



Uniwersytet
Wrocławski



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2011, 18(1), p. 143–159.

PECULARITIES OF LEGAL REGULATION OF MARRIAGE CONTRACTS

Inga Kudinavičiūtė-Michailovienė

Mykolas Romeris University, Faculty of Law,
Department of Civil and Commercial Law
Ateities 20, LT–08303 Vilnius, Lithuania
Telephone (+370 5) 271 4587
E-mail ingaieva@mruni.eu

Received 4 February, 2011; accepted 21 March, 2011

Abstract. *Under the market economy, a contract serves as the main regulatory instrument of mutual rights and obligations of private law subjects. Many different types of contracts allow people to satisfy their needs and to achieve the desired results. Most contracts are concluded subject to established common criteria, yet almost every type of contract has also its own specifics. The article examines the marriage contract with its particular features (subjects, content, etc.) and analyses its complex nature and its main purpose. The institution of marriage contract is relatively poorly covered by academic research in Lithuania (academic papers on legal science provide only patchy analysis of these contracts); case law in the resolution of arguments originating from such contracts is also limited and thus not completely established. Despite controversial attitudes towards the purpose of marriage contract, the numbers of concluded prenuptial and postnuptial agreements increase from year to year, i.e. more and more individuals express their will to specify the content of property obligations and to define the legal regime of property. These contracts are usually concluded to avoid unpredictable division of property in case of divorce and to protect family members against possible future claims of third parties (creditors). Bearing in mind that legal provisions governing marriage contracts are subject to diverse interpretation, analysis of this institution appears timely and relevant.*

Keywords: *marriage, contract, property, legal regime, pre-nuptial and post-nuptial agreements.*

Introduction

On the 1st of July 2001 new Civil Code of the Republic of Lithuania (hereafter – CC) came to force and established new family law institute – marriage contract,¹ which changed radically the legal regime of joint community property. Its perception and correct realization is relevant not only to lawyers, but to all intending to marry or already married person, and third parts, i.e. creditors, as well. Therefore, this article will analyze property legal relations which are regulated by marriage contract and defined in the section III “Contractual Legal Regime of Property of Spouses” of the chapter VI of the part III of the Book III “Family Law” (hereafter – “Family Law”) of the CC of the Republic of Lithuania. According to some lawyers (prof. V. Mikelėnas), introduction of the contractual legal regime of property of spouses has to facilitate the solution of issues concerning property regime and form responsible attitude towards marriage and family.² On the other hand, for example, researches made in Finland reveal that approximately every other couple divorces, however, only every fifth has a settled marriage contract. The principle argument why marriage contract is not created is that spouses are convinced that it results marriage termination in the future.³ According to notaries, people often think that if they consider about marriage contract, they summarily determine divorce. In other words, there is no love, no respect or confidence, just money. Purportedly, if one asks for the regulation of rights to the property, one does not rely on the partner. Especially it involves pre-nuptial contracts. It should be noticed that in Lithuania marriage contract mainly is understood as the means of property division after marriage termination. However, it is forgotten that such contract may become an effective element in economic planning. Gradually the attitude towards marriage contract becomes more liberal, for example, in 2002 – 24 contracts, in 2003 – 160, in 2004 – 210, in 2005 – 306, in 2006 – 488, in 2007 – 600 contracts. Since 2003 till 2009 the number of marriage contracts has increased four times – till 642.⁴ Thus, having in mind that this institution is regulated almost in all European states and treating marriage contract as the model of spouses will which determines their behavior in the sphere of property relations, the analysis of the marriage contract is actual both in theoretical and practical aspects, since only correct and unequivocal understanding of the norms is their successful guaranty with positive results.

According to the historical standpoint marriage contracts have originated in the 17th century in England. Their main purpose was to protect women rights, since at the end of the 16th century spouses were treated as one person who became a man. Therefore, marriage contract was invented in order a woman had power to control property. These

1 Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.

2 Grumadaitė, R. Naujasis kodeksas šeimą tvirtins pareigų ir turto saitais [The new Code will consolidate family with ties of obligations and property]. *Lietuvos rytas*. 2000-10- 21, No. 248, p. 10.

3 Itkonen, L. Marriage settlement and economic security [interactive]. [accessed 11-10-2010]. <<http://www.helsinki.fi/lehdet/uh/498c.htm>>.

4 *Statistical records of the Register of Marriage Contracts* [interactive]. [accessed 09-01-2011]. <<http://www.lhr.lt/index.php?-1364796021>>.

contracts are still popular and used widely in England and Wales,⁵ USA also. Although it is acknowledged that the nature of marriage contract is a civil legal transaction, it has some specific features which are typical just to the type of such contracts. Naturally, as all transactions, marriage contract has to satisfy the requirements of the transaction validity, i.e. it has to be created in appropriate form and content on the free will of legal persons. However, the analysis of CC reveals such specific features of marriage contract as contract parties, content, the order of amendment and termination. The object of this article is to analyse both theoretical and practical aspects of the institution of marriage contract as the means defining legal regime of property of spouses as well as to reveal the specific features of the marriage contract and its place in the system of contracts. Theoretical and empirical scientific methods, such as comparison, systematic analysis, theological, linguistic, logical and statistical methods, were used in the study for achieving its objective and implementing the set tasks.

