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Choice of Matrimonial Property Regime in Argentina

Why choosing (or not choosing) a matrimonial property regime matters

Argentine law has progressively evolved in order to align with contemporary social and economic realities and with legal practices commonly adopted across civil law jurisdictions.

In the same way that the legal system has strengthened autonomy of will in matters of succession planning and family organisation, it has also modernised the rules governing marriage. Since the entry into force of the Argentine Civil and Commercial Code (Código Civil y Comercial de la Nación – CCyC), the system has expressly recognised broader party autonomy in the patrimonial dimension of marriage. Specifically, future spouses may choose between two matrimonial property regimes and formalise that choice through marital agreements (convenciones matrimoniales), which are subject to a restrictive numerus clausus.

However, this autonomy is not unlimited. The CCyC adopts a closed-option model: spouses may opt either for (i) the community of gains regime (régimen de comunidad/ganancialidad) or (ii) the separation of property regime (régimen de separación de bienes). Where the parties do not validly choose separation of property, the law provides that the default legal regime shall be the community of gains regime.

Accordingly, marriage does not merely create a civil status and a set of personal and family duties; it also establishes a patrimonial framework that has immediate effects between spouses and, in many cases, vis-à-vis third parties (creditors, purchasers and public registries, among others).

In practice, the choice of regime has a direct impact on sensitive issues that affect the spouses throughout married life, including:

- ownership and management of assets acquired during the marriage;
- responsibility for liabilities and debts;
- protection of the family home;
- potential reimbursement claims or credits between spouses; and
- the rules applicable to liquidation and partition in the event of divorce or death.

This decision therefore requires careful consideration of the legal consequences attached to each regime. Many couples marry without realising that, if no express election is made, they will automatically be subject to the legal default regime of community of gains; and that if they later wish to change regimes, the CCyC allows such change only under strict formal and temporal requirements.

This contribution reviews the current Argentine framework and the alternatives provided by the CCyC, focusing on marital agreements, their legal nature, permitted content, validity requirements and the possibility of modifying the matrimonial property regime after marriage.

The alternatives under the CCyC

The CCyC sets out clear rules on the matrimonial property regime. Title II, which regulates patrimonial relations between spouses, is divided into three chapters: (i) general provisions applicable to both regimes; (ii) a specific chapter on the community regime; and (iii) a specific chapter on the separation of property regime.

Within the general provisions, the Code introduces marital agreements as the mechanism through which future spouses may, before marrying, agree on certain matters that will govern their patrimonial relationship.

Marital agreements: concept, legal nature and limits

As stated above, the CCyC grants a degree of autonomy of will by allowing future spouses, prior to marriage, to enter into marital agreements. However, this autonomy is strictly limited: the subject matter of such agreements is confined to the matters expressly listed in Article 446 CCyC.

Those matters are:

- the identification and valuation of the assets each party brings into the marriage;
- the disclosure of existing debts;
- donations made between the parties; and
- the election of one of the legally permitted matrimonial property regimes.

This framework shows two core features. First, the legislature authorises party autonomy, but only within a closed statutory system. Second, the instrument serves purposes of publicity, evidentiary certainty and predictability, both for the spouses and, in relation to the matrimonial property regime, for third parties.

From a systematic standpoint, marital agreements are contracts with a family-law subject matter, but with restricted party autonomy. Their effectiveness is causally linked to the celebration of the marriage: they do not fully operate if the marriage is not celebrated or is later annulled, without prejudice to the nuances of nullity and good faith.

They are also formal legal acts, binding upon the parties, which must be executed and performed in good faith.

Article 448 CCyC establishes the formal validity requirement: marital agreements must be executed by public deed (escritura pública) prior to marriage. They become effective upon the celebration of the marriage, provided the marriage is not annulled.

This requirement is not merely evidentiary; it is constitutive. In the absence of a public deed, the marital agreement is ineffective as such.

Furthermore, where the agreement includes the election of the matrimonial property regime, that election must be recorded by marginal annotation in the marriage record in order to be enforceable against third parties.

This legal nature explains why notarial and registry practice tends to be particularly strict with respect to compliance with form and correct registration.

At stake is transactional legal certainty: a creditor or third-party contracting party must be able to ascertain which regime applies, as this determination affects key rules on liability and enforcement.

From a professional perspective, it is not sufficient to treat the execution of the public deed as the end of the process; it is essential to ensure that the regime election is properly recorded in the relevant marriage registry, to prevent future disputes.

Can a marital agreement be modified?

The CCyC introduces limited flexibility by allowing spouses to modify the matrimonial property regime after one year of application of the existing regime, counted from the celebration of the marriage. Such modification must likewise be made by agreement between the spouses, executed by public deed, and recorded by marginal annotation in the marriage record in order to be enforceable against third parties.

