SMART MARRIAGE CONTRACTS: THE FUTURE OF BLOCKCHAIN IN MATRIMONIAL PROPERTY LAW?

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Summary

This paper is intended to serve as an introductory treatise on the subject of smart marriage contracts (SMC) as a manifestation of blockchain in matrimonial property law of contracts. At the beginning, a brief description of the origin and functioning of a SMC from a technical standpoint is provided, following that, we attempt to evaluate the legal nature of a SMC. Secondly, we focus on the possibilities and means of a SMC's formation under German, Austrian, and Slovak law. Moving on, issues related to the content of a marriage contract forming a SMC are examined. Finally, the permissibility of a SMC-related provision in a marriage contract referred to as a "registration clause" is tested. The key findings of our research are as follows. SMCs can be formed via marriage contract under German and Austrian law, however, they cannot be created under Slovak law. Regarding the proper content of a marriage contract establishing a SMC, there are several factors to which drafters should pay close attention in order to ensure the desired functionality of a SMC. A registration clause in a marriage contract is invalid both under German and Austrian law due to the violation of good morals. The question of possible partial avoidance of a registration clause pursuant to BGB depends on the circumstances of an individual case; ABGB, on the other hand, allows partial avoidance of such clause in every case.

Keywords: *matrimonial property law; smart marriage contract; marriage contract; comparative private law.*

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1 INTRODUCTION

One of the most recent technologies based on artificial intelligence is the ever-so popular blockchain. Thus far, it is used particularly in commerce and business. There, blockchain is most frequently represented by phenomena such as cryptocurrencies, smart contracts, or decentralized autonomous organisations (DAO). It is needless to say that these and many other inventions based on artificial intelligence in the digital world pose a major challenge for the existing legal frameworks of public, private, national, international, and supranational law. That legal academics and practitioners are aware of these challenges is displayed by numerous books, articles, studies, and educating courses devoted to the topic.

This paper focuses on a specific expression of a blockchain referred to as a smart marriage contract (hereafter: SMC). Although we are aware of and acknowledge the technological complexity of blockchain, we make an effort to offer only the information we consider inevitable for the proper comprehension of the respective legal aspects related to the selected topic.

After describing the origin, technical functionality, and legal nature of SMC's, we confront them with the national private law of three jurisdictions – Germany, Austria, and Slovakia. These countries were chosen not only because of their spatial proximity to the provenance of the SMC-idea, but also to experiment on how different legal orders handle the discussed technological invention. Of particular interest is the question whether SMC's are permissible under the current law in the selected countries and if so, what is the best way to secure their proper functionality.

This paper has by no means the ambition to offer an in-depth study. It should rather be understood as an introductory, but perhaps fairly complex, legal observation of a phenomenon which has, to the best of our knowledge, not been addressed by the scholarship of private law or comparative private law so far. Our aim is to make the reader aware of the topic at hand, provide solutions to the basic problems that it presents, and maybe to kickstart a discussion amongst the academia without being limited to any one legal order. It is also because of this aim that we at times attempt to exit the boundaries of the selected legal orders and speak in a more general manner which could be apprehended by readers irrespective of the origin of their legal training.

2 THE IDEA OF A SMART WEDDING CONTRACT

A few press reports of late 2018 informed that two persons in Austria entered marriage while being bound by a blockchain-based marriage contract called a "Smart Wedding Contract".[1] This was allegedly the first occasion at least in the German

1 See e.g. "Wie die Blockchain bei der Scheidung helfen kann", *Brutkasten*, November 29, 2018, https://www.derbrutkasten.com/smart-wedding-contract-scheidung-blockchain/; Christopher Klee, "Bis dass der Code uns scheidet: Erster Smart Wedding Contract in Österreich", *BTC ECHO*, December 3, 2018, https://www.btc-echo.de/bis-dass-der-code-uns-scheidet-erster-smart-wedding-contract-in-oesterreich/; Markus Kasanmascheff, "Österreicher führt erste Blockchain-Hochzeit mit "Smart Wedding Contract" durch", *Cointelegraph*, December 3, 2018, https://de.cointelegraph.com/news/osterreicher-fuhrt-erste-blockchain-hochzeit-mit-

speaking world when the spouses concluded a pre-nuptial property agreement as a smart contract. Interestingly, the groom himself, a famous Austrian startupper (hereafter: the inventor) in the field of blockchain and the CEO of an Austrian company named "block42 Blockchain Company GmbH"[2] (hereafter: block42) is the architect of the Smart Wedding Contract-project. By using it in his own marriage, he wanted to test how would his ambitious project function in real life.

In this section, we first go into the factual and technical details of a Smart Wedding Contract (hereafter: SWC), mainly related to its subject matter, establishment and functioning. On the basis of this description, we then summarize the crucial attributes of an SWC which are needed for the subsequent legal analysis thereof. We also fine-tune the designation "Smart Wedding Contract" for it to better correspond its nature and purpose.

2.1 Subject matter, establishment, and functioning from a technical viewpoint

The primary source of information for this subchapter is a blog post of the inventor where he describes all what is important to know about a SWC from a technical perspective.[3] Because the SWC-idea emanates from Austria, every law-related data which manages to creep in this predominantly technical subchapter must be perceived from the perspective of Austrian law.

Firstly, and before proceeding to the functionality, we elaborate on the subject matter of an SWC and the method of its establishment. Based on the introductory depiction of the inventor,[4] the subject matter of an SWC are property relations of spouses. Moreover, it is meant to replace a classical written matrimonial property agreement. However, the inventor admits that the legal basis for an SWC must be laid in an ordinary written matrimonial property agreement (marriage contract) as required by Austrian law.[5] Block42 even collaborated with a law firm which produced a model marriage contract available in German.[6]

We now proceed to the technical functionality of an SWC. Possessing a written "base" marriage contract, spouses open the SWC product page at the block42 website.[7] It is here that the "signing" and actual birth of a blockchain, Ethereum based[8] SWC

smart-wedding-contract-durch.

2 Website of block42 available at: https://www.block42.tech/.

3 Available at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713.

4 See "Implementation" at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713. We emphasize the usage of "funds and assets".