1. Contract Parties

According to the article 3.101 of “Family Law”, marriage contract is an agreement of the spouses defining their property rights and duties during the marriage as well as on divorce or separation. It is created on free will expressing mutual agreement and motivated by equal rights. This contract is peculiar to the specific circle of the subjects – spouses. However, it should be mentioned that marriage contract may be made before the registration of marriage as well (pre-nuptial contract), although the definition of marriage contract does not involve persons intending to marry. More concrete definition of marriage contract is in the Family Code of Russian Federation.⁶ Here marriage contract is described as the agreement on property rights and duties in marriage or in cases of its termination between persons intending to marry or spouses.⁷ Therefore, it is considered, that the definition of marriage contract established in the article 3.101 of the “Family Law” may be revised including the property legal regime of both the engaged couples and the spouses and may be stated as “the contract of the property legal regime of the spouses and engaged couple is an agreement regulating their property rights and duties during marriage, as well as on separation or divorce.”

The issue on the creation of marriage contract between infants is more problematic. A person before the age of 18 may get married only with court’s leave, i.e. spouse’s age may be reduced not more than two years, i.e. court may issue a leave to marry for

5 Unlike many jurisdictions, England and Wales does not have a matrimonial property regime. One obvious way of achieving greater certainty for spouses in their financial affairs could be marital agreements in which the couple regulate their property and other relations in case of divorce. Research Project „Marital Agreements and Private Autonomy in a Comparative Perspective“ [interactive]. [accessed 10-11-2010]. <http://www.cels.law.cam.ac.uk/marital_agreements/>

6 *Semeinij kodeks rosiskoj federaciji* [Family code of Russian Federation]. Sobranije zakonadatelstva RF, 1996, N 1.

7 Simonian, S. L. *Imuschestvennyje otnoshenija mezhu suprugami* [Property Relations between spouses]. Moskva: Kontur, 1998, s. 117.

persons at the age of 16. In case of pregnancy the court may allow the person to marry before the age of 16.⁸ The part 3 of the article 3.102 of the CC embeds the provision that minor may enter into a marriage settlement only after the registration of the marriage. However, the question is whether this limitation pursues with emancipation institution.⁹ As it is indicated in part 1 of the article 2.9 of the CC, the court's decree may recognize a minor as capable at the age of 16, i.e. emancipated, if there is a reason to let him or her realize all civil rights and duties independently. Thus, we may come to a conclusion that the legislator has not considered new institute of emancipation. If, after emancipation, court gives a minor possibility to realise all civil rights, it is supposed that such persons have right to make a prenuptial contract.

An issue on foreigners as one side of the marriage contract becomes more relevant, since the number of marriages with the domiciles of foreign countries increased significantly.¹⁰ If marriage contract has a foreign element (i.e. spouses are the domiciles of different countries) the property relations apply the Law indicated in the part 2 of the article 1.28 of the CC which allows the spouses to chose the law of the state applicable for the marriage contract. This principle is not absolute, since the choice is limited by three possibilities, spouses may choose the following legal status of property relations: 1) the law of the state in which they are both domiciled or will be domiciled in future; 2) the law of the state in which the marriage was solemnized; 3) the law of the state a citizen of which is one of the spouses.

The agreement of the spouses upon the applicable law shall be valid if it is in compliance with the requirements of the law of the chosen state or the law of the state in which the agreement is made. Thus, the validity of such agreement is determined by the legal norms of chosen state regulating imperative requirements for the form and content of marriage contract. If the applicable law is not chosen, general norms established in the part 1 of the article 1.28 of the CC should be applied, i.e. the matrimonial property legal regime shall be governed by the law of the state of domicile of the spouses. If the spouses have never had a common domicile, the law of the state where the marriage was solemnized shall be applied.¹¹ On the other hand, the attention should be drawn, that the provisions of the latter article (part 5 of the article 1.28) regulate the law applicable to the amendment of the contractual legal status of the property of the spouses. This case impels to make a conclusion that the choice of applicable law is significantly narrower, therefore, it may presuppose negatively assessed conflict situations.

Analyzing the subjects of the marriage contract, the institute of agents should be mentioned. This contract, just like the others, is a juridical document signed by both parties. However, the contract may be signed by the agents who have an appropriate attor-

-
- 8 Law of the Amendment of the Article 3.14 of the Civil Code of the Republic of Lithuania. *Official Gazette*. 2010, No. 76-3873.
- 9 See: Kudinavičiūtė, I. Nepilnamečių emancipacija: nuolatinis ar eksperimentinis statusas [Emancipation of minors; stable or experimental status]. *Jurisprudencija*. 2002, 31(23).
- 10 Kudinavičiūtė-Michailovienė, I. *Santuokos sąlygos ir jų vykdymas*. Monografija [Marriage Conditions and their Realisation. Monograph]. Vilnius: Justitia, 2007.
- 11 Mikelėnas, V. *Tarptautinės privatinės teisės įvadas* [Introduction of Private international Law]. Vilnius: Justitia, 2001, p. 222–223.

ney. Is the representation possible while signing marriage contract? Legal literature does not provide a solid opinion on the issue. For example, some authors¹² state that marriage contract is closely related to the present persons, therefore, it cannot be made by legal agent or under the attorney issued by one of the parties. On the other hand, there are opinions that¹³ the settlement of marriage contract via agents, who have an appropriate attorney with all main conditions of marriage contract included, is acceptable since the transaction is property related. Following the part 1 of the article 1.70 of the CC, it is indicates that it is not allowed to enter into transaction through an agent if, dependent on the nature of the transaction, it may be formed only by the natural person himself. Marriage contract is ascribed to the latter transactions. Therefore, considering the fact that this contract is a concurrent part of the fact of marriage creation, the institute of agents is not applicable. There should be mentioned, that the Civil Code of the Republic of Latvia¹⁴ authoritatively indicates that persons making a marriage contract cannot be changed by agents. Contracts are settled in notary form at presence of both spouses. According to the 1410 article of the German Civil Code, marriage contract has to be settled in notarial form at presence of both spouses¹⁵. However, at the same time, parts may delegate their representatives who will represent their interests in the process of marriage contract settlement according to the attorney issued in respect to the order defined in the article 167 of the German Civil Code.¹⁶ In consequence the settlement of marriage contract via representative accelerates the process, however, it increases danger for spouses to express their will or make any amendments if they get wrong acquaintance with the content or concrete conditions of the marriage contract.

