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**Analysis of Possibility of Harmonization of Prenuptial Agreements
in the European Union**

Undergraduate thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
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The Bachelor Thesis meets the established requirements

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Abbreviations

FLA Family Law Act

CEFL Commission on European Family Law

Introduction

The European Union consists of 28 Member States, internal single market has been developed which allowed free movement of people, goods, services and capital within the EU. Travelling becomes more common which leads to the movement of people throughout the EU, as a consequence that leads to a high amount of international marriages.

Widely known, that the divorce rate is high. This fact is one of the reasons to enter a prenuptial agreement prior to marriage in order to protect the assets acquired before or during the marriage. As each of the Member States has its own rules of how to regulate premarital agreements an international couple has to create it extremely carefully as an agreement made in one Member State may not be enforced in the other Member State. Spouses from different Member States are unable to create an international matrimonial agreement fully enforceable in two different States. There is always a risk that a prenuptial agreement may not be enforceable under different jurisdiction. Some of the lawyers advise their clients to enter into another prenuptial agreement in another State just in case when the first agreement will not be enforceable in that State. The EU works on harmonization of the law of different Member States. The one of the reason of the chosen topic is a research and an analysis of the reason why the prenuptial agreement has not been harmonized yet. The aim of the research is to compare the regulations of the different States to find out whether the differences are such as that it is impossible to harmonize them and they could not be harmonized with no special breach of the culture of a certain State.

The main goal of the thesis is to establish and analyze what are the significant obstacles and are the most extraordinary differences in some States of EU which create a barrier in harmonization of the prenuptial agreements and whether they may be overcome.

The hypothesis of the work is that **it is impossible to unify the prenuptial agreements in the EU due to the differences of the legal norms and cultural differences with no breach of the values of the culture of a certain State.**

As far as the structure of the thesis is concerned, the first chapter consists of the attempts of harmonization of the regulations in the past. The whole idea of the chapter is a demonstration of the previous experience, support of the hypothesis and reinforcement of the Author's arguments by studying attempts to unify the prenuptial agreements.

The second chapter consists of the investigation of the States and main differences are provided as the bases of the analysis. Selected States are members of the European Union, the specific States have been chosen as they have most expressed differences in regulation of prenuptial agreements. The United Kingdom (UK) is also added to the list of the States of the EU even though this State is planning to leave the EU. Although, the Author included it because it is still in the European Union and it could take a long time to leave the EU. For the present moment the UK as any other EU Member States has its own way regulating the prenuptial agreements which can be included into this research for the full analysis. By the stating those main differences in the legal norms regulating the prenuptial agreement in the EU at the beginning the author gives a fundament for further analyses. There is a comparative analysis between all of the selected States was conducted in order to show and emphasize the main obstacles and most obvious differences exist at the moment, follows by the second chapter. The aim of the second chapter is to explore the variations of the differences in the matrimonial property regimes and culture, gain the evidence which would help for a purpose of controlling and evaluating the hypothesis.

The third chapter consists of the comparative analyses of the results, and attempts of harmonization of the regulations in the past and other countries' experience. When discussing and analyzing comparative family law in Europe it is reasonable to look at the practice of the United States of America because the USA has had similar legal problems related to prenuptial agreement in different States. It is reasonable to learn from their practice. For that reason, the Author gives a short discussion about the practice of USA on the analyzed topic of the thesis to show the possible obstacles and solutions the European Union could follow.

Thesis is an empirical and qualitative research. Comparative analysis has been used when discussing the legal regulations and practice of different EU Member States. The hypothesis of the thesis will be proved by analysis and comparison of legal matrimonial property regimes and some of the cultural characteristic of the chosen States of European Union.

The sources used for the thesis are searched in relation to the topic. The primary sources are national reports and the legal acts which are mostly used in the second chapter in order to investigate the provisions which regulate the prenuptial agreements in the selected States. The books and the academic articles are mostly used in the third chapter of the thesis where the actual analysis is conducted. The sources are the international articles, book chapters, legal acts, and cases. There are also the official governmental sites and other information on the topic used.

Harmonisation of law of the EU Member States is one of the significant topics. Nowadays, the integration of the European Union touches almost every part of every day life of a citizen of the EU. Family is an important part of life of a person, probably every adult has thought about setting up his own family at least once in his/her lifetime. Unfortunately, numerous amounts of marriages end by divorce. In order to soften the consequences of a divorce the couple may choose property division regime in advance, it is especially essential for international couples as jurisdictions of different Member States may not recognise the prenuptial agreement of the other State and there is no unified form of the prenuptial agreement which would allow an international couple to move across the EU without any risk of unprotected assets or property in case of a divorce.

1. Attempts to harmonize the regulation of prenuptial agreement in the past

Evidently, there have not been pure attempts to harmonize the regulations of the prenuptial agreement by some kind of strict legislative. Although, there were some attempts on harmonization through Recommendations and Resolution of the Council of Europe. Commission on European Family Law (CEFL) also includes patterns for harmonization of family law in European Union.

The Council of Europe resolution on Equality of Spouses in Civil Law 1978 contains recommendations on the matter of the contract of marriage in the European States. According to the recommendations the European States should not have clauses in their national laws which would discriminate the either of the spouse as the rule 1 of the resolution states "... to take all necessary steps to ensure that the civil law does not contain provisions whereby a spouse is put in a more advantageous position than the other spouse, in particular by being designated to act as the head of the family or by being given the sole right either to take decisions concerning the other spouse or to represent this spouse"¹ and ensure that the law gives equal rights² to the spouse as the second part of rule one states "Recognizing that the principle of legal equality between spouses is being implemented progressively in the member states of the Council of Europe"³.

By the Recommendations No. R (89) 1 of the Council of Europe on Contributions following divorce 1989, the European Governments were advised to provide rules which allow the spouses constitute: "matrimonial property regimes, in particular by granting to a former spouse the right to obtain a fair share in the property of the other".⁴

According to the principles and recommendations of the CEFL it could be possible to harmonize prenuptial agreement through their guidance. Even though, for example, a particular Member State is forced to follow the guidance strictly, there are still too many different details based on

¹ Resolution (78) 37 on Equality of Spouses in Civil Law. Council of Europe. Committee of Ministers. 27.09.1978. p 1.

² Boele-Woelki, K. et al. Principles of European Family Law Regarding Property Relations Between Spouses. Cambridge, Intersentia 2013, p 100.

³ Resolution (78) 37 on Equality of Spouses in Civil Law. Council of Europe. Committee of Ministers. 27.09.1978. p 1.

⁴ Recommendation No. R (89) 1 of the Committee of Ministers to Member States on Contribution following Divorce. Council of Europe. Committee of Ministers. 18.01.1989. Principle 1a.

cultural and traditional approach which would make additional obstacle for prenuptial agreements to be harmonized.

The regulation of the marriage contracts has been discussed by the Commission on European Family Law (CEFL) quite often because of a grown popularity of the prenups. In 2011 there was a Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.⁵ The purpose of the proposal was to set up rules that apply in cases with an international element regarding of matrimonial property regimes.⁶ The Proposal states that enforcement and recognition are guaranteed unless they are against public policy in that particular State meaning that the spouses have a right to choose law and the court dealing with their problem.⁷

The enforcement of regulations may help to recognize the independence of the parties' choice and eliminate vagueness surrounding enforcement of marriage contracts in certain Member States. Still, in order to fully override the obstacles there have to be fundamental changes in all of the Member States' internal laws of the European Union. Only that big change will ensure the unity and enforcement in Europe.

In addition, there are some other conventions that have provisions on marital property agreements which are the Convention on the law applicable to matrimonial property regimes of 14 March 1978, also, the French-German Agreement of 2010 which offers an extra choice of matrimonial property regime about participation in acquisition in family law of Member States and the Convention between Denmark, Finland, Iceland, Norway and Sweden on Issues of Private International Law concerning Marriage, Adoption and Guardianship.⁸

But there are conventions between certain States that do not apply rules for others. Several conventions between different States do not promote harmonization.

The idea of creating of one common regulation of prenuptial agreements was trying to be achieved by the Hague Convention on Law Applicable to Matrimonial Property Regimes in 1978. There are five countries which have ratified the Convention: Austria, France, Luxembourg, Netherlands, and Portugal.

⁵ Boele-Woelki, *supra* nota 2, p 92.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

The convention consists of thirty one Articles including the regulation of prenuptial agreements. As most of the European States' provisions do not regulate the provisions on maintenance obligations, succession rights and capacity of the spouses, the Convention does not apply to those either.