5 See "Uploading the Written Contract" at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713.

6 Available at: https://ipfs.io/ipfs/QmR62Mf6eiUZQbXuv1ckNAZ4nM9mmuvJwz9xk7VfCj8j5Y. We delve deeper into this model agreement in subchapter 3.2.

7 The demo is available at: https://block42.uber.space/smart-wedding-contract/.

8 More on Ethereum see e.g. Mayukh Mukhopadhay, *Ethereum Smart Contract Development* (Birmingham: Packt Publishing Limited, 2018); Elfriede Sixt, *Bitcoins und andere dezentrale Transaktionssysteme* (Wiesbaden: Springer Fachmedien Wiesbaden GmbH, 2017), 189ff.

takes place. Acting through an account of an application called "Metamask",[9] spouses upload the written base marriage contract and digitally sign the SWC. Hereby, the SWC starts operating and may have up to three functions: a) asset inventory; b) shared digital wallet; c) property partition tool in case of the dissolution of the property regime.

As to the first function, spouses add to or remove from the SWC moveable or immovable assets which belong to their common property according to their matrimonial property agreement and the respective normative regulation. Any changes in the list of assets must be confirmed by the other spouse in order to take effect.[10] The inventor emphasizes the importance of this first function, as he sees it as the main advantage to a "plain old fashioned" marriage contract. He states that with a traditional marriage contract, every single asset change must be verified by a public notary. Contrary to this, an SWC should be "dynamic asset management". This means that only the base marriage contract containing a SWC-establishment clause must be verified by a public notary and every asset change during a marriage takes place "automatically" via registration in the SWC.[11]As to the second function, SWC may act as a "saving account" by storing the Ethereum-cryptocurrency called "Ether" (ETH). Thirdly, SWC is meant to serve as an Ether division tool in the case of marriage dissolution, most often through divorce. After the spouses both agree to divorce on the SWC website, Ether in the common wallet splits equally between the wallets of the spouses.[12]

2.2 Assessment of facts and nature from a legal viewpoint

Summarizing the description above, an SWC is a special type of smart contract. Established via marriage contract (matrimonial property agreement), it focuses on the management of spouses' common property, serves as a storage of Ether and potentially as a tool for its division after the property regime's dissolution. Yet, the last-mentioned function does not necessarily have to be limited only to the division of Ether, but could potentially extend to the partition of other assets, however that would naturally have to take place also in the real world.

As to the legal nature of an SWC, it should not be interpreted as a lone standing marriage contract (matrimonial property agreement). Based on its functions, it is rather a special method of matrimonial property administration and management. Thus, an SWC targets *some* aspects of matrimonial property law which spouses can (depending on the governing law) organize differently from statutory law via matrimonial property

9 Metamask is a crypto wallet and a gateway to blockchain apps. For details see the homepage of the service at: https://metamask.io/index.html.

10 See "Adding an Asset", "Approving an Asset", "Removing an Asset" at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713.

11 See "Assets" at at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713.

12 See "Divorce" at at: https://medium.com/block42-blockchain-company/smart-wedding-contract-on-ethereum-c464570a2713.

agreement.[13] The label "Smart Marriage *Contract"* is therefore terminologically misleading similarly as "ordinary" smart contracts.[14] However, that is not the only flaw regarding terminology. Problematic is also the adjective "Wedding". Cambridge Dictionary defines "wedding" as a "marriage ceremony and any celebrations such as a meal or a party that follow it".[15] According to this common perception of "wedding" and through its inclusion in the title "Smart Wedding Contract", the inventor makes a strong suggestion that SWC is primarily connected with the nuptials and not the subsequent marriage life. One might thus get the impression that an SWC was designed to conclude marriages.[16] However, this was not the intention with SWCs, as we have seen in its description above. Thus, we are inclined to adjust the denomination "Smart Wedding Contract" to "Smart *Marriage* Contract", respecting thereby the well-established English[17] and continental[18] legal vocabulary traditionally used to describe arrangements of spouses connected with their property relations. Hence, solely for the purposes of terminological correctness in the remaining text we use "Smart Marriage Contract" or abbreviated only "SMC" instead of the original "Smart Wedding Contract" used by the inventor. The terms "matrimonial property agreement" and "marriage contract" are hereafter used as synonyms.

3 SMART MARRIAGE CONTRACT UNDER THE SELECTED LEGAL ORDERS

In this chapter, we point out and discuss several questions of private law connected with SMCs and present our solutions therefor. As already hinted, we examine the selected issues from the perspective of German, Austrian, and Slovak law.

13 Except administration and management of property, spouses generally may deviate from statutory law via marriage contract in questions such as disposition rights, scope of property masses, choice of property regime, or property partition. See Jürgen Rieck, *Ehegüterrecht und Eheverträge in Europa* (Koln: Bundesverwaltungsamt, 2016), 35ff. Available at: https://www.bva.bund.de/SharedDocs/Downloads/DE/Aufgaben/ZMV/Auswandern/Publikationen/Downloaddatei_Eheg%C3%BCterrecht_und_Ehevertr%C3%A4ge_in_Europa.pdf?__blob=publicationFile&v=2.

14 To this end see e.g. Stefan Möllenkamp, Leonid Shmatenko, "13.6 Blockchain und Kryptowährungen", margin number 72. In Thomas, Hoeren, Ulrich Sieber, Bernd Holznagel, eds., *Handbuch Multimedia-Recht* (Wien: C. H. Beck, 2020); Wolfgang Ernst, "Einleitung (Einl. SchuldR)", margin number 68. In Wolfgang Krüger, ed., *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 3: Schuldrecht Allgemeiner Teil II (§§ 311-432)* (C. H. Beck, 2019).

15 See the following link on the *Cambridge Dictionary* website: https://dictionary.cambridge.org/dictionary/english/wedding.

16 As was clearly the case in the press report from *Kasanmascheff.* Kasanmascheff, "Österreicher führt erste Blockchain-Hochzeit mit "Smart Wedding Contract" durch".