Additionally, the law provides specific protection for pre-existing creditors who may be adversely affected: they may request that the change be declared unenforceable against them within the statutory time limit, calculated from the moment they became aware of the change (as provided by the relevant provision).

In practical terms, changing the regime is not an automatic shield against existing debts. If the change is used as a means to frustrate third-party rights, the legal system provides mechanisms to neutralise its effects vis-à-vis affected creditors.

Content: what may – and may not – be validly included in a marital agreement

A common question in practice is: “May we agree on anything we want regarding property?” The legal answer is no. If the agreement addresses matters beyond Article 446 CCyC, the relevant clause is ineffective and, depending on the circumstances, may impact the agreement’s validity or severability.

Accordingly, spouses may include only clauses that fall within the expressly permitted categories.

Identification and valuation of contributed assets

The agreement may include an inventory and valuation of assets owned by each party prior to marriage. By way of example, the spouses may agree on clauses identifying each asset, assigning a valuation or stating the origin of ownership. This serves several purposes:

• it delineates pre-marital patrimony and facilitates distinguishing separate property from community property;
• it reduces evidentiary disputes upon dissolution; and
• it helps structure assets for tax, credit or family administration purposes.

From a practical standpoint, inventories should be as detailed as possible. Generic descriptions (eg, “a car” or “household furniture”) often lead to litigation.

Disclosure of debts

Debt disclosure functions as an informative declaration: it makes pre-existing liabilities visible, promotes transparency, and may influence subsequent discussions regarding liability and reimbursements. It can be evidentially relevant, especially if disputes later arise as to whether a debt was incurred before or during the marriage and for what purpose.

It may also refer to reimbursement consequences associated with such debts or their impact on the enforceability of claims against the family home.

Donations between future spouses

The CCyC allows donations between future spouses. In practice, such donations may serve multiple purposes – facilitating housing, balancing contributions, or supporting a business venture. As with any gratuitous transfer, they must be carefully assessed in light of patrimonial and succession consequences, potential future reduction claims and, where applicable, collation.

The central clause: election of the matrimonial property regime

The principal feature of marital agreements is the ability to formalise the election of the matrimonial property regime. The parties may confirm the community regime (which would apply by default) or elect the separation of property regime, which operates under the closed statutory framework established by the Code.

What cannot be included

Marital agreements cannot validly include clauses purporting to create binding obligations such as:

- broad advance waivers of indeterminate future rights outside the statutory framework;
- management or disposition arrangements contrary to mandatory rules of the primary regime;
- succession arrangements involving future inheritance, which are prohibited;

• clauses impairing personal rights, equality between spouses, or the protection of the family home; or
• "penalty clauses" triggered by divorce or provisions restricting the freedom to seek divorce.

This does not prevent spouses from using other lawful instruments (eg, corporate structures, trusts, donations within legal limits or testamentary planning), but such measures cannot be included within a marital agreement as if it were a "comprehensive patrimonial contract".

Validity, capacity and legal scrutiny: essential requirements

Beyond form and publicity, general principles govern validity.

• Capacity – parties must have legal capacity to execute the act; if capacity is restricted, the applicable legal regime and any required supports/representation must be assessed.
• Consent – consent must be free and informed; in practice, attorneys and notaries should detect asymmetries, defects of consent, or undue influence.
• Lawful and limited object – the agreement must not exceed Article 446.
• Cause and purpose – particularly relevant where fraud against third parties may be at issue.

PERMITTED REGIMES

Community of gains (default legal regime)

As a rule, if the parties do not validly elect separation, the community regime applies. Legal doctrine often refers to this as "community of gains". Functionally:

• each spouse retains their separate property; and
• a pool of community (or "marital") assets is formed, generally consisting of acquisitions made for consideration during the marriage, governed by specific rules on administration, disposition and liquidation.

Under this regime, the key issue is not merely title, but asset characterisation (separate versus community), management powers, limits on disposition, and the consequences upon dissolution (divorce, annulment, death, etc). In family litigation, characterisation and traceability of assets often become central evidentiary issues.

Separation of property (conventional regime)

As mentioned, the alternative regime is one of separation of property, adopted by express election through a marital agreement prior to marriage or through a later modification.

Its guiding principles are:

• each spouse retains ownership, administration and, in principle, responsibility for their assets, without forming a marital estate to be divided equally at the end. In other words, all assets are personal property.
• Nevertheless, the general provisions applicable to both regimes remain in force, including duties of contribution and family protection, as well as rules aimed at preventing fraud against third parties and safeguarding the family home.

FUNCTIONAL COMPARISON BETWEEN COMMUNITY AND SEPARATION

Asset management and disposition

Under community, the law establishes specific rules on administration and limits on disposition, particularly regarding registrable assets, the family home, or acts affecting family interests. In practice, this often entails stricter requirements for spousal consent and control.

Under separation, each spouse manages and disposes of their assets, subject to limitations arising from the primary regime (including protection of the family home and duties of contribution).