One of the purposes of the Convention is to settle a conflict of law issues. The main benefit of the Convention is that it gives the prospective spouses the chance to choose the law they want to be applicable in their case. The article 3 of the Convention designates the law which can be chosen by prospective spouses. However, the State of habitual residence, national State or a future habitual residence of a State's law may only be designated, which means that the Convention does not allow the future spouses to choose any jurisdiction they want. Basically, certain jurisdiction can be designated only in cases where one of the spouses can be related to that State. Article 12 provides that the validity of prenuptial agreement is determined by law of that country meaning that the agreement is valid only if it is in accordance to the national law or law which regulated that certain property in case where the property is allocated in different State. According to the convention the spouses have a right to choose the law applicable to their property when article 4 of the convention provides rules which applies if spouses have not chosen any law themselves. In that case, the law of State of the spouses' habitual residence will be applied.

Article 12 of the Convention requires that the prenuptial agreements have to be in a written form signed by both parties and dated.

The states that adopted the provisions of the Hague Convention on Law Applicable to Matrimonial Property Regimes may enforce the premarital agreements of those five states, but the nuptial agreements which are signed in other States, which have not adopted the provisions of the Hague Convention may have a complications to be enforced in those States.

In conclusion, even though not many European States have ratified The Hague Convention, the fact that it has been ratified by some States proves that the law on matrimonial property in Europe can be unified in the future.

2. Prenuptial agreements in the EU

2.1. Analysis of the States

There are many theories where prenuptial agreements take their origin. Generally, some of the sources state that England was the first State to ensure that the matrimonial property has to be divided equally; the other sources mention that such agreements existed already in ancient Egypt.⁹ In numerous countries the change in a system concerning equal division of property was made relatively not that long time ago. For instance, until 1976 in Germany it was common to consider that a wife's responsibility is to run the household.¹⁰

Some time ago, a woman was considered to be a mother of children and a homemaker without any rights to the property which her husband gained, which shows why earlier marital property regimes were not successful and left women unhappy, that fact headed to the development of the division of property and assets upon a divorce. The other reason of development of the division of property law comes with a development of a society, when the man is not considered any longer as a breadwinner and a wife as a homemaker and a notion of a marriage recognized as a union between two equal persons with an equal separation of labor. Obviously, the ancestry began to consider property acquired during the marriage as a common property which led to the progress of the marital property agreements and especially the prenuptial agreement where the spouses may choose the most suitable property regime for themselves.

Prenuptial agreements are often referred to as a premarital or ante-nuptial agreement, also, abbreviated as a prenup or prenupt. In some countries prenuptial agreements are considered to be similar to marriage contracts, although, some sources differentiate two notions referring to the marriage contract as a contract that commonly developed in the European Member States and deals with the issues of division of property, when prenuptial agreements are agreements which may have provisions on different matters and is wider in its scope and the content may deal not only with the property division but also with responsibilities of the spouses, alimony and maintenance issues. Most of the European States find such prenuptial agreements as a public policy violation. Mostly, the European Union Member States refer to the prenuptial agreement as an agreement that regulates the matrimonial property regime. The European Commission gave a definition of prenuptial agreement which is sometimes referred to as a marriage contract: "A

⁹ Whitlock R. Eight foot long scroll reveals Ancient Egyptian prenup. www.ancient-origins.net/news-history-archaeology/eight-foot-long-scroll-reveals-ancient-egyptian-prenup-003601?nopaging=1 (30.04.2017).

¹⁰ Bradley, D. Family Law and Political Culture. London, Sweet & Maxwell 1996, p 246.

marriage contract is defined as any agreement by which spouses organise their property relationship between themselves and in relation to third parties".¹¹

All selected States have been chosen in order to show the most extraordinary differences and demonstrate a picture of the situation of prenuptial agreements in the European Union.

After referendum in 2016, the United Kingdom is willing to leave the European Union. The United Kingdom was included because it is still in the European Union and it could take a long time to leave the EU. For the present moment the UK as any other EU Member State has its own way regulating prenuptial agreements which can be included into this research for the full analysis.

2.1.1. Estonia

The prenuptial agreement in Estonia is Marital Property Contract which is regulated by the Family Law Act (FLA). The contract allows the potential spouses to agree on the convenient property relationship prior entering into the marriage or during the marriage. By the marital property contract the spouses can terminate a selection made upon marriage, make proprietary relationship valid on the basis of a marital property contract; establish another proprietary relationship prescribed by law, or change a proprietary relationship in the cases prescribed by law¹².

In cases when marital property agreements made prior the marriage they become enforceable on the date when the actual contraction of marriage was conducted.¹³

In Estonia the potential spouses have to choose the proprietary relationship before entering the marriage. If the proprietary relationship has not been chosen then Parity of Property applies. Parity of property is the legal regime where all property gained during the marriage is considered to be joint property, meaning that the transaction of joint property requires the consent of two spouses and has to be divided up equally on both spouses in case of a divorce.¹⁴

¹¹ Boele-Woelki, *supra* nota 2, p 92.

¹² FLA RT I 2009, 60, 395.

¹³ Marital property contract. Ministry of Justice, 2013.

www.eesti.ee/eng/perekond/varalised_suhted_perekonnas/abieluvaraleping (28.02.2017).

¹⁴ *Ibid.*

The other type of the proprietary relationship is offsetting the net gain in assets meaning that the property which was acquired during the marriage has to be recognized as sole property of each of the spouse where the offset of shares have to be produced between the parties and added to the assets of each of the spouses. This type of property regime does not apply on the property acquired before the marriage was contracted. That property should be registered on the name of the spouse in whose name the property was gained¹⁵. This mean that both of the spouses make contracts concerned their property as a sole owner of the property.

The third type of proprietary relationship is the separation of property where any property acquired during the marriage is property which should remain to the spouse who personally gained the ownership of that property.¹⁶

Today, the content of the marriage property contract can be one of the three marriage property regimes. The parties can make a new agreement or have certain marriage property regime. Though law allows making changes in the chosen property this means that the only thing they can do is to choose another type of the offered three proprietary regimes. There are certain exceptions – that there is a possibility to leave some property to one spouse only but these exceptions to the general rules in the certain property regime is of low priority. For example:

- Single objects or certain type of objects may be declared to be joint property or separate property by a marital property contract.¹⁷
- Spouses may transfer the right to administer joint property to one of the spouses by a marital property contract.¹⁸
- A marital property contract may prescribe that consent of a spouse is not required in the case of transactions entered into in independent economic activities of the other spouse.¹⁹
- If the right to administer joint property has been granted to one spouse pursuant to subsection 28 (2) of the Family Law Act, he or she is entitled to possess and dispose of an object forming part of joint property taking into account the restrictions prescribed for the benefit of the other spouse by law and by the marital property contract. A spouse who

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ FLA RT I 2009, 60, 395, Art. 27(4).

¹⁸ FLA RT I 2009, 60, 395, Art. 28(2).

¹⁹ FLA RT I 2009, 60, 395, Art. 29(2).

administers joint property alone shall conduct legal disputes related to joint property in his or her name.²⁰

- If, upon contracting marriage, set-off of assets increment is selected pursuant to the procedure prescribed by the Vital Statistics Registration Act or established by a marital property contract, the share added to the property of each spouse during a proprietary relationship (acquired assets) shall be set off between the spouses. The proprietary relationship of set-off of assets increment does not affect the ownership of the proprietary rights acquired by a spouse before entry into force of or during the proprietary relationship.²¹

By the marital property contract the spouses may regulate the property issues such as what kind of property belong to each of the spouses after marriage, what property should be considered as a joint property and what is separate property, it could be agreed on the property which is acquired before the marriage or during the marriage. A marital property contract may specify how the property can be disposed, division of the property and other proprietary rights which do not contradict to the Law.

Therefore, the possibility to agree on something different than provided by the law is quite narrow and does not affect considerably the marital property regimes.

The Marital Property Contract has to be entered into personally by the parties, and it has to be entered in notarized form. It may be entered into Register upon a request of the spouses. The spouses have a right to amend the Marital Property Contract by an agreement or create a new agreement. However, there are some kinds of property which cannot be considered as joint property such as gift or inheritance. Also, the Marital Property Contract has a legal effect on the third party only in cases when the Marital Property Contract is registered.

The Marital Property Contract expires when one of the spouses dies, the spouses are divorced, the new marital contract is created or in case of the marriage proprietary relationship is terminated by a court.