Marriage contract applies general principles of contract creation, especially contract freedom, honesty, correctness and the principles of contractual obligation.¹⁷ The principle of contract freedom here is narrower than making any other transaction. The latter contract has distinctive creation conditions which allow to single out two types of marriage contract: contract may be made before marriage registration (pre-nuptial contract) or at any time after marriage registration (post-nuptial contract). Such division of marriage contracts appeals to the moment of the right of the spouses or persons intending to marry to make marriage contract realization. Thus, marriage contract might be made independent of the “experience of family life”. However, the time of its coming to effect will differ, i.e. the up rise of rights and duties. If it is made before marriage registration, it will come to force the day after marriage registration. If marriage is not

12 Ignatenko, A. A. *Brachnyj dogovor: zakonyj režim imuschestva suprugov* [Marriage contract: legal regime of spouses' property]. Moskva: Filin, 1997; Chefranova, E. A. *Imuschestvinyje otnoshenija v rossiskoj semie* [Property relations of russian family]. Moskva: Jurist, 1997.

13 Bondov, S. N. *Brachnyj dogovor* [Marriage contract]. Moskva: Juniti-Dana, 2000, s. 58.

14 The Civil Law of Latvia [interactive]. [accessed 09-01-2011]. <<http://unpan1.un.org/intradoc/groups/public/documents/unct/unpan018388.pdf>>.

15 German Civil Code [interactive]. [accessed 09-01-2011]. <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G14>.

16 Boele-Woelki, K.; Braat, B.; Curry-Sumner, I. (eds.). *Europien Family Law in Action. Volume IV: property relations between spouses*. Antwerpen: Intersentia, 2009, p. 1155.

17 Mikelēnas, V. *Sutarciu teisē* [Contract law]. Vilnius: Justitia, 1996, p. 34–37.

created, the latter contract has no juridical power and will not evoke any legal outcomes. It proves once more that marriage contract involves a special circle of subjects. In result, if wedding did not take place, the requirement concerning special circle will not be realized.¹⁸

Pre-nuptial contract comes to effect since the moment of marriage registration. As it was mentioned above, marriage contract is a civil transaction; therefore, parties may foresee that rights and duties discussed in pre-nuptial contract depend upon fulfillment of certain conditions (part 1 of the article 1.66 of the CC). The condition is uncertain event which has to take place in the future, but parties do not know if it happens.¹⁹ Thus, parties may anticipate that pre-nuptial contract come to force later and the term should be ulterior than marriage registration. The second dimension is that law does not indicate how soon the marriage has to be registered after the settlement of marriage contract. It has to be noticed, that some notaries which certify the contract are not properly acquainted with the content of latter norm and tell engaged couple to register pre-nuptial contract before marriage registration takes place. It is supposed that one of the factors of such mistake may be the title of the contract itself, which enforces to think that contract has to be registered in the Register of Marriage Contracts before marriage.

Hence, there might be a situation when pre-nuptial contract becomes valid after a long time after its creation. Such situation allows some legal indeterminacy to appear. Some scientists²⁰ suggest to apply regulating norms in reference to analogical preliminary contracts. In that case, if marriage is not registered in the settled time (during one year in Lithuania) since the creation of pre-nuptial contract, the contract terminates. Post-nuptial contract comes to effect since the moment of its creation or since the indicated term determined in the contract by the parties (it is important that the moment comes after marriage registration).

2. Content of Marriage Contract

One of the basic clauses of marriage contract is to define the property legal regime of the spouses, i.e. from the joint community property of the spouses to the regime versions provided by law or compiling several alternatives. It should be emphasized that marriage contract allows spouses to regulate only property²¹ relations (in reference to

18 Antokolskaja, M. V. *Semeinoje pravo* [Family Law]. Moskva: Jurist, 2000, s. 156.

19 *Lietuvos Respublikos civilinio kodekso komentaras*. I dalis [Comentary of the Civil code of Lithuanian Republic]. Vilnius: Justitia, 2001, p. 56.

20 Cvelich, M. Vedybų sutarties vieta sutarčių sistemoje [Position of the Marriage contract in the system of Contract Law]. *Jurisprudencija*. 2002, 28(20).

21 There are states where the object of marriage contract includes the regulation of both property relations and personal relations unrelated with property. It is usually characteristic to the system of common law of the states. It might be stated that each state has its own traditions of marriage contract, for example, in USA contract may include a clause on adultery and anticipate sanctions for it. Glendon, M. A. *The Transformation of Family Law. State Law and Family in the United State and Western Europe*. Chicago and London: The University of Chicago Press, 1989, p. 139–140.

the part 1 of the article 3.105 of the CC, conditions regulating personal relations of the spouses unrelated with property shall be void). It means that contract parties may define the destiny of the property acquired before or during marriage, after divorce or living in separation. Already the definition of the marriage contract suggests the conclusion that marriage contract cannot regulate property relations in case of spouse's death, since, according to the clause of the part 1 of the article 3.105 of the CC, conditions shall be void if they change the procedure and conditions of the succession in property. Spouses may stipulate that the matrimonial legal regime will be applied to their entire property, only to its certain part or specified chalets. In the marriage contract spouses may define matrimonial legal regime in respect to both the existing and future property. This provision is especially important for the spouses who have no acquired common property. If the future legal regime of the property is not determined, it will be applied a property legal regime defined by law. Here should be noticed that marriage contract is a complex document, i.e. spouses may also agree on rights and duties relating property administration, support, participation satisfying family needs and method of property division after marriage termination.