17 See e.g. "Marital Rights and Duties" in Henry Campbell Black, *Black's Law Dictionary* (St. Paul: West Publishing Co., 1968), 1120.

18 In German *Ehevertrag.* See § 1408 para. 1 BGB; in French *contrat de marriage.* See the 5th book, 5th title of the *Code civil.* In Italian *convenzione matrimoniale.* See Art. 162 *Codice civile.*

3.1 Legal basis of an SMC

The first question at hand is the manner in which an SMC can be established, i.e., what could be its legal basis. Although it might appear clear from the SMC's description provided by the inventor that, in terms of Austrian law, it can and should be established by a marriage contract, such an assertion ought to be put through a legal test. Besides, our ambition is to undertake this test not only pursuant to Austrian law, but also other legal orders.

We first examine the permissibility of an SMC's establishment via marriage contract through the prism of the German civil code[19] (hereafter: BGB) and the Austrian civil code[20] (hereafter: ABGB) as fairly liberal civil codes in the area of matrimonial property agreements; and afterwards of the Slovak civil code[21] as a more conservative codex in the same subject matter.

3.1.1 German and Austrian law

As a rule, the more liberal a national law is in the regulation of marriage contract law, the more problematic it sometimes is to ascertain the permissible content of such contracts. This is a natural result of a broad and wide-cut definition of marriage contracts by which legislators endeavour to strengthen the contractual freedom of spouses. Such an approach can be found in BGB and ABGB. When assessing the permissibility of the establishment of an SMC by a marriage contract, it is necessary to examine whether such an arrangement fits into the boundaries which the respective civil code sets to spouses' freedom of will in marriage contract law.

In BGB, the general provision on marriage contracts and their content is § 1408 para. 1 which states: *"Spouses can regulate their property relations by a contract (marriage contract), especially they can terminate or alter their property regime also after concluding marriage."*[22] The boundaries to the content of matrimonial property agreements set by the legislator are represented by the phrase "property relations". The meaning of this phrase is specified only demonstratively ["…, *especially* they can terminate or alter their property regime …" ("…, insbesondere *... den Güterstand aufheben oder ändern"*)], whence one must, to a great extent, search for clarification in case law and literature. Once very conservative reading of spouses' contractual freedom by courts has been overcome and much liberalised by a "functionally extended" perception of marriage contracts.[23] The adoption of a more relaxed approach to the term "property relations" found in § 1408 para. 1 BGB naturally led to the emergence of more borderline cases in which the interpretation of "property relations" involved some difficulties. However, the scholarship has

19 Bürgerliches Gesetzbuch, aktuelle Fassung.

20 Allgemeines bürgerliches Gesetzbuch, aktuelle Fassung.

21 Civil code (Slovakia), Act No. 40/1964 Coll.

22 Author's reader-friendly translation from the German original with the assistance of the official English version of BGB available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4994.

23 Johannes Scheller, "§ 1408", margin number 3. In Heinz Georg Bamberger, Wolfgang Hau, Roman Poseck, eds., *Beck'sche Online-Kommentare BGB* (C. H. Beck München, 2020).

made a respectful effort to highlight situations which may seduce to an erroneous "property relations" classification.[24] The common denominator of these situations is that although possessing some matrimonial property-related hallmarks, they fall within the framework either of other areas of marriage law[25] or an entirely different field of private law, e.g. corporation law or obligation law.[26]

Austrian law embraces a comparably wide definition of marriage contracts as German law. ABGB uses a more archaic nomenclature "marriage pacts" and describes them in § 1217 para. 1 followingly (authors translation from the original): *"Marriage pacts are such contracts which are directed at the marital bond of property. Their subject matter are especially community of property and contract of inheritance."* As BGB, also ABGB offers only an illustration of what a marriage pact might contain ["Their subject matter are *especially ..."* (*Sie haben* vorzüglich *... zum Gegenstand"*)]. The key is that such pacts regulate the "marital bond of property". Austrian courts and academia are prone to a more extensive reading of this expression.[27]

It follows from the description hitherto made that the limits of, by all means very lenient, rules on contractual freedom in matrimonial property law in both BGB and ABGB are not entirely clear. This issue is in Germany quite contentious and the answer is all but straightforward. Although opinions differ as to certain details, they seem to share the view that at the very least, spouses are bound by the *numerus clausus* principle regarding rights *in rem* (*Typenbeschränkung im dinglichen Bereich*) originating in statutory matrimonial property models.[28] In Austria, on the other hand, the case law and literature deny any *numerus clausus* principle and permit any kind of modification of statutory models or even *inter partes* creation of new ones.[29]

In view of the above, we hold that SMC's can be established by a marriage contract (pact) both in Germany and Austria. It can hardly be denied that the three main functions of an SMC – namely, asset inventory; shared digital wallet; property

24 See e.g. Wolfgang Reetz, "§ 1408", margin number 9, 18–21, 41. In Beate Gsell *et al.* eds, *Beck-online. GROSSKOMMENTAR zum Zivilrecht* (C. H. Beck, Stand 1.11.2020); Johannes Scheller, "§ 1408", margin number 6ff. In Bamberger, Hau, Poseck, *Beck'sche Online-Kommentare BGB;* Christof Münch, "§ 1408", margin number 8. In Elisabeth Koch, ed., *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 9* (C. H. Beck München, 2019).

25 E.g. general effects of marriage (*allgemeine Ehewirkungen*) or ancillary matrimonial property law (*Nebengüterrecht*). For more on that see e.g. Wolfgang Reetz, "§ 1408", margin number 40.1, 43. In Gsell *et al.*, *Beck-online. GROSSKOMMENTAR zum Zivilrecht.*

26 Christof Münch, "§ 1408", margin number 8. In Koch, *Münchener Kommentar zum Bürgerlichen Gesetzbuch.*

27 See e.g. Michael Bydlinski, "§ 1217", margin number 2. In Peter Rummel, Lukas Meinhard, eds., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Manz Verlag, 2020); Astrid Deixler-Hübner, *Der Ehevertrag* (Linde Verlag, 2018), 2. Teil, 7.1.