As far as the principal of equality in Estonia is concerned, it should be said that the spouses regulate the property by choosing the property regime provided by the State's law upon their

²⁰ FLA RT I 2009, 60, 395, Art. 30(1).

²¹ FLA RT I 2009, 60, 395, Art. 40.

discretion. According to the Hallik the system which gives the spouses autonomy to decide how the property should be regulated can "... be seen as a refusal of the state to take responsibility for guaranteeing an equal and fair proprietary relationship between spouses"²² as it could be possible that one of the spouses may be left in less favorable position than the other one.

Estonian law provides the provision which allows the spouses to create their property relations according to their wishes as if there would be compulsory choice would contradict the principles of European Union. At the same time the State cannot let the spouses to regulate their own matrimonial property regime on their own as it has to regulate and guarantee protection for both of the spouses and prevent unfair practice when the vulnerable spouse is left in less beneficial position.²³

2.1.2. France

France was one of the States which ratified the Hague Convention on Law Applicable to Matrimonial Property Regimes in 1978. The Convention applies to marriages after the 1st of September 1992. The Convention allows designating the applicable law only if one or both of the spouses can be connected to that particular Member State, the law of which they want to be applicable to their property. For instance, according to the Article 3 of the Convention, the spouses may designate the law applicable of a specific State in cases where one of the spouses is a national of that Member State, has a habitual residence or is willing to establish a new habitual residence in that State. Although, both of the spouses may choose the regime which completely applies to all property and they, also, have an opportunity to designate the law which applies in the Member State where the property is allocated or designate the law according to the future acquired immovable property's allocation.²⁴

Today, the French Civil Code and Hague Convention regulate the property regime in France. There are a few property regimes in the French law.

The first is the basic mandatory matrimonial rules applicable to all couples and the second is the specific matrimonial property regime. The prospective spouses have a right to adopt any of the

²² Hallik, L. Regulations of Proprietary Relations between Spouses in the New Family Law Act: Towards Better Regulation by Means of Private Autonomy? *Juridica International*, 2010, XVII, pp 161-166, p 165.

²³ *Ibid*, p 166.

²⁴ Ferrand, F., Braat, B. National Report: France. University Jean Moulin Lyon 3, France. University of Utrecht, UCERF, Molengraaff Instituut voor Privaatrecht, The Netherlands, 2008, p 55.

offered property regimes or combine those regimes. The prospective spouses have a freedom to choose their own way of regulation of the property. Although, they cannot make any provisions which would be contrary to the public policy, derogate any rights and duties of the spouses established by the French Civil Code.²⁵

According to the national report of France, prenuptial agreements are allowed and regulated by the French Civil Code, but still there are some certain limitations.

The proprietary regime has to be chosen before entering the marriage. There are a few regimes such as *separation de biens* meaning separation of property where each of the spouses retains a right to their own property including property gained during the marriage and *participation aux acquets* meaning participation in acquisitions where each of the spouses participate in the possession of joint property. Moreover, there are *communauté légale* which means legal community and *communauté conventionnelle* meaning contractual community.²⁶ There are, also, default property regimes which apply in case of the absent of prenuptial agreement.²⁷

Additionally, there are general rights and duties of the prospective spouses regardless of the marital property regime. Basically, the application of those general rights can be made upon the married spouses; those do not apply on the registered partnership or the civil cohabitation. The purpose of the rights and duties is to guide a new cell of the society. The applicability of that rules cannot be excluded or edited by the marital agreement²⁸.

Widely known, that some prenuptial agreements can include the disclosures about rights and responsibilities of the spouses, for example, cheating prenuptial agreement when one party is cheating on the other and because of that reason is deprived a right on certain assets. Unlike that, in France the spouses have that list of the duties regulated by the French Civil Code which state that the spouses have to respect and support each other or both spouses are obliged to educate their children.

²⁵ *Ibid*, p 56.

²⁶ *Ibid*, p 3.

²⁷ *Ibid*, p 56.

²⁸ *Ibid*, p 55.

Therefore, according to the French Law, it is impossible to create a marital contract which would provide financial compensation or duties and responsibilities for child guardianship in case of a divorce. Moreover, if the marital contract consists of such provisions it can be void.

As far as post-nuptial agreements are concerned, the spouses may modify their marital agreement only if they fulfill certain requirements. The spouses have to wait for two years to make an amendment; those amendments should be made for the benefits of the family²⁹. All children of age and parties of the prenuptial agreement and also creditors have to be informed of the amendments of the agreement. Modification of the prenuptial agreement is made by the notarial instrument if there is no opposition. Although, there were some cases when there was a judicial approval requested in order to make a modification³⁰.

The prenuptial agreement becomes effective on the date when the marriage is contracted. After the notary recognizes it he drafts a certificate which should be given to the registrar.

Prenuptial agreements are effective regarding to the thirds parties as well as post-nuptial agreements:

Prenuptial agreements have to be signed and dated by a notary. The certificate of the marriage has to be given to the registrar at the time of the wedding, even if the prenuptial agreement has not been declared to the registrar it is still effective against third parties in cases where the marital agreement was mentioned in cooperation to the third party³¹.

According to Ferrand and Braat in cases of post-nuptial agreement the agreement is effective against third party only in some period of time since modification was made "A change of matrimonial regime takes effect between the parties from the judgment or from the instrument which provides for it and, with respect to third parties, three months after the formalities of notice provided for in Article 1397-5 have been fulfilled. However, even failing fulfillment of those formalities, the change of matrimonial regime is effective against third parties where, in

²⁹ *Ibid*, p 56.

³⁰ *Ibid*, p 57.

³¹ *Ibid*, p 58.

the transactions entered into with them, the spouses have declared that they have amended their matrimonial regime."³²

2.1.3. Italy

A primary regime applies on a new family and includes obligation for both of the spouses to contribute to the family, educate and support children.³³ As in any other European State, the principle of equality plays a huge role in the marriage in Italy, the way the spouses contribute to their marriage have to be taken into account even if there are different kinds of activities, for example, the housework which is done by a wife, at some degree, can be considered as contribution equal to the husband's financial contribution.³⁴

The Italian law does not envisage the prenuptial agreements.³⁵ Prenuptial agreements are considered to be the contracts where spouses can stipulate their alimony and maintenance responsibilities. Although, the spouses are allowed to make a covenant by which they may alter their property regime.³⁶

There are three marital contractual regimes which are separate property, matrimonial property fund, and communal property contract.³⁷ In separate property regime the spouses have a right for the property he/she acquires during the marriage. In cases where there is no evidence can be provided that a specific property was acquired by a specific spouse the property may be considered to be gained under co-ownership.³⁸ Matrimonial property fund is a regime where the spouses designate use of certain property by themselves according to their family's necessities or at their discretion. Communal property contract is the regime where the spouses have a right to amend their statutory property regime by extending or limiting it in its scope³⁹.

The spouses may choose a separate property regime or modify the community property regime before or during the marriage is contracted. Although, the modifications have to be done

³² *Ibid*, p 57.

³³ Comande, G. National Report: Italy. Study on matrimonial Property Regimes and the Property of Unmarried Couples In Private International Law and Internal Law. TMC Asser Institut, 2001, p 5.

³⁴ *Ibid*.

³⁵ Boscarolli, S. Characterization Of Separate Property Within The Community Property Systems Of The United State and Italy: An Ideal Approach? Gonzaga Journal of International Law, 2015, 19 (1), pp 31-85, p 59.

³⁶ *Ibid*.

³⁷ Comande, *supra* nota 33, p 12.

³⁸ *Ibid*, p 13.

³⁹ *Ibid*.

according to some rule, for instance, the consents of both parties is requested, the consents have to be given in a form of authenticated document.⁴⁰

As far as the principle of equality is concerned, there are only default regimes provide equality, the rest of the property regimes give the spouses the autonomy to dispose their property as they wish, the spouses are not fully protected by the States Law in case where they regulate their property by the prenuptial agreement.⁴¹

Validity of the covenant is determined by its notarization and record in the marriage certificate.

Marital agreements of some states may be valid in Italy, although those agreements which are against public policy cannot be enforceable.⁴²

The prenuptial agreement may be enforced against third party "... if there is an annotation in the margin of the record of celebration of the marriage which is filed in the archives of the civil registry office"⁴³.