Liability for debts

This issue often motivates the choice of separation. However, it should not be approached simplistically. Even under separation, obligations linked to the satisfaction of family needs may give rise to concurrent or joint liability, depending on the circumstances and the source of the obligation, together with the protection afforded to good-faith third parties.

Under community, depending on the origin of the debt and its relationship with family interests or the administration of community assets, liability may extend to community assets or, in some cases, to separate assets. Legal advice should therefore be tailored to the case (activity, risk exposure, patrimonial structure, expected indebtedness, etc).

Dissolution: liquidation and partition

Under community, dissolution requires liquidation and partition of the community pool, including characterisation of separate and community assets, reimbursements and interspousal credits. This process may be straightforward or highly complex depending on the patrimonial structure (family businesses, significant unregistered assets, assets abroad, untraceable cash flows, etc).

Under separation, there is no community pool to be divided; nonetheless, disputes may still arise (co-ownership, interspousal claims, proof of contributions, family home disputes, post-divorce economic compensation – which is distinct from the patrimonial regime – and maintenance issues).

PRACTICAL CRITERIA FOR CHOOSING BETWEEN COMMUNITY AND SEPARATION

In practice, there is no universally "best" regime. The appropriate choice depends on the family's needs and the spouses' patrimonial and life project. The following sets out an example.

Situations where separation is commonly recommended:

• activities involving significant credit exposure (business, commerce, professional liability risk, frequent guarantees);
• substantial pre-existing patrimony requiring traceability, often inherited across generations;
• second marriages with children from previous relationships, requiring clear patrimonial expectations;
• ventures where one spouse contributes capital and the other contributes primarily through domestic work (which requires careful structuring to avoid inequity and may call for complementary instruments); and
• multi-generational family business planning aimed at preserving continuity.

Situations where community may be functional:

• integrated economic projects, joint acquisitions and shared roles;
• couples wishing joint efforts during marriage to be reflected in a pool divisible equally; and
• cases where proving individual contributions would be especially difficult and could increase litigation under separation.

However, while separation may reduce certain disputes typical of community liquidation, it may intensify others (co-ownership disputes, evidentiary issues regarding contributions, credit claims, improvements to separate property, loan repayments and, outside the patrimonial regime, economic compensation). For that reason, separation should ideally be accompanied by systematic documentation of ownership and contributions.

Adequate legal advice is recommended so that spouses can make an informed decision and fully understand the consequences of each regime.

MARITAL AGREEMENTS VERSUS COHABITATION AGREEMENTS (COHABITATION UNIONS)

By way of comparison, the CCyC recognises cohabitation unions in Title III and allows cohabitation agreements.

In this regard, it allows cohabitants to enter into agreements to regulate certain aspects of their life together.

Unlike marital agreements, cohabitation agreements may cover a broader scope, reflecting genuine autonomy of will rather than a closed list. Article 514 provides that such agreements may regulate, among other matters:

- contribution to household expenses during the relationship;
- allocation of the shared home upon separation; and
- division of assets acquired through joint effort upon termination.

The expression “among other matters” broadens the range of permissible provisions, allowing regulation of matters such as allocation of expenses, residence, household assets, children’s residence, co-ordination of family income, and economic compensation upon separation – covering both personal and patrimonial aspects.

The only limits are public policy, equality between partners, and the protection of fundamental rights.

To be effective against third parties, the cohabitation union must be registered together with the agreement, which must be in writing. If the agreement involves real estate or

other registrable assets, it must be executed by public deed. It may also be amended or terminated by mutual agreement without further restrictions.

Accordingly, cohabitation agreements allow broader regulation of the relationship and may facilitate a less contentious asset division upon separation.

CONCLUSIONS

Argentine matrimonial property law currently offers two clear alternatives: the community of gains regime (default legal regime) and the separation of property regime (conventional regime). The principal mechanism to exercise that choice is the marital agreement, whose object is strictly limited to Article 446 CCyC and whose validity requires execution by public deed prior to marriage, taking effect upon celebration and requiring registry publicity to be enforceable against third parties.

Although the CCyC expanded party autonomy, the system remains a closed-option model, as the election is limited to the two regimes under exclusive statutory conditions.

Moreover, as discussed, the regime may be modified subject to strict requirements: after one year of application of the existing regime, by public deed, with marginal annotation, and with specific safeguards for pre-existing creditors adversely affected, pursuant to Article 449 CCyC.

From a practical standpoint, the recommended approach is preventive: to assess each party's patrimonial situation, identify assets, debts and risks, and then align the election with the family project through proper documentation.

It should be understood that failing to elect a regime results, in practice, in the application of the default regime.

With adequate information and advice, proper formalisation, and registry publicity, the matrimonial property regime can become a tool for order, predictability, and dispute prevention, without undermining the protection afforded to the family and to third parties.

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