28 See e.g. Christof Münch, "§ 1408", margin number 8. In Koch, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*; Johannes Scheller, "§ 1408", margin number 11-12. In Bamberger, Hau, Poseck, *Beck'sche Online-Kommentare BGB*.

29 See *Oberster Gerichtshof,* Judgment of 17.12.1976, No. 6Ob591/75; Deixler-Hübner, *Der Ehevertrag,* 2. Teil, 7.1.; Bernhard A. Koch, "§ 1217", margin number 2. In Helmut Koziol, Peter Bydlinski, Raimund Bollenberger, eds., *Kurzkommentar zum ABGB* (Wien: Verlag Österreich, 2014); Michael Bydlinski, "§ 1217", margin number 7. In Rummel, Meinhard, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch.*

partition – fall within the (wide) scope of "property relations" in the case of § 1408 para. 1 BGB or "marital bond of property" in the case of § 1217 para. 1 ABGB. The subject matter of SMCs directly concerns property relations of spouses and we detect no visible friction with other quasi-proprietary legal aspects of marriage which could put the proposed subsumption in question.

3.1.2 Slovak law

Sign of a conservative approach to contractual freedom of spouses might be a statutory framework which offers only a limited and exhaustive list of means how they can adjust mutual property relations via contract. A proper example for this approach is Slovak law. The single available statutory matrimonial property regime here is the common ownership of assets acquired during marriage (*bezpodielové spoluvlastníctvo manželov;* in German equivalent to *Errungenschaftsgemeinschaft*).[30] The Slovak civil code adopts the *numerus clausus* principle in marital contract law and thus allows spouses to make only such agreements which are envisaged by the statute. Married couples have these three options: 1. reduce or extend the scope of common ownership, 2. modify the statutory rules on administration of common property[31] and finally 3. subject the formation of common ownership to the dissolution of marriage.[32] Based on this selection, the only conceivable option how to establish an SMC is option 2 on the modification of administration of common property which could fit especially the "asset inventory"-function of an SMC. However, the Slovak civil code does not further elucidate the meaning of "administration of property". While most authors seem to suggest that a marriage contract on the administration of common property should only concern the question *who* shall or shall not have rights of administration to the whole property or parts thereof,[33] some lean towards a more extensive reading and are open to other content of such agreements.[34] Bearing in mind that matrimonial contract law in the Slovak civil code is by its very nature rather strict, we opine that the generally rigorous legal environment may hardly be overlooked while working with singular rules belonging thereto. Therefore, the (teleological) interpretation of individual provisions of Slovak marriage contract law should be restrictive as well. As a result, from the positions described above, we prefer the more restrictive one. Applying this to the question at hand, an SMC cannot be established by a marriage contract under the 2nd option found in § 143a para. 1 of the Slovak civil code, as it would not represent an arrangement on *who* should administer common property of spouses, but *how* this ought to be done.

30 See § 143 of the Slovak civil code.

31 For these two options see § 143a para. 1 of the Slovak civil code.

32 For the third option see § 143a para. 2 of the Slovak civil code.

33 See Imrich Fekete, *Občiansky zákonník - Veľký komentár. 2. zväzok* (Eurokódex, 2015), § 143a, margin number 4; Ján Lazar *et al.*, *Občianske právo hmotné. Tretia časť: Vecné právo* (Bratislava: Iuris Libri, 2018), 569; Peter Vojčík *et al.*, *Občianske právo hmotné. 1. časť* (Praha: Aleš Čeněk, 2018), 327.

34 See Zuzana Fabiánová, "§ 143a", margin number 3. In Marek Števček *et al.*, *Občiansky zákonník. Komentár. I. časť* (Praha: C. H. Beck, 2019).

3.2 Form and content of a marriage contract establishing an SMC

Thus far, we found out that the establishment of SMC's via marriage contract should be permitted in Germany and Austria as jurisdictions with a more liberal marriage contract law. A natural follow-up question thus arises, whether an SMC clause in a marriage contract introduces any peculiarity into the issues of form and content thereof. We do not detect any feature of an SMC arrangement which could disturb the basic rules on the form of marriage contracts in Germany or Austria. Yet the same cannot be said about the question of content, which is the object of closer scrutiny in the following lines. Namely, we take a closer look at the already mentioned model marriage agreement drafted in German (hereafter: draft marriage contract or draft) by a law firm for block42, which should purportedly serve as the basis for establishing an SMC according to Austrian law.[35] After a brief description of the drafts content, we continue with an evaluation thereof as well as with suggestions for its improvement. These are not restricted to Austrian law (because they do not have to be) but are formulated more generally for the benefit of readers from various jurisdictions.

The draft is structured into seven parts. The 1st part titled "Preamble" identifies the parties to the contract; specifies when, where, and in front of whom did the couple marry; and declares that the marriage neither finds itself in crisis nor does the couple plan to divorce. In the 2nd part titled "Choice of law", parties choose Austrian law as applicable both for their property relations and the potential divorce, notwithstanding eventual alteration of their residence. In the 3rd part titled "Property regime", the parties explicitly declare the separation of property (*Gütertrennung*) as the regime governing their property relations, even though this already is the default mode under ABGB anyway. They also state that the separation of property shall remain fixed as the governing regime even if it should no longer be the default statutory mode due to an eventual amendment of law. The 4th part titled "Current state of assets" sets down the *status quo* of spouses' property at the time of contract conclusion. Assets contained in list A and list B represent exclusive ownership of either spouse, while assets in list C represent common ownership of spouses. The 5th part titled "Proprietary effects of divorce" pronounces that common savings and other utilities shall be divided after the dissolution of marriage in the "following" but further unspecified manner. In the 6th part titled "Jurisdiction", the parties agree on the subject-matter jurisdiction of an Austrian court. The 7th and final part titled "Signatures" declares that by signing the contract, parties agree with all its content.