2.1.4. The United Kingdom of Great Britain and Northern Ireland

The United Kingdom is one of the Common Law State where the prenuptial agreements are not regulated by the Law. There is no special regime on division of family assets. Prenuptial Agreements are not legally binding but have to be given an effect in the courts. The enforcement of the prenuptial agreement depends on the English courts; some of the courts want to ensure the fairness of such agreements on specific cases. The parties have to stipulate between each other how to divide the property assets. Due to the fact that the prenuptial agreements are not enforceable they are concluded rarely comparing to some of the EU Member States or even United States of America.⁴⁴

⁴⁰ *Ibid*, p 15.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ Couples in Europe. www.coupleseurope.eu/en/italy/topics/3-how-can-the-spouses-arrange-their-property-regime (01.05.2017).

⁴⁴ Welsted, M. From Birth to Death, Family Life in 2002. International Survey of Family Law, 2004, pp 143-168, p 163.

Case of *Radmacher v Granatino*⁴⁵ make a significant change in the prenuptial agreement⁴⁶ as the binding effect of a particular pre-nuptial agreement will be considered by the court in regard to its fairness.

The case is important as it shows how the court deals with prenuptial agreement issues in the UK concluded between citizens of different States.

In this case, one of the spouses is French and the other is German, they married in London in 1998 and entered a prenuptial agreement before the marriage in Germany. In England future spouses have to take the legal advice before entering a nuptial agreement⁴⁷. However, the husband ignored that rule. The wife initiated the agreement as she got her family's wealth after assigning the agreement which basically stated that no spouse benefit from the wealth of other spouse during or after termination of marriage.

After divorce the husband applied to the court in order to get financial relief. The Court awarded him some finances with which he could afford to buy some property in London for children to visit. At this instance the High Court took the agreement into account, although, did not give much weight to it as it was signed in Germany and he was French, and did not take a legal advice before signing it.⁴⁸

The wife did not agree with the Court's decision and appealed to the Court that held that the agreement has to be taken into account and there should not be finances granted to the husband for his own needs.

The husband appealed to the Supreme where it was held that the prenuptial agreement has to be given weight. As the agreement was entered freely by both spouses, would be binding in Germany and the spouses and both parties intended to effective agreement. The Court awarded the husband finances which would help him to provide for himself and his children.

In England and Wales, future spouses may enter a prenuptial agreement upon their discretion, but that agreement will not be binding. In cases where a prenuptial agreement is considered fair to both of spouses, such an agreement will be given a weight in the court. The agreement is

⁴⁵ Akhtar, Z. Prenuptial Agreements, Sacred Marriages and the Radmacher Judgment. *Journal of Comparative Law*, 2013, 8 (1), pp 192-210, p 199.

⁴⁶ *Granatino v. Radmacher (formerly Granatino)*, [2010] UKSC 42, [2011] 1 AC 534.

⁴⁷ Barlow, A. National Report: England and Wales. University of Exeter, England, 2008, p 16.

⁴⁸ Akhtar, *supra* nota 45, p 199.

considered fair when each of the spouse took a legal advice, there is no hidden assets from each of the spouses, the agreement is appropriate to all children in the marriage.⁴⁹ Comparing to some of the European States such an agreement cannot be fully forced and enforcement of such an agreement will completely depend on the court's decision.⁵⁰ Prospective Spouses may also make a post nuptial agreement upon their discretion.

The only formal requirement for the prenuptial agreement to be formal is to be in form of a deed.

As far as the postnuptial agreement is concerned, it is valid for the third party in cases where there is consent of it or even a creation of a separate agreement with that third party in order to have an effect.⁵¹

The fact that prenuptial agreements are not binding there is no special registrar for them, there are also no special rules concerning, for instance, full disclosure of assets or debts.

Comparing to Estonia, France, Italy, Germany, Sweden and the Netherlands, the law of England and Wales cannot guarantee that the agreement the spouses entered will be enforced by a court. Respectively, there is no official obligations imposed on the spouses, no particular matrimonial regimes to choose from, no statistical data about the prenuptial agreements in both States, although, it is known that usually the prenuptial agreements are entered by people who getting married second time.⁵²

In Northern Ireland the situation with the prenuptial agreements is the same as in England and Wales. The agreements are not binding but can be taken into account in conformity with Law letting courts to make "an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage".⁵³

In case of Scotland, if there is an agreement between the spouses then it is considered by a contract which is binding.⁵⁴ Although, according to law marriage does not have any effect on property "Marriage not to affect property rights or legal capacity".⁵⁵ The agreement could be

⁴⁹ Barlow, A. National Report: England and Wales. University of Exeter, England, 2008, p 16.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978/1039 (N.I. 1)) 26 c.

⁵⁴ Mair, J. National Report: Scotland. University of Glasgow, Scotland, 2008, p 25.

⁵⁵ Family Law (Scotland) Act 1985.

registered in the Books of Council and Session or Sheriff Court Books. In Scotland prenuptial agreement is referred to as “A minute of Agreement”.⁵⁶

Prenuptial and Postnuptial agreements are allowed to be concluded by the spouses. The prenuptial agreement in Scotland is considered to be an agreement which allow the spouses to regulate their assets and property in case of divorce without any interference from the settled regime as there is no matrimonial property regime provided by Law.

As far as the formal requirements are concerned, as the prenuptial agreements supposed to be in the form of the contract; there are no other specific requirements have to be fulfilled. The agreement may be registered upon the spouses wish and consents of each of them, there are no requirement that the contract must be registered to be valid to relation to the third party.⁵⁷

Even though the prenuptial and post nuptial agreements are binding, the Court still have a right to recognize them void in cases where it seems unfair to one of the spouses, for instance, in cases where a spouse had hidden his debts from the other spouse at the time of creation of the agreement.

According statistical data, prenuptial agreements are not popular in Scotland at all, and concluded quite rarely.⁵⁸

The feature of the Scottish prenuptial agreement is that the spouses have a right to regulate their property as they wish and in contrast to England, that prenuptial agreement will be binding.

Prenuptial agreements were considered against public policy in the past, therefore unenforceable. The situation is different now.

2.1.5. Sweden

The same as in most European Member States the prenuptial agreements are enforced in Sweden. The prenuptial agreements have to be in writing and registered in a national registrar. The couple may choose the nature of the marital property or separate property. Sweden provides special law on gifts between spouses.⁵⁹

⁵⁶ Mair, J. National Report: Scotland. University of Glasgow, Scotland, 2008, p 25.

⁵⁷ *Ibid.*

⁵⁸ *Ibid*, p 26.

⁵⁹ Jänterä-Jareborg, M., Brattström, M., Walleng, K. National Report: Sweden. Uppsala University, 2008, p 32.

The prenuptial agreements are generally enforceable, although, if a court finds it unreasonable there can be a derogation of that agreement, but in cases where it was established that the spouses were acknowledged what they were doing then its power is limited. Originally, the idea of the prenuptial agreement was suggested because of a wife took care of the house, children and a husband giving the husband an opportunity to do a career. Thus, both of the spouses contributed to their family, which means that both of them had equal rights for the property and assets they acquired during the marriage, which seems fair, emphasizing that the equality principle plays an important role in Sweden⁶⁰.

There is only one of the property regime in Sweden called deferred community of property regime meaning that each of the spouses owns his property during the marriage and each of the spouses is obliged to pay only his/her debts⁶¹. That regime can be set aside and by the prenuptial agreement, the prospective spouse may establish the property regime when all or certain property will be fully considered as a separate property. If the spouses have chosen to have separate property then the agreement introduces wholly separate property in that marriage. In a case where spouses decided to choose separate regime on a specific property by an agreement then the deferred community property regime applies on the rest of their property.⁶²

The spouses have a right to modify their prenuptial agreements or even enter a new one. The spouses are not allowed to create another regime by their prenuptial agreement they only may set their property as separate or marital⁶³.

The Swedish law does not separate any requirement for the agreement to be valid in relation to the third party. According to the Swedish Marriage Code, in order for a marital property contract to become formal have to be registered with a court.⁶⁴ Therefore, the marriage contract is effective in a relation to the third party when it fulfills general requirement for prenuptial agreement in order to be bound.

⁶⁰ Sörgjerd, C. *Reconstructing Marriage. The Legal Status of Relationships in a Changing Society*. Cambridge, Intersentia 2012, p 76.

⁶¹ Jänterä-Jareborg, *supra* nota 59, p 32.

⁶² *Ibid*, p 32.

⁶³ *Ibid*, p 32.

⁶⁴ *Ibid*, p 32.