It should be noted that in case of dispute between spouses concerning property division the court does not follow the law provisions, but the conditions defined in marriage contract if the one exists, i.e. the property is applied the contractual legal regime. The legislator allows the spouses to stipulate in marriage contract that

- property acquired both before and during the marriage shall be the individual property of each spouse (CC art. 3.104 part 1);
- individual property acquired by a spouse before the marriage shall become joint community property after the registration of the marriage (CC art. 3.104 part 1);
- property acquired during the marriage shall be joint community property (CC art. 3.104 part 1).

Thus, the legislator allows spouses to choose broad legal regime spectrum: from complete separateness till complete joint community legal regime of property. Each regime has its advantages and disadvantages. For example, the partial property regime suits the spouses where each has its own business or capital, or when spouses have children from previous marriage. This regime like the one with complete separation (part 1 of the article 3.104 of CC) guarantees absolute independence of each spouse, protects from the claims of the creditors of the other spouse and provides possibility to dispose one's property independently. However, the accountance of personal property is quite difficult; therefore, the suggestion would be to apply the latter regimes to the property which requires state registration.

We will provide an example of possibility of absolute joint community regime application. Each of the spouses had a vehicle before marriage. After marriage, spouses sold wife's vehicle and used husband's car. Money, which was got when the wife's car had been sold, was used for family needs. After divorce in the process of property division, the vehicle which was used by both spouses was attributed to husband's property since he was the owner of it before marriage. The outcome – wife's interests were not protected. In this case, it is purposeful to use the possibility to create a marriage contract

in order individual property acquired by a spouse before the marriage becomes joint community property after marriage registration, both in marriage and in case of its termination. In comparison to other states, it might be stated that the provisions of the Family Code of the Russian Federation,²² describing the content of marriage contract, are familiar with the provisions of the Lithuanian Family Law, i.e. spouses may determine joint, partial and personal property regime in marriage contract. Meanwhile, the French Civil Code²³ suggests different models of property legal regimes of the spouses: separation of the property of the spouses, involving in income, and joint community regime of all property. German Civil Act does not include a paragraph with concrete indication what regimes of property relations spouses may choose, however, the analysis of the norms allows to state that there is a regime of individual property (Gütertrennung) and joint community property regime (Gütergemeinschaft).²⁴

Quite seldom happens that in practice are applied only the legal regime of absolute community or absolute separation. Usually spouses try to combine legal regimes (mixed regime is chosen). Let us suppose that marriage contract may include personal legal regime referring real estate acquired during marriage (i.e. absolute separation) and joint community legal regime for chattel (i.e. absolute community). Analyzing marriage contract and sustaining notary practice, it has been noticed that very often pre-nuptial contract is the regime of absolute separation²⁵, and the absolute community regime is unpopular (figure 1).

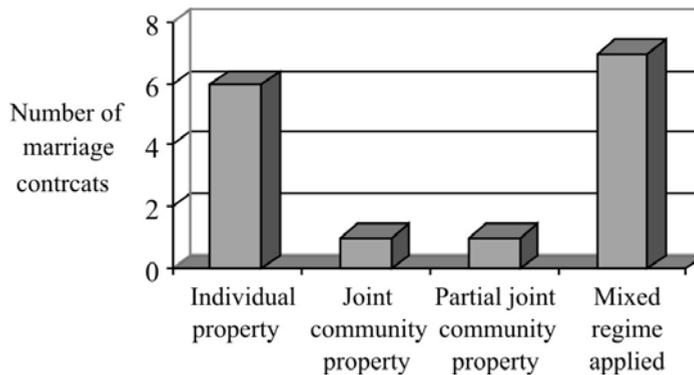


Figure 1. Legal regime of the property acquired during marriage application in pre-nuptial contracts

-
- 22 Family Code of the Russian Federation [interactive]. [accessed 09-01-2011]. <www.jafbase.fr/docEstEurope/RussiaFamilyCode1995.pdf>.
- 23 French Civil Code [interactive]. [accessed 09-01-2011]. <http://www.lexinter.net/ENGLISH/civil_code.htm>.
- 24 German Civil Code [interactive]. [accessed 09-01-2011]. <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G14>.
- 25 Saukienė, I. Lietuviai vedybų sutartimis pasirenka kaimynystę [Lithuanians choose the neighbourhood by marriage contract]. [interactive]. [accessed 04-02-2011]. <www.delfi.lt/archive/article.php?id=40453661>.

After the analysis of the content of the pre-nuptial contracts, it might be stated that engaged couples apply the legal regime of individual property to all property, i.e. both real estate and chattel acquired after marriage registration, without dissolution to separate property types. Such contracts make 66 percent of all analyzed pre-nuptial contracts. Rest 34 percent apply legal regime of individual property to separate property types. Main property types which undergo the application of legal regime of individual property are the following: real estate; registered and unregistered chattel; stock and funds, they are the reason for dividends; enterprises, bank deposits and interest; income from industrial or intellectual activity, pensions, allowances and other payouts; private pension funds. As an example of application of joint community legal regime may be such pre-nuptial contract: engaged couple has stipulated that property acquired during one year from marriage registration shall be treated as joint community property. After the indicated term all property of the spouses will be considered as individual property. In this case an assumption might be made that during the period of one year future spouses have stipulated to get concrete property, however, in order to protect themselves from force major they flinched to name it concretely and indicated just legal regime.