First aspect deserving attention is part three of the draft where spouses choose the separation of property (*Gütertrennung*) regulated in § 1237 ABGB as the governing property regime. *Prima facie,* it is not quite obvious how should a SMC serve its purpose if a model such as the Austrian *Gütertrennung* were the governing regime of spouses' property relations. This regime does not create common ownership of any assets, regardless of the time when they were acquired. Furthermore, either spouse bears exclusive rights of administration and disposition to his or her property if not

35 For the link to the draft see Mukhopadhay, *Ethereum Smart Contract Development*; Sixt, *Bitcoins und andere dezentrale Transaktionssysteme*.

agreed otherwise[36] (which is not the case with the draft). It follows that if one of the main ideas of an SMC is to administer spouses' common ownership through an asset inventory, it simply cannot work when the governing property regime such as the Austrian *Gütertrennung* not only excludes the creation of a mutually owned mass of property, but also rules out any common rights of administration or disposition thereto. Therefore, the draft marriage agreement seems to beat the purpose of a SMC which it intends to establish. However, part four of the draft could shed some light on this irregular situation. Although the spouses presumably never lived under a different regime than separation of property, the draft states they have mutual ownership of some assets specified in an inventory called "List C". This could only make sense if the draft refers to a "simple" non-matrimonial *in rem* co-ownership pursuant to §§ 825 ff ABGB. Spouses could then administer only this non-matrimonial co-ownership through an SMC. Should this presumption be true, an explicit explanation of such intention would have improved the clarity of the draft.

In view of these considerations, we would recommend a more precise wording of a marriage agreement regarding property intended to be managed by an SMC. Most importantly and regardless of the governing law, drafters of marriage contracts should keep in mind that an SMC makes the most sense if spouses live under some type of community of property regime,[37] as the need for a "smart" management of mutually acquired and owned assets appears highly desired chiefly under such a circumstance. Taking this into account, an SMC appears greatly relevant for countries having the community of property as the default matrimonial property regime. SMCs might further be of interest in jurisdictions which may not have the community of property as the default regime, but where spouses frequently prefer the choice thereof. Lastly, it is not out of question for an SMC to administer regular non-matrimonial co-ownership as the draft marriage agreement seems to suggest, but in our eyes, such utilization appears rather unconventional.

The second aspect of the draft which stands out is the absence of an explicit wish of spouses to establish an SMC. If a marriage contract should serve as the legal basis for an SMC, we consider it essential to explicitly mention such an intention directly in the agreement. Otherwise, the future SMC would float in a legal vacuum and either spouse could easily, probably even legitimately, object his or her lack of will to be bound by it.

Thirdly, the draft is devoid of rules about the operation of an SMC. This would not be problematic if some statutory provisions on SMC's existed. To our knowledge, there is no statutory law on SMC's in Austria as the law governing the draft and the odds that any jurisdiction presently has such regulation are close to none. Therefore, the whole legal framework of an SMC should be contained in the marriage contract. Such a framework should encompass, for instance, rules about the duty to register

36 Bydlinski, "§ 1237", margin number 1. In Rummel, Meinhard, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch.*

37 E.g. the German *Gütergemeinschaft* under §§ 1415 ff BGB; the Austrian *Gütergemeinschaft inter vivos* under §§ 1233 ff ABGB; the Slovak *bezpodielové spoluvlastníctvo manželov* (a type of community of property; *Errungenschaftsgemeinschaft*) under § 143 ff of the Slovak civil code.

changes in the *status quo* of assets in the SMC software, namely: acquisition or loss of assets; alteration of shares of assets (e.g. from 50/50 to 60/40); the time period in which the registration must be done starting from the deciding event in real world (e.g. mutual acquisition of a car on 1.1.2021, deadline for registration of this fact to the SMC until 14 days from this event) etc. All this might sound redundant as long as the marriage works smoothly, but as soon as the relationship deteriorates, the battle between spouses often occurs in the property dimension of marriage. Precisely in such a scenario would either spouse appreciate a lucid and possibly gapless legal framework of their SMC.

Fourthly, and as a follow-up to the previous point, the draft does not provide any sanctions in case of a breach of spouses' duties regarding the operation of an SMC – naturally, because it does not contain such duties in the first place. If spouses should be motivated to abide by an established SMC, the marriage agreement must stipulate sanctions for a breach of duties discussed in the previous point. An SMC would otherwise remain nothing more than an empty high-tech toy without any enforcement potential. Admittedly, setting up a system of sanctions between spouses might seem a bit harsh. Reaching after a monetary sanction should be out of discussion. It is hard to imagine a rule saying e.g. that if a spouse failed to fulfil his duty to register an asset change in an SMC, he or she would have to pay his partner a fine. This type of sanction might work in a business relationship, but surely not in a marriage. Thinking that one spouse could demand a monetary fine from the other while living in a harmonious relationship is simply corrupt. One older judgment of the German *Reichsgericht* also endorses this view and states that contractual monetary penalties for a breach of duty originating in the marital bond are *contra bonos mores*.[38] This judgment represents, in our view quite rightly, the unanimous opinion in Germany on the (im)permissibility of contractual monetary penalties between spouses up to this day.[39] Such an approach probably corresponds with the general perception of marriage in Europe. Thus, if monetary sanctions are excluded, it is hard to come up with any kind of rational penalty which would not contradict the nature (good morals) of marriage. The only circumstance in which a sanction for the breach of an SMC-duty would seem acceptable and realistic is the case of property division after marriage dissolution. For example, spouses might agree that the asset inventory in an SMC should mirror the actual state of their common property, usually not only for evidentiary and informative purposes during marriage, but also for speediness and clarity during potential property division. Mainly the latter would be considerably impaired if spouses disregarded or neglected their asset registration duties. Thus, it appears correct and just to "punish" an infringing spouse for undermining the registration duty. One can think of a sanction clause stating, for instance, that when a spouse does not register an asset change in

38 *Reichsgericht,* IV. Zivilsenat. Urteil vom 3.11.1938, IV 145/38. Published as RGZ 158, 294 (300).