2.1.6. Germany

German law allows prospective spouses to enter into prenuptial and also postnuptial agreements. The spouses may regulate their property regime by the prenuptial agreement, if they do not have any agreements then the statutory property regime which named as community of accrued gains “Zugewinnngemeinschaft” applies⁶⁵. By the agreement there can be chosen and stipulated two property regimes which are a community of property (*Gutergemeinschaft*) and a separate property (*Gutertrennung*)⁶⁶. However, Germany's Federal Court of Justice has a right to recognize a prenuptial agreement invalid in cases where it disadvantages one of spouses.

The agreement has to be entered into personally by the spouses or their representatives in a presence of a notary.

It is possible for one of the spouses to change the content of an agreement in cases where the other spouse's income rose.

The most emphasized requirement for the German prenuptial agreement to be bound is that the agreement has to be entered into the matrimonial property register⁶⁷. The future couple can invoke the prenuptial agreement in relation to the third party if that party knows about prenup. The spouses may register only the facts regarding to the third parties. According to the German Civil Code, a third party cannot "... fully rely on the non-registration of individual restrictions while at the same time using the marital agreement as a basis ..." ⁶⁸ as stated by Martiny and Dethloff.

⁶⁵ Martiny, D., Dethloff, N. National Report: Germany. European University Viadrina and University of Bonn, 2008, p 31.

⁶⁶ Morley, D. International Prenuptial Agreements. www.international-divorce.com/prenuptial-agreements.htm (02.03.2017).

⁶⁷ Martiny, *supra* nota 65, p 33.

⁶⁸ *Ibid*, p 41.

2.1.7. Netherlands

Dutch Civil Code regulates property regime in the Netherlands. The spouses are permitted to enter nuptial agreements before and after marriage.⁶⁹ In some postnuptial agreement cases there is an approval of courts may be requested⁷⁰.

The common request for the nuptial agreements to become valid is to be entered into by a notarial instrument.

Basically, the spouses are unlimited on their choice of property regime. They may choose an existing regime or create their own. There are two property regimes in the Netherlands which can be modified which are the community of benefits and income where all assets, debts shall be considered as community of property which means that both spouses have equal rights for the property and assets.⁷¹ Community of profits and losses is a combination of the community of property regime and separate property where the spouses themselves choose certain property to remain their private property, and on the rest of the property remain under community of property regime.⁷²

There is a high level of protection of third parties which was achieved within a creation of a system of publicity for marital agreements⁷³.

The Dutch Civil Code states that in order to be valid in relation to a third party marital agreement entered before and during the marriage must be entered into by notarial instrument and according to the National Report of Netherland: "Marital contracts containing agreements on the property relationship between the spouses may be used against third persons only if the marital contract has been registered in the public Matrimonial Property Register".⁷⁴

⁶⁹ Boele-Woelki, K., Schonewille, F., Schrama W. National Report: Netherlands. UCERF, Molengraaff Institute for Private Law, Utrecht University, 2008, p 37.

⁷⁰ Morley, *supra* nota 66.

⁷¹ Boele-Woelki, *supra* nota 69, p 10.

⁷² *Ibid.*

⁷³ Ovidiu-loan, P. Matrimonial Conventions and Same - Sex Marriages - Comparing the Netherlands, England and USA Law. *Studia Universitatis Babes-Bolyai Jurisprudentia*, 2009 (3), pp 153-180, p 169.

⁷⁴ Boele-Woelki, *supra* nota 69, p 38.

The Netherlands is one of the five States that ratified the Hague Convention on Law Applicable to Matrimonial Property Regimes in 1978. The Convention applies to marriages after the 1st of September 1992.

2.1.8. United States of America's experience

When discussing and analyzing comparative family law in Europe it is reasonable to look at the practice of the United States of America. Could come out that the USA has had similar legal problems related to prenuptial agreement in different States with regulating it so far. For that reason, the Author gives a short discussion about the USA's practice on the analyzed topic of the thesis to show the possible obstacles and solutions the European Union which could be followed. The same as the Europe Union the United State of America had to unify their law on prenuptial agreement. The USA is one of the Countries in the world with a high rate of divorce⁷⁵. The author considers that the experience of the United State of America may, by its own example, show how the marital agreements may be unified. The USA consists of fifty States where each State has his own law on prenups.

Comparing to the European Countries, the prenuptial agreements in the USA is more complex, as they regulate not only the property division regimes, but also the responsibilities of the prospective spouses⁷⁶. Regulations of the prenuptial agreement consist of three laws: the Uniform Premarital Agreement Act (further U.P.A.A.), conflict of law, and choice of law⁷⁷.

The purpose of the Uniform Premarital Agreement Act 1983 is to unify the prenups in the United States of America. In fact, the regulation was adopted by twenty five States. Although, it has not fulfill its purpose as those States which adopted it, modified it to a certain extend or added their own provisions⁷⁸. There is an opinion that the Act has made the situation worse "The U.P.A.A. at best did not solve the inconsistency problems it attempted to solve and at its worse, may have further complicated prenuptial agreements by creating another source of inconsistency. Couples

⁷⁵ Garrison, M. What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence. Louisiana Law Review, 2011, 72 (1), pp 57-88, p 57.

⁷⁶ Bix, B. Domestic Agreements. Hofstra Law Review, 2007, 35 (4), pp 1753-177, p 1763.

⁷⁷ International Prenuptial Agreements. Part II Issues for Prenuptial Agreements in the United States. www.thailawforum.com/international-prenuptial-agreement-united-states.html (03.03.2017).

⁷⁸ Ryznar, M. To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context. Chapman Law Review, 2009, 1, pp 27-62, p 36.

considering a prenuptial agreement should seek legal counsel that is well versed in the U.P.A.A. and that particular state's unique modifications"⁷⁹.

A prenuptial agreement which have been signed in one State and is tried to be enforced in another State may confront the conflict of law. In such cases where the conflict of law appears the courts have to choose an approach to deal with it. The first approach is application of the law of the State where the prenup was signed, and the second approach is when the courts apply the law of the State that have an interest in the prenuptial agreement. Sometimes, it is impossible to predict the court's choice of law⁸⁰.

The prospective spouses may designate the law of the State upon their wish. However, not all Courts of United States of America may apply the law designated by the couple.

Thus, it could be seen that in a country of one federal law but various State legislatures it is not always possible to unify the prenuptial agreements. Considering the European Union, the mixture of several States with their own traditions, culture and customs, it is would be even more complicated to unify the prenuptial agreements there.

⁷⁹ International Prenuptial Agreements. Part II Issues for Prenuptial Agreements in the United States. www.thailawforum.com/international-prenuptial-agreement-united-states.html (03.03.2017).

⁸⁰ Nichols J. A. (ed.) *Marriage and Divorce in a Multicultural Context: multi-tiered marriage and the boundaries of civil law and religion*. New York, Cambridge University Press, 2012, p 66.

3. Analysis

3.1. The main difference in the prenuptial agreement in the EU

The common purpose of the prenuptial agreements is to protect the assets and ensure the equality of the share of assets. Due to different law systems, a mixture of Common and Civil Law, variety of different national law features there is no harmonization on a common prenuptial agreement in Europe⁸¹. The prospective spouses cannot enter into an agreement in one Member State and be positive that the agreement will be enforceable in the other Member State, which indicates that they not always make the most of freedom of movement in the Europe. In case of international agreements, the courts are not always certain which law have to be applied in certain cases.

As the analysis of the properties showed the prenuptial agreements are regulated in most of the European States. Although, it may seem that the structure of the prenuptial agreements in the European Member States to be similar, at the closer look it can be seen that there are some significant differences in the actual regulations and also in the cultural features.

The most important difference between the Common and Civil Law system is that the prenuptial agreement is not binding in the Common Law when in Civil Law Systems and in most European States the prenuptial agreement is binding.

3.1.1. Regimes

There are various regimes are provided by the law, for example, Estonian Family Law Act provides three property regimes.⁸² According to the Law prospective spouses may choose one of the regimes comparing to Germany where only two property regimes the spouses may choose from. In France, there are four property regimes to choose from, but there is also a possibility to create the prenuptial agreement by the spouses without any limitations. At the same time, the law of Italy allows the spouses to choose from three property regimes. The law of the UK does not provide any property regimes at all, where Sweden has just a one property regime. Germany and the Netherlands provide two property regimes both, although, the law of the Netherlands allows creating the prenuptial agreement upon the spouses' discretion. The only limitation is that it should not be contrary to the law of the Netherlands and against public policy.