Analyzing the conditions of post-nuptial contracts, the conclusions might be made that major part of postnuptial contracts establish the legal regime of property acquired after the creation of marriage contract. Here dominates the regime of absolute separation (figure 2).

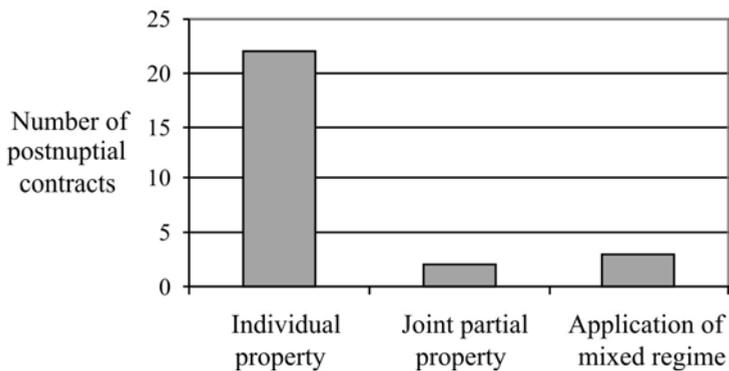


Figure 2. Legal regime of property acquired after marriage contract identification in post-nuptial contracts

The conclusion might be made that spouses use post-nuptial contract in order to avoid the application of legal regime of property determined by the law. The analysis revealed that the object of the legislative to broaden the application of the principle of the contract freedom and provide the possibility for the spouses to regulate their property relations was achieved. On the other hand, it might be stated, that conditions which determine the regime of absolute separation for such property type as income (for

example, incomes from work or operations of the enterprise and etc.) are questionnaire. Having in mind that court practice on disputes concerning the conditions of marriage

contract does not exist, as an example might be taken the case²⁶ where on the 10th of August, 2005 claimant DnB NORD Bankas introduced the claim asking court to recognize the article 2.4 of the post-nuptial contract between A.G and S.L. created on the 10th of June 2004 as void. In this article respondents agreed that income from industrial and intellectual activity, pensions, allowances and other payouts are an individual property of each spouse. Claimant indicated that at the moment of marriage contract creation, it had had claim rights to A.G. according to the resolution of Vilnius District Court which came to force on the 29th of August 2000. The resolution adjudged a liability from A.G. The claimant stated that creating the post-nuptial contract spouses seek to avoid recovery direction towards the income what violates claimant's creditor rights and legal interests and reveals respondents' dishonesty regarding the creditor. The attention should be drawn that the post-nuptial contract had been signed after the liability adjudgement. The Court of First Instance and Appellate Court decided that disputed contract's condition does not allow to prosecute further liability recovery from the income of respondent S. L. and violates claimant's rights to the debts recovery. However, the Supreme Court stated that

- only the establishment of the property regime (statute) in the post-nuptial contract itself does not negate creditor's right for recovery in reference to the liability of the spouses which appeared before the creation of the post-nuptial contract;
- attribution of spouses' income to individual property of each spouse does not incapacitate creditor to direct the recovery towards the individual property of the spouses, but to the part of the joint community property which belongs to the debtor as well. If the other spouse was in agreement and took the liability on the bases of which creditor prosecutes the recovery, the recovery might be directed to the individual property of each spouse, unless the joint community property is enough. Therefore, the agreement concerning the legal regime of the income of the spouses does not limit the debtor's civil responsibility towards the liabilities which have emerged during the marriage before the post-nuptial contract. Besides, spouses concealed and did not include joint community property. Moreover, they did not indicate the priority right of other creditors towards liability recovery. The property legal regime indicated in the post-nuptial contract does not influence their responsibility;
- creditor had a possibility to find out about the created post-nuptial contract, since the records of the Register of Marriage Contracts are public.

In reference with the arguments of the Supreme Court and part 2 of the article 104 of the Civil Code, it is supposed that conditions defining income application to the individual property of each spouse are not treated as void. Thus, each concrete case has to be analyzed separately, since the article 3.105 of the Civil Code regulating

26 Ruling of the Supreme Court of Lithuania of 14 November 2006, civil case No. 3K-3-493/2006.

void conditions of the marriage contract is interpreted ambiguously, especially in absence of settled legal practice, the second and the third conditions listed in the article No. 3.105 of the CC²⁷ evoke many discussions between notaries. In our opinion the analysis of nullity of conditions in a marriage contract should be separate study because of its problematic.

It is important to draw attention to the fact that post-nuptial contract cannot change legal regime of the property acquired before the CC came to force, i.e. till the 1st of July, 2001 (part 2 of the article 24 of the Law Concerning the Enactment, Coming to Force and Implementation of the Civil Code of the Republic of Lithuania). Thus, talking about the content of the post-nuptial contract and defining the regime of the property acquired during marriage, three main periods should be mentioned: 1) property acquired during marriage before CC came to force; 2) property acquired during marriage after CC came to force and before the creation of marriage contract; 3) property acquired during marriage after the creation of marriage contract.