39 Lutz Milzer, "1. Teil. 4. Stabilisierung durch Schadensersatzpflichten und Vertragsstrafen?", margin number 164. In Gerrit Langenfeld, Lutz Milzer, eds., *Eheverträge und Scheidungsvereinbarungen* (C. H. Beck, 2019); Ludwig Bergschneider, Anette Wolf, "§ 7 Eheverträge", margin number 130. In Christof Münch, *Familienrecht in der Notar- und Gestaltungspraxis,* Christof Münch (C. H. Beck, 2020).

an SMC within the stipulated time, he or she loses the right to this asset in case of property division after divorce or dissolution of marriage.

3.3 SMC and rights in rem vis-á-vis *third persons: registration clause*

SMC functions, amongst other things, as an asset inventory. With the aim to enhance the significance of this instalment (e.g. for the purpose of full reliance on the inventory in case of property division as mentioned earlier), spouses could be interested in a marriage contract clause stating that, irrespective of the statutory provisions on acquisition and loss of rights *in rem,* registrations in an SMC have constitutive effects on such rights (hereafter: registration clause). Whether such a clause might be permissible depends on the limits of will autonomy in national marriage contract law. Since we already concluded an SMC as such should be permitted under German and Austrian law, it is only fitting to test the validity of a registration clause based on the rules of both legal orders.

3.3.1 Grounds for invalidity

The question stands whether a registration clause could withstand all grounds for invalidity anchored in BGB and ABGB. We hold that both under German and Austrian law, a registration clause in a marriage contract would defy good morals (§ 138 para. 1 BGB; § 879 para. 1 ABGB). We first present a general background to our assertion and afterwards the justification.

3.3.1.1 German law

The provision on the invalidity of transactions *contra bonos mores* in § 138 para. 1 BGB is traditionally abstract and very open, as the statute does not provide a definition of what good morals are. This task is entrusted to case law and academia. Based on the interaction with one another, so-called case groups (*Fallgruppen*) have developed via abstraction of the factual and legal circumstances of cases in which a violation of good morals was found. One of these case groups is the *contra bonos mores* of transactions, usually contracts, which impair the legal interests or legal positions of third parties.[40] The main idea of this case group is that contracts which even indirectly weaken or harm the rights of third parties already acquired or to be acquired cannot enjoy legal protection. Such agreements are notoriously known as contracts to the disadvantage (detriment) of third parties (*Verträge zulasten Dritter*). Contracts marked by recklessness and the absence of loyalty towards legal relations (*Rechtsverkehr*) also fall under this category.[41] For a contract to defy good morals, it is sufficient that it objectively does so. Subjective element, that is the intent to act with ill will, is thereby irrelevant.[42]

40 See e.g. Christian Armbrüster, "§ 138", margin number 96ff. In Claudia Schubert, ed., *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1* (C. H. Beck, 2018).

41 Thus Armbrüster, "§ 138", margin number 96ff. In Schubert, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1.*

42 See e.g. Holger Wendtland, "§ 138", margin number 22. In Bamberger, Hau, Poseck, *Beck'sche*

Even though a registration clause might primarily be directed at the reinforcement of proprietary interests of spouses, its worrying impact on the *in rem* position of third parties is undeniable. Let us demonstrate this notion by a few examples while presuming that a registration clause would be in effect, spouses lived under the common ownership of assets (*Gütergemeinschaft*) pursuant to §§ 1415 ff BGB, and that the transactions had the approval of the other spouse as required by § 1450 para. 1, sentence 1 BGB. (1) A spouse sells and hands over to a third person a car mutually owned with the other spouse and which is registered in an SMC; (2) *vice versa,* a spouse buys and receives a car from a third person, whereas this car should become common ownership of spouses by virtue of § 1416 para. 1, sentence 2 BGB. As long as the right *in rem* remained unregistered after the transaction with a third party had been completed, the third party would either (1) become a possessor without ownership if he was a buyer or (2) remain an owner without possession if he was a seller. Consequently, this third party might (1) dispose of an object in a way he was not entitled to as a mere possessor or (2) abstain from further disposition of an object even though he retained ownership. In our opinion, a registration clause potentially placing third parties in the described positions would place an enormous burden on legal relations, since it would compromise the harmony in disposition of rights *in rem* and tarnish the good faith of third parties in the validity of statutory rules on acquisition and loss of rights *in rem.*

When pondering upon the potential *contra bonos mores* of a registration clause, it all comes down to the weighing of two conflicting interests. On one side of the scale are the proprietary interests of spouses – a registration clause would strengthen the legal importance of the asset inventory in an SMC and spouses thus could have full confidence therein. On the other side, there is the protection of third parties' interests and legal relations – a registration clause heavily compromises the *in rem* position of third parties and on the same note also the fluency of legal relations. Therefore, the crucial question is whether the registration clause impairs third parties' rights and legal relations so severely that the proprietary interests of spouses must back off. In view of the examples above, we consider the impairment of the rights of third parties by a registration clause severe enough, which is why the interests of third parties should overweigh the interests of spouses in this case. Consequently, a registration clause should be considered *contra bonos mores* and therefore void under § 138 para. 1 BGB. Finally, this view can be supported by the view of practicing notaries. They tend to restrict the autonomy of will in marriage contract law whenever the rights of third parties are involved.[43] A registration clause would thus most probably be rejected by a public notary when authorizing the marriage contract. The subject of a further discussion could be whether the matrimonial property register (*Güterrechtsregister*) would change our conclusion.

Online-Kommentare BGB.

43 See Herbert Grziwotz, "§ 12. Eheverträge", margin number 49. In Heribert Heckschen*, ed., Das Beck'sche Notar-Handbuch* (C.H. Beck, 2019).

3.3.1.2 Austrian law

The clause invalidating *contra bonos mores* transactions (contracts) in ABGB is § 879 para. 1. To no surprise, the same basics can be said about this provision as was the case with § 138 para. 1 BGB, namely that it is open and abstract in formulation; that it is concretized by case groups (*Fallgruppen*); that one of these case groups is the *contra bonos mores* of contracts to the detriment of third parties;[44] and that is suffices when good morals are defied objectively.[45] The arguments favouring the *contra bonos mores* of a registration clause under § 879 para. 1 ABGB are, therefore, identical to those presented under German law. The only matter which must be adjusted when shifting to Austrian law is the property regime used in the examples on the impairment of third parties' rights – let us presume that spouses live under the Austrian common ownership of property *inter vivos* (*Gütergemeinschaft unter Lebenden*) pursuant to § 1233 ff ABGB.