⁸¹ Crowley, L. International and European Developments in Family Law. International Survey of Family Law, 2013, 1, pp 1-38, p 22.

⁸² FLA RT I 2009, 60, 395.

The difference in the content of the regimes is an obstacle. As In Estonia the potential spouses have to choose the proprietary relationship before entering the marriage. If the proprietary relationship has not been chosen then Parity of Property applies. Parity of property is the legal regime where all property gained during the marriage is considered to be joint property, meaning that the transaction of joint property requires the consent of two spouses and has to be divided up equally on both spouses in case of a divorce.⁸³ The other type of the proprietary relationship is offsetting the net gain in assets meaning that the property which was acquired during the marriage has to be recognized as sole property of each of the spouse where the offset of shares have to be produced between the parties and added to the assets of each of the spouses. This type of property regime does not apply on the property acquired before the marriage was contracted. That property should be registered on the name of the spouse in whose name the property was gained⁸⁴. This mean that both of the spouses make contracts concerned their property as a sole owner of the property. The third type of proprietary relationship is the separation of property where any property acquired during the marriage is property which should remain to the spouse who personally gained the ownership of that property.⁸⁵

Comparing to France where the proprietary regime has to be chosen before entering the marriage. There are a few regimes such as *separation de biens* meaning separation of property where each of the spouses retains a right to their own property including property gained during the marriage and *participation aux acquets* meaning participation in acquisitions where each of the spouses participate in the possession of joint property. Moreover, there are *communauté légale* which means legal community and *communauté conventionnelle* meaning contractual community.⁸⁶ There are, also, default property regimes which apply in case of the absent of prenuptial agreement.⁸⁷

In Italy, There are three marital contractual regimes which are separate property, matrimonial property fund, and communal property contract.⁸⁸ In separate property regime the spouses have a right for the property he/she acquires during the marriage. In cases where there is no evidence can be provided that a specific property was acquired by a specific spouse the property may be

⁸³ Marital property contract. Ministry of Justice, 2013.
www.eesti.ee/eng/perekond/varalised_suhted_perekonnas/abieluvaraleping (28.02.2017).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Ferrand, *supra* nota 24, p 3.

⁸⁷ *Ibid*, p 56.

⁸⁸ Comande, G. National Report: Italy. Study on matrimonial Property Regimes and the Property of Unmarried Couples In Private International Law and Internal Law. TMC Asser Institut, 2001, p 12.

considered to be gained under co-ownership.⁸⁹ Matrimonial property fund is a regime where the spouses designate use of certain property by themselves according to their family's necessities or at their discretion. Communal property contract is the regime where the spouses have a right to amend their statutory property regime by extending or limiting it in its scope.⁹⁰

There is only one of the property regime in Sweden called deferred community of property regime meaning that each of the spouses owns his property during the marriage and each of the spouses is obliged to pay only his/her debts⁹¹. That regime can be set aside and by the prenuptial agreement, the prospective spouse may establish the property regime when all or certain property will be fully considered as a separate property. If the spouses have chosen to have separate property then the agreement introduces wholly separate property in that marriage. In a case where spouses decided to choose separate regime on a specific property by an agreement then the deferred community property regime applies on the rest of their property.⁹²

In Germany, by the agreement there can be chosen and stipulated two property regimes which are a community of property (*Gutergemeinschaft*) and a separate property (*Gutertrennung*).⁹³

In the Netherlands, the spouses are unlimited on their choice of property regime. They may choose an existing regime or create their own. There are two property regimes in the Netherlands which can be modified which are the community of benefits and income where all assets, debts shall be considered as community of property which means that both spouses have equal rights for the property and assets.⁹⁴ Community of profits and losses is a combination of the community of property regime and separate property where the spouses themselves choose certain property to remain their private property, and on the rest of the property remain under community of property regime.⁹⁵

As it could be seen from the analyzed states there are states which have a few matrimonial property regimes such as Estonia, France, Netherlands and Italy. According to Boele-Woelki there is a one property regimes in Sweden, but "... the spouses may by marital property

⁸⁹ *Ibid*, p 13.

⁹⁰ *Ibid*, p 13.

⁹¹ Jänterä-Jareborg, M., Brattström, M., Walleng, K. National Report: Sweden. Uppsala University, 2008, p 32.

⁹² *Ibid*, p 32.

⁹³ Morley, D. International Prenuptial Agreements. www.international-divorce.com/prenuptial-agreements.htm (02.03.2017).

⁹⁴ Boele-Woelki, *supra* nota 69, p 10.

⁹⁵ *Ibid*, p 10.

agreements make considerable modifications of legal rules and thus find individual solution for their property relations".⁹⁶

It should be mentioned that there is a big difference between some states as there are states such as Sweden where there is an only one statutory regime and countries such as Netherlands and France where the spouses may create their own property regime almost without limitations.

For one or another reason, sometimes, the potential spouses may wish to create their own agreement, it has been allowed in the Netherlands and France. On the other hand, the Law of Italy and Germany, Estonia, do not provide the provisions for such an option.

3.1.2. Post-nuptial agreements

As far as the post nuptial agreements concerned there is a clear distinction between prenuptial and postnuptial agreements in France, Italy, The Netherlands when in Germany and Sweden there is no differentiation by the law⁹⁷. In most Member States in the EU the prospective spouses may make post-nuptial agreements. It should be noted, that the same rule applies to the Common Law System.

As it was mentioned above, French Law does not allow the spouses to modify the agreement without fulfillment of certain requirements. The spouses have to wait for two years to make an amendment and those amendments should be made for the benefits of the family⁹⁸. All children and parties of the prenuptial agreement and also creditors have to be informed of the amendments of the agreement. Modification of the prenuptial agreement is made by the notarial instrument if there is no opposition. Although, in cases where there are underage children involved when there is a judicial approval requested in order to make a modification.⁹⁹

⁹⁶ Boele-Woelki, *supra* nota 2, p 95.

⁹⁷ *Ibid*, p 106.

⁹⁸ Ferrand, F., Braat, B. National Report: France. University Jean Moulin Lyon 3, France. University of Utrecht, UCERF, Molengraaff Instituut voor Privaatrecht, The Netherlands, 2008, p 58.

⁹⁹ *Ibid*.

3.1.3. Principle of equality

According to the comparative research of De Cruz France, England and Germany resemble each other in a context of marital property¹⁰⁰. The spouses are considered to be equal and regardless of the prenuptial agreement the division of the assets will be fair. For example, even if the French Law limits the freedom of dealing with the property in case of a divorce that division still be equal, according to the De Cruz "... husbands and wives know from the outset that their equal co-ownership during marriage will be translated into equal property rights in the event of death or divorce."¹⁰¹

Principle of equality applies in Germany, in case of a divorce, the spouse who made higher earnings have to share surplus with the partner "... there is a separation of property during the marriage, but the spouse who has earned more during the marriage knows that upon divorce, he or she will have to give half the value of the surplus to the other spouse"¹⁰² within opinion of De Cruz. In cases where the prenuptial agreements were concluded unequally to one of spouses the Court shall most definitely restrict that dominant spouse from benefiting economically after divorce¹⁰³. Comparing to England and Wales each party has a right to his own property even after marriage. They may regulate their property regime by an agreement.

It is also important to mention that some European Courts' opinions on a matter of a principle of equality may be different. For example, the courts can deviate from the principle in cases where the equal separation of property may seem unfair.¹⁰⁴

In Estonia, Italy and Sweden the spouses are considered to be equal and deserve equal share of property and assets.

3.1.4. Enforceability

The prenuptial agreements are generally enforceable in the most of the European Countries, although, there are still some exceptional Member States like England, Wales and Northern

¹⁰⁰ De Cruz, P. Family Law, Sex and Society: a comparative study of family law. Oxon, Routledge 2010, p 72.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Dethloff, N. The Constitutional Court as Driver of Reforms in German Family Law. International Survey of Family Law, 2006, pp 217-234, p 229.

¹⁰⁴ Clarkson, C. Matrimonial Property On Divorce: All change In Europe. Journal Of Private International Law, 2008, 4 (3), pp 421-442, p 430.

Ireland where the prenuptial agreements are not binding, but have a significant effect and may be given a decisive weight by Court. Prenuptial agreements are binding in Scotland as they are considered as contracts. Accordingly, in Germany, Italy, Estonia, France, Sweden and Netherlands the prenuptial agreements are binding.