Analyzing the provisions concerning the choice of the property legal regime defined in marriage contract which is provided in the CC and the content of marriage contracts signed in Lithuania, the reasonable question is what criteria determine how the property of the spouses is divided into an individual property of each of the spouse. The following criteria groups might be distinguished: 1) according property acquisition documents. For example, property acquisition documents include the name, the surname and other information which allows to identify the person who acquired this property. However, while purchasing TV, refrigerator and other similar stuff, acquisition documents are not set, just a filled guarantee which includes information about a person is provided. In that case, precisely this document will be treated as criteria according which the owner of the chattel becomes a person indicated in this document. Problems occur when buyer gets only the check which is equated to sale and purchase agreement; therefore, the latter criterion is questionable. 2) according separate written agreement of the spouses, i.e. it is not registered in public register. If there is no possibility to indicate the person who signed the transaction of property acquisition, the latter property is ascribed to the concrete spouse by mutual written agreement; 3) according property registration, i.e. usually marriage contract indicates that real estate and chattel, which requires legal registration in public register, will belong to the spouse under whose name the property is registered. Such criteria are determined for real estate, stock, vehicles and etc. In the context of enterprise this criterion is interpreted the following: individual property right of the enterprise will belong to the spouse under the name of who it was established and registered in the Register of Legal Entities. 4) according funds needed to acquire a property, i.e. property acquired by individual funds of a spouse becomes his or her individual property. It has to be noticed, that most contracts do not equate this criterion to the provision of the Civil Code which defines that individual property of the spouse

27 „2) change the legal regime in respect of the individual property of one of the spouses or in respect of their joint community property, where the matrimonial legal regime the spouses have chosen provides for joint community property; 3) prejudice the principle of equal parts in joint community property.” Civil Code of Lithuanian Republic article 3.105.

consists of the property acquired using separate funds or from the sale of a separate property with the express intention of the spouse at the time of the acquisition to acquire it as a separate property (part 1 of the article 3.89 of the CC). The latter provision of the CC is very often included in the marriage contract by special clause; therefore, the identification of the dependence of the funds according this criterion is ambiguous. 5) concrete list of property objects. This criterion is typical to post-nuptial contracts, when legal regime of the already acquired property is amended. Usually such contracts list real estate and chattel and indicate the rights of individual property of the spouse who will own the latter property after the contract comes to force.

3. Amendments of the Contract and Interests of Third Parties

Civil Code provides complicated and inflexible order of the amendments of marriage contracts. Marriage contracts may be amended in the same way as they were made, but only with the court's leave. It means that if a person who has created a marriage contract wants to make amendments, first of all he or she has to get court's leave. Naturally, the legislator seeks to protect the rights and interests of the third persons,²⁸ however, moment for critics may be found. The question is why the amendment of the marriage contract needs a court's leave? After all, settled marriage contract is the baseline the validity of which was certified by notary. In that case, the amendment would be just the change of some clauses of the already existing transaction between parties without substantial influence upon the contract itself. Especially when the law stipulates that such amendments do not have a feedback, i.e. they are applied exceptionally to those legal relations, which shall appear after the amendment. We can come to a conclusion that with the regulation of the marriage contract the legislator seeks to protect particularly the rights of the third persons²⁹ and has established duplicated security element as the possibility of the amendment of especially important document. On the other hand, it is negotiable whether the provision of the part 2 of the article 3.103 indicating that contract may be amended only with the leave of the court is not excessive. Besides, it does not correspond the title of the article, since article No. 3.106 regulates the amendments and

28 Here we should notice that in Lithuania is required registration of marriage contract. Since only then it is valid in respect to the third parts (part 3, art. 103, CC). It means that if marriage contract is not registered in the Register of Marriage Contracts, it lacks opportunity to use it against the third parts, although it is valid in respect of the spouses. Obligatory legal registration is determined by law and reflects the specificity of marriage contract. The Register of Marriage Contract started its work on the 1st of July 2002. New edition of the regulations was approved by Government Resolution No. 1315 on the 14th of October 2009. Regulations of the Register of the marriage contracts. *Official Gazette*, 2009, No. 126-5430.

29 Provisions of the part 3 of the article 3.108 and part 4 of the article 3.106 guarantee the interests of the third persons. Thus, if the amendment or termination of marriage contract violate the rights of the creditor of one or of both of the spouses, then creditors whose rights have been prejudiced by the amendment or termination of the marriage contract may, within a year of becoming aware of the amendment or termination, may challenge in court such an amendment or termination and require the restoration of their rights, for example, claiming *actio Pauliana* or etc.

termination of the contract and article No. 3.103 is intended for the form of marriage contract.

After the analysis of the part 2 of the article 3.103 of the CC, reasonable question is whether the leave of the court is obligatory for the termination of the contracts as well. It is supposed that the leave of the court should not be required in the process of marriage contract termination if both spouses agree on the fact. The same is stated in the part 1 of the article 3.106 of the CC which establishes that marriage contract may be terminated by the mutual agreement of the spouses at any time in the same form as that laid down for its formation. According to the part 1 of the article 3.103 of the CC, the form of marriage contract is notary. Therefore, if there is no dispute between the spouses, marriage contract should be terminated applying to notary, but not the court. If the dispute concerning marriage contract termination exists and there are elements stipulated in the book VI (articles 6.217 – 6.228 of the CC), then following the request of one of the spouses marriage contract may be terminated by court's resolution.³⁰

Unlike in Lithuania, French Civil Code³¹ indicates different and unequivocal order of marriage contract amendment. The amendments have to be certified by notary or by court. However, each case is regulated separately. The 1379 article of the French Civil Code provides essential requirements for contract amendments: a) the contract can be amended not earlier than two years after its settlement date, b) both spouses have to accept amendments and c) contract amendments have to be made exceptionally referring family interests. In case, if spouses have no infants, contract is amended according to notary order (French CC, art. 1397). If spouses have infants, notarial certified contract amendments have to be presented to the domicile court's confirmation (French CC, art. 1397).

Thus, it might be stated that alternative to regulate property relations according to the individual needs of the spouses is not absolute, and dispositive nature of the contract is conditional. The attention should be drawn to the fact that marriage contract may include either several abstract conditions or tens of conditions. However, one should not forget that this contract may be disputed, adjudged as void and etc. Therefore, we would like to state that condition may be inscribed while life prognosis is far more complicated.