On top of the analysis made under BGB, however, Austrian law, unlike German law, distinguishes between absolute and relative invalidity.[46] The invalidity under § 879 para. 1 ABGB within the scope of "contracts to the detriment of third parties"-case group should be considered as absolute, since its purpose is to protect third parties and thereby, more generally, public interests. Finally, since there is no public registry of marriage contracts in Austria similar to the German *Güterrechtsregister,* the invalidity of a registration clause under ABGB is a bit more straightforward.

3.3.2 Partial invalidity?

Founding that a registration clause should be invalid due to the violation of good morals both in Germany and Austria*,* the question arises whether this leads to the invalidity of the marriage contract as a whole or whether the marriage contract could remain valid with the exclusion of the invalid registration clause. The latter alternative is called partial invalidity (*Teilnichtigkeit*). As is well known, the attitudes towards partial invalidity of transactions (contracts) in Germany and Austria are substantially different. In the upcoming lines, we carry out the partial invalidity test of a registration clause in a marriage contract both under BGB and ABGB.

3.3.2.1 German law

In principle, any kind of transaction (contract) in civil law violating good morals is from the very beginning (*ex tunc*) void under § 138 para. 1 BGB. The basic rule is that if an individual part of a transaction is *contra bonos mores,* the transaction is void in whole.[47] Hence, BGB does not embrace the ancient maxim *utile per inutile*

44 See Heinz Krejci, "§ 879", margin number 141ff. In Rummel, Meinhard, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch.*

45 See Krejci, "§ 879", margin number 14. In Rummel, Meinhard, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch.*

46 Basics thereto see e.g. Peter Bydlinski, *Bürgerliches Recht I. Allgemeiner Teil* (Wien NewYork: Springer, 2007), 143-145.

47 See § 139 BGB, part of the sentence before the first comma. Explanatory thereto e.g.

non vitiator ("that which is useful is not vitiated by that which is useless").[48] Partial invalidity under § 139 BGB is an exception from § 138 para. 1 BGB and is based on the following considerations. If only a detachable individual contractual provision defies good morals and the rest of the contract could reasonably function even without it, only the provisions *contra bonos mores* should be avoided.[49] For this to happen, it must be maintained that, based on an objective evaluation, the parties would have concluded the contract even without the eliminated provision. Such an intent of the parties is called "hypothetical will of the parties" (*hypothetischer,* or *mutmaßlicher Parteiwille*).[50] In summary, the conditions for partial invalidity under § 139 BGB are that (1) the provision in question is detachable from the rest of the contract and (2) the hypothetical will of the parties speaks in favour of validity without the eliminated clause.

Ad (1): We hold that a marriage contract including its provisions on the establishment of an SMC could reasonably serve its purpose even after eliminating a registration clause. Such a clause should be understood only as a supplementary tool fortifying the confidence of spouses in the SMC. Thus, a registration clause does not compromise the functionality of an SMC or a marriage contract as a whole and can, therefore, be considered as detachable.

Ad (2): While the foregoing part of the partial invalidity test is rather unproblematic, investigating the hypothetical will of the parties seems tricky. Whether spouses would objectively establish an SMC even without a registration clause depends on the circumstances of an individual case. For one group of spouses, a registration clause might be the deciding motivation for the establishment of an SMC. Without a registration clause, it would not be worth for them to establish the SMC. For the other group, such a clause could be only a secondary afterthought or something the spouses introduced with a "why not" attitude. A general conclusion regarding the partial invalidity of a marriage contract with a registration clause is therefore not possible to make. Should there be a case of spouses from the *first* mentioned group, there could be no room for partial invalidity and the marriage contract as such would have to be avoided, given that it only concerns an SMC. However, the marriage contract should regularly contain also other matters than the creation of an SMC, for instance, a choice of property regime, modifications to the scope of property masses, modification of property administration or disposition etc. In this setting, it would be more correct to consider partial avoidance of only that part of the marriage

Bundesgerichtshof, Beschluß vom 21. 9. 2005 - XII ZR 256/03, 4. a); Wendtland, "§ 138", margin number 32. In Bamberger, Hau, Poseck, *Beck'sche Online-Kommentare BGB*; Christian Armbrüster, "§ 138", margin number 158. In Schubert, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1*. 8.

48 See duhaime.org Legal Dictionary at: http://www.duhaime.org/LegalDictionary/U/UtilePerInutileNonVitiatur.aspx.

49 See § 139 BGB, the rest of the sentence after the first comma. Explanatory thereto e.g. *Bundesgerichtshof,* Urteil vom 12. 7. 1965 - II ZR 118/63, II., 1; Wendtland, "§ 138", margin number 32. In Bamberger, Hau, Poseck, *Beck'sche Online-Kommentare BGB*; Armbrüster, "§ 138", margin number 159. In Schubert, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1*. 8.

50 See *Bundesgerichtshof,* Urteil vom 30.01.1997 - IX ZR 133/96, III., 2., c).

contract concerning an SMC, since the registration clause is connected solely thereto, not to the rest of the marriage contract. This scenario would again depend on the two conditions for avoiding only partially – whether the SMC part of the marriage contract is detachable from its rest and whether the spouses would have concluded this contract had they known the agreement on an SMC is invalid (hypothetical will of the parties). As far as the *second* group of spouses is concerned, the sole avoidance of a registration clause and the "survival" of the marriage contract's remnants could be earnestly contemplated.