3.1.5. Cultural features

Along with the property regimes there are also national concerns. For example, taking the French Law into consideration it could be seen that the French family legislations and guidance are provided to help family to develop well, the law may allow modifying the prenuptial agreement only if that amendment is in the interest of the family. France is the only state which has such a feature.

Generally, it may seem to worth mention that religions, beliefs and ethical norms have to be taken into account when the harmonization of the prenuptial agreements is discussed. For instance, the vast majority of the EU citizens are Catholics, and Catholic Church may only allow making a prenuptial agreement in order to protect the rights to inheritance of children. Generally, according to Foster "A prenuptial agreement that provides protection in the case of divorce may very well imply an exclusion of the permanence of marriage and, consequently, invalidate marital consent in the Catholic view"¹⁰⁵. Thus, it may be suggested that forcing some of the EU Member States to include the maintenance and responsibilities rights clauses into prenuptial agreements may be considered not only against public policy but also against some people beliefs and religions.

3.1.6. Form of the agreements

Form of prenuptial agreement plays an important role as well. In Estonia, the spouses have to sign the agreement in a particular form, comparing to Germany, where the agreement has to be in writing, and no special legal or notarial form required. In France the prenuptial agreement have to be authorized by a notary, should be signed and dated. In Italy, validity of the covenant is determined by its notarization and record in the marriage certificate. In the UK, particularly in England, Wales and Northern Ireland only formal requirement for the prenuptial agreement to be formal is to be in form of a deed when in Scotland, the prenuptial agreements supposed to be in

¹⁰⁵ Foster, C. When a Prenup & Religious Principles Collide. *Family Advocate*, 2011, 33 (3), pp34-37, p 35.

the form of the contract; there are no other specific requirements have to be fulfilled. According to the Swedish Marriage Code, in order for a marital property contract to become formal have to be registered with a court.¹⁰⁶

Thus, according to the research, there are states that require the special form of the prenuptial agreement and the others do not.

3.1.7. The prenuptial agreement in relation to a third party

It is important to note that marriage contracts have to be considered from the third party prospective because the spouses may be liable for the debts¹⁰⁷. In case of English law, the spouses can be liable only for their own debts unless their property is not joint. Property contract between the spouses is determined on marriage, depending on choice of marital property agreement and application of chosen jurisdiction. In Estonia, the Marital Property Contract has a legal effect on the third party only in cases when the Marital Property Contract is registered. In France, according to Ferrand and Braat in cases of post-nuptial agreement the agreement is effective against third party only in some period of time since modification was made "A change of matrimonial regime takes effect between the parties from the judgment or from the instrument which provides for it and, with respect to third parties, three months after the formalities of notice provided for in Article 1397-5 have been fulfilled. However, even failing fulfillment of those formalities, the change of matrimonial regime is effective against third parties where, in the transactions entered into with them, the spouses have declared that they have amended their matrimonial regime."¹⁰⁸ In Italy, the prenuptial agreement may be enforced against third party "... if there is an annotation in the margin of the record of celebration of the marriage which is filed in the archives of the civil registry office"¹⁰⁹. The Swedish law does not separate any requirement for the agreement to be valid in relation to the third party. According to the Swedish Marriage Code, in order for a marital property contract to become formal have to be registered with a court.¹¹⁰ Therefore, the marriage contract is effective in a relation to the third party when it fulfills general requirement for prenuptial agreement in order to be bound. . According to the German Civil Code, a third party cannot "... fully rely on the non-registration of

¹⁰⁶ Jänterä-Jareborg, *supra* nota 59, p 33.

¹⁰⁷ Boele-Woelki, *supra* nota 2, p 19.

¹⁰⁸ Ferrand, *supra* nota 24, p 57.

¹⁰⁹ Couples in Europe. www.coupleseurope.eu/en/italy/topics/3-how-can-the-spouses-arrange-their-property-regime (01.05.2017).

¹¹⁰ Jänterä-Jareborg, *supra* nota 59, p 33.

individual restrictions while at the same time using the marital agreement as a basis ..."111 as stated by Martiny and Dethloff. Taking everything mentioned above into account, it could be said that effectiveness of the prenuptial agreement against third parties depends on the state.

According to Boele-Woelki's comparative overview the nuptial agreements may end in case of a death or divorce. Some States law, for instance, the Netherlands's law may allow the future couple to take into account the grounds of dissolution of the marriage when creating the prenuptial agreements, as different ground for the end of a marital contract may lead to the different legal consequences.¹¹²

In most of the cases where the spouses abstain to enter prenuptial agreement there is always a certain primary regime which will be applied by default.

There are also different rules of the underage persons who are willing to enter marriage. Some States such as Germany is more restrictive than, for instance, the French law. In Germany an underage person must have a legal representative or it can be even asked a court's approval in special circumstances¹¹³.

In order to sum up, according to the analysis there are many differences such as different variety of regimes, most states has its own optional matrimonial property regimes. There is a possibility to mix the regimes in some states and the law of other states does not provide such an option for spouses. There is also a mixture of Common and Civil Law which worsen the situation with unification as well. Some of the States' Law regulate not the only matrimonial property regime but also encourage new families and work in their interests by allowing making modifications of prenuptial agreements only after two years and only for the benefits of the family.

There are also the states where the prenuptial agreements are binding, usually under Civil Law system and there are States where the prenuptial agreements are not binding, for instance in Common Law system. Taking into account the variety of the regimes of analyzed State, it is obvious that the harmonization of the prenuptial agreements is not that easy to conduct at the moment.

¹¹¹ Martiny, *supra* nota 65, p 41.

¹¹² Boele-Woelki, *supra* nota 2, p 115.

¹¹³ Ryznar, *supra* nota 78, p 50.

One of the reasons the prenuptial agreement is difficult to harmonize is the fact that every single family is different with its own needs and preferences and law cannot provide many variations of provisions to satisfy every single family wishes of consequences of divorce. That is why there are a few matrimonial property regimes in some of the European countries such as Estonia, France, Italy, Germany and Netherlands to choose from. There are also the states where the potential spouses may create their own agreement such as the UK, France and Netherlands.

The problem of the creation of prenuptial agreement was discussed by Scherpe where he states that each jurisdiction has special legal rules, acts and laws which give spouses to deal with their property and assets after divorce by creating prenuptial agreement within certain restriction of spouses' autonomy. As the function of Law is to provide appropriate outcome, in case of prenuptial agreements it was recognized that the Law cannot provide rules suitable for everybody, which is the reason for creating certain property regimes.¹¹⁴

Accordingly, in cases where the potential spouses find the default matrimonial property regime inappropriate they may opt out from it and chose the optional ones. Although, in most examined states the law allows spouses' autonomy only to that extent meaning that they cannot mix the regimes or create their own one, for instance, Estonia.

By giving the spouses the autonomy to choose the matrimonial property regimes themselves, especially in such countries where a couple may create its own regime for themselves, for example, France and Netherlands, as a consequences one of the spouses may fall into less privileging position comparing to the other spouse which may contradicts to the principles of the European Union. This is the reason why some of the states do not allow the spouse to regulate their prenuptial agreement freely, in order to avoid unfairness. The question is to what extend the spouses have to be given autonomy.

According to Scherpe matrimonial property agreement should not be considered as commercial agreement as generally relationship between the spouses is different from the parties concluding the commercial contract as in case of commercial contract parties do not have emotional attachments and both spouses are concerned with each other's welfare.¹¹⁵

¹¹⁴ Scherpe, J. *The Present and Future of European Family Law*. Cheltenham, Edward Elgar, 2016, p 61.

¹¹⁵ *Ibid.*

On the other hand, prenuptial agreement in its form could be deemed as a contract for an uncertain future as there are many things could change during the time of marriage such as condition of health of spouses, children or a change of family incomes.¹¹⁶

Therefore, it is quite comprehensive to make an agreement which would suit one specific family, then questions asked is how there could be one unified agreement for 28 states where every single state has its own mentality, customs and traditions.

During the analysis of the States the Author finds that there are many similarities regarding to prenuptial agreements. Basically, there are two types of property regime which are the joint and separate property, simply speaking the rest of the regimes are variations of those two.

One of the brightest examples that the Member States may come to an agreement in the matter of the prenuptial agreement is the Hague Convention which was ratified by five States. By including this Convention in the analysis the Author wants to show that it is possible to achieve some results on the harmonization of marital agreements in the EU.