Conclusions

1. In the context of changing social, economic conditions and values, it is important to judge legal innovations (institutions), which provide broad spectrum of possibilities to realize one's rights and duties, objectively. The legislator established the possibility to choose the contractual legal regime of the property in the Civil Code of the Republic of Lithuania on the 1st of July, 2001 and provided alternative choosing legal regime of the

30 Vitkevičius, P. S. *Šeimos narių turiniai teisiniai santykiai* [Legal relations between family members]. Vilnius: Justitia, 2006, p.174-176

31 French Civil Code, *supra* note 23.

property which would mostly correspond to the interests and expectations of each of the spouses or engaged couple. The operation principle of this regime is marriage contract the nature of which is exceptionally the modeling of property relations. However, the principle of contract freedom creating the marriage contract and determining its content is not absolute, i.e. just like the other civil transactions, marriage contract is applied the nullity principles of common transactions, as well as the principles of contract amendment and termination. Hereby it is endeavored to protect the interests of both the parties of the contract and their minors.

2. The institute of marriage contract is quite perspective novelty of the Civil Code. Gradually it receives greater attention among the society and forms qualitatively new attitude towards the regulation of property relations of the family. This contract is specific in the context of the parties and its content. Its conditions mainly may be divided into the one that establish legal regime of the property and the one that regulate obligatory relations. The norms of the Civil Code indicate three contractual legal regimes of the property which may be defined as absolute separation (individual property), absolute community and partial community (partial property). The attention should be drawn that the construction of the fourth version is possible, i.e. mixed legal regime of the property which includes elements of several regimes.

3. The analysis of the peculiarities of the content of marriage contract and its common tendencies allows to make a conclusion that priority is given to the legal regime of individual property both to the property acquired before the commencement of the marriage and after it. The latter regime is chosen quite often both by the pre-nuptial and post-nuptial contracts. The problem is that application of the regime of separation does not concretize the criteria which establish the attribution of the property to the spouse to whom it depends according the right of individual property. Considering the fact that court practice on disputes concerning the conditions of marriage contracts is not embedded, it is suggested to establish unambiguous conditions of the contract the prosecution of which will not be prejudiced by stencil statements, since they usually contradict the part 2 of the article 24 of the Law Concerning the Enactment, Coming into Effect and Implementation of the Civil Code of the Republic of Lithuania. The legal regime of the property acquired during marriage until the Civil Code came to force is amended. Besides, it is also suggested to divide contract's content to separate periods and establish legal regime to the property acquired before the commencement of the marriage, to the property acquired after marriage registration until the creation of marriage contract and to the property acquired after the settlement of marriage contract, since each discussed legal regime has its advantages and disadvantages.

4. It is suggested to refuse ambiguously interpreted provisions concerning the amendments of marriage contract under court's leave and some other void conditions of marriage contract (for example, part 2 of the article 3.105). In reference to the practice of marriage contract settlement and disputes related to the solution of its creation in other foreign countries, it is proposed to make several amendments which will allow to

avoid contradictory solutions regarding the formulation of some conditions of marriage contract and their realization after contract termination.

References

- Antokolskaja, M. V. *Semeinoje pravo* [Family Law]. Moskva: Jurist, 2000.
- Boele-Woelki, K.; Braat, B.; Curry-Sumner, I. (eds.). *Europien Family Law in Action. Volume IV: property relations between spouses*. Antwerpen: Intersentia, 2009.
- Bondov, S. N. *Brachnyj dogovor* [Marriage contract]. Moskva: Juniti-Dana, 2000.
- Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262.
- Cvelich, M. Vedybų sutarties vieta sutarčių sistemoje [Position of the Marriage contract in the system of Contract Law]. *Jurisprudencija*. 2002, 28(20).
- Chefranova, E. A. *Imuschestvinyje otnoshenija v rossiskoj semie* [Property relations of russian family]. Moskva: Jurist, 1997.
- Itkonen, L. Marriage settlement and economic security [interactive]. [accessed 11-10-2010]. <<http://www.helsinki.fi/lehdet/uh/498c.htm>>.
- Ignatenko, A. A. *Brachnyj dogovor: zakonyj rezhim imuschestva suprugov* [Marriage contract: legal regime of spouses' property]. Moskva: Filin, 1997.
- Family Code of the Russian Federation [interactive]. [accessed 09-01-2011]. <www.jafbase.fr/docEstEurope/RussiaFamilyCode1995.pdf>.
- French Civil Code [interactive]. [accessed 09-01-2011]. <http://www.lexinter.net/ENGLISH/civil_code.htm>.
- German Civil Code [interactive]. [accessed 09-01-2011]. <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000G14>.
- Glendon, M. A. *The Transformation of Family Law. State Law and Family in the United State and Western Europe*. Chicago and London: The University of Chicago Press, 1989.
- Grumadaitė, R. Naujasis kodeksas šeimą tvirtins pareigų ir turto saitais [The new Code will consolidate family with ties of obligations and property]. *Lietuvos rytas*. 2000-10-21, No. 248.
- Kudinavičiūtė, I. Nepilnamečių emancipacija: nuolatinis ar eksperimentinis statusas [Emancipation of minors; stable or experimental status]. *Jurisprudencija*, 2002, 31(23).
- Kudinavičiūtė-Michailovienė, I. *Santuokos sąlygos ir jų vykdymas*. Monografija [Marriage Conditions and their Realisation. Monograph]. Vilnius: Justitia, 2007.
- Law of the Amendment of the Article 3.14 of the Civil Code of the Republic of Lithuania. *Official Gazette*. 2010, No. 76-3873
- Lietuvos Respublikos civilinio kodekso komentaras*. I dalis [Comentary of the Civil code of Lithunian Republic. Part 1]. Vilnius: Justitia, 2001.
- Marital Agreements and Private Autonomy in a Comparative Perspective“ [interactive]. [accessed 10-11-2010].
- Mikelėnas, V. *Šeimos teisė* [Family Law]. Vilnius: Justitia, 2009.
- Mikelėnas, V. *Tarptautinės privatinės teisės įvadas* [Introduction of Private international Law]. Vilnius: Justitia, 2001.
- Mikelėnas, V. *Sutarčių teisė* [Contract law]. Vilnius: Justitia, 1996.
- Regulations of the Register of the marriage contracts. *Official Gazette*, 2009, No. 126-5430.
- Ruling of the Supreme Court of Lithuania of 14 November 2006, civil case No. 3K-3-493/2006.
- Saukienė, I. Lietuviai vedybų sutartimis pasirenka kaimynystę [Lithunians choose the