3.3.2.2 Austrian law

The basic rule on partial invalidity is found in § 878 second sentence ABGB. Although the text of this provision explicitly focuses solely on the partial impossibility of performance, it is applied *mutatis mutandis* to partial invalidity as well.[51] With this in mind, we can retell § 878 second sentence ABGB followingly: if only an individual provision of a contract is flawed, in principle, only this provision should be eliminated and the rest of the contract should continue to "live", if that rest is by itself capable of existence. Thus, contrary to BGB, ABGB sticks to the principle *utile per inutile non vitiator*. However, if § 879 para. 1 ABGB is the ground for avoidance, as in the case of a registration clause in a marriage contract, it is perceived as *lex specialis* to the general rule in § 878 second sentence ABGB. Hence, when avoiding under § 879 para. 1 ABGB, the *purpose of the prohibition* decides about avoidance in whole or in part.[52] It is therefore necessary to ascertain this purpose. As assessed earlier, a registration clause in a marriage contract should be *contra bonos mores* under § 879 para. 1 ABGB because it impairs the legal interests and positions of third parties. The purpose of the prohibitory norm is thus unambiguous: protection of third parties' rights and interests. Using the "purpose of the prohibition" criterion, we hold that it perfectly serves the protective purpose of § 879 para. 1 ABGB in the given case if only the registration clause in a marriage contract were eliminated. There is no need to avoid the whole marriage contract, since third parties could eventually be harmed only by the registration clause.

4 CONCLUSION AND PROSPECTS

A relatively new addition to the utilization of blockchain in private law is a smart marriage (originally "wedding") contract developed by an Austrian IT-firm "block42 Blockchain Company GmbH". SMC is not a contract in a strict sense, but rather a specific expression of will autonomy in marriage contract law. It is meant to serve as an asset inventory; shared digital wallet; and property partition tool. The establishment of an SMC through a marriage contract is not problematic under German

51 See Georg Graf, "§ 878", margin number 13. In *ABGB-ON. Online Commentary,* ed. Andreas Kletečka, Martin Schauer (Wien: Manz Verlag). Stand am: 1.8.2020.

52 More on that, including case law, see Graf, "§ 878", margin number 13. In Kletečka, Schauer, *ABGB-ON. Online Commentary*; Krejci, "§ 879", margin number 514. In Rummel, Meinhard, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*.

and Austrian law as jurisdictions with fairly liberal approaches towards freedom of will in matrimonial property law. However, pursuant to Slovak law as a representative of a quite rigorous jurisdiction in the same area, the creation of an SMC by a marriage contract is not permitted.

If an SMC should work properly, it is necessary to pay attention to some points of content of the base marriage contract. Firstly, spouses should ensure that their property regime is a community of assets in some form. Otherwise, there would be no common property to manage by an SMC, save for a potential regular *in rem* co-ownership. Secondly, it is advised to express the intention to create an SMC explicitly in the base marriage contract. In case of omission, the lack of will to be bound by the SMC could be contested later on. Thirdly, the base marriage contract should include a relatively detailed set of rules under which an SMC operates, since the existence of a statutory law on this matter may hardly be expected in any jurisdiction. Fourthly, sanctioning a breach of the SMC-legal framework set up under the previous recommendation should be included in the base marriage contract as well.

Spouses might want to include a clause in the base marriage contract stating that, irrespective of the statutory provisions on acquisition and loss of rights *in rem,* registrations in an SMC have constitutive effects on such rights ("registration clause"). Both under German law and Austrian law, a registration clause should be invalid due to the violation of good morals. As to the question of partial invalidity, applying first BGB, the answer depends on the hypothetical will of spouses in every particular case. If the hypothetical will test is answered in the negative, the base marriage contract must be avoided in whole; should the answer be positive, only the registration clause needs to be eliminated. Under ABGB, however, it should be always allowed to avoid only the registration clause and let the rest of the base marriage contract "live on".

At the present state of affairs, the idea of an SMC sounds quite futuristic. Firstly, its establishment appears permissible only in jurisdictions with rather relaxed attitudes towards freedom of will in marriage contract law. Furthermore, while an SMC might work very well if spouses scrupulously abide by the duties associated with the proper functioning of the SMC, current legal framework hardly offers effective enforcement options in case of the contrary. This might be a major hindrance for the further proliferation of SMCs, for they embody rules without sanctions, which probably would not sound attractive to interested spouses. However, no legislation is adopted without demand. Therefore, should the popularity of the still very young SMC-project rise, it might spark a change of law which would better correspond to its purpose and functions.

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Ľuboslav Sisák*

Sažetak

PAMETNI BRAČNI UGOVORI: BUDUĆNOST *BLOCKHAINA* U BRAČNO-IMOVINSKOM PRAVU?

Ovaj članak predstavlja uvodnu studiju o pametnim bračnim ugovorima (PBU) kao manifestaciju blockchaina u ugovornom bračno-imovinskom pravu. Počinjemo s kratkim opisom podrijetla i funkcioniranja PBU sa tehničkog gledišta, kako i definiranjem njegovog pravnog karaktera. Odmah ćemo koncentrirati pažnju na mogućnosti i način kreiranja PBU prema njemačkom, austrijskom i slovačkom pravu. Nakon toga istražujemo probleme povezane sa sadržajem bračnog ugovora koji kreira PBU. Na kraju provjeravamo dopustivost takozvane registarske klauzule kao bračnog ugovornog sporazuma povezanog s PBU. Ključni rezultati istraživanja su slijedeći: PBU može biti kreiran bračnim ugovorom i sukladno s njemačkim i austrijskim pravu, ne ali sukladno sa slovačkim pravom. Šta se tiče odgovarajućeg sadržaja bračnog ugovora, koji kreira PBU, neophodno je posvetiti pozornost nekoliko faktora radi postizanja željene funkcionalnosti. Šta se tiče registracijske klauzule, ista ne važi prema njemačkom i austrijskom pravu i to zbog proturječnosti s dobrim moralom. Pitanje, je li prema BGB može biti bračni ugovor nevažeći samo u dijelu registracijske klauzule (djelomična nevaljanost) ovisi od okolnosti konkretnog predmeta. Na drugoj strani, ABGB omogućava djelomičnu nevaljanost u ovom slučaju uvijek.

Ključne riječi: *bračno imovinsko pravo; pametni bračni ugovor; bračni ugovor; usporedno privatno pravo.*

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