Basically, in order to make the enforceable wide-European prenuptial agreement there have to be regulation which would allow the courts to enforce the prenuptial agreements including maintenance clauses without infringing public policy. It is known that some of the State already have a regulation on maintenance, and is usually not considered as a part of the marriage contract. The Author suggests that some States may combine the regulation of the marital property regime and maintenance together and then it will be possible to get closer to the common prenuptial agreement. The variation of regimes may be solved by establishing only two basic ones: common/joint and separate property.

There is also an opinion of Antokolskaya that the cultural differences are not the main obstacles of harmonization of the Family Law in Europe but "... rather national differences in the balance of political power".¹¹⁷

The problem of the two different legal systems: the Common Law System and Civil Law System can be lessening. After the referendum in 2016 the United Kingdom has taken some steps in order to leave an area of freedom, security and justice.

¹¹⁶ *Ibid*, p 63.

¹¹⁷ Antokolskaya, M. Harmonisation of Substantive Family Law in Europe: Myths And Reality. *Child and Family Law Quarterly*, 2010, 22 (4), pp 397-421, p 420.

In case UK leaves the EU, the unification of the prenuptial agreement may be easier as there is a quite comprehensive law on the prenups in the UK, even if the prenuptial agreements have a weight in the courts but are not legally binding.

An absence of States with a completely different legal system in the European Union may bring some benefits to the idea of harmonization of that particular law of the prenuptial agreements.

The other argument is that, generally speaking, there is an opinion of Antokolskaya that Family Law of Europe has evolved as far that some of the rules and customs of certain Member States may be out of date and be replaced "... the normal pattern of such a replacement through the revision of domestic laws could be accelerated by the imposition of binding harmonised family law drafted upon modern standards".¹¹⁸

There are many legal law, guidance, rules, directives and conventions have provisions on marital property agreements some of them are the Convention on the law applicable to matrimonial property regimes of 14 March 1978, the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes of march 2011 which dealing only with private international law, there is also the French-German Agreement of 2010 which offers a extra choice of matrimonial property regime about participation in acquisition in family law of those Member States and the Convention between Denmark, Finland, Iceland, Norway and Sweden on Issues of Private International Law concerning Marriage, Adoption and Guardianship.¹¹⁹ The Author underlines that there have been made a big development towards unification of matrimonial agreement, although, despite all of the work the harmonization or unification of all Member States still have not been achieved.

Anyhow, in order to harmonize certain laws they have to be harmonizable, otherwise the outcome of incorrect harmonization can lead to a chaos¹²⁰. The differences named by the Author have to be considered carefully with a plenty of time and full attention to every detail.

¹¹⁸ Antokolskaya, *supra* nota 117, p 45.

¹¹⁹ Boele-Woelki, *supra* nota 2, p 92.

¹²⁰ Kerameus, D. Procedural Harmonization in Europe. American Journal Of Comparative Law, 1995, 43 (3), pp 401-416, p 416.

Taking everything mentioned above into account, it is obvious that the harmonization of the prenuptial agreements is impossible at the time being due to the variety and diversity of different legal regimes, specific cultural differences, procedures and other details. According to Schack: "The harmonization of substantive divorce law in the EU is certainly illusory for the time being - and in my opinion not even desirable, given the manifold religious and cultural specificities connected to marriage".¹²¹

The other argument that the way each of the States regulate its prenuptial agreements appeared with historical and cultural development under certain factors and experience. The European Union is an area of freedom and justice and the removal some of the existing matrimonial property regimes from each State may ease the process of harmonization but at the same time lacks the States of certain features; it would be unfair for some States to give up something important from their culture, customs and traditions.

In any case, it has to be said that in order to harmonize some areas of international family law the Member States of the European Union have to concede at least some amount of their norms for harmonization or unification purposes. As long as the States will not agree, there will not be achievement on the issue. Therefore, it is impossible to unify the prenuptial agreements in the EU due to the differences of the legal norms and cultural differences with no breach of the values of the culture of a certain State at the moment. According to Glenn the Europe may achieve the harmonisation of the law only when "A presumption of harmony should therefore replace a presumption of conflict".¹²²

3.2. Suggestions

Boele-Woelki suggests that the variety of the regimes described below cannot be put in one matrimonial property agreement. However, there are five diverged systems may be highlighted. Based on those systems there may be two matrimonial property regimes appear where the property considers to be common and separate.¹²³

¹²¹ Schack, H. The New International Procedure In Matrimonial Matters in Europe. *European Journal Of Law Reform*, 2002, 4 (1), pp 37-56, p 38.

¹²² Glenn, P. Harmonization of Law, Foreign Law and Private International Law. *European Review of Private Law*, 1993, 1 (1-2), pp 47-66, p 65.

¹²³ Boele-Woelki, *supra* nota 2, p 25.

The Boele-Woelki states that the community property has to take an effect at the time when the marriage is concluded, when participation regime does not allow any common property and in that regime each spouses has a right only to his or her matrimonial property. It States that if there would be only those two matrimonial property regimes in all 28 Member States of the European Union than a harmonization is possible.¹²⁴ "In the view of the CEFL's aim of reducing the wide variation within Europe, such a result - and the resulting comparable simplicity - might be regarded as a major achievement".¹²⁵

There are also some of the advantages of the spouses to take one of those regimes, for example the participation of property provides independence.¹²⁶ On the other hand the common property regime provides solidarity between the spouses.¹²⁷

It could be said that the participation regime is better choice from the both of the spouses' prospective as after divorce there will not be any question how the property should be divided, at the moment of divorce both spouses know for sure what property belongs to each of the spouses. The participation of matrimonial property regime is easy to implement itself.¹²⁸

The suggested way of harmonization looks good, although, along with the property matrimonial regimes there are other barriers which have been analyzed above and which are difficult to overcome at the moment. The other argument is that the way each of the States regulate its prenuptial agreements appeared with historical and cultural development under certain factors and experience. The European Union is an area of freedom and justice and the removal of the existing matrimonial property regimes from each State may ease the process of harmonization but at the same time lacks the States of certain features.

Once again, taking into account the variety of the matrimonial property regimes and other above mentioned factors, the harmonization or unification of the prenuptial agreements is impossible due to differences of the legal norms and cultural differences.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid*, p 27.

Conclusion

There are 28 Member States of the European Union and there are only 7 States have been analyzed where analysis of those States showed how different they are.

As the analysis has shown, most of the European countries consider the prenuptial agreements with provisions of setting the responsibilities, alimony and maintenance against public policy. Most of the European Member States would have this policy, opposed to England, where the prospective spouses may stipulate the marital responsibilities, but the agreements by themselves are not binding. The fundamental difference is that the prenups containing clauses of maintenance cannot be enforced in most of the European Member States.

Evidently, there is a huge difference between Common and Civil Law. Such a fundamental conceptual differences may become the highest barrier in attempt to unify the law in those two legal systems.

The most expressed factor is a variety of regimes of property. Each Member State in the EU has its own way of dealing with property issues. Some of the States have four of matrimonial property division regimes, but some have just one. For the reason of harmonization it was suggested that all Member States have to agree on a property regimes regulations, as it could be challenging for a Member State to enforce an agreement which is dealing with four property regimes when that particular Member State deals only with one property regime in its own State.

According the differences described above the prenuptial agreement may be a variation of different regimes. If narrow those variations down there will be just two basic types of property regime which are the joint and separate property. One of the brightest examples that the Member States may come to an agreement in the matter of the prenuptial agreement is the Hague Convention which was ratified by five States. This Convention shows that it is possible to achieve some results on the harmonization of marital agreements in the EU.

Enforcement of the prenuptial agreement may be considered as a huge challenge as in order to harmonize the law, the active cooperation of the all of European States is needed. As it was already been mentioned, even the United States of America does not have a legal act which would fully regulate the prenuptial agreements. Still, the proposed principals of CEFL would help to the process of harmonization of prenuptial agreements.

Generally, each of the MS has their own experience dealing with the share of property upon the divorce. That is the reason why it is not that easy for the State to give up its principles and customs on the matter of the prenups.

The harmonization of the prenuptial agreements would mean that the State may anyhow concede their norms, which completely contradict to the whole idea of the European Union - the area of freedom, security and justice, referring to the fact that it would be unfair for some States to give up something important from their culture, customs and traditions. For instance, one of the principles of the French prenuptial agreement is that it insures and encourages the family's existence and interest.

In conclusion, considering all arguments "for" and "against" the possibility of harmonization of prenuptial agreements is impossible at the moment. It is clear that there are too many obstacles and details in each Member State have to be taken into account, which appear one of the reasons why harmonization of marital property agreements across the European Union has not been conducted yet.

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