dissolution of the marriage or judicial separation of property, the community is divided according to the criteria of the legal regime. Each spouse will receive these community goods that would be his separate property under the legal regime. The rest of the community, ie the *Errungenschaft*, is divided equally.[146] Ownership of the family home and furnishings or a right of use and occupation of the family home may be awarded, in exchange for compensation, to the spouse proving a determining interest in this sense (compare no 36, 53).[147]

Parties may depart from these principles in a marital contract. However, it is not possible to deviate from the rule that property qualified in the legal regime as *Eigengut* will return to the owning spouse (see no 61).

C. *Contracts of separation of property*

89. According to the title principle, each spouse takes what is his property. A distribution may of course be made in case of joint ownership. In this situation, Swiss law eg provides for the possibility to award, in exchange for compensation, the whole asset to the spouse proving to have a determining interest in it.

90. The title principle may be very unfair to the spouse without income (see no 39, 63).

(1) However, this principle will govern without any correction the situation of spouses married under a contract of pure and simple separation of property (see no 63), as is possible in France, Belgium and the Netherlands.

Some limited correction may be found in the doctrine of unjust enrichment or in the existence of a natural obligation. For instance, in recent Dutch case law, it was said that the unpaid labor of the wife in the enterprise of her husband may create a natural obligation for the latter to compensate.[148] In another case, the Dutch Supreme Court equally admits that it is possible that, due to the fulfillment by the wife of housekeeping duties, the husband has a natural obligation to compensate her for that.[149]

Moreover, the Dutch Supreme Court has accepted that the court can, although very exceptionally, on grounds of equity and fairness, qualify certain consequences of the contract as inapplicable.[150]

(2) In several other countries, on the other hand, sharing principles upon dissolution of a system of separation of property, contractual or not, are imperatively prescribed

[146] Art 239 ZGB.
[147] Art 244, al 3 ZGB.
[148] HR, 4 December 1987, NJ, 1988, no 610.
[149] HR, 30 January 1991, NJ, 1991, no 191.
[150] See HR, 25 November 1988, NJ, 1989, no 529, with conclusions of Advocate-General Biegman-Hartogh and annotation of E.A.A. Luijten; HR, 5 October 1990, NJ, 1991, no 576, with annotation of E.A.A. Luijten. Compare no 37.

by the legal regime, thus making it impossible for the spouses to adopt a contractual regime of pure and simple separation (see no 64).

91. In the Austrian contract of *Heiratsgut,* in case of death of the husband, the dowry comes entirely to the wife.[151] In case of the latter's death, it will go to her heirs or to the third party who offered the dowry. Dowry assets owned by the husband may be recovered by a contractual claim for delivery against the husband.

92. In the Austrian contract of community by death, community property will be dissolved equally. Also in contracts with a compensation clause, generally the rule of equal distribution will be applied (compare no 50-54).

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[151] § 1229 ABGB.

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