- neighbourhood by marriage contract]. [interactive]. [accessed 04-02-2011]. <www.delfi.lt/archive/article.php?id=40453661>.
- Semeinij kodeks rosiskoj federaciji* [Family code of Russian Federation]. Sobranije zakonadatelstva RF, 1996, N 1.
- Simonian, S. L. *Imuschestvenyje otnoshenija mezhdu suprugami* [Property Relations between spouses]. Moskva: Kontur, 1998.
- The Civil Law of Latvia [interactive]. [accessed 09-01-2011]. <<http://unpan1.un.org/intradoc/groups/public/documents/unpan018388.pdf>>.
- Vitkevičius, P. S. *Šeimos narių turtiniai teisiniai santykiai* [Legal relations between family members]. Vilnius: Justitia, 2006.
- Vedybų sutarčių registro statistiniai duomenys* [Statistical records of the Register of Marriage Contracts]. [interactive]. [accessed 09-01-2011]. <<http://www.lhr.lt/index.php?-1364796021>>.

VEDYBŲ SUTARČIŲ TEISINIO REGLAMENTAVIMO YPATUMAI

Inga Kudinavičiūtė-Michailovienė

Mykolo Romerio universitetas, Lietuva

Santrauka. *Rinkos ekonomikos sąlygomis pagrindinis privatinių teisinių santykių subjektų tarpusavio teisių ir pareigų reguliavimo instrumentas yra sutartis. Sutarčių įvairovė suteikia galimybę patenkinti poreikius ir pasiekti pageidaujama rezultatą. Nors daugeliui sandorių yra nustatyti bendri sudarymo kriterijai, tačiau beveik kiekvienas turi ir savitų bruožų. Straipsnyje nagrinėjama vedybų sutartis, kuri pasižymi tik jai būdingais požymiais (subjektai, turinys ir kt.), analizuojamas jos kompleksinis pobūdis bei esminė paskirtis. Vedybų sutarties instituto ištirtumo laipsnis Lietuvoje yra gana menkas (mokslinėje teisinėje literatūroje šios sutartys nagrinėjamos tik fragmentiškai), teismų praktika sprendžiant iš šių sutarčių kylančius ginčus taip pat negausi ir dėl to dar nesusiformavusi. Nepaisant kontroversiškai vertinamos vedybų sutarties paskirties, kasmet vis daugiau sudaroma ikivedybinių ir poveidybinių sutarčių, t. y. vis daugiau asmenų išreiškia valią konkretizuoti turtinių išpareigojimų turinį bei apibrėžti turto teisinį režimą. Tokios sutarties sudarymo motyvai yra grindžiami siekimu išvengti neprognozuojamų turto dalybų santuokos nutraukimo atvejais bei apsaugoti šeimos narius nuo trečiųjų asmenų (kreditorių) pretenzijų ateityje.*

Straipsnyje pateikiama nuomonė, kad vedybų sutarties institutas yra gana perspektyvi Civilinio kodekso naujovė, formuojanti kokybiškai naują požiūrį į šeimos turtinių santykių reglamentavimą ir suteikianti situotiniams galimybę modifikuoti labiausiai jų lūkesčius bei poreikius atitinkantį turto teisinį režimą. Civilinio kodekso normos įvardija tris turto teisinius režimus, sudarius vedybų sutartį, kuriuos galima būtų apibrėžti kaip: visiško turto atskirumo (asmeninė nuosavybė), visiško turto bendrumo ir riboto turto bendrumo (dalinė nuosavybė). Be to, galimas ir ketvirtąjį režimo konstravimo variantas, t. y. – mišrus turto teisinis režimas, kurį sudarytų keletas režimų elementai.

Kita vertus, straipsnyje pateikiama pastebėjimų dėl dvišališkų vedybų sutartį reglamentuojančių normų, kurios turėtų būti tobulintinos, pasiremiant užsienio valstybių (Prancūzijos, Vokietijos ir kt.) pažangia reglamentacija bei jau susiformavusia praktika. Atsižvelgiant į tai, kad vedybų sutartį reglamentuojančios teisės aktų nuostatos interpretuojamos nevienareikšmiškai, šio instituto analizė yra savalaikė ir aktuali.

Reikšminiai žodžiai: santuoka, sutartis, turtas, teisinis režimas, ikivedybinė ir poveidybinė sutartys.

Inga Kudinavičiūtė-Michailovienė, Mykolo Romerio universiteto Teisės fakulteto Civilinės ir komercinės teisės katedros docentė. Mokslinių tyrimų kryptys: šeimos teisė, civilinė teisė, tarptautinė privatinė teisė.

Inga Kudinavičiūtė-Michailovienė, Mykolas Romeris University, Faculty of Law, Department of Civil and Commercial Law, associate professor. Research interests: family law, civil law, private international law.